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THE IMPLICATIONS OF THE REINTERPRETATION OF THE FLORES SETTLEMENT AGREEMENT FOR BORDER SECURITY AND ILLEGAL IMMIGRATION INCENTIVES

HEARING

BEFORE THE

COMMITTEE ON HOMELAND SECURITY AND GOVERNMENTAL AFFAIRS UNITED STATES SENATE

ONE HUNDRED FIFTEENTH CONGRESS

SECOND SESSION

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THE IMPLICATIONS OF THE REINTERPRETATION OF THE FLORES SETTLEMENT AGREEMENT FOR BORDER SECURITY AND ILLEGAL IMMIGRATION INCENTIVES

TUESDAY, SEPTEMBER 18, 2018

U.S. SENATE,
COMMITTEE ON HOMELAND SECURITY
AND GOVERNMENTAL AFFAIRS,
Washington, DC.

The Committee met, pursuant to notice, at 10:04 a.m., in room SD–342, Dirksen Senate Office Building, Hon. Ron Johnson, Chairman of the Committee, presiding.

Present: Senators Johnson, Portman, Lankford, Daines, Kyl, McCaskill, Carper, Heitkamp, Peters, Hassan, Harris, and Jones.

OPENING STATEMENT OF CHAIRMAN JOHNSON

Chairman JOHNSON. Good morning. This hearing will come to order.

I want to thank our witnesses for your time for appearing, for your thoughtful testimony. We are looking forward to hearing it and looking forward to your answering what I hope will be some really good questions by the Committee.

I also want to thank the audience members for attending. We have a long line out here. It is nice to have a hearing that people are interested in. I do want to point out that this is not audience participation. We do hope that you sit and listen to the proceedings respectfully.

This hearing really is a follow-on to a problem that I think everybody recognized. Obviously, it became pretty controversial, but we took a look at this on our Committee in August. We had a meeting with the Committee to figure out what we can do to solve the issue about being able to enforce our immigration laws without separating families. I do not think anybody wanted to do that.

In that meeting I proposed four basic goals that I hoped we could agree on. I am not sure we have total agreement, but the goals that I proposed in trying to focus on fixing this problem—we are not talking about comprehensive immigration reform here. We are really talking about trying to fix this particular problem. The four goals I laid out was, hopefully we all want to secure our border—I think a sovereign nation needs to do that—enforce our immigration laws, maintain reasonable asylum standards, and also keep

asylum-seeking families together. I thought those were four reasonable goals. I thought we had a very good discussion in August.

Senator McCaskill certainly pointed out and other people on the Democrat side talked about we really do need to take a look at alternatives to detention, take a look at research, take a look at the cost-effectiveness of that. I am happy to do that. We held, I think, 21 bipartisan briefings, with different groups in government and outside of government, trying to take a look at that issue.

Again, this is all part of that problem-solving process. We are still gathering the information. I am not sure we have all of it. When you start taking a look at alternatives to detention, it is pretty complex. We do not have a whole lot of data on it. But I do want to start with a hearing chaired by me would not be complete without some charts. If we can put up our first chart here, it is just basically describing the problem.

The first chart[1] just shows the history of unaccompanied alien children (UAC) coming to this country illegally from Central America. You can take a look. In 2009, 2010, and 2011, on average, less than 4,000 unaccompanied children came in from Central America. Then starting in 2012, we began a surge with 2014 being the most dramatic surge year. But it really has not abated all that much. This is just an ongoing problem, and, again, I would argue there are certainly things in our laws that have created an incentive for children to come in unaccompanied from Central America.

Next chart?[2]

This is really the chart that is describing the problem that we are trying to address here today in this hearing. This is family units coming to this country. You can see in 2012 we had a little over 11,000 family units coming to this country, then 13,000 to 15,000, then in 2014, together with that surge of unaccompanied children from Central America, more than 16,000 families surged across the border.

The Obama Administration recognized that was a problem, and so they began detaining families so they could adjudicate the claims. Those that had valid asylum claims obviously stayed; those that did not have valid asylum claims were returned. It had an effect. In 2015, the number of families, still at an unacceptably high level, but it definitely dropped to 40,000. Then in July 2015, through court action, the *Flores* Settlement Agreement (FSA), which really dates back to 1985—and we will get a little bit of a history lesson, I am sure, from our witnesses—was reinterpreted and really applied to accompanied children as well as unaccompanied children, and that really forced the Obama Administration into a decision: Do we continue to detain people—well, they simply could not detain—well, do we detain the adult and be forced to release the child into Department of U.S. Health and Human Services (HHS) custody? They basically chose they were not going to do that. It began a process of basically apprehending families that came to the border, not being able to detain them, and then releasing them into the interior. We will be, I am sure, talking about the rates of deportation associated with not detaining individuals.

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[1] The chart referenced by Senator Johnson appears in the Appendix on page 89.
[2] The chart referenced by Senator Johnson appears in the Appendix on page 90.

That resulted in an incentive for more families to come in, and you can see the results: 77,000 in 2016, 76,000 in 2017, and already this year, in just 11 months, we are up over 90,000 families. Again, this is a problem.

Next chart?[1]

Now, I think it is pretty obvious that there are both push and pull factors at work here in terms of why people come to this country. It is a land of unlimited opportunity. That is a huge pull factor. But there is also violence and really destruction of public institutions certainly in Central America because of our insatiable demand for drugs and the drug cartels. This is a chart that combines murder rates in Central America versus asylum claims. I think what is interesting about this is even though murders have stayed relatively steady in terms of murder rates, very high—again, it is unacceptably high in Central America—asylum claims have shot up in the last couple of years. There is some disconnect here in terms of cause and effect in terms of a push factor out of Central America. There is something happening, and I would say there are a lot of incentives here, and we will talk about that, the *Flores* decision, the Trafficking Victims Protection Reauthorization Act (TVPRA). There are things that caused some incentives.

Our next chart[2] then?

The Obama Administration realized they had a problem with family units, and so back in 2014 and 2015, I think it was, the Secretary of Homeland Security, Jeh Johnson, commissioned study by the Institute for Defense Analysis just looking at—basically the name of it was "Describing the Adjudication Process for Unlawful Non-Traditional Migrants." This was published in June 2017. Again, this was commissioned by the Obama Administration. I would like to enter that in the record.[3]

But what is showed is the removal rate for detained illegal immigrants versus not detained. You can see there is a dramatic difference, and also how many were actually detained out of their sample versus not detained. You can see for those illegal immigrants that were detained, 77 percent were removed. For those that were not detained, only 7 percent were removed, which, again, creates an awful lot of incentive for more family units to come to this country.

I do not want to go on too much longer here, but we just kind of laid the ground work describing the problem. I would ask that my written statement be entered into the record.[4]

But I will just close by saying that what we have really created here for Customs and Border Protection (CBP), for U.S. Immigration and Customs Enforcement (ICE), for our law enforcement community is they have two options when it comes to dealing with people coming to this country illegally as a family unit, and both of them are bad. We either have to enforce the law and then are forced to separate parents from children—and nobody wants that to happen. That is no longer the policy—or revert to the Obama era policy, which is what we are under right now, which is we appre-

[1] The chart referenced by Senator Johnson appears in the Appendix on page 91.
[2] The chart referenced by Senator Johnson appears in the Appendix on page 90.
[3] The report referenced by Senator Johnson appears in the Appendix on page 94.
[4] The prepared statement of Senator Johnson appears in the Appendix on page 49.

hend these families. We cannot hold them. We cannot really determine parentage, and we release them into the interior. We have very low removal rates for those that do not have valid asylum claims.

I do not think that is an acceptable state of affairs. What we are trying to do in this Committee is look at that one specific problem and try and fix that on, I would call it, a nonpartisan basis. Just take a look at the facts, deal with that information, try and set an achievable goal, and design a solution. That is the purpose of this hearing. It is the purpose of our efforts, and I for one hope we succeed.

With that, I will turn it over to Senator McCaskill.

OPENING STATEMENT OF SENATOR MCCASKILL[1]

Senator MCCASKILL. Thank you. I want to recognize the witnesses before us today first and applaud the work you do. I know from my time as a prosecutor that law enforcement officials go to work each day not thinking about themselves and, frankly, sometimes not even thinking about their families but, rather, how do we keep our communities safe and how do we keep each other safe. That is true of law enforcement officers of both CBP and ICE.

The selflessness of service is also true of the immigration judges, public servants who work at the Department of Justice (DOJ) and the independent auditors, analysts, and watchdogs at the U.S. Government Accountability Office (GAO). I know firsthand that our Federal law enforcement officers face real challenges in carrying out their jobs. I have seen the ingenuity of our Border Patrol agents as they built their own night vision surveillance vehicle by literally duck-taping surplus night vision goggles they got from the Department of Defense (DOD) to a pole in the back of a pickup truck.

I know that even though officers at ports of entry (POEs) are the ones that are seizing the majority of the fentanyl and other opioids, they are still understaffed by CBP's own guidelines. I know our immigration court judges face a tremendous backlog.

I also know that while, overall, illegal border crossings are at their lowest level in 30-plus years following a decade-long trend, for the past few years these agents and officers have been facing an increasing number of immigrant families trying to cross the border.

There are a lot of different proposals for dealing with these families, but I think there is one thing we can all agree on, on a bipartisan basis, that we cannot lose sight that they are families and that they need to be dealt with as families. No one should be separating children from their parents.

Beyond that, this is a complex problem, and my Chairman likes to constantly say we need to get the facts. I think any action on legislation at this point is premature because we do not have all the facts. Let us face it. If this were easy, we would have gotten this done a long time ago.

I want to talk about and focus on the *Flores* decision today, that it does not allow the Department of Homeland Security (DHS) to detain families for long enough.

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[1] The prepared statement of Senator McCaskill appears in the Appendix on page 50.

I will say this unequivocally: We do not have enough facts to even consider indefinite detention of families—even if it were the right thing to do, which I do not think it is. We do not know enough. We do not know what it would cost. We do not know how many beds would be needed. We do not know how long the average detention would be. There is simply not enough information to consider indefinite detention.

We have learned that *Flores* is not the only thing standing in the way. We have learned there are not enough detention facilities. It would be incredibly expensive to add more. According to the briefings we received, ICE would need an additional 15,000 beds just to house the immigrant families for 30 days, at a cost of over $1.3 billion per year. This does not include the cost of additional personnel or the cost of construction. Frankly, it takes an average, a median of 128 days to process an asylum case in detention. If that is even close to how long those families remain in detention, that $1.3 billion only represents a fraction of the cost that we would actually pay.

We also know that it costs $320 a day per person to keep a family unit detained. It only costs $8.50 to monitor them electronically. If both programs, or some other alternative results in families showing up for their immigration hearing, let us just say there are a lot of other border security needs we could be spending that money on.

As a former prosecutor, I understand the balance we need to strike. This is all about securing appearance at court and, when people appear at court, being efficient and ready for deportation if that is the decision of the court.

If you look at the facts around this issue, there may have been some electronic monitoring projects that were abandoned. But there is no reason to believe they do not work. The majority of people that are arrested for crimes in the United States of America are released pending their appearance at court.

I have a great deal of experience with this. When I was the Jackson County prosecutor, we were under a Federal court order about how many people we could have in our jail. Every day I had to make a decision as to who we let out of jail and who we kept in jail. I guarantee you, we spent a lot of time on figuring out how we monitored those people that got out and how we secured their appearance.

We know how to secure people's appearance at court. There is technology and there is oversight, and both of them are less expensive than building billions of dollars of beds to hold families indefinitely because our system is so inefficient.

How effective is the monitoring? It is very effective in this country. How efficient is the system? Our system on asylum determination and removal could not be more inefficient. We should be starting with a bill that requires electronic records. Do you know if they have to do a hearing in Texas and the file is in California, they have to Federal Express (FedEx) the file? No system in this country is still all paper. Except this one.

It is absolutely unbelievable to me that we are this inefficient, and we have been securing people's appearances at hearings, but the last hearing, when asylum is determined, for some reason after

they have determined they do not get asylum, we are not monitoring them anymore. We need to be prepared at that last hearing. We need to have preparations and the people coming need to know that if the case goes against them on asylum, they are going to be deported immediately.

It is about efficiencies in the system. It is not about imprisoning families indefinitely in this country.

I think what we have to do is we have to deal with the shortage of immigration judges; we have to deal with the inefficiency in the system and how long it is taking to have these claims heard. That does not mean we should short-change people on their claims. We should give them adequate opportunity to have their claims heard. But the fact that we are willing to build more beds, but we are not willing to even hire the number of judges that have been funded? We do not even have enough judges now to even fill the number of judges we have given the Department of Justice for asylum claim determination.

We are putting the cart before the horse. We are defaulting to the most expensive and nonsensical way to secure appearance when there are all kinds of ways in this country that we can secure appearance and make this system more efficient. I stand ready and willing to work with the Chairman of this Committee and any Republican making sure that we secure people's appearance at court. But we do not have to separate their families, and we do not have to—for the first time in our country's history—go on a building program of family prisons. That is not the right answer.

I look forward to the witnesses' testimony and discussion about these issues as we move forward.

Chairman JOHNSON. Thank you, Senator McCaskill. The good news is there are an awful lot of things we agree on right there, and that is how we will try and come up with some kind of solution here, those areas of agreement.

I would be remiss if I did not point out the fact that we have a new member, Senator Jon Kyl from Arizona, who obviously on this issue, you are sort of the tip of the spear in terms of this problem. I really want to welcome you to the Committee, and I look forward to your valuable input throughout all of our issues, but particularly this one here today, and I appreciate you appearing here today.

It is the tradition of this Committee to swear in witnesses, so if you will all stand and raise your right hand. Do you swear that the testimony you will give before this Committee will be the truth, the whole truth, and nothing but the truth, so help you, God?

Mr. ALBENCE. I do.

Mr. PEREZ. I do.

Mr. EDLOW. I do.

Ms. GAMBLER. I do.

Chairman JOHNSON. Please be seated.

Our first witness is Matthew Albence. Mr. Albence is the Executive Associate Director for Enforcement and Removal Operations (ERO) and the senior official performing the duties of the Deputy Director at Immigration and Customs Enforcement. Mr. Albence has over 24 years of Federal law enforcement experience with Immigration and Customs Enforcement, Immigration and Naturaliza-

tion Service (INS), and the Transportation Security Administration (TSA). Mr. Albence.

TESTIMONY OF MATTHEW T. ALBENCE,[1] EXECUTIVE ASSOCIATE DIRECTOR, U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT, U.S. DEPARTMENT OF HOMELAND SECURITY

Mr. ALBENCE. Chairman Johnson, Ranking Member McCaskill, and distinguished Members of the Committee, thank you for the opportunity for the opportunity to appear before you today to discuss the impact of the *Flores* Settlement Agreement on U.S. Immigration and Customs Enforcement's critical mission of protecting the homeland, securing the border, and ensuring the integrity of our Nation's immigration system.

Our Nation's immigration laws are extremely complex and, in many cases, outdated and full of loopholes. Moreover, the immigration laws have been increasingly subject to litigation before the Federal courts, which has resulted in numerous court decisions that have made it increasingly difficult for ICE to carry out its mission. The current legal landscape often makes it difficult for people to understand all that the dedicated, courageous, professional officers, agents, attorneys, and support staff of ICE do to protect the people of this great Nation. To ensure the national security and public safety of the United States, our ICE personnel faithfully execute the immigration laws enacted by Congress, which may include enforcement action against any alien encountered in the course of their duties who is present in the United States in violation of immigration law.

Since the initial surge at the Southwest Border in fiscal year (FY) 2014, there has been a significant increase in the arrival of both family units and unaccompanied alien children at the Southern Border, a trend which continues despite the Administration's enhanced enforcement efforts. Thus far in fiscal year 2018, as of the end of August, approximately 53,000 UACs and 135,000 members of alleged family units have been apprehended at the Southern Border or deemed inadmissible at ports of entry, a marked increase from fiscal year 2017.

Most of these family units and UACs are nationals of the Central American countries of El Salvador, Guatemala, and Honduras. Pursuant to the Trafficking Victims Protection Reauthorization Act of 2008, UACs from countries other than Canada and Mexico may not be permitted to withdraw their applications for admission, further encumbering the already overburdened immigration courts. With an immigration court backlog of over 700,000 cases on the non-detained docket alone, it takes years for many of these cases to work their way through the immigration court system, and few of those who receive final orders are ever actually returned to their country of origin. In fact, only approximately 3 percent of UACs from Honduras, El Salvador, or Guatemala encountered at the Southwest Border in fiscal year 2014 had yet to be returned or removed by the end of fiscal year 2017.

One of the most significant impediments to the fair and effective enforcement of our immigration laws for family units and UACs is

[1] The prepared statement of Mr. Alebence appears in the Appendix on page 55.

the *Flores* Settlement Agreement. Since it was executed in 1997, the *Flores* Settlement Agreement, which was intended to address the detention and release of unaccompanied minors, has spawned over 20 years of litigation regarding its interpretation and scope and has generated multiple court decisions resulting in expansive judicial interpretations of the original agreement in ways that have severely limited the government's ability to detain and remove UACs as well as family units.

Pursuant to court decisions interpreting the FSA, DHS can generally only detain alien minors accompanied by a family member in a family residential center for approximately 20 days, and the TVPRA generally requires that DHS transfer any UAC to the Department of Health and Human Services within 72 hours. However, when these UACs are released by HHS or family units are released from DHS custody, many fail to appear for court hearings and actively ignore lawful removal orders issued against them. Notably, for family units encountered at the Southwest Border in fiscal year 2014, as of the end of fiscal year 2017 44 percent of those who remained in the United States were subject to a final removal order, of which 53 percent were issued in absentia. With respect to UACs, between the beginning of fiscal year 2016 and the end of June in fiscal year 2018, nearly 19,000 UACs were ordered removed in absentia—an average of approximately 568 UACs per month.

This issue has not been effectively mitigated by the use of Alternatives to Detention (ATD), which has proved to be substantially less effective and cost-efficient in securing removals than detention. While the ATD program averages 75,000 participants, in fiscal year 2017 only 2,430 of those who were enrolled in the program were removed from the country. This accounts for only 1 percent of the 226,119 removals conducted by ICE during that time. Aliens released on ATD have their cases heard on the non-detained immigration court dockets, where cases may linger for years before being resolved. Thus, while the cost of detention per day is higher than the cost of ATD per day, because those enrolled in the ATD program often stay enrolled for several years or more, while those subject to detention have an average length of stay of approximately 40 days, the costs of ATD outweighs the costs of detention in many cases. Nor are the costs of ATD any more justified by analyzing them on a per removal basis. To illustrate, in fiscal year 2014, ICE spent $91 million on ATD, which resulted in 2,157 removals; by fiscal year 2017, ICE spending on ATD had more than doubled to $183 million but only resulted in 2,430 removals of aliens on ATD—an increase of only 273 removals for the additional $92 million investment and an average cost of $75,360 per removal. Had this funding been utilized for detention, based on fiscal year 2017 averages, ICE could have removed almost 10 times the number of aliens as it did via ATD.

Moreover, because family units released from custody and placed on ATD abscond at rates significantly higher than non-family unit participants—many family units must be apprehended by ICE while at large. Such at-large apprehensions present a danger to ICE officers, who are the victims of assaults in the line of duty at alarmingly increasing rates. Specifically, in fiscal year 2018

through July 31, the absconder rate for family units on ATD was 27.7 percent compared to 16.4 percent for non-family unit participants. Most of these aliens remain in the country, contributing to the more than 564,000 fugitive aliens on ICE's docket.

Unfortunately, by requiring the release of family units before the conclusion of immigration proceedings, seemingly well-intentioned court rulings, like those related to the FSA, and legislation like the TVPRA in its current form create loopholes that are exploited by transnational criminal organizations (TCOs) and human smugglers. These same loopholes encourage parents to send their children on the dangerous journey north and further incentivizes illegal immigration. As the record numbers indicate, these loopholes have created an enormous pull factor.

To address these issues, the following legislative changes are needed:

Terminate the FSA and clarify the government's detention authority with respect to alien minors, including minors detained as part of a family;

Amend the TVPRA to provide for the prompt repatriation of any UACs who are not victims of human trafficking and who do not express a fear of return to their home country, and provide for similar treatment of all UACs from both 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 demonstrate that reunification with both parents is not viable due to abuse, neglect, or abandonment, and that the applicant is a victim of human trafficking. The current legal requirement is simply 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 fraudulent or frivolous claims, and 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.

Thank you again for the opportunity to appear before you today and for your continued support of ICE and its essential law enforcement mission. We continue to respond to the trend of family units and UACs who are apprehended while illegally crossing into the United States and to address this humanitarian and border security issue in a manner that is comprehensive, coordinated, and humane.

Though DHS and ICE are continuing to examine these issues, ongoing litigation and recent court decisions require a permanent fix from Congress to provide operational clarity for officers in the field and to create a lasting solution that will secure the border. Congress must act now to eliminate the loopholes that create an incentive for new illegal immigration and provide ICE with the lawful authority and requisite funding needed to ensure that families can be detained together throughout the course of their immigration proceedings. Most family units claiming to have a fear of returning to their home countries are not ultimately granted asy-

lum or any other relief or protection by immigration judges, and it is imperative that ICE can ensure that when such aliens are ordered removed from the United States, they are actually removed pursuant to the law.

I would be pleased to answer your questions.

Chairman JOHNSON. Thank you, Mr. Albence.

Our next witness is Robert Perez. Mr. Perez is the Acting Deputy Commissioner with Customs and Border Protection. Mr. Perez started his career with the U.S. Customs Service in 1992 as a Customs Inspector and has served in a variety of operational leadership positions within the Customs Service and Customs and Border Protection. Mr. Perez.

TESTIMONY OF ROBERT E. PEREZ,[1] ACTING DEPUTY COMMISSIONER, U.S. CUSTOMS AND BORDER PROTECTION, U.S. DEPARTMENT OF HOMELAND SECURITY

Mr. PEREZ. Chairman Johnson, Ranking Member McCaskill, and distinguished Members of the Committee, it is my honor to appear before you today on behalf of U.S. Customs and Border Protection.

Every day the men and women of CBP facilitate legitimate travel, screening more than 1 million international passengers and pedestrians. Every day we process an average of $6.5 billion worth of imported goods. Every day CBP seizes nearly 6,000 pounds of narcotics and arrests 21 wanted criminals. Every day we protect our borders from terrorists, identifying more than 1,600 individuals with suspected national security concerns. Every day we guard our Nation's food supply, discovering over 350 pests and more than 4,300 materials for quarantine at our ports of entry. Every day CBP's employees work to make our Nation safer and our economy more competitive.

CBP has a vast and complex mission that affects the lives of every American every day. I am honored to represent the hard-working men and women of CBP whose work is often difficult and dangerous and critical to our national security. I am also grateful for this opportunity to share what they are experiencing in the field. As the guardians of America's borders, the men and women of CBP are on the front lines of our country's migration crisis.

While many factors do contribute to an individual's decision to attempt the dangerous journey to the United States, we cannot ignore the role our country's immigration laws plays in enticing illegal entry, subverting the rule of law, and encouraging manipulation of the system.

There is a perception among some migrants that children and families are treated differently than individual adults, and our operations at times governed by the laws and judicial interpretations resulting in legal loopholes do not dispute this perception. As a result, we have seen an alarming spike in the number of family units we encounter.

Last month, the number of family unit aliens apprehended in our border or deemed inadmissible at our ports of entry increased by 38 percent, 3,500 more than July of this year and the highest number on record for the month of August. No matter how well inten-

[1] The prepared statement of Mr. Perez appears in the Appendix on page 60.

tioned, these laws and policies—including the *Flores* Settlement Agreement and the Trafficking Victims Protection Reauthorization Act of 2008, have an operational impact on CBP's ability to fulfill its mission and uphold the rule of law.

For example, the *Flores* Settlement Agreement limits the government's ability to detain family units through their immigration proceedings. This means that adults who arrive in this country alone are treated differently than adults who arrive with a child. Given the timeframe associated with the immigration process, that means that more times than not, families are released from custody.

This has created a business model for smugglers that at times places children into the hands of adult strangers so they can pose as families with the hope of being released from immigration custody once they cross the border.

There are similar unintended consequences associated with the TVPRA. In order to comply with the TVPRA, CBP prioritizes unaccompanied alien children for processing before transferring them to the custody of the U.S. Department of Health and Human Services. However, increases in apprehensions severely limit HHS' ability to quickly place unaccompanied alien children with adequate sponsors or place them in long-term shelters.

In addition, elements of the TVPRA encourage trafficking organizations to smuggle unaccompanied alien children into the United States, knowing they will eventually be released to sponsors.

Ultimately, enforcement of our immigration laws is the foundation of a secure border and a secure Nation. At times, well-intentioned actions have had unintended negative consequences on the immigration system as a whole. DHS leaders, including CBP, have worked closely with Members of Congress to address these immigration loopholes that affect our national security. I look forward to continuing our work with the Committee toward this goal.

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

Chairman JOHNSON. Thank you, Mr. Perez.

Our next witness is Joseph Edlow. Mr. Edlow is the Acting Deputy Assistant Attorney General at the Department of Justice. Mr. Edlow serves in the Office of Legal Policy working on a variety of issues, including immigration. Mr. Edlow served for 6 years as an Assistant Chief Counsel at Immigration and Customs Enforcement. Following that he worked for the House Judiciary Committee. Mr. Edlow.

TESTIMONY OF JOSEPH B. EDLOW,[1] ACTING DEPUTY ASSISTANT ATTORNEY GENERAL, OFFICE OF LEGAL POLICY, U.S. DEPARTMENT OF JUSTICE

Mr. EDLOW. Thank you, Mr. Chairman.

Chairman Johnson, Ranking Member McCaskill, and other distinguished Members of the Committee, thank you for the opportunity to speak with you today regarding the Department of Justice's position on the *Flores* Settlement Agreement.

The *Flores* Settlement Agreement was reached in 1997 after 12 years of litigation. The agreement set nationwide procedures and

[1] The prepared statement of Mr. Edlow appears in the Appendix on page 65.

conditions for the care, custody, and release of unaccompanied minors, including to whom these minors may be released. At the time this agreement served as the framework for handling immigration matters related to unaccompanied minors. The FSA also served as the basis for the William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, which, like the FSA, does not address accompanied aliens.

The agreement remained in effect through the dissolution of the INS and the passage of the Homeland Security Act, which formally created the Department of Homeland Security, and transferred responsibilities for care and custody of unaccompanied alien minors to Health and Human Services. It was interpreted several times since 1997, including in 2015 when the U.S. District Court for the Central District of California found that the agreement was applicable to all alien minors without legal status, including those encountered with a parent or guardian. Based on this interpretation, the court, therefore, explained that the FSA required that accompanied minors be transferred to a licensed facility as expeditiously as possible. The previous Administration unsuccessfully appealed these rulings, and the courts were warned in 2015 that this expansion of the agreement could lead to the separation of accompanied children from their parents in order to comply with the new interpretation.

After the initial entry of the agreement, Congress passed legislation which the government argued largely superseded the agreement, including the Homeland Security Act of 2002 and the TVPRA. However, regardless of the efforts by previous Administrations, the court found that these statutes did not supersede the agreement.

On June 21 of this year, pursuant to an Executive Order (EO), the Department of Justice requested a modification of the agreement to permit DHS to detain alien families together throughout immigration proceedings, which was ultimately denied by the district court.

Despite the agreement's requirement that a child must be transferred from a secure unlicensed ICE or CBP facility as expeditiously as possible, it is generally legally and practically impossible to complete immigration proceedings in the 20 days that have typically been used as a guidepost. The pending immigration court caseload increased by nearly 470,000 cases, or 350 percent, between 2008 and 2017, in part due to surges in illegal immigration which accompanied changes in immigration policies and reinterpretations of prior law.

Nevertheless, the Executive Office for Immigration Review (EOIR), has taken steps to address the increased caseload, including by hiring more immigration judges and moving forward with a long overdue electronic filing and case management modernization effort.

The Department of Justice appreciates the opportunity to work with the Department of Homeland Security, the Department of Health and Human Services, and Congress to address these challenges and improve our immigration system. The outdated *Flores* Settlement Agreement constitutes a roadblock to solutions for keeping families together once encountered at the border. The Depart-

ment believes that the best path forward is through legislation aimed at terminating the agreement, returning to the rule of law, and enforcing our Nation's immigration laws. Additionally, DHS and HHS' proposed regulations will, in the absence of legislation, ultimately serve the best interests of all alien minors and their families.

Thank you for this opportunity to speak with you today, and I look forward to your questions.

Chairman JOHNSON. Thank you, Mr. Edlow.

Our final witness is Rebecca Gambler. Ms. Gambler is the Director for Homeland Security and Justice with the Government Accountability Office. Ms. Gambler leads GAO's work on border security, immigration, and election issues. Ms. Gambler.

TESTIMONY OF REBECCA GAMBLER,[1] DIRECTOR, HOMELAND SECURITY AND JUSTICE, U.S. GOVERNMENT ACCOUNTABILITY OFFICE

Ms. GAMBLER. Good morning, Chairman Johnson, Ranking Member McCaskill, and members of the Committee. Thank you for the opportunity to appear today to discuss GAO's work on the immigration courts and the Alternatives to Detention program.

Within the Department of Justice, the Executive Office for Immigration Review, is responsible for conducting immigration court proceedings to uniformly administer and interpret U.S. immigration laws and regulations.

In June 2017, we reported on EOIR's management of the immigration courts. As part of that report, we took a look at EOIR's caseload. From fiscal year 2006 through 2015, EOIR's caseload grew 44 percent, from approximately 517,000 cases in fiscal year 2006 to about 747,000 cases in fiscal year 2015. This increase was attributable primarily to an increase in the case backlog. From fiscal years 2006 through 2015, the immigration courts' backlog more than doubled, reaching a backlog of about 437,000 cases pending in fiscal year 2015.

We also reported on how EOIR was overseeing and managing immigration court operations, and we identified a number of challenges related to workforce planning and hiring, among other things.

For example, during the time of our review, EOIR estimated its staffing needs using an informal approach that did not account for long-term staffing needs or reflect EOIR's performance goals. We recommended that EOIR develop and implement a strategic workforce plan.

Moreover, during our review we found that EOIR did not have efficient practices for hiring new immigration judges, which contributed to staffing shortfalls. Our analysis showed that from February 2014 through August 2016, EOIR took an average of 647 days to hire an immigration judge. We recommended that EOIR assess its immigration judge hiring process and implement actions identified through such an assessment.

EOIR generally agreed with our recommendations in these areas and is taking action toward addressing them by, for example, work-

[1] The prepared statement of Ms. Gambler appears in the Appendix on page 70.

ing on a strategic plan that includes human capital planning and working to streamline the hiring process. We will continue to monitor EOIR's progress in responding to our recommendations to address the agency's longstanding challenges.

With regard to the Alternatives to Detention program, in November 2014 we reported on how U.S. Immigration and Customs Enforcement managed the program. ICE implemented the program in 2004 to be a cost-effective alternative to detention that uses case management and electronic monitoring to ensure foreign nationals released into the community comply with their release conditions, including requirements to appear at immigration court hearings and to comply with final orders of removal from the country. At the time of our review, the program was comprised of two components—one managed primarily by a certainly and another managed by ICE.

The number of foreign nationals who participated in the Alternatives to Detention program increased from about 32,000 in fiscal year 2011 to over 40,000 in fiscal year 2013. This increase was attributable to increases in enrollment and the average length of time foreign nationals spent in the program.

We also looked at the cost of the Alternatives to Detention program. We found that the average daily cost of the program per person was $10.55 in fiscal year 2013 while the average daily cost of detention per person was $158. While our analysis showed that the average daily cost to the program was significantly less than the average daily cost of detention, the length of immigration proceedings affected the cost-effectiveness of the Alternatives to Detention program over time.

Further, at the time of our report, ICE had two performance measures to assess the program's effectiveness: one, compliance with court appearance requirements; and, two, removals from the United States.

For the first measure, for the component of the Alternatives to Detention program managed by the contractor, data from fiscal years 2011 through 2013 showed that over 99 percent of foreign nationals with a scheduled court hearing appeared at their scheduled court hearings while participating in the program.

For the second measure, the program met its goals for the number of removals in fiscal years 2012 and 2013.

However, we identified limitations in data collection that hindered ICE's ability to assess overall program performance in part because ICE did not consistently collect performance data for both components of the program. We recommended that ICE strengthen its data collection, and ICE took action to implement that recommendation.

This concludes my prepared statement, and I am happy to answer any questions members may have.

Chairman JOHNSON. Thank you, Ms. Gambler.

Again, first of all, I appreciate the attendance here by my colleagues, and so out of respect for their time, I will defer my questions to the end. I will turn to Senator McCaskill.

Senator MCCASKILL. Yes, I just have a couple. Somebody correct me if I am wrong. When folks are monitored, the majority show up. Correct?

Mr. ALBENCE. ATD has been proven to be fairly effective at getting people to appear for appearances with ICE and appear for some court hearings, yes.

Senator MCCASKILL. OK. After asylum has been denied and a removal order has been entered, the majority of them are no longer monitored. Correct?

Mr. ALBENCE. Many of them are not monitored up to the point of the removal order.

Senator MCCASKILL. Why?

Mr. ALBENCE. Well, first of all, there is cost. It would be expensive to monitor them throughout the pendency as some of these hearings go for 4, 5, 6, or 7 years. Many individuals that get these removal orders actually get them in absentia because they have absconded.

Senator MCCASKILL. But here is my point, Mr. Albence. What I am trying to say is if we know monitoring gets them to court and if the problem is after they know they are not going to get asylum, they no longer show up, it seems to me that we need to focus monitoring at that place.

Now, let me continue——

Mr. ALBENCE. But if I can answer that question, that is when those individuals will abscond, if they had a bracelet on, as we have seen, with many individuals now, especially these family units, they will cut those bracelets.

Senator MCCASKILL. But the majority of them are not even getting those bracelets once they have been denied asylum. The vast majority are not even getting bracelets. Nobody is paying attention to them.

Mr. ALBENCE. No, ma'am. We have a contractor that does a significant amount of work tracking these cases and monitoring them. As GAO just indicated, our metrics are very good with regard to how we track these cases, how we are able to monitor them.

Senator MCCASKILL. I think you do, but not after the asylum has been denied. I think that is the problem.

Let me go further with this. Mr. Edlow, is there any reason in the law that you could not organize asylum hearings around country of origin?

Mr. EDLOW. I do not know that that has ever been considered. Certainly the Department and EOIR takes every case on a case-by-case basis, and the immigration judge makes that adjudication, that determination on a case-by-case basis. I do not know, given all the factors that would be in play there, that we would be able to organize it around the same country.

Senator MCCASKILL. Well, it seems to me that the vast majority of these cases are coming from a handful of countries. It seems to me that it would not be beyond reasonable to try to organize these courts hearings around countries, especially if you had enough judges to do it earlier than 2 or 3 years. Why could you not monitor people until that hearing, and then when they show at that hearing, then they are deported right then?

Mr. ALBENCE. Well, they would have a 30-day appeal period during which time they could appeal the ruling of the judge.

Senator MCCASKILL. And they could be monitored.

Mr. ALBENCE. They could be monitored, but, again, our experience has shown once—individuals will comply with their reporting requirements up until the point where there is no benefit of them doing so. Once they no longer are going to obtain that benefit or have a denied asylum claim, that is when individuals will generally abscond. They will comply up until the point where the benefit of complying is no longer there.

Senator MCCASKILL. But I guess what I am saying is, it reminds me of how we got people to court when they were charged with a crime. We would never dream of—after the jury had found them guilty and they were sentenced, we would never dream of deciding that would be the least intensive time of monitoring. The data shows that there is not as intensive monitoring at that point in the process as there is for their initial appearance.

Mr. ALBENCE. Again, we are experiencing a significant rate of absconders among the family units. Nearly three in 10 family units are cutting off their ankle bracelets at the beginning of the process, when they have been released from our custody within days or weeks. They are not even going to get to that point where they would get the final order of removal.

Senator MCCASKILL. Do we have the resources, when they cutoff those bracelets, to pick them up?

Mr. ALBENCE. Absolutely not. ICE has not been given resources to go out and effectuate these at-large arrests in many years. I have 129 fugitive operations teams within ERO, and most of their time is spent going after criminal aliens and public safety threats. I simply do not have the resources to get people once they are at-large in the communities.

Senator MCCASKILL. Well, it seems to me that this is a court appearance problem, and we ought to figure out a way to make court appearances more likely. Believe me, when you are facing prison, you do not want to go to court. But we have a very low rate of absconding in the criminal justice system compared to this system. I think we can learn lessons there. For one, you hire enough judges to handle the caseload.

Mr. Edlow, can you explain why you can only hire 100 judges a year?

Mr. EDLOW. Well, since the beginning of this Administration, we have hired over 128 judges.

Senator MCCASKILL. Why can't you hire more?

Mr. EDLOW. First, it took a while to get the authorization. Now I realize that, based on what you said, we do have the authorization, and I believe Mr. McHenry spoke to this at the last hearing. It is not just a matter of getting the judges. The judges are important, but it is having the facilities for those judges. It is having the courtrooms. It is having appropriations so that we can have the appropriate staff, the video-teleconference system if that is the way hearings are going to be handled. Frankly, it is also appropriations to ensure that ICE is able to provide a trial attorney to those hearings. The Department of Homeland Security is a party to these hearings, and we need to make sure that they are represented there as well.

Senator MCCASKILL. But would this not be a better investment than building family prisons? Would that not be a better invest-

ment of hiring personnel and—I guarantee you, there are all kinds of places. I have seen hearings in amazing places, especially when they are done with video. What it seems like to me. We are throwing up road blocks when the real problem is we have not invested in a system in terms of adequate personnel to actually handle these claims. The longer this goes on, the more likely it is they abscond. I do not think that anybody will argue with me about that, that the longer this goes on, the less likely we are going to be monitoring and knowing where people are that are supposed to go to court. This is a process that people need to comply with. It is the law.

I think we need from DOJ exactly what your excuses are that you cannot—and give us the numbers, because people are considering building family prisons, and I know how expensive that is. That is contractors as far as the eye can see if we are going to go about building family prisons in this country as a new policy initiative. I would much prefer to do the hard work of getting the resources in place for the infrastructure of a judicial system as it applies to immigration that could work in a timely way. It is outrageous that people are waiting 6 and 7—or let me be more fair, 3 to 4 years for a hearing. No wonder we cannot keep track of everyone; 3 to 4 years is a long time.

This is one of those issues that I think we need more input from Justice as to why if it is resources, I guarantee you we can get bipartisan support to get you more resources for this. Most of us would much rather spend the money on this than building family prisons.

Thank you, Mr. Chairman.

Chairman JOHNSON. I want to quick interject here because I need to help our hearing moving forward to really get clarity on the whole judicial process here. OK? This is how I understand it, and please correct me. I want you to really clarify this.

You really have, first of all, two distinctions. You have the detained docket and the non-detained docket. Correct?

Mr. EDLOW. That is correct.

Chairman JOHNSON. The detained docket has a priority given to it.

Mr. EDLOW. Well, we work with DHS to prioritize the detained docket.

Chairman JOHNSON. But it is a dramatic difference in terms of the initial completion as well as any kind of appeals and everything else. The final adjudication occurs much quicker on the detained docket versus the non-detained.

Mr. EDLOW. That is correct, Mr. Chairman.

Chairman JOHNSON. Is there not a big difference between our normal criminal justice system where people have addresses, they have family, they have ways of finding them, and a lot more resources, by the way, to track them down, versus the illegal population that necessarily do not have families, that it is actually pretty easy for them to cut their bracelets and just blend into society.

Mr. ALBENCE. That is correct. I am not aware of any criminal justice system in this country that has a docket size over 700,000.

Chairman JOHNSON. Again, we are just overwhelmed by the numbers, and there is a difference between the illegal immigration

population versus our normal criminal justice system in terms of being able to track them down, the resources to track them down if they were to abscond from an alternate detention.

Mr. ALBENCE. There is a huge difference with regard to that. There is also a huge difference with regard to our ability to locate these individuals. Individuals that are here in the country lawfully will have numeric identifiers that we can utilize to locate them. They have utility bills. They have Social Security numbers. They have driver's license numbers. That is how we conduct investigations to locate people. When you have people that are just here illegally in the country and there is no investigative footprint, our ability to try to identify those people and locate where they are is very limited, very time-consuming, and very resource-intensive.

Chairman JOHNSON. My final point or final question is—because I have seen so many numbers, and that is why I am trying to simplify this as best I can in a very complex situation. In terms of the average length to final deportation, where we can actually remove them, where there is no longer appeals—see, that is the part of the problem, to, they get what they call a final order, but then they can appeal it and that is when they abscond. How long is that, on average, on the detained docket versus the non-detained docket? Anybody have a good number on that. Mr. Edlow.

Mr. EDLOW. Mr. Chairman, first I would just note that if they are on the detained docket, they probably cannot abscond since they are in detention, so there is no lag time in that. But certainly it is taking an average right now to complete a non-detained case of 752 days. Then after that, I would have to defer to the Department of Homeland Security, after that period of time, how long it would take to get the travel documents and effectuate the removal.

Chairman JOHNSON. That is less than 2 years. I have seen much longer figures, kind of depending on the court, too. We have seen it going 4 to 5 years.

Mr. EDLOW. Well, certainly, the dockets vary. The crowdedness of each docket would vary based on the location of the court and what that court is typically handling.

Chairman JOHNSON. What about on the detained docket? What is the length of time on average? I have seen, initial determinations like 41 days. That is up quite a bit.

Mr. EDLOW. That is exactly right.

Chairman JOHNSON. What about to the final point of removal?

Mr. EDLOW. I can just tell you where we are in terms of completing the case, and then I would have to defer to ICE on that, but 40 days is correct.

Chairman JOHNSON. Mr. Albence.

Mr. ALBENCE. Generally, removal to Mexico or one of these Northern Triangle countries is quite rapid. We work very closely with the consular officials in these countries. We also actually have them onsite in many of our facilities. We can get travel documents in many cases between 3 to 7 days. I will confirm what Mr. Edlow said, that our absconder rate for aliens in detention is zero.

Chairman JOHNSON. Thank you. Well, magically my 7 minutes are still there, so I think I am getting close to it, so we will go to Senator Portman.

OPENING STATEMENT OF SENATOR PORTMAN

Senator PORTMAN. Thank you, Mr. Chairman.

This is a really important hearing. It is a tough issue, really difficult issue, because we are balancing kids coming into our country who we all have compassion for with our immigration system, families coming in, infrastructure that is inadequate to deal with it, and we have talked about that today. With 700,000 pending cases, there is nothing like this, as Mr. Albence just said in the criminal justice system in this country certainly, 700,000 cases pending, and with regard to unaccompanied kids, I think it is about 70,000. Is that right? Mr. Edlow, do you know?

Mr. EDLOW. It is around 80,000, sir.

Senator PORTMAN. 80,000. Look, this is challenging. I got involved in this issue, as some of you know, a few years ago when we had eight individuals from Guatemala who were sent by HHS from detention, HHS care, to traffickers, actually the same traffickers who had brought them up from Guatemala as their sponsors. Those traffickers then took them to an egg farm in Ohio where they were exploited and put into a forced labor situation.

I want to thank DOJ this morning because we just learned this morning that the seventh defendant in the Marion case pled guilty yesterday to trafficking charges. You all have been aggressive in going after these traffickers, and I appreciate that.

But the problem is when these children come in and now when the families come in and the children are in HHS care, they then go out to these sponsors without adequate screening. That is certainly what our research has found over the last few years. We have a legislative initiative that some of us on this Committee—in fact, my two colleagues to the right, Senator Carper and Senator Lankford, are very involved in this—are going to be shortly introducing, which we think will really help to put somebody in charge, have some accountability, for two reasons: one, to ensure these kids are properly treated, that we do not send them out with traffickers; but, second, to get them to their court hearings and to ensure the immigration system is working.

We learned that late last year there was a call that went out, a 30-day call that the Trump administration had initiated, which, frankly, was not done in the Obama Administration, so that is a positive step at least to have a call going to these sponsor families to say, "What is going on? Where are the kids?" Some of you have heard this number, that 1,500 kids are unaccounted for. We will have some new data we will release later today probably which shows that has not gotten much better, and a number of kids, a couple dozen, had left altogether, had runaway from their family.

Part of the problem is the fact that we do not have this infrastructure in place to deal with it. Again, it is not easy to put it together, but it seems to me there are two things that we should all agree on. One is to deal with the push factors, particularly in the Northern Triangle countries, because if we continue to have this push to the United States, we are going to continue to have enormous challenges, regardless of what kind of infrastructure we put in place. Second, we need to ensure that we have more judges, more expedited proceedings. As was said by the Chairman and the Ranking Member, if you have these long wait periods, a couple

years, it is far more likely you are going to have problems. We have seen this in all of the data as we compare the detained versus the non-detained individuals in going to court.

A couple of questions, if I could, and, Ms. Gambler, you talked a little about this, the enormous backlog, the reasons for it. But, Mr. Edlow, you are with the Department of Justice, so tell us a little more about this. If we allow detention of family units together, what would that do to the detained docket?

Mr. EDLOW. Well, certainly, Senator, it would add additional cases to the detained docket. If we were not bound by the *Flores* Settlement Agreement, those cases could move forward on that docket as opposed to being released and placed in a non-detained docket.

The Department would prioritize its resource and its judges to ensure that we continue to not have a backlog on the detained docket. We do not have a backlog now. We would not have a backlog then.

The problem in speculating too much as to how it would ultimately look, perceptions matter. If there is a legislative change or a termination of *Flores* that would ultimately allow for the detention of family units together during their immigration court proceedings, that probably is going to cutoff one of the pull and push factors that you just alluded to before. That may affect apprehensions. I cannot speculate on whether that would, but certainly the Department would put the resources that it has and that it will continue to gain to ensure that we can hear those cases.

I should note that the Department has been working already very closely with the Department of Homeland Security to prioritize family cases and to ensure that those cases can be expedited—not accelerated. We want to make sure that the process is there as Congress has intended, and we want to make sure that the law is being enforced evenly and fairly. But we want to make sure that these cases are heard quickly, and we can do that now, and we will continue to do that.

Senator PORTMAN. I think it is important to prioritize those cases for all the reasons you said, but we also have to prioritize all the cases. In other words, we need to bring the backlog down for everybody. Again, 700,000, you talked about the number of days, which is about 2 years on average even to get someone to court. You talked about the fact that there is an appeal process after that.

Let me ask you this, and maybe this goes to the entire panel. Have you given us a number? How much would DHS and DOJ need to be able to substantially reduce that backlog, let us say, by half over a period of a couple of years? What resources would be required?

Mr. EDLOW. Senator, I would——

Senator PORTMAN. I would give this to DHS as well.

Mr. EDLOW. I would have to work with our team and come up with a number.

Senator PORTMAN. Would you do that?

Mr. EDLOW. Absolutely, Senator.

Senator PORTMAN. Because I think, that is sort of the question all of us are asking ultimately. One, how do you avoid the push factor and do more in Central America to avoid so many people com-

ing here without documents and having this system that is going to be tough, as I said, no matter what? But then just dealing with the infrastructure, what kind of resources are required? Senator McCaskill said a lot of us, we want to put more funds into that than into other things. That may be true, because if you could, in fact, expedite these cases, it is much more likely they can be handled properly and that we are not going to lose people in the system, which is currently happening, and you are not going to have issues that we talked about earlier of HHS actually putting kids into dangerous situations with sponsors who there is no accountability for. By the way, that needs to be dealt with no matter what. I am not going to get into that in this hearing because that is a separate topic, but we have got to get somebody responsible and accountable.

Mr. ALBENCE. Sir, if I could add, in addition to adding the judges, ICE is in desperate need of attorneys to actually prosecute these cases.

Senator PORTMAN. Right.

Mr. ALBENCE. If you only front-load the judges, you are still going to have a bottleneck within ICE because we need the attorneys and the support staff within our legal department to help prosecute these cases.

Senator PORTMAN. On both sides.

Mr. ALBENCE. We would need, obviously, officers to manage these cases. But, in fact, the fiscal year 2018 appropriations bill that gave us some additional attorneys—I believe it was 72—the appropriations language actually prohibited them from working on immigration cases. We have to be able to get the immigration attorneys——

Senator PORTMAN. Mr. Eldow and Mr. Albence, I would just ask—and I am sure the Chair would appreciate this, and the Ranking Member—just give us a number based on reducing the backlog by half within 2 years. What would that take?

Chairman JOHNSON. Again, total resources specified, detailed out, everything you need. Senator Peters.

OPENING STATEMENT OF SENATOR PETERS

Senator PETERS. Thank you, Mr. Chairman, and thank you to our witnesses for being here today.

I have been listening to the testimony, and I am just trying to clarify in my mind some of the numbers that have been thrown around here, so if you could help me with that, I would appreciate it.

Mr. Albence, in particular, you have talked about folks who are in alternative programs and then do not show up for cases, or once there is an adjudication, immediately leave. Yet I am looking at numbers here, so help me through this. It shows the data that families on ICE's main Alternative to Detention program attended 99.6 percent of their hearings in the first half of 2017, and ICE reports an overall success rate of 95.7. A study of the family case management program (FCMP), which is the high-touch caseworker-based alternative pilot for families, shows that 99 percent of families complied with court appearances and ICE appointments.

It seems at least from this data, do appear for their court appointment 95 to 99 percent of the time. Is that accurate?

Mr. ALBENCE. Sure. It is accurate, but there are a lot of caveats to that. Many of these individuals, because the docket is so long, it is only measuring their compliance with one hearing or one court appointment, because they may have four or five resets or continuances that it does not measure. You are only tracking a small period of time. Over the long run, what we know is our absconder rates for family units in this year is 28.4 percent. Last year it was 23 percent. In 2016 it was 31 percent. In 2015 it was 25 percent. Those are hard, firm numbers.

With regard to family case management, family case management was a well-intentioned program that, again, the goal was to ensure compliance with court hearings. Overall, its compliance rate was a little bit less than our normal program at a much higher expense, and ultimately only resulted in 15 removals from the country at a cost of $1.16 million per removal. It was a very expensive program with no removals attached to it at the end.

Senator PETERS. This figure of 99 percent for the family case management program you said is flawed because it only has the first hearing?

Mr. ALBENCE. In some cases. I would have to look at FCMP. Many of those individuals, they probably never ever completed their case before the program was dropped because of the expense and inefficiency with actually removing people and getting the compliance with removal orders.

Senator PETERS. Well, we will have to do a deeper dive then, because these are the numbers that have been presented to me. And you talk about the measurement of the program is removals. Now, these are folks who went through a court process looking for asylum. Do you think perhaps they were successful because they had a good argument to make and a successful case? Should we be looking at facts related to folks who actually were here on legitimate reasons associated with asylum that we should not just look at removals as the standard measure of success or not?

Mr. ALBENCE. Well, again, ICE is in charge of immigration enforcement. Our goal is to enforce the laws and comply with the judge's order, whether that judge's order is the grant of asylum or whether that judge's order is removal. The vast majority of individuals who even though they surpass the credible fear threshold upon apprehension and their initial screening by Citizenship and Immigration Services (CIS), ultimately, many of them do not ever actually file for asylum. Even those that do file, I believe the approval rate is in the 20-percent range. I do not have that exact number in front of me, but I believe it is in the 20-percent range. The vast majority of these people we are talking about are not people with successful asylum claims.

Senator PETERS. Certainly, with the detention docket or the detained docket, in 40 days we process folks and get them out. That is pretty quick. I agree with what I have heard from my colleagues earlier that we have to be able to have a process that moves that quickly for everybody by hiring judges, having the infrastructure in order to do it.

But if I look at some of these costs associated with alternative programs as well, based on the significant reduction in cost that the GAO has identified, it would take 1,229 days waiting for an adjudication in an alternative program before it was more expensive than the detained.

Mr. Edlow, you mentioned the average of 752 days, so it seems alternative programs from just a cost-benefit analysis are significantly cheaper. But let us move the process along. That is not making that argument. I think we need to be moving this process along a lot quicker.

But in my remaining time, I just want to mention something that I think is very important, and that is what our top priority in all of this should be, and that is the welfare and care of children who are in this process. A host of medical organizations, including the American Academy of Pediatrics (AAP), the American College of Emergency Physicians (ACEP), the American College of Physicians (ACP), the American Medical Association (AMA), the American Psychological Association (APA), and on and on, to name a few, have all concluded that there is irreparable physical and mental harm done to children who are placed in detention. Even brief stays in detention, according to these folks, can lead to psychological trauma and lasting mental health risks.

My question to the panel is: In proposing rollbacks to the *Flores* Settlement Agreement, has DHS reviewed the extensive literature discussing the long-term health consequences that detention will have on children? Mr. Albence, do you want to start?

Mr. ALBENCE. The regulation writing process was very extensive. I was not personally involved in a whole lot of that, so I cannot speak to all of the things that were reviewed during the course of that process. What I can tell you is that the family residential centers (FRC) are humane.

What we are looking to do with that regulation is not change the standards which we currently maintain. The purpose of the regulation is not to change the standards that we have, that currently exist. The purpose of the regulation is to bring us into compliance with the *Flores* Settlement Agreement, which was contemplated by the court, and that is the purpose of the regulation.

Senator PETERS. How long is too long, do you think, to detain a child in a detention facility?

Mr. ALBENCE. I am certainly not qualified to answer that question, sir.

Senator PETERS. Has your agency looked into that and thought about it and reviewed the literature associated with that?

Mr. ALBENCE. I do not know. I could find out and get back with you.

Senator PETERS. I would appreciate that.

Would anyone else like to comment about the review of your organization as to the psychological impact on children are detained? Mr. Perez.

Mr. PEREZ. Senator, I am not aware with respect to CBP's particular review of the findings in the report, but we could certainly get back to you on that. I would just echo my colleague's sentiment that if it is with respect to CBP's disposition, when it is that we do encounter children, their health and well-being is first and fore-

most on our mind. Even if it in our short-term care, we not only comply with all the standards that we have imposed on ourselves and others have, but nevertheless go above and beyond. The front line Border Patrol agents and CBP officers do absolutely everything we can to assure their well-being while in our custody.

Senator PETERS. Mr. Edlow.

Mr. EDLOW. Senator, thank you. The Department of Justice's role in this process is to enforce the laws that Congress has passed. Certainly, if Congress amends the law to take that into account, we will enforce those laws. But I cannot speak specifically on that. I am not able to speak specifically to the reports themselves.

Senator PETERS. Well, I would like to follow up, Mr. Chairman, with all of you to get a sense of what sort of analysis has been done by each of your agencies to take a look at this, and I am going to propose for the record, if I may, Mr. Chairman, a letter[1] here signed by, I think, over 1,200 professionals and health care officials who believe that any kind of detention, even short-term detention, can have significant impacts on children. Certainly, I would hope that this is something all of you would take a look at, and I think we have to find out who exactly is even considering this as these proposals come forward. From the testimony I have heard today, it does not sound like anybody is giving any kind of comprehensive, thoughtful analysis of this situation.

Thank you, Mr. Chairman.

Chairman JOHNSON. Without objection, that will be entered into the record.

By the way, while you were talking about asylum claims that have been granted, I do have a chart[2] which I will enter in the record. We have staff making copies and distributing it. But it gives you the 10-year averages: 25 percent of asylum claims are granted, 28.2 percent were denied, 30.8 percent other closure rates, and that is abandonment, not adjudicated, other, or withdrawn; and finally, administrative closure rates 16 percent. There are some trends involved in here, too. The actual denial rate has actually spiked up in the last couple of years. We will take a look at this.

Again, that is just asylum. As Mr. Albence was talking about, some people do not claim asylum, and they get removal orders as well. There is a lot of information and a lot of data, and that is what I am trying to do, is trying to accumulate all of it so we can get the exact picture of what is pulling off.

With that, it is Senator Lankford.

OPENING STATEMENT OF SENATOR LANKFORD

Senator LANKFORD. I thank all of you for your work and for what you are continuing to do to keep our Nation safe. We appreciate that very much. You are carrying out the law and what you have been asked to do, and there are a lot of families across the country that are incredibly grateful for the work that you do in that.

I want to get a couple definitions here. The number has come up, over 90,000 family apprehensions. Is that 90,000 individuals total

[1] The letter referenced by Senator Peters appears in the Appendix on page 127.
[2] The chart referenced by Senator Johnson appears in the Appendix on page 93.

or is that 90,000 families, but we do not know what the number is within that family? Let us do a clarification there.

Mr. PEREZ. Thank you, Senator. Actually, for this fiscal year, CBP apprehensions, both at the ports of entry and between the ports of entry, through August is now over 130,000 family units, and that is actually individuals that make up——

Senator LANKFORD. So 130,000 individuals that came as a family unit coming through?

Mr. PEREZ. Yes, Senator.

Senator LANKFORD. Do we know how many actual families that is? Does that represent 75,000 families or groups of individuals, or you just have a number that is broken down to 130,000?

Mr. PEREZ. It is more typically broken out in the manner in which I just mentioned, but we can get back to you on that, Senator.

Senator LANKFORD. That is fine. How do you determine family relationship there? As you have already mentioned before in your prior testimony, there are adults that are coming across the border carrying a child with them or bringing a child with them so they can say they are a family unit. How are you determining who is a family unit and who is not?

Mr. PEREZ. Thank you, Senator. We are using every resource at our disposal, so not only our biographic and biometric databases, our interviews with the actual families themselves. If they are not carrying documents, we will reach into the consulate contacts that we have, also our colleagues throughout the law enforcement community, and, again, leaning on the behavioral analysis and skills of our front-line agents and officers to make those determinations ultimately of whether or not the family unit is, in fact—or the parent who is just being claimed is, in fact, a valid one.

Senator LANKFORD. Do you have to resort to Deoxyribonucleic acid (DNA) testing at times to be able to determine that?

Mr. PEREZ. We do not do DNA testing at the border, sir.

Senator LANKFORD. Is there an additional penalty for an adult bringing a child with them claiming to be a family member, but then you determine this is not actually a family members; this is them trying to be released in the country? Is there any additional consequence for that individual adult?

Mr. PEREZ. Well, typically, yes, Senator. If we find that fraudulent claim being made, then we will refer that individual for potential prosecution as well as, of course, take great care, as I mentioned earlier, of the safety and well-being of the child.

Senator LANKFORD. Because at that point that child is being trafficked or that child is being used by the adult for whatever purpose to be able to try to get across the border. Then we have to actually try to find their family.

Mr. PEREZ. Those are the determinations that, again, uniquely case by case that are subsequently made and that are investigated. Whether or not it was a trafficking organization, that was simply trying to gain profit, as many of them will do in marketing themselves to these migrants to take this very dangerous journey, or whether or not it is a serious, more alarming case at times of human trafficking. Those are subsequently then investigated both by ourselves and our colleagues at ICE to make those determina-

tions, and then, again, as you asked, determine what end state and/or disposition we will collectively have with the individual that is found to be perpetuating these illicit acts.

Senator LANKFORD. OK. Thank you. Thank you for the ongoing work that you all are doing all the time in that for those kids and those families.

We have talked about push and pull factors some today.

Over the last 3 years, the U.S. Congress has allocated about $650 million in economic assistance for the Northern Triangle, for economic investment there to be able to increase jobs for anticorruption efforts, for criminal justice efforts to try to help reduce the crime rate. The murder rate has dropped some in the Northern Triangle. There has been some economic development that is there, but we have made tremendous investments of around $650 million a year each year into the Northern Triangle to be able to help them have a more stable environment that people are not having to flee.

At the same time, I am concerned about the pull factor here because most of the children that are coming as unaccompanied minors and many of the individuals that are coming as family units are coming because there is a family member already here. Is it our policy currently, if there is a family member already present in the United States, even if they are not legally present in the United States, that unaccompanied minor can be placed with someone not legally present in the United States?

Mr. ALBENCE. Those determinations are made by HHS, but I can tell you that the policy of that agency is the immigration status of the sponsor is not relevant to their determination as to whether or not a child can be placed in that household, which from our data that we have seen just recently, you are looking at close to 80 percent of the people that are sponsors or household members within these residences are illegally here in the country.

Senator LANKFORD. That has not always been so. If you go back 15 or 20 years ago, if someone came into the country illegally as a child, they were not placed in the home of someone who also did not have legal status in the United States. The sponsor had to be someone who had legal status or was a United States citizen, if you go back in time. My question is: Is that a reasonable standard to be able to have and to be able to go back to, that we do not have sponsors that do not have legal presence in the United States?

Mr. ALBENCE. You are getting me way out of my lane here, because that is really an HHS decision. I would not want to weigh on how they manage their resources.

Senator LANKFORD. Mr. Perez, what effect do you think that would have on the pull factor?

Mr. PEREZ. Thank you, Senator. I think from CBP's perspective pecking away at any of the potential pull factors that we are seeing that create this spike of movement, one that is, again, wrought with danger, wrought with exploitation, wrought with abuse and abandonment at times is something that we are interested in seeing. Again, as Mr. Albence suggested, it really is HHS to answer in-depth the question that you are posing. But I think a very important point that I would like to make from the CBP perspective is that in my opening I talked of the complexity that oftentimes I

think gets overlooked of what it is that is being done at the front line at the border, the national security mission, the trade and travel mission, the drug interdiction mission, the trade enforcement mission—all critical missions that are taxed, if you will, by the surge in migrants.

Senator LANKFORD. Mr. Chairman, there seems to be some very obvious things that we can do. Senator McCaskill has brought up again the judges. You have brought up the judges and expanding the number of judges. I think it is something that we really need to continue to be able to press in on and to say we have to have a faster adjudication and due process than 2 years or 2½ years.

One of the issues that we have to address is this issue about sponsorship. We tend to "lose children" when they go and are placed in a home with someone who is already not legally present, who has been living under the radar for years, and then we are surprised when they both disappear. That should not surprise us. If we are going to take care of children, we have to find a way to be able to take care of children and not put them in the home of someone who is not legally present here, but that also discourages people from saying, "You are 14 years old. Your Dad is already in the United States working. It is time for you to go join him," and encourage that activity and that connection point.

The last thing we have not talked about is the licensing of the facilities, and I would like to be able to do some follow up on that because the *Flores* Agreement requires a licensed facility, but that has been quite a barrier to actually get licensed facilities from a State for a family facility, and I think it has created an artificial barrier for us, and I would like to be able to follow up on those in the days ahead.

Chairman JOHNSON. I appreciate that. Again, I think there are some pretty commonsense things we can all agree on to start solving this problem, but we do need to—granted, in the data you talked about children. Seventy percent of the unaccompanied children are males, 70 percent are 15 or older. They are not 3 years old.

The other thing, Mr. Perez, I want to talk to you about, because we have been tracking this very carefully, month by month for a number of years, family apprehensions between the borders. Again, this is our blue chart[1] here, and you responded to Senator Lankford there were 130,000 individuals between the borders and at the ports of entry through August. We have 90,000 family units between the borders. Again, I want you to check because, again, we have been tracking this very carefully, I think potentially—my guess it is 130,000 family units, average number in a family is 2.1, is what we have from DHS. If you can kind of check that because, again, we need to make sure that we are actually talking about the same thing and we can use the same figures. OK? Maybe you can have been somebody find in terms of, what you just told Senator Lankford.

Mr. PEREZ. I would be glad to, Mr. Chairman.

Chairman JOHNSON. Senator Hassan.

[1] The chart referenced by Senator Johnson appears in the Appendix on page 90.

OPENING STATEMENT OF SENATOR HASSAN

Senator HASSAN. Thank you, Mr. Chair, and thank you and Ranking Member McCaskill for holding this hearing. Thank you to all of the witnesses for being here today. To the members of law enforcement represented here today, I want to thank you for your work.

I had the opportunity to visit some of the ports of entry that CBP runs last spring to look at your efforts around drug interdiction, and we are very grateful for the hard work and risks that your officers take.

I wanted to get down to what I think Senator Peters began to get to, which is what this hearing really is all about. What this hearing comes down to for me is whether the Federal Government should be keeping children in detention indefinitely while waiting for a judge to review their case. We are talking about the indefinite detention of children. That is, frankly, not who we are as a country, and it is not what the United States should become.

Senator Peters referenced the American Academy of Pediatrics. It strongly opposes long-term detention of children. A March 2017 report from the academy notes that such detention—and this is a quote—"can cause psychological trauma and induce long-term mental health risks for children."

The report goes on to say that detaining children can lead to physical and emotional symptoms such as post-traumatic stress disorder, suicidal ideation, behavioral problems, and difficulty functioning in school.

I am going to ask both Mr. Albence and Mr. Perez just to clarify your answer to Senator Peters. Are you aware of that report from the American Academy of Pediatrics? First, Mr. Albence.

Mr. ALBENCE. If I could just clarify, we do not have indefinite detention.

Senator HASSAN. My question is: Are you aware of that report from the American Academy of Pediatrics?

Mr. ALBENCE. I think I have seen media reports on that report.

Senator HASSAN. OK. Mr. Perez?

Mr. PEREZ. I am not, Senator. Someone else in the agency may be, but I am not.

Senator HASSAN. All right. Thank you. We will make sure that you get copies of it.

In addition to the American Academy of Pediatrics, two physicians who work for the Department of Homeland Security came forward in July as whistleblowers. They had both visited detention centers housing children that provided an appalling lack of care, including finding—and this is a quote—"an infant with bleed of the brain that went undiagnosed for 5 days."

Those same physicians stated publicly that detaining children risks permanent psychological harm, placing children at risk of post-traumatic stress and depression later in life.

Again, Mr. Albence, have you seen these statements from these DHS whistleblowers?

Mr. ALBENCE. I do not believe I have, no.

Senator HASSAN. Mr. Perez?

Mr. PEREZ. I have not, Senator.

Senator HASSAN. Beyond the pediatricians and the whistleblowers, Immigration and Customs Enforcement itself set up an advisory committee of subject matter experts to review family detention, and here is what the agency's own advisory committee found. It said that DHS should "discontinue the general use of family detention," and that in cases where detention was absolutely necessary, families should be detained for "the shortest amount of time possible."

Now, given that it is DHS' own findings, I am going to assume that you guys are familiar with that.

Mr. Albence, given these findings from the American Academy of Pediatrics, DHS whistleblowers, and your agency's own advisory committee, why does Immigration and Customs Enforcement continue to support modifying the *Flores* Agreement to allow for the indefinite detention of children?

Mr. ALBENCE. OK. As I previously stated, we do not have indefinite detention. The Supreme Court has ruled on that——

Senator HASSAN. But you are recommending the modification or overruling of the *Flores* decision, which would allow the indefinite detention of children.

Mr. ALBENCE. Again, there is not indefinite detention of children. People are detained——

Senator HASSAN. Right now there is not because the *Flores*——

Mr. ALBENCE. If you would let me answer, please.

Senator HASSAN. Excuse me, but I have limited amount of time here, and what I am trying to get at is you are all here saying—or three of the four of you are here saying that you want us to allow the Federal Government to do something that the *Flores* Agreement does not currently allow. I understand your current position. But why are you here recommending a set of changes that would allow the indefinite detention of children?

Mr. ALBENCE. What we are doing in this regulation is implementing the process as contemplated by the court in its ruling, which was requiring the licensing of—that children could be held in licensed facilities. We have been unable to get State licensure in most places. What we have requested and are proposing underneath this regulation is to establish a Federal licensing scheme which will be similar and mirror to what we currently utilize in our standards that would enable us to have the authority to hold these individuals. No one is arguing there is not a humanitarian crisis. I think the numbers show it.

Senator HASSAN. Mr. Albence——

Mr. ALBENCE. The humanitarian crisis also——

Senator HASSAN [continuing]. I have limited time, so I am going to ask you to stop for a second, because what I am concerned about is your own agency says that there should not be indefinite or long-term detention of children, that it should be as short as possible. Instead of going toward the remedies that could help us, some that Senator McCaskill suggested, some that you have heard other members of the panel suggested, instead of going toward those remedies to deal with the immigration surge, you are instead recommending something that experts in child development and welfare ask you not to do, and your own people.

Now I want to go on to Mr. Perez. Why does CBP continue to support indefinite detention of children?

Mr. PEREZ. Thank you, Senator. I will respectfully just explain that from CBP's perspective, the modification of the *Flores* Agreement is more so a deterrence and/or the ability to help deter a myriad of pull factors that exist throughout the entire immigration continuum, if you will, by creating a legal framework that does not create disparity in the treatment of single adults and/or family units.

Senator HASSAN. Thank you. Because, again, I am running out of time, I will follow up with you further. First, I am going to suggest our office will get to you the various reports about the impact on children of long-term—any kind of detention.

Earlier this year, we were faced with the humanitarian crisis that President Trump created on our Southern Border. The Administration decided that the best course of action was to forcibly separate thousands of children from their parents. That was an affront to American values, and Americans all across this country from all walks of life objected to it. Now the proposed solution that I am hearing today is to keep children in detention indefinitely. We know that that is harmful to these children, just as forcibly separating children from their parents is. Pediatricians are telling us, DHS whistleblowers are telling us, that based on the conditions they are seeing on the ground, this is wrong and bad for children, and the Immigration and Customs Enforcement's own advisory committee is telling us that, not to mention that any parent can tell you how harmful detention and separation is to children.

I will not support this Committee moving forward with this legislation that allows the Federal Government to indefinitely detain children. I encourage my fellow Members of this Committee and fellow Members of the Senate to do that. We have heard lots of suggestions of important and practical ways to deal with the backlog and to make sure people come forward not only for their first hearing, but also for all subsequent hearings in the immigration process. But it is absolutely unacceptable to detain children and to have the United States of America, the strongest, best country in the world, treat children this way because we do not want to do other things that are more difficult. That is not who we are. We are stronger than that, we are better than that, and we are far more capable than that.

Thank you, Mr. Chair.

Chairman JOHNSON. Thank you, Senator Hassan.

I do want to give Mr. Albence a chance to talk about indefinite—from my standpoint, I do not want to see indefinite detention. I do not think that is what we are asking. What we are saying is give ICE the ability to detain longer than 20 days so that they do not have to make a gut-wrenching decision: Is that the father or is that the sex trafficker? Is that his daughter or is that the victim? Because they cannot determine parentage in 20 days.

The whole point would be to provide the resources so that we can adjudicate those claims as quickly as possible. Those family units that seem eligible for asylum, that is where you do some kind of alternative to detention. Those that really have no valid claim that

it looks pretty much like they are going to be removed, remove them as quickly as possible.

Again, I am certainly not supporting indefinite detention. I do not think that is really what ICE is trying to do with this Administration.

Senator HASSAN. Mr. Chair, respectfully, without deadlines, without caps, without ceilings, detentions can become indefinite. We are already seeing and hearing from these very witnesses how long it takes for those who are not in detention to be heard because we cannot get around to hiring immigration judges or trial attorneys fast enough or paying them enough or resourcing it enough. As soon as we license detention facilities that allow children to be detained for longer, they are going to be, by definition, in indefinite detention.

Chairman JOHNSON. Again, some limits on that or something, I am more than happy to discuss with you. I think it would probably be a reasonable proposal. Senator Heitkamp.

OPENING STATEMENT OF SENATOR HEITKAMP

Senator HEITKAMP. Thank you, Mr. Chairman.

I think the common interest for everyone here is, number one, children. If we can just kind of take away all of the layers and say we are going to focus on keeping children safe, because children had no choice on whether they were going to come to the border. They were brought by their parents, and now we have a situation at our border where people have legally applied for asylum, and we are going to have to decide what is going to happen.

Now, what I will tell you is this movement toward more permanent detention, if we are going to call it that, of minors, what would recommend us that we do that when I look at our current record of what is happening to kids in detention?

Let us just for minute say that we are going to basically allow extended detention of children. I have a couple of questions. I raised this issue the last time we were all here on the Permanent Subcommittee on Investigations (PSI), the issue of sex abuse, sexual assault, and rape of immigrant children who were detained in facilities under the contract of the Federal Government. Where are we at with investigating those? Where are we at in reviewing our contractors?

We have this problem already that has been well reported and well documented. Now we are going to put more children in harm's way? Where are we at with these—I think maybe for the Department of Justice, we will start with you. This problem started with you. I think we all know that. It started when you decided you were going to separate kids at the border. Now we have all these kids that we do not know what to do with and we cannot find their parents or their parents may have left without them, and they are in facilities where they are being abused, sexually assaulted. Whose responsibility is it to fix that problem and investigate it and prosecute it?

Mr. EDLOW. Well, Senator, if I may start, I am not sure I agree with the premise that the problem started with the Department of Justice. The Department of Justice issued a memo involving prosecutorial exercise. What the Department was doing was stating

that the Federal prosecutors along the Southwest Border would be prosecuting and would be accepting referrals for prosecution from the Department of Homeland Security, matters involving unlawful entry under 1325(a) of the act, which is——

Senator HEITKAMP. I am more interested in what you are doing to investigate instances of sexual assault and otherwise abuse of children in our custody.

Mr. EDLOW. Senator, I would defer to the Department of Homeland Security and Health and Human Services. I cannot speak to what the Department of Justice is doing on—especially if it involves ongoing investigations.

Senator HEITKAMP. Do you think it is a Federal crime if they are in a Federal contract facility?

Mr. EDLOW. Senator, again, I would not be able to——

Senator HEITKAMP. You should figure that out. I think it would be appropriate to at least ask the question of who has jurisdiction. Maybe we will turn to the Department of Homeland Security. Who is investigating these claims? Can we expect indictments and prosecutions any time soon?

Mr. ALBENCE. I am not aware of any allegations regarding sexual assault in any of ICE's FRCs.

Senator HEITKAMP. OK. Maybe we are looking at Federal Government facilities. Mr. Perez, can you help me out here?

Mr. PEREZ. Thank you, Senator. Our Office of Professional Responsibility is looking into the allegations. Some allegations, a relatively small number of allegations when you consider the nearly half million, again, annually inadmissibles that are temporarily detained in facilities that are meant to only hold people no more than 3 days, nevertheless comply with the Prison Rape Elimination Act standards, comply with our own transport, escort, and detention standards. As I mentioned earlier, quite typically, not only designed for short-term detention, but our front-line agents and officers go over and above to make sure that we are complying with all those standards.

Senator HEITKAMP. Yes, and——

Mr. PEREZ. We are vigorously looking into the allegations made, and we are glad to share the outcomes once those investigations are——

Senator HEITKAMP. Yes, and out of fairness, we are talking about what we are going to do to try and resolve this issue of separation of kids, which, that is the Catch-22. I will acknowledge what the Chairman is saying. We want these kids to be kept with their parents. The American public wants appropriate reaction to people who are seeking asylum and not letting people get a free pass in because they show up with a kid. I get that. I get that we have a challenge here. But a common purpose should be preventing children in our custody from being abused either physically or sexually, and the person who is not at the podium today is HHS. Right? But yet they are the entity and they are the organization who is going to be responsible for some kind of extended detention of children and families.

We are caught in this spot where we are trying to figure out how we can best enforce our law—and we all agree that that should happen—and how we can protect kids. It is always the kids that

seem to take a back seat here. I do not think that is right, and I do not think it reflects American values. I do not think it reflects the values of who we are. I do not care if you are Democrat or Republican. No one thinks kids should be put in harm's way.

But yet the fact that the Department of Justice does not know if that is a Federal crime if it occurs at a federally contracted facility, that is disturbing to me.

Mr. EDLOW. Senator, what I would say is if there is an investigation and there are allegations, and that is referred to the appropriate U.S. Attorney's Office for prosecution, then based on those facts, the U.S. Attorney's Office will make the determination whether prosecution is appropriate.

Senator HEITKAMP. Do you think it is appropriate to investigate contractors where this has been systematically revealed and discussed and reported?

Mr. EDLOW. Again, if the Department of Homeland Security, if CBP is reviewing this through their professional responsibility component, certainly if they bring the Justice Department in, then we can——

Senator HEITKAMP. OK. I am out of time, but I will tell you this: Until someone tells me how they are going to be better regulated and how we are going to get these facilities into compliance so that children are not abused, either sexually or physically, it is going to be really hard for us to expand any kind of detention jurisdiction. It is really important for me to understand how we are going to create a systemic system of protection of children, whether they are detained for 2 days or 3 days in an ICE facility, whether they are basically part of the apprehension process, or whether they are part of a longer-term detention and, I will call it, the foster care system that the Federal Government through HHS is advancing. These are not partisan questions. These are questions we need an answer to before we move on any additional scoping of detention.

Thank you, Mr. Chairman.

Chairman JOHNSON. Thank you, Senator Heitkamp.

Senator Jones has yielded to Senator Daines. Senator Daines?

OPENING STATEMENT OF SENATOR DAINES

Senator DAINES. I want to thank Senator Jones, too, for yielding. Thanks. Thank you, Mr. Chairman. I want to thank the witnesses for coming here today and for the very important work that you do for our Nation.

As we know, the reinterpretation of the *Flores* Settlement Agreement is at the crux of this catch-and-release policy for apprehended families. *Flores* presents a significant hurdle to the enforcement of our immigration laws. We need a solution that secures our border, upholds the rule of law, and accomplishes these goals without separating children from their parents as a default policy, and the Administration has made it clear that Congress must act, and I heartily agree.

I am a father of four, raised four children. I understand the importance of keeping families together. I also understand that the rule of law is a fundamental part of the foundation of our Nation, and it also needs to be protected. I helped introduce two bills that address family separation at the border and offer a fix to *Flores*.

That is the Keep Families Together and Enforce the Law Act as well as the Protect Kids and Parents Act. Both of these bills would require families remain together while the adults who illegally cross the border face legal action.

Furthermore, these bills would authorize additional immigration judges and provide mandatory standards of care for family residential centers to ensure suitable living accommodations.

Mr. Albence, you listed some specific legislative changes that are needed to close the loopholes in our immigration system. How would fixing *Flores* better allow ICE and law enforcement to do their job?

Mr. ALBENCE. Unfortunately, I am limited to what I can speak to based on the fact that the rule is out there right now for public comment, so I am limited as to what I can say with regard to the rule and kind of have to limit my answers.

I can tell you from an enforcement perspective, the transnational smuggling organizations that are bringing these people to the country are very good at messaging to the individuals in the Northern Triangle and these other countries that, if they come to the United States as a family unit, they will be processed quickly and released, and they never need to appear for court, they never have any repercussions for what they have, and no one is going to be out there looking for them and finding them. That is why you have a continual surge of individuals coming to the border.

When we in 2014 created family detention, we saw a marked drop of almost 30 or 40 percent, I believe, in the number of apprehensions by CBP because of the fact that there were consequences to that illegal activity that individuals were engaging in.

Senator DAINES. Just yesterday the Senate passed legislation that will help combat the meth and opioid crisis in our country. Before the vote, I went to the Senate floor, and I spoke about the devastating effects meth and opioid use is having in Montana. We have seen drastic increases in meth and heroin use in Montana. In fact, from 2011 to 2017, there was a 415-percent increase in meth and a 1,234-percent increase in heroin found in controlled substance cases in the State. Furthermore, we have seen a 375-percent increase in meth found in postmortem cases during the same timeframe. Keep in mind, Montana is a long ways away from our Southern Border, but those drugs are coming through our Southern Border.

Mr. Perez, as you point out in your testimony, the increasing numbers of individuals held in CBP facilities divert CBP resources from addressing a number of serious threats to our Nation, including transnational criminal organizations and dangerous narcotics that are wreaking havoc in places like Montana. CBP has a vast mission. I understand it is often a balancing act with limited resources.

My question is: How do we ensure that stopping the flow of illicit drugs at the border remains a top priority? How do we better prevent these drugs from reaching communities in places like Montana?

Mr. PEREZ. Thank you, Senator. First, I would like to absolutely tell you that it is for CBP an absolute top priority amongst the complex mission set that we have; that is, to stop this terrible

scourge of not only narcotics in general, illegal narcotics being trafficked by these transnational criminal organizations across our border, but, in particular, the two you mentioned: the ongoing synthetic opioid crisis, with fentanyl, and other synthetics drugs like meth. This is, again, an ongoing daily challenge, but one that we bring all our resources to bear—again, all the training and expertise of our agents and officers, the technology that we have at our disposal, our canines, and our advance information, our targeting techniques, again, working alongside our investigative arm in ICE to dismantle as well, subsequent to seizures, these transnational criminal organizations to the best degree we possibly can.

That is why I circle back with this particular topic, CBP's particular interest in what it can possibly and probably do with respect to eliminating a pull factor. We would just as soon see those numbers of illegal migrants drop, people, again, not choosing to take a long, arduous, and sometimes very dangerous journey that also exposes them, again, to being exploited by human trafficking organizations, by other criminal elements, and, frankly, again, criminal organizations that have only profit in mind, and then these folks end up becoming victims themselves even more so than where it is that they are fleeing from.

That is why it is so critical for us that these loopholes be addressed in order to bring those numbers down as far as what is actually arriving at and/or between our ports of entry at the border.

Senator DAINES. I think it is important because it is a zero sum game here. Every moment you are spending here addressing the issue of illegal crossings is time spent that could be used to stop the flow of illegal drugs.

Mr. PEREZ. Thank you, Senator. As I mentioned earlier, legitimate trade and travel, national security concerns, pests that threaten our agriculture, our economy, those are all amongst the myriad of missions that CBP has, including dealing with migrants, which we do as humanely and as caringly as we possibly can, particularly when children are involved. It is a delicate balance that we strive to make.

Senator DAINES. I have a follow up question for Mr. Albence. Thank you, and thanks for your work to secure our borders.

Mr. Albence, I want to know if Alternatives to Detention work.

Mr. ALBENCE. Alternatives to Detention are a fairly effective tool at getting people to appear at some or all of their immigration court hearings. It is a woefully ineffective tool at actually allowing ICE to effectuate a removal order issued by an immigration judge.

Senator DAINES. Like ankle monitors, for example, effective or not?

Mr. ALBENCE. Again, getting people to a hearing, they are fairly effective. Actually enforcing a judge's removal order, they are woefully ineffective.

Senator DAINES. Last question. Has the implementation of the Memorandum of Agreement (MOA) helped ICE removal criminal aliens?

Mr. ALBENCE. Are you talking about the MOA with regard to HHS and the fingerprinting of sponsors?

Senator DAINES. Yes.

Mr. ALBENCE. Yes, we have arrested 41 individuals thus far that we have identified pursuant to that MOA. Our data that we have received thus far indicates that close to 80 percent of the individuals that are either sponsors or household members of sponsors are here in the country illegally, and a large chunk of those are criminal aliens. We are continuing to pursue those individuals.

Senator DAINES. Thank you.

Chairman JOHNSON. Senator Jones.

OPENING STATEMENT OF SENATOR JONES

Senator JONES. Thank you, Mr. Chairman. Thank you to all of our witnesses for appearing here today on this really important topic.

I want to talk a little bit about procedure. To Mr. Albence and Mr. Edlow, are you familiar with the studies that show immigrants with counsel are four times more likely to win their cases than those without counsel? Are you familiar with that, Mr. Albence?

Mr. ALBENCE. I may have seen some media reporting on that, but I cannot say I am intimately familiar with the report.

Senator JONES. Mr. Edlow, are you familiar with it?

Mr. EDLOW. Again, I have seen some reporting on several studies of that nature. I cannot speak to that specific one.

Senator JONES. Well, it seems to be important because if that study—and I have no reason to doubt that study—that immigrants that have counsel are five times more likely to win their cases, I think it is a testament to who is crossing the border and why. We may be deporting folks that have legitimate cases simply because they do not have access to counsel.

My question for both of you is: Is the Department of Justice and is Homeland Security doing anything to try—are you taking into account in your processes the ability of folks to be able to get counsel? Because right now there is no constitutional right to counsel. They either have to get a pro bono counsel or try to get retained counsel, which is difficult to do.

Is the ability to get counsel any factor in your considerations?

Mr. ALBENCE. Thank you. Yes, actually we have a very extensive legal orientation program that we work with many nongovernmental organizations to provide legal counseling and pro bono counseling to our detainees. We actually had them onsite in our family residential center in Dilley, Texas. They actually have office space, and one of the first things that the aliens that are booked into that facility experience is that legal orientation program. They have a private room to meet to go over their asylum claims before they speak with the asylum officers from CIS. Any individual that we arrest, families or otherwise, that we take into custody, we provide them with a list of free legal services and other opportunities of which to avail themselves.

Senator JONES. All right. If you get more lawyers—and I will come to you real quick Mr. Edlow, but if you get more lawyers—you mentioned more lawyers to prosecute these cases. Will you also try to expand the legal services ability for these immigrants that are coming in?

Mr. ALBENCE. We will certainly do whatever we can to provide individuals with whatever legal orientation programs that they want to avail themselves of.

Senator JONES. All right. Mr. Edlow.

Mr. EDLOW. Thank you, Senator, for raising this topic. With regard to counsel, as I am sure you are well aware, the immigration laws do not allow for government-funded counsels. Certainly if Congress wishes to change the law, Congress is free to do so, but certainly at this stage, the government cannot provide counsel.

The role of the immigration judge during the immigration court proceedings is to ensure a fair hearing for both sides, and oftentimes that means that if the alien is unrepresented, the judge has to step in and ensure that the alien is getting their entire claim out——

Senator JONES. But that also bogs down the process. My experience is that in court proceedings of almost 40 years of practice now, the people that are represented by counsel, the proceedings move at a better pace and much more efficiently. Would you not agree with that?

Mr. EDLOW. I would, but I would also note that if—you have to make sure it is an immigration lawyer that is coming to the proceedings on behalf of the alien because a lot of times when pro bono counsel come in, there is a learning curve at that point——

Senator JONES. Sure.

Mr. EDLOW [continuing]. That they need to figure out. But what I am saying, though, is in these instances, first of all, the judges give, when necessary, continuances to allow respondents to seek counsel that is both detained and non-detained, get time to seek counsel, especially non-detained get a significant period of time. Depending on the city where the court is, it could be several months. But ultimately, if the judge decides that the case has to go forward with the respondent unrepresented, there is a painstaking process that is taken to ensure that that alien gets a fair hearing and that those claims are fleshed out to the degree that they need to be.

Senator JONES. Well, would you not agree, though, that someone that is being detained has a harder time trying to retain counsel than someone who is not detained? Is your proposed rules that we are talking about now, does it take into account the ability to get counsel?

Mr. EDLOW. Those are two separate questions. Let me take the second one first.

Senator JONES. OK.

Mr. EDLOW. Just so you are aware, the Department of Justice is not a party to the proposed rule.

Senator JONES. Right.

Mr. EDLOW. I cannot comment on those rules, especially as we are in the middle of the notice and comment period.

In terms of the attorneys coming into the courtroom, though, there are a significant number of organizations that regularly go to these detained facilities to make themselves available to detained respondents, and that may include themselves representing these respondents. It may also be that they put these respondents in touch with other available pro bono attorneys.

Senator JONES. There is a process in place.

Mr. EDLOW. There is a process in place. I think in a lot of cases it may be easier for a detained individual to meet with a pro bono attorney or meet with a legal organization that is looking to provide pro bono services than a non-detained alien.

Senator JONES. All right. Well, I would encourage all parties to try to do what they can to ensure a swift ability to get counsel, because I think it will speed up the process, it will help the process, and particularly consider doing more to get these children advocates or guardians ad litem throughout our court system. No matter if a child is injured or whether it is part of an adoption proceeding, they always have guardians ad litem to protect their interests, which I also think would help protect their safety.

The last thing in the remaining time, Mr. Edlow, I would like to talk about the filing system that you guys have. Over 30 years ago, the Federal courts went to electronic filing, and in 2001, EOIR also decided that they would implement an electronic filing system. But as of today, it is still not there. We are still dealing in the Dark Ages, like I am with this paper. I have books instead of my iPad sitting here. But, look, I have been practicing law a long time, and I know how efficient it can run when you have an electronic filing system.

What is going on, why the delay in what every court in America is doing these days to speed their process and make it more efficient?

Mr. EDLOW. Senator, thank you for your question. I cannot speak to what previous Administrations did or did not do, what action they were able to take to move this along. I can tell you from personal experience practicing in immigration court for many years, it would have been very helpful to have an electronic filing system. I can also tell you that EOIR is working very hard to get a pilot program out there and to get the kinks worked out so that we can do a nationwide rollout.

Senator JONES. Have you any kind of timeline on that?

Mr. EDLOW. Senator, I would get back to you on that. I would want to speak to the folks who are handling it at EOIR to make sure that I get you the right information.

Senator JONES. All right. Great. Well, please do that.

Thank you very much, Mr. Chairman.

Chairman JOHNSON. Senator Harris.

OPENING STATEMENT OF SENATOR HARRIS

Senator HARRIS. Thank you. Senator Jones, I actually have a piece of legislation, the Access to Counsel Act. I could not agree with you more. These folks should not be denied access to counsel when they arrive.

Mr. Albence, to follow up on questions you have been previously asked by my colleagues regarding the position of medical experts, including the American Pediatrics Association and the American Medical Association, you told us in July, I believe, "With regard to the family residential centers, I think the best way to describe them is to be more like a summer camp." When pressed on this statement, you said that you were "very comfortable" with the

treatment of the immigrants at these centers. Do you stand by that statement?

Mr. ALBENCE. Absolutely I do.

Senator HARRIS. Do you believe they are like summer camps?

Mr. ALBENCE. I believe the standards under which they are kept are very safe, they are humane.

Senator HARRIS. Do you have children or do you know children that have attended summer camp? Would you send your children to one of these detention centers?

Mr. ALBENCE. Again, that question is not applicable. What I can tell you is that I went to a codel there just 3 weeks ago with Senator Boozman and Senator Capito, and what we saw there were children receiving excellent medical care. We saw children playing in the gymnasium. We saw families sitting at computers in a library that was well stocked. We saw a cafeteria that was spotless with unlimited amounts of food with regard to when they eat. They live in dormitory settings with televisions, Xboxes, and a host of other recreational opportunities.

Senator HARRIS. But you can understand the concern to suggest it is like a summer camp would suggest that a parent would voluntarily send their child to a place like that to have a good time for the summer. I think——

Mr. ALBENCE. Well, you are missing the point——

Senator HARRIS. Excuse me. I am not——

Mr. ALBENCE [continuing]. The parent made the illegal entry. The parent put themselves in this position. They made the illegal entry into the country. That is why they are there.

Senator HARRIS. You are here because this is an oversight committee hearing, so I am asking you specific questions to gauge your ability to actually conduct oversight over the operations of your agency.

Moving on, Mr. Perez, I am sure you are aware of the great public outrage at seeing images of young children in CBP custody in large metal detention cages. They apparently have been given Mylar blankets and camping pads to sleep on concrete floors for multiple nights.

Since the President signed the Executive Order on June 20, 2018, regarding family separation, have any families been separated at the border? And if so, how many?

Mr. PEREZ. Thank you, Senator. We are not separating families at the border, at or between the ports of entry. As I mentioned earlier, the temporary detainment facilities that are run at the ports of entry, run by the Border Patrol, are meant for short-term holding. The men and women on the front line of CBP go above and beyond not only to impose standards on maintaining the sanitary, the healthy conditions, and the care of those in our custody, family units, adult and children——

Senator HARRIS. I just want to be clear that we are thinking the same thing. I am asking, are you saying then that no families have actually been separated since the Executive Order was signed on June 20?

Mr. PEREZ. The only instances where families would be separated is if there is an element of false parentage, a criminal situa-

tion with the actual adult and the child, a health concern or a safety concern for that child.

Senator HARRIS. Do you know how many such cases there have been since June 20, 2018?

Mr. PEREZ. We could get back to you on that, Senator, but, again, those would be the only circumstances, with the safety and well-being of the child first and foremost on our mind, where a family would be separated.

Senator HARRIS. Other than that, there are no families that have been separated since the signing of that Executive Order?

Mr. PEREZ. Yes, ma'am.

Senator HARRIS. Then, Mr. Albence, I have asked repeatedly for information on the number and the status of any cases, if they exist, where your agency has referred an adult who accompanied a child to prosecution for trafficking, and I have still not received that information.

In your briefing, I am sure you are prepared to answer the question because I ask it every time. How many cases has your agency referred to the Department of Justice for prosecution or even investigation of trafficking since that appears to be the basis for some of your policies, a concern that trafficking exists?

Mr. ALBENCE. Thus far, Homeland Security Investigations (HSI) within ICE has initiated 778 human trafficking investigations, has made 1,410 human trafficking arrests, criminal arrests, has obtained 759 indictments and 425 convictions.

Senator HARRIS. Since what date is that?

Mr. ALBENCE. That is this fiscal year, up through August 31st.

Senator HARRIS. Are those cases where the concern was that an adult who was accompanying a child—that is the specific question, adults who are accompanying a child who arrive at our border, how many of those cases have been referred for trafficking prosecution?

Mr. ALBENCE. We would have to get back with you on that. We would have to go look in our records to see.

Senator HARRIS. OK. When can I expect——

Mr. ALBENCE. But I am certainly glad——

Senator HARRIS [continuing]. To get that information?

Mr. ALBENCE. I would not think it would take more than a couple of weeks.

Senator HARRIS. OK. By the end of next week? Is that doable?

Mr. ALBENCE. I will go back and talk to—I am not quite familiar with the Investigative Case Management (ICM) and how searchable it is, but once I find out, we will certainly let you know.

Senator HARRIS. OK. I appreciate that.

I do not know if it either Mr. Albence or Mr. Perez, whichever—if both of you can answer this question. But I am assuming that you are both aware that there are affidavits that have been filed this summer alleging that children faced limited access to food and water and experienced spoiled food, freezing temperatures, and verbal and physical assault in CBP custody. Mr. Perez, are you aware of that?

Mr. PEREZ. Thank you, Senator. As mentioned earlier, our Office of Professional Responsibility alongside DHS' Office of Inspector General (OIG) have been investigating any and all of those allegations of misconduct. We take those investigations and those allega-

tions very seriously, as we do with any other allegation of misconduct by either contractors or employees. Nevertheless, very confident that, given the amount of intake and allegations and cases that there are versus the nearly, again, almost half million inadmissibles that we are detaining and encountering, that the instances with which this is occurring are relatively modest and, again, our front-line agents and officers are doing the best they can to take care of these folks over and above——

Senator HARRIS. Thank you. I have just a few seconds left. I have asked on both April 22 and May 15 DHS officials about CBP employee training as it pertains to the handling of children, as well as training that pertains to the handling of the youngest children in your detention facilities, and I have not received a response. Can one of you tell me where that information is or if it exists at all, and that is, what you are doing to train your employees who are having direct contact with children and their parents on how they should be approached in the least traumatic manner?

Mr. PEREZ. Absolutely, Senator. We can get back to you. I will make sure that we do respond to you with the actual laydown of the training that we provide. But I can tell you very briefly that our agents and officers annually are required to take training both with respect to potential human trafficking concerns, exploitation of children, and/or the care and custody of the children in our temporary detention facilities through our transportation escort and detention standards.

Senator HARRIS. Thank you. Again, I will note I asked for this information on April 26 and again on May 15, so I would appreciate your swift response.

Thank you.

Chairman JOHNSON. Senator Carper.

OPENING STATEMENT OF SENATOR CARPER

Senator CARPER. Thanks, Mr. Chairman. Welcome one and all.

I want to return to a subject that I have turned to many times on this Committee, as my colleagues will affirm, and that is root causes. I have long been a proponent of commonsense comprehensive immigration reform to fix our broken immigration system. But it seems to me that a proposal to hold families indefinitely fails to address an incredibly important part of the equation, and that is the push factor that leads so many to seek safe haven here in the United States.

When I was privileged to serve as Chairman and Ranking Member of this Committee, I made any number of trips to Mexico, to Central America, to Honduras, Guatemala, and El Salvador in order to try to better understand the root causes of migration to the United States, joined by a number of members of this panel, including our Chairman and Senator Heitkamp.

What I learned on those trips is that many people in those countries live in fear for their lives, Gang violence is in too many instances rampant. Government officials are too often unaccountable. Many people have no hope or little hope of a better economic situation for themselves and their families.

I think unless we work with our neighbors to the south and continue to work with our neighbors to the south, work more effec-

tively with our neighbors to the south to address the factors that lead so many to seek safe haven in the United States, including lack of rule of law, unimaginable violence, the lack of economic opportunity, we are simply putting a Band-Aid on the problem.

In its most recent budget request, the Trump administration asked for about $430 million to support the U.S. strategy for engagement in Central America. I think that is less than half of what was initially sought by the Obama Administration. It is about almost a third less than this year's appropriation.

This occurred despite the fact that some in the Administration, including General John Kelly and Commissioner Kevin McAleenan, have argued for continued funding for this strategy. Thankfully, bipartisan Senate appropriators agreed on the importance of continued funding, and they restored President Trump's cuts.

Parents and children facing sure death at home or likely death at home will continue to make this dangerous journey to our borders despite nearly any inhumane policy this Administration or other Administrations might pursue.

For all the witnesses, this question: Take a moment and react to that. Do you agree that any effective strategy to secure our border must address the root causes of migration? Let us start with you, Ms. Gambler.

Ms. GAMBLER. I think that seems reasonable, and certainly through GAO's work, as you have indicated, Senator, we found that there can be a mix of factors contributing to unaccompanied children leaving their countries and coming to the United States, to include both factors in their home countries as well as factors here.

Senator CARPER. Thank you. Mr. Edlow.

Mr. EDLOW. Thank you, Senator. Certainly in terms of the root cause of the migration, you are going to see push and pull factors with what is going on here in this country. We saw that in 2015 when the *Flores* interpretation came out that it included accompanied minors. We saw an increase in apprehensions of families along the border. I am not saying that is the only reason that they were coming, but certainly that does help.

Also, when there appears to be a consequence, there does appear to be a drop in those apprehension numbers, too. We saw after President Trump's inauguration that there was a 40-percent decrease in apprehensions for a period of months.

Certainly there are so many varied push and pull factors that would have to be addressed, and I would just say that the Department welcomes legislation to address those to come up with a more equitable solution moving forward.

Senator CARPER. Thank you. Mr. Perez.

Mr. PEREZ. Thank you, Senator. I believe you mentioned the Commissioner's previous testimony. I can assure you that CBP, alongside our DHS colleagues, continue to invest and put forth a significant effort in working with our counterpart agencies throughout the hemisphere, particularly in Mexico and the Northern Triangle, the creation of vetted units, systems and information sharing, capacity building to the extent of even modernizing and helping them to modernize some of their trade functions, to address the different push factors. That does certainly remain a priority for

CBP and something that we are going to continue to put forth an effort on.

I would just echo my colleagues comment that, for us it is so critically important given the entirety of this, as I like to call it, "immigration continuum," that it is an effort for the push and pull factors, which are many, so that whenever we have the opportunity to address some of those, to again prevent someone from ever embarking on what is oftentimes a very dangerous journey, that we would again welcome those discussions.

Senator CARPER. Thank you.

Mr. Albence, just be very brief in your response, if you would.

Mr. ALBENCE. I would just echo the sentiments of my colleagues. ICE has invested significant resources both on its Homeland Security Investigations as well as Enforcement and Removal Operations in the Central America and Mexican regions to help dissuade some of this travel. I will also say I think it is a humanitarian issue, and I think it is incumbent upon us to limit those pull factors that exist, to stop people from making this dangerous journey. If individuals in those countries know that they are going to spend their life savings to try to get here and run that risk of going through cartels and smugglers and all sorts of horrific abuse that happens to them on the trip, and that when they get to this country, if they have no lawful right to be here, that they will actually be ordered removed, and that removal order will be effectuated in a timely fashion, that humanitarian issue will decrease significantly because people will stop making the trip, as we have seen before.

Senator CARPER. I do not ask a lot of yes or no questions, but I am going to ask one now. It is not a trick question. It is just yes or no, and it would be helpful. Would you all support a proposal that provides funding to address the root causes of migration from Central America, which ensure that law enforcement there has the resources it needs to fight organized crime, drug cartels, and gangs? Mr. Albence.

Mr. ALBENCE. Yes, sir.

Senator CARPER. Thank you. Mr. Perez.

Mr. PEREZ. Yes, Senator.

Senator CARPER. Mr. Edlow.

Mr. EDLOW. I am sorry. The Department would have to take a look at the legislation and then make a determination whether it could be supported.

Senator CARPER. Thank you.

Ms. Gambler, would you care to take a gamble on that one?

Ms. GAMBLER. Of course, funding decisions are within Congress' authority, but certainly we agree that there are factors in those Central American countries that are contributing to some of the migration.

Senator CARPER. All right. I am out of time.

Chairman JOHNSON. We do have a vote called.

Senator CARPER. I understand. I have some more questions for the record.

Let me just say one thing in closing. We have been funding this Alliance for Prosperity now for, I think, maybe our third year, and the Chairman has been down to these same places, sometimes us together, other times on separate codels. I have watched with inter-

est over the last 20 years what has happened in Colombia, a place where, 20 years ago, you had a bunch of gunmen who rounded up their supreme court and shot them all to death. To go from that point in time to a country that is stable, not perfect but economically strong and vibrant, has actually made a success of themselves—we have helped them. I always like to say it is just like Home Depot: "You can do it. We can help." That is what we have done with Colombia, and that is what we need to continue to do with Honduras, Guatemala, and El Salvador. If we do, they can do it. But we need to help.

Thank you.

Chairman JOHNSON. Thank you, Senator Carper. Before you leave, just a couple of points.

If you can put my blue chart[1] up there for my next question? We have traveled down there, and we have done a lot of hearings, and I think we would agree that it is our insatiable demand for drugs that gave rise to drug cartels and destroyed public institutions down there. We bear responsibility. But I want to ask Mr. Perez real quick, the exact same detention facilities that we were really on a nonpartisan/bipartisan basis praising in 2014 at the height of the UAC crisis, those are the exact same detention facilities that CBP is using to just handle, again, the continuing flow of unaccompanied children and family units, correct?

Mr. PEREZ. They are, Mr. Chairman.

Chairman JOHNSON. Again, they are not designed to keep people in cages for—this is really you are funneling people through these detention facilities where you delouse them, you provide some additional medical assessment, and try and move them out of there within about a 24-hour period, correct?

Mr. PEREZ. As best and as quickly and safely as we possibly can, and effectively, yes, Mr. Chairman.

Chairman JOHNSON. Again, I just want to make sure, because right now—in 2014 we were praising CBP's efforts. Now we are calling them cages, and they are the exact same facilities.

Real quick, that chart, I think, is pretty telling. A picture says an awful lot. What it tells me is that detention did work. We had Secretary Michael Chertoff in 2008, when we had the Brazilian crisis, where there were 88 apprehensions in 1992; in 2005, because of a number of reasons, there were 32,000. Then Secretary Chertoff really began a process of apprehending, detaining, and removing them back to Brazil. A year later, there were less than 1,500.

The Obama Administration kind of recognized the same point. In 2014 we saw a surge in UACs as well as family units. We began detaining with the whole process of those that did not qualify for asylum would be returned. From my standpoint, it is pretty obvious that worked. Anybody want to dispute that? Mr. Albence, do you believe that detention did serve as an effective deterrent?

Mr. ALBENCE. I think detention, coupled with removal and consequences to illegal activity, serves as an effective deterrent. Detention in and of itself is——

Chairman JOHNSON. Again, I am saying detention and removal. OK. Mr. Perez.

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[1] The chart referenced by Senator Johnson appears in the Appendix on page 90.

Mr. PEREZ. I believe the data speaks for itself, Mr. Chairman, with respect to what it is that can possibly be realized when there are consequences that are delivered for illegal activity.

Chairman JOHNSON. Mr. Edlow.

Mr. EDLOW. Senator, I would echo what my colleagues have already said. Certainly when there is a consequence, we see immigration flows respond to that consequence.

Chairman JOHNSON. Ms. Gambler.

Ms. GAMBLER. We have not specifically studied the issue to be able to make an assessment one way or the other, but——

Chairman JOHNSON. This is like a sentient human being, you kind of look at that, and you figure something is going on there, right?

Ms. GAMBLER. But I would add more broadly, not just as it relates to families, but certainly, Border Patrol and CBP have implemented programs to apply consequences to individuals who are apprehended crossing the border, and I think the intent of those consequences is in part to address what you are speaking to.

Chairman JOHNSON. Mr. Perez, you talked about the perception in Central America. It is way more than a perception. It is a reality. The drug cartels, the human traffickers, the transnational criminal organizations are using these loopholes, right? They are talking about—whether it was back in 2012—Deferred Action for Childhood Arrivals (DACA), the permiso slips. They are using that, telling individual from Central America, "Come on to America. You can stay." By and large, they stay, correct?

Mr. PEREZ. Thank you, Mr. Chairman. That is why I followed up with my comment about the perception being at times a reality, that the loopholes that exist by virtue of, judicial decisions and/or legal loopholes in effect have had and made these perceptions an operational reality by not being able to deliver uniform consequence throughout the entirety of the immigration process.

Chairman JOHNSON. Mr. Albence, do you basically concur with that fact, whether it is the *Flores* decision, whether it is the human trafficking bill in 2008, these created a circumstance that is being used and being exploited by drug cartels and human traffickers, correct?

Mr. ALBENCE. Certainly. Not only does our intelligence tell us that, the individuals that we interview, that CBP interviews, tell us that, but the numbers speak for themselves.

Chairman JOHNSON. Ms. Gambler, in your testimony you talked about that the Administration had actually met its goals in terms of alternatives to detention. That was set at 2,899 out of a population of approximately 40,000 in the program? I mean, that is 7 percent. That is not exactly a stretch goal, is it?

Ms. GAMBLER. No, it is not, and that measure in particular was fairly new when we looked at the program. It had only been in place for about 2 years.

I would also add that, at least at the time that we were reviewing the Alternatives to Detention program, which was a few years ago, that was measuring removals and it was counting whether or not aliens who had been in an Alternatives to Detention program at any point during the same fiscal year in which they were removed. I know that Mr. Albence was mentioning some more recent

data, and if it would be helpful, GAO would be happy to take a look at that as well.

I think there are some intricacies in terms of the data associated with the Alternatives to Detention program and its performance that might be helpful to the Committee for us to provide information on if it is helpful.

Chairman JOHNSON. I would say in preparation for this hearing, all the information I got, bottom line, we need a lot more information in terms of real data on Alternatives to Detention. Again, it sounds like a good idea, but I think there are some real problems with it that we need to flesh out here. These types of statistics, where 99 percent show up to a hearing, yes, until they get a removal order, and then it does not really behoove them—it makes a lot of sense to show up to a hearing. You just might get asylum. But the minute you find out you are not going to get asylum, you abscond.

Those are just commonsense human behaviors, and, of course, a very low level goal, I mean, underpromise, overdeliver, that is good in business, but I think we need to point out that fact.

A final point. The Administration is undergoing a rulemaking procedure, and this is really a sales pitch to pass legislation that hopefully the courts will not overrule, they would actually respect the fact that Congress has spoken. But to fix this, the Administration is undergoing a rulemaking, which was contemplated in the *Flores* settlement, correct, Mr. Edlow?

Mr. EDLOW. Yes, Senator. Back in 2001, there was a stipulation agreed to and added into the *Flores* Settlement Agreement that specifically contemplated the agreement terminating within a certain period of time following promulgation of regulations.

Chairman JOHNSON. A couple laws have been passed. When Congress passed those laws, they probably figured they were taking care of the *Flores* Settlement, but the courts have not recognized those laws, basically, correct?

Mr. EDLOW. That is correct, specifically TVPRA. Had it said this is enacted to terminate the *Flores* Settlement Agreement, it probably would have at that point.

Chairman JOHNSON. OK. I guess my final point—and this is why I think Congress has to act—and I know you really cannot answer this, but I am going to ask you to, anyway. What do you think the probability is that, when the Administration issues a rule on this, going through the process, the Administrative Procedures Act, that it is going to be challenged in court and will not be able to put into effect? It will basically have the same problem, the courts will overrule the rulemaking.

Mr. EDLOW. The Department—I really cannot comment——

Chairman JOHNSON. Does anybody want to comment just from a commonsense standpoint? I know my view on that. It is going to be an extremely high probability that the courts will intervene and this rulemaking will never be put into effect.

Mr. EDLOW. Senator, I would just add that should the rule be challenged following the notice and comment period—and I am fully confident that the Department of Homeland Security and Health and Human Services will respond to those comments that

come out of this process—the Department will stand ready to defend the challenges as they come forward.

Chairman JOHNSON. But it would be a whole lot cleaner and a whole lot more certain if Congress would act and pass a law and fix this particular problem, correct?

Mr. EDLOW. Certainly, legislation would be preferable.

Chairman JOHNSON. OK. That is all I was looking for.

Again, I want to thank all of you for taking the time, for your testimony, for answering our questions. I think this hearing has definitely been helpful. I think it has moved us forward in this Committee. We still have information. I am looking forward to future cooperation so we can get all the facts, get all the information so we can set an achievable goal, which I think is more than an achievable goal, so we can design a solution on what I would call a nonpartisan basis.

With that, the hearing record will remain open for 15 days until October 3 at 5 p.m. for the submission of statements and questions for the record.

This hearing is adjourned.

[Whereupon, at 12:23 p.m., the Committee was adjourned.]

APPENDIX

Chairman Johnson's Opening Statement
"The Implications of the Reinterpretation of the Flores Settlement Agreement for Border Security and Illegal Immigration Incentives"
Tuesday, September 18, 2018

As prepared for delivery:

In 2014, the Obama Administration began detaining family units in response to a significant increase in the number of families crossing the Southern border – 68,684 in fiscal year 2014 compared to 15,056 in fiscal year 2013 — a 356 percent increase. Then-Homeland Security Secretary Jeh Johnson explained that decision this way: "Frankly, we want to send a message that our border is not open to illegal migration, and if you come here, you should not expect to simply be released."

In response to a lawsuit challenging the new policy of family detention, courts reinterpreted the 1997 *Flores* settlement agreement more broadly than the parties to that agreement had ever intended: for the first time, it was interpreted to require DHS to release minors even if they were apprehended with their parents.

The *Flores* reinterpretation has basically left the Department of Homeland Security with only two options — both of them bad: release children and detain their parents, or go back to the failed policy of "catch and release" for illegal immigrant families apprehended at the border. This policy is well known in Central America, due to social media, the press, and smugglers, and creates an incentive for increased illegal family migration — and it is a policy that is being widely exploited. Since the 2015 court decision, United States Border Patrol has apprehended more than 254,000 family units attempting to cross our border illegally.

"Catch and release" not only exacerbates illegal immigration, it creates an obvious threat of child trafficking. This is particularly true for children arriving with adult men, as the Department does not have enough time to verify parentage in the 20-day detention limit set by *Flores*. One publicized example describes the circumstances of a man who trafficked a young girl into the United States, claiming she was his daughter. DHS released him with a notice to appear, under the terms of *Flores*. The Huron Police Department in California later arrested him on charges that include two counts of forcible lewd acts upon and two counts of sexual penetration of a victim with mental or physical disabilities. These acts allegedly occurred after the victim and suspect were released from federal custody.

The Administration's recent decision to withdraw from the *Flores* settlement agreement will probably face legal challenge, further underscoring that it is well past time for Congress to act. Our action should be guided by facts and the reality of the current situation, relying heavily on what experts on the ground tell us will and won't work. To that end, Committee staff have held 21 bipartisan briefings and phone calls to gather information and inform our legislation.

Today we welcome representatives from the Department of Homeland Security, Department of Justice, and the Government Accountability Office to provide further information about the effects the reinterpretation of the *Flores* settlement agreement has had, and address any open questions. I am grateful to the witnesses for being here.

U.S. Senate Homeland Security and Governmental Affairs Committee

"The Implications of the Re-interpretation of the Flores Settlement Agreement for Border Security and Illegal Immigration Incentives"

September 18, 2018

Ranking Member Claire McCaskill

Opening Statement

Thank you. I want to recognize the witnesses before us today first and applaud the work you do. I know from my time as a prosecutor that law enforcement officials go to work each day not thinking about themselves, and frankly, sometimes not even thinking about their families. But rather, how do we keep our communities safe, and how do we keep each other safe. That's true of law enforcement officers of both CBP, Customs and Border Patrol, and ICE. The selflessness of service is also true of the immigration judges, public servants who work at DOJ and the independent auditors, analysts, and watchdogs at GAO.

I know firsthand that our federal law enforcement officers face real challenges in carrying out their jobs. I've seen the ingenuity of our border patrol agents as they built their own night vision surveillance vehicle by literally duct taping a surplus night vision goggles they got from the Department of Defense to a pole in the back of a pickup truck. I know that even though officers at ports of entry are the ones that are seizing the majority of the fentanyl and other opioids,

they are still understaffed by CPB's own guidelines. I know our immigration court judges face a tremendous backlog.

I also know that while overall illegal border crossings are at their lowest level in over 30 years, for the past few years these agents and officers have been facing an increasing number of immigrant families trying to cross the border.

There are a lot of different proposals for dealing with these families. But I think there is one thing we can all agree on, on a bipartisan basis, is we cannot lose sight that they are families. And that they need to be dealt with as families. No one should be separating children from their parents.

Beyond that, this is a complex problem. And as the Chairman likes to say, "we need to get that facts, we need to get the facts." I think any action on legislation at this point is premature because we don't have all the facts. Let's face it, if this were easy, we would have gotten this done a long time ago. I want to talk about, focus on, the *Flores* decision today. That it does not allow DHS to detain families for long enough. I will say this unequivocally, we do not have enough facts to even consider indefinite detention of families. Even if it were the right thing to do, which I do not think it is. We don't know enough. We don't know what it would cost. We don't know how many beds would be needed. We don't know how long the average detention would be. There is simply not enough

information to consider indefinite detention. We've learned that Flores is not the only thing standing in the way. We've learned there aren't enough detention facilities. It would be incredibly expensive to add more. According to the briefings we've received, ICE would need an additional 15,000 beds just to house the immigrant families for 30 days, at a cost of over $1.3 billion per year. This doesn't include the cost of additional personnel or the cost of construction. And frankly, it takes an average, a median of 128 days to process an asylum case in detention. If that is even close to how long the families will remain in detention, that $1.3 billion only represents a fraction of the cost of what we would actually pay.

We also know that it costs $320 a day per person to keep a family unit detained. It only costs $8.50 to monitor them electronically. If both programs or some other alternatives result in families showing up at their immigration hearing, let's just say there's a lot of other border security needs that we could be spending that money on. As a former prosecutor, I understand the balance we need to strike. This is all about securing appearance at court, and when people appear at court, being efficient and ready for deportation if that's the decision of the court. If you look at the facts around this issue, there may have been some electronic monitoring projects that were abandoned, but there is no reason to believe they don't work.

The majority of people that are arrested for crimes in the United States of America are released pending their appearance at court.

I have a great deal of experience with this. When I was the Jackson County prosecutor, we were under a federal court order about how many people we could have in our jail. So every day I had to make a decision as to who we let out of jail and who we kept in jail. And I guarantee you we spent a lot of time on figuring out we monitored those people that got out, and how we secured their appearance.

We know how to secure people's appearance at court. There is technology and there is oversight. And both of them are less expensive than building billions of dollars of beds to hold families indefinitely because our system is so inefficient. How effective is the monitoring? It is very effective in this country. How efficient is the system? Our system on asylum determination and removal couldn't be more inefficient. We should be starting with a bill that requires electronic records. Do you know if they have to do a hearing in Texas and the file is in California they have to FedEx the file? No system in this country is still all paper. Except this one. It is absolutely unbelievable to me that we are this inefficient.

And we've been securing people's appearances at hearings, but the last hearing, when asylum is determined, for some reason after they've determined that they don't get asylum, we're not monitoring them anymore. We need to be

prepared at that last hearing. We need to have preparations, and the people coming need to know that if the case goes against them on asylum, they're going to be deported. Immediately. It is about efficiencies in the system, it is not about imprisoning families indefinitely in this country.

So I think what we have to do, is we have to deal with the shortage of immigration judges. We have to deal with the inefficiency in the system and how long it's taking to have these claims heard. That doesn't mean we should short change people on their claims. We should give them adequate opportunity to have their claims heard. But we're not willing to even hire the number of judges that have been funded. We don't even have enough judges now to fill the number of judges we have given the Department of Justice for asylum claim determination. So we're putting the cart before the horse.

We are defaulting to the most expensive and nonsensical way to secure appearance when there is all kinds of ways in this country that we can secure appearance and make this system more efficient. And I stand ready and willing to work with the Chairman of this committee and any Republican making sure that we secure people's appearance at court. But we don't have to separate their families and we don't, for the first time in our country's history, go on a building program of family prisons. That is not the right answer. And I look forward to the witnesses' testimony and discussion about these issues as we move forward.

U.S. Immigration and Customs Enforcement

STATEMENT

OF

MATTHEW T. ALBENCE

EXECUTIVE ASSOCIATE DIRECTOR
ENFORCEMENT AND REMOVAL OPERATIONS
U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT
DEPARTMENT OF HOMELAND SECURITY

REGARDING A HEARING ON

"Reinterpretation of Flores Settlement and Its Impact on Family Separation and Catch and Release"

BEFORE THE

UNITED STATES SENATE
HOMELAND SECURITY AND GOVERNMENTAL AFFAIRS COMMITTEE

Tuesday, September 18, 2018
342 Senate Dirksen Office Building

Introduction

Chairman Johnson, Ranking Member McCaskill, and distinguished members of the Committee:

My name is Matthew T. Albence, and I am the Executive Associate Director of U.S. Immigration and Customs Enforcement (ICE), Enforcement and Removal Operations and the Senior Official Performing the Duties of the Deputy Director. Thank you for the opportunity to appear before you today to discuss the impact of the *Flores* Settlement Agreement (FSA) on ICE's critical mission of protecting the homeland, securing the border, enforcing criminal and civil immigration laws in the interior of the United States, and ensuring the integrity of our nation's immigration system.

Our nation's immigration laws are extremely complex, and in many cases, outdated and full of loopholes. Moreover, the immigration laws have been increasingly subject to litigation before the federal courts, which has resulted in numerous court decisions, orders, and injunctions that have made it increasingly difficult for ICE to carry out its mission. The current legal landscape often makes it difficult for people to understand all that the dedicated, courageous, professional officers, agents, attorneys, and support staff of ICE do to protect the people of this great nation. To ensure the national security and public safety of the United States, our officers faithfully execute the immigration laws enacted by Congress, which may include enforcement action against any alien encountered in the course of their duties who is present in the United States in violation of immigration law.

Executive Orders

During his first two weeks in office, President Trump signed a series of Executive Orders that laid the policy groundwork for the Department of Homeland Security (DHS) and ICE to carry out the critical work of securing our borders, enforcing our immigration laws, and ensuring that individuals who pose a threat to national security or public safety, or who otherwise are in violation of the immigration laws, are not permitted to enter or remain in the United States. These Executive Orders established the Administration's policy of effective border security and immigration enforcement through the faithful execution of the laws passed by Congress.

On June 20, 2018, President Trump signed an Executive Order entitled, *Affording Congress an Opportunity to Address Family Separation*. This Executive Order clarified that it is the policy of the Administration to rigorously enforce our immigration laws, including by pursuing criminal prosecutions for illegal entry under 8 U.S.C. § 1325(a), until and unless Congress directs otherwise. The goal of this Executive Order was to allow DHS to continue its judicious enforcement of U.S. immigration laws, while maintaining family unity for those illegally crossing the border. However, the FSA, as interpreted by court decisions, makes it operationally unfeasible for DHS and ICE to simultaneously enforce our immigration laws and maintain family unity, and DHS supports legislation that replaces this decades-old agreement with a contemporary solution that effectively addresses current immigration realities and border security requirements.

Challenges and Legislative Fixes

Since the initial surge at the Southwest border in Fiscal Year (FY) 2014, there has been a significant increase in the arrival of both family units and unaccompanied alien children (UACs) at the Southern border, a trend which continues despite the Administration's enhanced enforcement efforts. Thus far in FY 2018, as of the end of August, approximately 53,000 UACs and 135,000 members of alleged family units have been apprehended at the Southern border or deemed inadmissible at Ports of Entry. These numbers represent a marked increase from FY 2017, when approximately 49,000 UACs and 105,000 members of family units were apprehended or deemed inadmissible throughout the entire fiscal year.

Most of these family units and UACs are nationals of the Central American countries of El Salvador, Guatemala, and Honduras. While historically Mexico was the largest source of illegal immigration to the United States, the number of Mexican nationals attempting to cross the border illegally has dropped dramatically in recent years. This is significant, because removals of non-Mexican nationals take longer, and require ICE to use additional detention capacity, expend more time and effort to secure travel documents from the country of origin, and arrange costly air transportation. Additionally, pursuant to the Trafficking Victims Protection Reauthorization Act of 2008 (TVPRA), UACs from countries other than Canada and Mexico may not be permitted to withdraw their applications for admission, further encumbering the already overburdened immigration courts. With an immigration court backlog of over 700,000 cases on the non-detained docket alone, it takes years for many of these cases to work their way through the immigration court system, and few of those who receive final orders are ever actually returned to their country of origin. In fact, only approximately 3% of UACs from Honduras, El Salvador, or Guatemala encountered at the Southwest border in FY 2014 had been removed or returned by the end of FY 2017, despite the fact that by the end of FY 2017 approximately 26% of this cohort had been issued a final removal order.[1]

One of the most significant impediments to the fair and effective enforcement of our immigration laws for family units and UACs is the FSA. In 1997, the former Immigration and Naturalization Service (INS) entered into the FSA, which was intended to address the detention and release of unaccompanied minors. Since it was executed, the FSA has spawned over twenty years of litigation regarding its interpretation and scope and has generated multiple court decisions resulting in expansive judicial interpretations of the original agreement in ways that have severely limited the government's ability to detain and remove UACs as well as family units. Pursuant to court decisions interpreting the FSA, DHS can generally only detain alien minors accompanied by a family member in a family residential center for approximately 20 days before releasing them, and the TVPRA generally requires that DHS transfer any UAC to the Department of Health and Human Services (HHS) within 72 hours, absent exceptional circumstances. However, when these UACs are released by HHS, or family units are released from DHS custody, many fail to appear for court hearings and actively ignore lawful removal orders issued against them. Notably, for family units encountered at the Southwest border in FY

[1] This figure includes aliens who accepted an order of voluntary departure but whose departure from the United States has not been confirmed. Approximately 44% of the cohort remained in removal proceedings as of the end of FY 2017.

2014, as of the end of FY 2017, 44% of those who remained in the United States were subject to a final removal order, of which 53% were issued *in absentia*. With respect to UACs, the Department of Justice's Executive Office for Immigration Review reports that from the beginning of FY 2016 through the end of June in FY 2018, nearly 19,000 UACs were ordered removed *in absentia*—an average of approximately 568 UACs per month.

This issue has not been effectively mitigated by the use of Alternatives to Detention (ATD), which has proved to be substantially less effective and cost-efficient in securing removals than detention. Specifically, while the ATD program averages 75,000 participants, in FY 2017, only 2,430 of those who were enrolled in the ATD program were removed from the country—this accounts for only one percent of the 226,119 removals conducted by ICE during that time. Aliens released on ATD have their cases heard on the non-detained immigration court dockets, where cases may linger for years before being resolved. Thus, while the cost of detention per day is higher than the cost of ATD per day, because those enrolled in the ATD program often stay enrolled for several years or more, while those subject to detention have an average length of stay of approximately 40 days, the costs of ATD outweighs the costs of detention in many cases. Nor are the costs of ATD any more justified by analyzing them on a per-removal basis. To illustrate, in FY 2014, ICE spent $91 million on ATD, which resulted in 2,157 removals; by FY 2017, ICE spending on ATD had more than doubled to $183 million but only resulted in 2,430 removals of aliens on ATD—an increase of only 273 removals for the additional $92 million investment, and an average cost of $75,360 per removal. Had this funding been utilized for detention, based on FY 2017 averages, ICE could have removed almost ten times the number of aliens as it did via ATD.

Moreover, because family units released from custody and placed on ATD abscond at high rates—rates significantly higher than non-family unit participants—many family units must be apprehended by ICE while at large. Specifically, in FY 2018, through July 31, 2018, the absconder rate for family units on ATD was 27.7%, compared to 16.4% for non-family unit participants. Such at-large apprehensions present a danger to ICE officers, who are the victims of assaults in the line of duty at alarmingly increasing rates. In FY 2017 and FY 2018, through the end of August, ICE's Office of Professional Responsibility and/or the DHS Office of the Inspector General investigated 73 reported assaults on ICE officers, 17 of which have resulted in an arrest, indictment, and/or conviction to date. Additionally, because ICE lacks sufficient resources to locate, arrest, and remove the tens of thousands of UACs and family units who have been ordered removed but are not in ICE custody, most of these aliens remain in the country, contributing to the more than 564,000 fugitive aliens on ICE's docket as of September 8, 2018.

Unfortunately, by requiring the release of family units before the conclusion of immigration proceedings, seemingly well-intentioned court rulings, like those related to the FSA, and legislation like the TVPRA in its current form create legal loopholes that are exploited by transnational criminal organizations and human smugglers. These same loopholes encourage parents to send their children on the dangerous journey north, and further incentivizes illegal immigration. As the record numbers indicate, these loopholes have created an enormous pull-factor. Amendments to the laws and immigration court processes are needed to help ensure the successful repatriation of aliens ordered removed by an immigration judge. Specifically, the following legislative changes are needed:

- Terminate the FSA and clarify the government's detention authority with respect to alien minors, including minors detained as part of a family unit.
- Amend the TVPRA to provide for the prompt repatriation of any UACs who are not victims of human trafficking and who do not express a fear of return to their home country, and provide for similar treatment of all UACs from both 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 demonstrate that reunification with both parents (together or separately) is not viable due to abuse, neglect, or abandonment, and that the applicant is a victim of trafficking. The current legal requirement is simply 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 fraudulent or frivolous claims, and 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.

Conclusion

Thank you again for the opportunity to appear before you today, and for your continued support of ICE and its essential law enforcement mission. We continue to respond to the trend of family units and UACs who are apprehended while illegally crossing into the United States, and to address this humanitarian and border security issue in a manner that is comprehensive, coordinated, and humane. Though DHS and ICE are continuing to examine these issues, ongoing litigation and recent court decisions require a permanent fix from Congress to provide operational clarity for officers in the field and to create a lasting solution that will secure the border. Congress must act now to eliminate the loopholes that create an incentive for new illegal immigration and provide ICE with the lawful authority and requisite funding needed to ensure that families can be detained together throughout the course of their immigration proceedings. Most family units claiming to have a fear of returning to their home countries are not ultimately granted asylum or any other relief or protection by immigration judges, and it is imperative that ICE can ensure that when such aliens are ordered removed from the United States they are actually removed pursuant to law.

I would be pleased to answer your questions.

TESTIMONY OF

Robert E. Perez
Acting Deputy Commissioner
U.S. Customs and Border Protection

BEFORE

U.S. Senate
Committee on Homeland Security and Governmental Affairs

ON

"The Implications of the Reinterpretation of the Flores Settlement Agreement for Border Security and Illegal Immigration Incentives"

September 18, 2018
Washington, DC

Introduction

Chairman Johnson, Ranking Member McCaskill, and distinguished Members of the Committee, thank you for the opportunity to appear before you today on behalf of U.S. Customs and Border Protection (CBP).

As America's unified border agency, CBP protects the United States from terrorist threats and prevents the illegal entry of persons and contraband, while facilitating lawful travel and trade. CBP works tirelessly to detect illicit smuggling of people and trafficking of drugs, weapons, and money, while facilitating the flow of cross-border commerce and tourism.

CBP is responsible for securing approximately 7,000 miles of land border, 95,000 miles of shoreline, 328 ports of entry, and the associated air and maritime space from the illegal entry of people and contraband into the United States. The border environment in which CBP works is dynamic and requires continual adaptation to respond to emerging threats and changing conditions. Recently, we have seen an increase in the levels of migration at our southwest border.

There are many factors that influence an individual's decision to attempt to migrate to the United States. These individuals are often driven by so-called "push factors," such as violent conditions in the country of origin, or "pull factors," such as immigration loopholes that increase the probability of being released into the interior of the United States. The result has been an increase in southwest border migration, both at our ports of entry and between them. Comparing July 2018 to July 2017, the overall numbers of individuals encountered are up nearly 57 percent; the largest increase has been in the number of family units, which increased more than 142 percent since last year. Although FY 2017 was an anomalously low year for southwest border migration, the sharp increase is a cause for concern.

From October 1, 2017, to July 31, 2018, the U.S. Border Patrol apprehended more than 317,000 individuals between ports of entry. In the same period of time, the Office of Field Operations determined that more than 105,000 individuals presenting themselves at ports of entry were inadmissible.

After CBP encounters an alien who has unlawfully entered or is inadmissible to the United States, the alien is processed and, in general, is temporarily held in CBP custody before being transferred to U.S. Immigration and Customs Enforcement (ICE) Enforcement and Removal Operations (ERO) or, in the case of unaccompanied alien children (UAC), to the U.S. Department of Health and Human Services (HHS) Office of Refugee Resettlement (ORR). Increased migration due to push and pull factors causes a strain on U.S. Citizenship and Immigration Services (USCIS), CBP, and ICE operations and stresses the system at various points in the processing, holding, detention, and placement continuum. Increasing numbers of aliens held in CBP facilities divert CBP resources from addressing a number of serious threats to our nation, including transnational criminal organizations, dangerous narcotics, and harmful agricultural products.

The rise in migration is, in part, a consequence of the gaps created by layers of laws, judicial rulings, and policies. Today, I would like to testify about the operational impact these laws,

judicial decisions, and policies—however well-intentioned—have on CBP's ability to fulfill its mission.

***Flores* Settlement Agreement**

The 1997 *Flores Settlement Agreement* requires the government to release alien minors from detention without unnecessary delay, or, under the current operational environment, to transfer them to non-secure, licensed programs "as expeditiously as possible." The settlement agreement also sets certain standards for the holding and detention of minors, and requires that minors be treated with dignity, respect, and receive special concern for their particular vulnerability.

The Department of Homeland Security (DHS) maintains that the settlement agreement was drafted to apply only to unaccompanied minors. In 2014, DHS increased the number of family detention facilities in response to the surge of alien families crossing the border. Soon after, the U.S. District Court for the Central District of California interpreted *Flores* as applying not only to UAC, but also to those children who arrived with their parents or legal guardians. This ruling limited DHS's ability to detain family units during their immigration proceedings. In general, pursuant to this and other court decisions interpreting the *Flores Settlement Agreement*, DHS rarely holds accompanied children and their parents or legal guardians for longer than 20 days.

However, an unintended consequence of the limitations on time-in-custody mandated by the *Flores Settlement Agreement* and court decisions interpreting it is that adults who arrive in this country alone are treated differently than adults who arrive with a child.

UAC Provision of Trafficking Victims Protection Reauthorization Act of 2008

There are similar unintended consequences associated with the UAC provision enacted in the *Trafficking Victims Protection Reauthorization Act of 2008* (TVPRA). The provision requires that, once a child is determined to be a UAC, the child be transferred to 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 and be repatriated to that contiguous country immediately. CBP complies with the *Flores Settlement Agreement,* court orders, and the TVPRA and processes, and holds all UAC accordingly.

UAC who are nationals or habitual residents of Mexico or Canada require additional consideration. Under the UAC provision of the TVPRA, a UAC who is a national or habitual resident of Canada or Mexico may be permitted to withdraw his or her application for admission and be repatriated immediately, as long as CBP determines that he or she has not been a victim of severe forms of trafficking in persons, and there is no credible evidence that the UAC is at risk of being trafficked upon return to the country of nationality or of last habitual residence; has no fear of returning owing to a credible fear of persecution; and has the ability to make an independent decision to withdraw his or her application for admission. CBP uses CBP Form 93 to screen these contiguous country UAC to determine whether they meet the requirements of the TVPRA. Under

current procedures, CBP also screens all UAC using CBP Form 93 to determine whether they have been, or are likely to be, victims of human trafficking or have a fear of return.

The CBP Form 93 includes examples of trafficking indicators and requires the processing Border Patrol Agent or CBP Officer to pursue age appropriate questions to help identify if a UAC may have been, or is likely to be, the victim of trafficking; has a fear of return; or, for contiguous country UAC, is able to make an independent decision to withdraw an application for admission. Based on the totality of the situation, including visual and verbal responses, the Border Patrol Agent or CBP Officer determines if the UAC is a victim or potential victim of trafficking or has a fear of return. CBP conducts these screenings at the processing location – generally at a port of entry or Border Patrol station.

For Mexican and Canadian UAC who cannot be returned immediately because they do not meet one or more of these requirements or who do not choose to withdraw their application for admission, and for all UAC from countries other than Mexico or Canada, the UAC provision of the TVPRA requires that they be served a Notice to Appear, placed in formal removal proceedings under Section 240 of the Immigration and Nationality Act, and transferred to the care and custody of ORR. If an immigration judge orders a UAC removed or grants voluntary departure, ICE arranges for the UAC's safe return to their country of nationality.

Upon determining that a UAC is unable to withdraw his or her application for admission, or chooses not to, CBP notifies both the local ICE Field Office Juvenile Coordinator (FOJC) and HHS/ORR. Once HHS/ORR notifies CBP and ICE that a bed is available for the UAC, either ICE, CBP, or DHS contractors transport the UAC to an HHS/ORR shelter facility. CBP maintains custody of the UAC while awaiting notification from HHS/ORR that facilities are available – again, usually for no longer than 72 hours, absent exceptional circumstances.

CBP operates short-term detention facilities for, as defined in 6 U.S.C. § 211(m), detention for 72 hours or fewer before repatriation to a country of nationality or last habitual residence. In order to comply with the TVPRA and other statutory requirements, CBP prioritizes UAC for processing. However, HHS/ORR's ability to quickly place UAC in shelters or with adequate sponsors is severely limited by any increases in UAC apprehensions—such as those we have seen in recent months.

Because of the TVPRA, UAC are often released to adult sponsors in the community, and some subsequently fail to show up for court hearings or comply with removal orders.

Asylum Claims

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

Accordingly, CBP has designed policies and procedures based on these legal standards, in order 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 USCIS for adjudication of that claim. CBP officers and agents neither make credible fear determinations, nor weigh the validity of the claims.

Importance of Border Security

Ultimately, enforcement of immigration laws is the foundation of a secure border and a secure nation. Each action taken by lawmakers, the judiciary, policymakers, and operators—while made in good faith by people grappling with complex issues—can have unintended consequences on the functioning of the immigration system as a whole. DHS leaders have worked closely with other Administration officials and members of Congress to address existing loopholes that allow individuals and dangerous transnational criminal organizations to exploit our immigration laws. I look forward to continuing to work with the Committee toward this goal.

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

Department of Justice

STATEMENT OF

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

BEFORE THE

COMMITTEE ON HOMELAND SECURITY AND
GOVERNMENTAL AFFAIRS
UNITED STATES SENATE

FOR A HEARING ENTITLED

"THE IMPLICATIONS OF THE REINTERPRETATION OF THE FLORES SETTLEMENT AGREEMENT FOR BORDER SECURITY AND ILLEGAL IMMIGRATION INCENTIVES"

PRESENTED ON

SEPTEMBER 18, 2018

Statement of

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

Before the
Senate Committee on Homeland Security and Governmental Affairs

Entitled
The Implications of the Reinterpretation of the Flores Settlement Agreement for Border Security and Illegal Immigration Incentives
September 18, 2018

Mr. Chairman, Ranking Member McCaskill, and other distinguished Members of the Committee, thank you for the opportunity to speak with you today regarding the Department of Justice's position on the *Flores* Settlement Agreement (FSA). This is a very timely subject, and I welcome the opportunity to address it from the Department of Justice's perspective.

Prior to a 1985 class action suit, the former Immigration and Naturalization Service (INS) relied on regulations and the Juvenile Justice and Delinquency Prevention Act of 1974 to determine appropriate detention and release standards for alien minors apprehended along the border. In 1988, the INS published a final rule entitled "Processing, Detention, and Release of Juveniles." In 1997, the *Flores* Settlement Agreement capped nearly twelve years of litigation. The agreement was excecuted to establish procedures and conditions for the care, custody, and release of unaccompanied alien minors, including to whom those minors could be released.

The FSA remained in effect through the dissolution of the INS and the creation of the Department of Homeland Security. The Homeland Security Act of 2002, Pub. L. 107-296, 116 Stat. 2135, enacted Nov. 25, 2002, abolished the INS and transferred most of its functions to the Department of Homeland Security (DHS), with one relevant exception: While DHS assumed the functions of initiating removal proceedings and the detention and removal of aliens, the Homeland Security Act transferred responsibilities for the care and custody of unaccompanied alien children to the Office of Refugee Resettlement (ORR) in the Department of Health and Human Services (HHS). It defined an "unaccompanied alien child" as an alien under the age of 18 who lacks legal status in the United States and for whom no parent or guardian in the United States or no parent or guardian is available to provide for the care and physical custody of the child. The Homeland Security Act did not transfer the functions of the Executive Office for Immigration Review (EOIR) to DHS. Accordingly, the Board of Immigration Appeals and the immigration judges, which are part of EOIR, remain in the Department of Justice under the authority of the Attorney General.

From 2015 through 2018, class members filed five motions to enforce the FSA alleging a myriad of violations. The U.S. District Court for the Central District of California granted each of these motions, resulting in reinterpretations of the class membership and additional remedies for what the District Court held were material breaches of the FSA. This resulted in several changes to the agreement; most notably, one such order in 2015 found that the FSA was applicable to all alien minors encountered and taken into custody by the DHS, including those encountered with a parent or guardian. Additionally, the Court determined that DHS's family residential centers were secure, unlicensed facilities, and thus, holding accompanied minors in such facilities beyond a certain period of time constituted a material breach of the FSA. Further, the FSA requires that in the event of an emergency or an influx, minors must be transferred to a licensed facility "as expeditiously as possible." In many instances, the Court determined that this translates to an average of 20 days, the typical length of time for DHS to complete reasonable or credible fear processing.

The previous Administration unsuccessfully appealed the Court's determination that the FSA applied to accompanied minors. In its reply brief, the government argued that the plain meaning of the agreement was limited only to cases of unaccompanied minors in custody. The brief noted that a finding to the contrary would require an additional finding that the government intended the agreement to apply to accompanied minors and their parents. No such language or other support for this premise exists in the text.

Subsequent to the initial entry of the FSA, Congress enacted legislation which the government argued largely superseded the FSA. This included the Homeland Security Act of 2002, which provides a statutory definition for unaccompanied alien children and transferred responsibility for the care and custody of unaccompanied alien children to HHS, and the William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, Pub. L. 110-457, 122 Stat 5044, enacted Dec. 23, 2008, which set requirements for addressing the processing, treatment, care, transfer, and custody of unaccompanied alien children. The latter includes a provision that an unaccompanied alien child must be transferred to HHS within 72 hours of determining the child is an unaccompanied alien child, absent exceptional circumstances. Regardless of efforts by the previous Administrations, the District Court found that these statutes did not supersede the FSA

On June 20, 2018, President Trump issued an Executive Order that, in part, directed the Attorney General to move for a modification of the FSA in a manner that would "permit the Secretary, under present resource constraints, to detain alien families together throughout the pendency of criminal proceedings for improper entry or any removal or other immigration proceedings." The Department complied and requested a modification that was ultimately denied by District Court Judge Dolly M. Gee. The Department has not yet decided whether to appeal this ruling.

In 2001, the parties added a stipulation to the FSA that it would terminate following the promulgation of regulations implementing the agreement. In order to terminate the agreement, DHS and HHS published a notice of proposed rulemaking on September 7, 2018, to address the FSA. While the Department of Justice does not have a role in the rule, the Department supports the regulatory effort, and stands ready to defend any challenges that may arise from its promulgation.

Apart from its role as litigator, the Department of Justice plays no current operational role in detaining or releasing aliens under the FSA and, thus, cannot comment on detention or release decisions made by DHS or ORR. I would observe, however, that as adults entering the United States with children between ports of entry are not currently being referred for prosecution by DHS, the FSA provides DHS little recourse in its decision to hold or release this family unit. Pursuant to the FSA, the time a child can be held in a family residential center generally is limited.

The Department, through EOIR, is diligently working to facilitate immigration court proceedings at many of these DHS facilities. That said, many of these aliens claim a credible fear of persecution and, pursuant to statute and regulation, must be provided with a credible fear interview by an asylum officer with DHS's U.S. Citizenship and Immigration Services. Upon request by the alien, a negative credible fear finding by an asylum officer is to be reviewed by an immigration judge within 7 days. If either the asylum officer or the immigration judge finds that the alien has a credible fear of persecution, the alien be issued a Notice to Appear (NTA) and given an opportunity to file and present an asylum claim on the merits before an immigration judge. By statute, unless the alien requests an earlier date, the government cannot schedule the alien's first immigration court hearing until 10 days after the service of the NTA. Further, pursuant to a policy codified in a judicial settlement agreement, an immigration judge must give a detained alien at least 14 days between his initial immigration court hearing and a merits hearing on his asylum application. Thus, for aliens seeking asylum, it is generally legally impossible to complete their immigration proceedings within the time a child generally can be held in a family residential center. As of the end of June 2018, the median time to adjudicate an asylum application for a detained alien in immigration proceedings was 128 days; for a non-detained alien, the median time was 964 days.

The number of asylum applications in immigration proceedings has increased significantly in recent years, as have the number and length of continuances. Although lengthy case processing times are pronounced for asylum cases, the issue runs throughout the immigration court system. For instance, more than 70 percent of pending unaccompanied alien child cases have been pending for over one year, and the median time to complete an unaccompanied alien child case is 465 days. Only about 9,600 unaccompanied alien child cases have been completed in immigration court through the first three quarters of this fiscal year, compared to over 135,000 non-unaccompanied alien child cases. Of those 9600, roughly 6300 were completed with an order of removal. Although the Attorney General recently clarified the parameters for immigration judges to follow in assessing whether to grant a continuance, other factors—including a lack of preparation or diligence by an alien, processing delays for applications outside of EOIR's purview, and a lack of legal clarity regarding many criminal removal provisions—continue to raise significant obstacles in adjudicating cases expeditiously.

The pending immigration court caseload increased 350% between FY 2008 and FY 2017, in part due to surges in illegal immigration driven by a myriad of factors. Certain judicial decisions, such as the expansion of the FSA to include accompanied children, stymied DHS's efforts to address these surges and contributed to the growth of the backlog. Nevertheless, EOIR has taken steps to address the caseload, including by hiring more immigration judges. EOIR

currently has 395 immigration judges, including 128 who have been hired since January 20, 2017. EOIR has reduced the hiring time for a new judge from an average of 742 days to as little as 195 days, which is a reduction of almost 74 percent. Additionally, EOIR is moving forward with a long sought-after electronic filing and case management modernization effort, commonly referred to as EOIR Courts and Appeals System (ECAS). EOIR began piloting the new electronic case management system in July of this year, and expects to begin expanding it nationwide in early 2019.

The Department of Justice appreciates the opportunity to work with DHS, HHS, and Congress to address these challenges and improve every facet of our immigration system. While we want to ensure that all minors are appropriately cared for while in government custody, the outdated FSA and subsequent reinterpretations constitute a roadblock to solutions for keeping families together once encountered at the border. At this juncture, the Department believes that the proposed regulations provide much needed flexibility to DHS and HHS and will ultimately serve the best interests of all alien minors and their parents.

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

United States Government Accountability Office



Testimony
Before the Committee on
Homeland Security and
Governmental Affairs, U.S. Senate

For Release on Delivery
Expected at 10 a.m. ET
Tuesday, September 18th, 2018

IMMIGRATION

Progress and Challenges in the Management of Immigration Courts and Alternatives to Detention Program

Statement of Rebecca Gambler, Director, Homeland Security and Justice

GAO Highlights

Highlights of GAO-18-701T, a statement before the Committee on Homeland Security and Governmental Affairs, U.S. Senate

Why GAO Did This Study

The Department of Justice's EOIR is responsible for conducting immigration court proceedings, appellate reviews, and administrative hearings to fairly, expeditiously, and uniformly administer and interpret U.S. immigration laws. The Department of Homeland Security's ICE manages the U.S. immigration detention system, which houses foreign nationals, including families, whose immigration cases are pending or who have been ordered removed from the country. ICE implemented the ATD program in 2004 to be a cost-effective alternative to detention that uses case management and electronic monitoring.

This statement addresses (1) EOIR's caseload, including the backlog, and how EOIR manages immigration court operations, including hiring, workforce planning, and technology use; and (2) participation in and the cost of the ATD program and the extent to which ICE has evaluated the performance of the ATD program. This statement is based on two reports and a testimony GAO issued from November 2014 through April 2018, as well as actions agencies have taken, as of September 2018, to address resulting recommendations. For the previous reports and testimony, GAO analyzed EOIR and ICE data, reviewed documentation, and interviewed officials.

What GAO Recommends

GAO previously made recommendations to EOIR to improve its hiring process, among other things, and to ICE to improve ATD performance assessment. EOIR and ICE generally agreed and implemented or reported actions planned to address the recommendations.

View GAO-18-701T. For more information, contact Kathryn Larin at (202) 512-8777 or larink@gao.gov.

September 2018

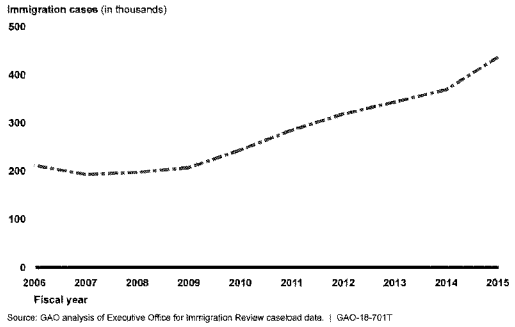
IMMIGRATION

Progress and Challenges in the Management of Immigration Courts and Alternatives to Detention Program

What GAO Found

In June 2017, GAO reported that the Executive Office for Immigration Review's (EOIR) immigration court case backlog—cases pending from previous years still open at the start of a new fiscal year—more than doubled from fiscal years 2006 through 2015 (see figure), primarily due to declining cases completed per year.

Immigration Courts' Case Backlog, Fiscal Years 2006 through 2015



Source: GAO analysis of Executive Office for Immigration Review caseload data. | GAO-18-701T

GAO also reported in June 2017 that EOIR could take several actions to address management challenges related to hiring, workforce planning, and technology utilization, among other things. For example, EOIR did not have efficient practices for hiring immigration judges. EOIR data showed that on average from February 2014 through August 2016, EOIR took more than 21 months to hire a judge. GAO also found that EOIR was not aware of the factors most affecting the length of its hiring process. GAO recommended that EOIR assess its hiring process to identify efficiency opportunities. As of January 2018, EOIR had made progress in increasing its number of judges but remained below its fiscal year 2017 authorized level. To better ensure that it accurately and completely identifies opportunities for efficiency, EOIR needs to assess its hiring process.

In November 2014, GAO reported that the number of aliens who participated in U.S. Immigration and Customs Enforcement's (ICE) Alternatives to Detention (ATD) program increased from 32,065 in fiscal year 2011 to 40,864 in fiscal year 2013. GAO also found that the average daily cost of the program—$10.55—was significantly less than the average daily cost of detention—$158—in fiscal year 2013. Additionally, ICE established two performance measures to assess the ATD program's effectiveness, but limitations in data collection hindered ICE's ability to assess program performance. GAO recommended that ICE collect and report on additional court appearance data to improve ATD program performance assessment, and ICE implemented the recommendation.

Chairman Johnson, Ranking Member McCaskill, and Members of the Committee:

I am pleased to be here today to discuss our work on the immigration court system and the Alternatives to Detention (ATD) program. Each year, the Department of Homeland Security (DHS) initiates hundreds of thousands of cases with the U.S. immigration court system to decide whether respondents—foreign nationals charged on statutory grounds of inadmissibility or deportability—are removable as charged; and, if so, should be ordered removed from the United States or granted any requested relief or protection from removal and permitted to lawfully remain in the country. Within DHS, U.S. Immigration and Customs Enforcement (ICE) operated on a budget of nearly $3 billion in fiscal year 2017 to manage the U.S. immigration detention system, which houses foreign nationals, including families, whose immigration cases are pending or who have been ordered removed from the country.[1]

With regards to the immigration court system, the Department of Justice's (DOJ) Executive Office for Immigration Review (EOIR) is responsible for conducting immigration court proceedings, appellate reviews, and administrative hearings to fairly, expeditiously, and uniformly administer and interpret U.S. immigration laws and regulations. Within EOIR, immigration judges at 58 immigration courts located nationwide preside over removal proceedings for respondents detained by ICE or released pending the outcome of their proceedings, to determine their removability and eligibility for any relief being sought. In addition to removal proceedings, immigration judges also conduct certain other types of hearings, such as to review negative credible fear determinations and ICE custody and bond decisions, as well as make decisions on motions, such

[1]GAO, *Immigration Detention: Opportunities Exist to Improve Cost Estimates*, GAO-18-343 (Washington, D.C., Apr. 18. 2018). The Immigration and Nationality Act, as amended, provides DHS with broad discretion (subject to certain legal standards) to detain, or conditionally release aliens on bond, terms of supervision, or other alternatives to detention depending on the circumstances and statutory basis for detention or release. The law requires DHS to detain particular categories of aliens, such as those deemed inadmissible for certain criminal convictions or terrorist activity or ordered removed, during the removal period. See 8 U.S.C. §§ 1225, 1226, 1226a, 1231. For the purpose of this statement, we generally refer to aliens (i.e., persons who are not U.S. citizens or nationals) as foreign nationals.

as motions to reopen cases or reconsider prior decisions.[2] Members of EOIR's Board of Immigration Appeals hear and issue decisions regarding appeals of immigration judges' decisions and certain DHS decisions.

With regards to the ATD program, ICE is responsible for the oversight of foreign nationals who, if not detained in a detention facility, were released into the community. In November 2014, we reported that ICE uses one or more release options when it determines that a foreign national is not to be detained in ICE's custody—including bond, order of recognizance, order of supervision, parole, or on condition of participation in the ATD program.[3] ICE implemented the ATD program in 2004 to be a cost-effective alternative to detention that uses case management and electronic monitoring to ensure adult foreign nationals released into the community comply with their release conditions—including requirements to appear at immigration court hearings—and comply with final orders of removal from the United States.

The ATD program seeks to provide an enhanced monitoring option for those foreign nationals for whom ICE, or an immigration judge, has determined that detention is neither mandated nor appropriate, yet may need a higher level of supervision than that provided by the less restrictive release conditions, such as being released on bond. Foreign nationals enrolled in the ATD program may be subject to various types of supervision, including office visits, unscheduled home visits, and electronic monitoring—Global Positioning System (GPS) equipment or a telephonic reporting system.[4] ICE generally makes all decisions about the appropriate level of supervision and type of technology with which a foreign national should be monitored. However, a private contractor carries out the case management for foreign nationals enrolled in one of

[2]If a DHS asylum officer determines that a foreign national in expedited removal proceedings has not established a credible fear of persecution or torture in their country of origin, the individual may request review of that negative determination by an immigration judge. See 8 U.S.C. §§ 1182(a)(6)(C), (a)(7), 1225(b); 8 C.F.R. §§ 1208.30, 208.30.

[3]GAO, *Alternatives to Detention: Improved Data Collection and Analyses Needed to Better Assess Program Effectiveness*, GAO-15-26 (Washington, D.C., Nov. 13, 2014).

[4]A foreign national enrolled in the telephonic reporting voice verification program will receive an automated telephone call at periodic intervals, which will require the foreign national to call the system back within a certain time frame; the computer will recognize the biometric voiceprint and register the "check-in." It is not the purpose of the voice verification system to locate a foreign national.

the two components of the ATD program that were available at the time of our November 2014 report.

My statement today addresses: (1) EOIR's caseload, including the backlog, and how EOIR manages immigration court operations, including workforce planning, hiring, and technology utilization; and (2) participation in and the cost of the ATD program and the extent to which ICE has measured the performance of the ATD program. This statement is based on two reports and one testimony that we issued between November 2014 and April 2018, as well as actions agencies have taken, as of September 2018, to address our recommendations from the reports.[5] To perform the work for our previous reports and testimony on the immigration courts, we analyzed data on immigration case receipts and completions from EOIR's case management system for fiscal years 2006 through 2015; examined documentation, such as contracts for workforce planning services; and interviewed EOIR and DHS officials from headquarters and six immigration courts. To perform the work for our previous report on ATD, we reviewed agency documents, analyzed ATD program data from fiscal years 2011 through 2013, and interviewed ICE officials responsible for the ATD program. More detailed information about our scope and methodology can be found in our reports and testimony. To determine actions the agencies have taken to address recommendations we made in these reports as of September 2018, we collected documentation and testimony from ICE and EOIR officials.

The work upon which this testimony is based was conducted in accordance with generally accepted government auditing standards. Those standards require that we plan and perform the audit to obtain sufficient, appropriate evidence to provide a reasonable basis for our findings and conclusions based on our audit objectives. We believe that the evidence obtained provides a reasonable basis for our findings and conclusions based on our audit objectives.

[5]GAO, *Immigration Courts: Observations on Restructuring Options and Actions Needed to Address Long-Standing Management Challenges*, GAO-18-469T (Washington D.C.: April 18, 2018); *Immigration Courts: Actions Needed to Reduce Case Backlog and Address Long-Standing Management and Operational Challenges*, GAO-17-438 (Washington D.C.: June 1, 2017); and GAO-15-26.

The Immigration Court Backlog Grew and EOIR Has Faced Long-Standing Management Challenges

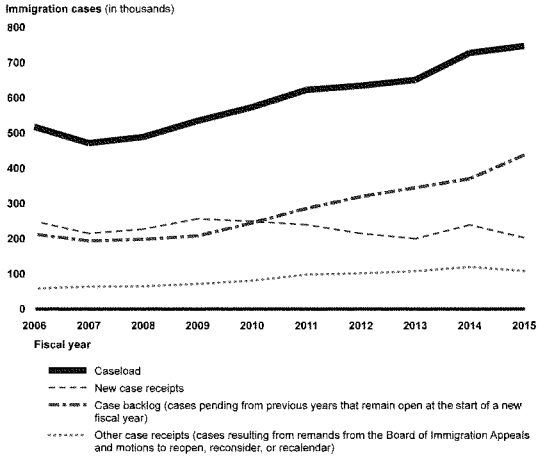
The Immigration Courts' Caseload and Case Backlog Grew As Immigration Courts Completed Fewer Cases

We reported in June 2017 that our analysis of EOIR's annual immigration court system caseload—the number of open cases before the court during a single fiscal year—showed that it grew 44 percent from fiscal years 2006 through 2015 due to an increase in the case backlog, while case receipts remained steady and the immigration courts completed fewer cases.[6] For the purpose of our analysis, the immigration courts' annual caseload was comprised of three parts: (1) the number of new cases filed by DHS; (2) the number of other case receipts resulting from remands from the Board of Immigration Appeals and motions to reopen cases, reconsider prior decisions, or recalendar proceedings; and (3) the case backlog—the number of cases pending from previous years that remain open at the start of a new fiscal year.[7] During this 10-year period, the immigration courts' overall annual caseload grew from approximately 517,000 cases in fiscal year 2006 to about 747,000 cases in fiscal year 2015, as shown in figure 1.

[6]See GAO-17-438. Data for fiscal years 2006 through 2015 were the most current available at the time of our June 2017 review.

[7]We use the term caseload to denote the workload or volume of open cases before the courts during a given time period. These cases may or may not have been adjudicated by the courts during the time period. This definition may be different from how EOIR uses the term in its annual statistics yearbook or other publications. Cases that remain open at the start of a new fiscal year—pending cases—are cases that have not yet received an initial completion. An initial completion is an initial ruling on the case by an immigration judge. This does not include later motions to reopen, reconsider, or remand a case as those actions can occur many years after the initial decision and are out of the control of immigration court judges. See GAO-17-438.

Figure 1: Immigration Courts' Annual Caseload and Component Parts, Fiscal Years 2006 through 2015



Source: GAO analysis of Executive Office for Immigration Review caseload data. | GAO-18-701T

We further reported in June 2017 that, according to our analysis, total case receipts remained about the same in fiscal years 2006 and 2015 but fluctuated over the 10-year period, with new case receipts generally decreasing and other case receipts generally increasing. Over the same period, EOIR's case backlog more than doubled. Specifically, immigration courts had a backlog of about 212,000 cases pending at the start of fiscal year 2006 and the median pending time for those cases was 198 days. By the beginning of fiscal year 2009, the case backlog declined slightly to 208,000 cases. From fiscal years 2010 through 2015, the case backlog grew an average of 38,000 cases per year. At the start of fiscal year 2015, immigration courts had a backlog of about 437,000 cases pending and the median pending time for those cases was 404 days.

The increase in the immigration court case backlog occurred as immigration courts completed fewer cases annually. In particular, the number of immigration court cases completed annually declined by 31

percent from fiscal year 2006 to fiscal year 2015—from about 287,000 cases completed in fiscal year 2006 to about 199,000 completed in 2015. According to our analysis, while the number of cases completed annually declined, the number of immigration judges increased between fiscal year 2006 and fiscal year 2015. This resulted in a lower number of case completions per immigration judge at the end of the 10-year period.

Additionally, we reported in June 2017 that initial immigration court case completion time increased more than fivefold between fiscal year 2006 and fiscal year 2015.[8] Overall, the median initial completion time for cases increased from 43 days in fiscal year 2006 to 286 days in fiscal year 2015. However, case completion times varied by case type and detention status. For example, the median number of days to complete a removal case, which comprised 97 percent of EOIR's caseload for this time period, increased by 700 percent from 42 days in fiscal year 2006 to 336 days in fiscal year 2015. However, the median length of time it took to complete a credible fear case, which comprised less than 1 percent of EOIR's caseload during this period, took 5 days to complete in fiscal year 2006 as well as in fiscal year 2015. Initial case completion times for both detained and non-detained respondents more than quadrupled from fiscal year 2006 through fiscal year 2015.[9] The median case completion time for non-detained cases, which comprised 79 percent of EOIR's caseload from fiscal year 2006 to fiscal year 2015, grew more than fivefold from 96 days to 535 days during this period. Similarly, the median number of days to complete a detained case, which judges are to prioritize on their dockets, quadrupled over the 10-year period, increasing from 7 days in fiscal year 2006 to 28 days in fiscal year 2015.

EOIR officials, immigration court staff, DHS attorneys, and other experts and stakeholders we interviewed provided various potential reasons why the case backlog may have increased and case completion times slowed in recent years. These reasons included:

- a lack of court personnel, such as immigration judges, legal clerks, and other support staff;
- insufficient funding to appropriately staff the immigration courts;

[8]Initial completion time refers to the time period between the date EOIR received the charging document from DHS and the date an immigration judge issued an initial ruling on the case.

[9]We include cases in which the respondent was originally detained and then later released among the non-detained cases.

- a surge in new unaccompanied children cases, beginning in 2014, which may take longer to adjudicate than other types of cases;
- frequent use of continuances—temporary case adjournments until a different day or time—by immigration judges; and
- issues with the availability and quality of foreign language translation.

EOIR Has Initiated Actions to Improve Its Management of the Immigration Courts, but Has Faced Long-Standing Challenges

We also reported in June 2017 that EOIR has faced long-standing management and operational challenges. In particular, we identified challenges related to EOIR's workforce planning, hiring, and technology utilization, among other things. We recommended actions to improve EOIR's management in these areas. EOIR generally concurred and has initiated actions to address our recommendations. However, EOIR needs to take additional steps to fully implement our recommendations to help strengthen the agency's management and reduce the case backlog.

Workforce planning. In June 2017, we reported that EOIR estimated staffing needs using an informal approach that did not account for long-term staffing needs, reflect EOIR's performance goals, or account for differences in the complexity of court cases. For example, in developing its staffing estimate, EOIR did not calculate staffing needs beyond the next fiscal year or take into account resources needed to achieve the agency's case completion goals, which establish target time frames in which immigration judges are to complete a specific percentage of certain types of cases. Furthermore, we found that, according to EOIR data, approximately 39 percent of all immigration judges were eligible to retire as of June 2017, but EOIR had not systematically accounted for these impending retirements in its staffing estimate.

At the time of our review, EOIR had begun to take steps to account for long-term staffing needs, such as by initiating a workforce planning report and a study on the time it takes court staff to complete key activities. However, we found that these efforts did not align with key principles of strategic workforce planning that would help EOIR better address current and future staffing needs.[10] EOIR officials also stated that the agency had begun to develop a strategic plan for fiscal years 2018 through 2023 that

[10]Strategic workforce planning focuses on developing long-term strategies for acquiring, developing, and retaining an organization's total workforce to meet the needs of the future. Key principles of strategic workforce planning include, for example, determining critical skills and competencies needed to achieve current and future programmatic results.

could address its human capital needs. We recommended that EOIR develop and implement a strategic workforce plan that addresses key principles of strategic workforce planning.

EOIR agreed with our recommendation. In February 2018, EOIR officials told us that they had established a committee and working group to examine the agency's workforce needs and would include workforce planning as a key component in EOIR's forthcoming strategic plan. Specifically, EOIR officials stated that the agency had established the Immigration Court Staffing Committee in April 2017 to examine how to best leverage its existing judicial and court staff workload model to address its short- and long-term staffing needs, assess the critical skills and competencies needed to achieve future programmatic results, and develop strategies to address human capital gaps, among other things. In February 2018, EOIR officials stated that the agency replaced this committee, which had completed its work, with a smaller working group of human resource employees charged with addressing the agency's strategic workforce planning. These are positive steps, but to fully address our recommendation, EOIR needs to continue to develop, and then implement a strategic workforce plan that: (1) addresses the agency's short- and long-term staffing needs; (2) identifies the critical skills and competencies needed to achieve future programmatic results; and (3) includes strategies to address human capital gaps. Once this strategic workforce plan is completed, EOIR needs to monitor and evaluate the agency's progress toward its human capital goals.

Hiring. Additionally, in our June 2017 report, we found that EOIR did not have efficient practices for hiring new immigration judges, which has contributed to immigration judges being staffed below authorized levels and to staffing shortfalls. For example, in fiscal year 2016, EOIR received an appropriation supporting 374 immigration judge positions but had 289 judges on board at the end of the fiscal year.[11] EOIR officials attributed

[11]EOIR's fiscal year 2016 appropriation included funds for 55 new Immigration Judge Teams to be hired and on board by November 2016. See Explanatory Statement, 161 Cong. Rec. H9693, H9738 (daily ed. Dec. 17, 2015), accompanying Division B—Commerce, Justice, Science, and Related Agencies Appropriations Act, 2016 (Pub. L. No. 114-113, div. B, 129 Stat. 2242, 2286-2333 (2015)). In December 2015, EOIR's Director indicated that the authorization of 55 new immigration judges for fiscal year 2016 would result in about 374 immigration judges nationwide if all such positions were filled. See Oversight of the Executive Office for Immigration Review: Hearing Before the Subcomm. on Immigration and Border Security of the H. Comm. on the Judiciary, No. 114-57, 114th Cong. 1st Sess., pg.15 (Dec. 3, 2015).

these gaps to delays in the hiring process. Our analysis of EOIR hiring data supported their conclusion. Specifically, we found that from February 2014 through August 2016, EOIR took an average of 647 days to hire an immigration judge—more than 21 months. As a result, we recommended that EOIR (1) assess the immigration judge hiring process to identify opportunities for efficiency; (2) use the assessment results to develop a hiring strategy that targets short- and long-term human capital needs; and (3) implement any corrective actions related to the hiring process resulting from this assessment.

In response to our report, EOIR stated that it concurred with our recommendation and was implementing a new hiring plan as announced by the Attorney General in April 2017 intended to streamline hiring. Among other things, EOIR stated that the new hiring plan sets clear deadlines for assessing applicants moving through different stages of the process and for making decisions on advancing applicants to the next stage, and allows for temporary appointments for selected judges pending full background investigations. In February 2018, EOIR indicated to us that it had begun to use the process outlined in its hiring plan to fill judge vacancies. The Attorney General also announced in April 2017 that the agency would commit to hire an additional 50 judges in 2018 and 75 additional judges in 2019. In January 2018, EOIR officials told us that the agency had a total of 330 immigration judges, an increase of 41 judges since September 2016. However, EOIR remained below its fiscal year 2017 authorized level of 384 immigration judges based on funding provided in fiscal years 2016 and 2017.[12] Additionally, the Consolidated Appropriations Act, 2018 provided funding for EOIR to hire at least 100 additional immigration judge teams, including judges and supporting staff, with a goal of fielding 484 immigration judge teams nationwide by 2019.[13]

[12]EOIR's fiscal year 2017 appropriation included funds for at least 10 new Immigration Judge Teams. See Explanatory Statement, 163 Cong. Rec. H3327, H3370 (daily ed. May 3, 2017), accompanying Division B—Commerce, Justice, Science, and Related Agencies Appropriations Act, 2017 (Pub. L. No. 115-31, div. B, 131 Stat. 135, 182-229). In November 2017, EOIR's then Acting Director stated that OCIJ was authorized 384 immigration judge positions. See Overview of the Executive Office for Immigration Review: Hearing Before the Subcomm. on Immigration and Border Security of the H. Comm. on the Judiciary, 115th Cong., 1st Sess., pg. 1 (Nov. 1, 2017).

[13]See Explanatory Statement, 164 Cong. Rec. H2045, H2090 (daily ed. March 22, 2018), accompanying Division B—Commerce, Justice, Science, and Related Agencies Appropriations Act, 2018 (Pub. L. No. 115-141, div. B). The President's fiscal year 2019 budget proposed funding to allow EOIR to hire 75 new immigration judge teams.

In September 2018, EOIR reported it had a total of 351 immigration judges and was continuing to hire additional judges.

Hiring additional judges is a positive step; however, EOIR has not assessed its hiring process to identify opportunities for efficiency, and we found in our June 2017 report that EOIR was not aware of the factors most affecting its hiring process. For example, we reported that EOIR officials attributed the length of the hiring process to delays in the Federal Bureau of Investigation background check process, which is largely outside of EOIR's control. However, our analysis found that while background checks accounted for an average of 41 days from fiscal year 2015 through August 2016, other processes within EOIR's control accounted for a greater share of the total hiring time. For example, for the same period our analysis found that an average of 135 days elapsed between the date EOIR posted a vacancy announcement and the date EOIR officials began working to fill the vacancy.[14] By assessing its hiring process, EOIR could better ensure that it is accurately and completely identifying opportunities for efficiency. To fully address our recommendation, EOIR will need to continue to improve its hiring process by (1) assessing the prior hiring process to identify opportunities for efficiency; (2) developing a hiring strategy targeting short- and long-term human capital needs; and (3) implementing corrective actions in response to the results of its assessment of the hiring process.

Technology utilization. In June 2017 we also reported on EOIR's technology utilization, including the agency's oversight of the ongoing development of a comprehensive electronic-filing (e-filing) capability—a means of transmitting documents and other information to immigration courts through an electronic medium, rather than on paper. EOIR identified the implementation of an e-filing system as a goal in 2001, but had not, as of September 2018, fully implemented this system. In 2001, EOIR issued an executive staff briefing for an e-filing system that stated that only through a fully electronic case management and filing system

[14]During this period of time, EOIR's Office of Human Resources reviews and prepares the applications for a subsequent review by hiring officials in the Office of the Chief Immigration Judge. According to EOIR officials, EOIR's vacancy announcements do not necessarily correspond to vacant positions. Rather, EOIR issues annual hiring announcements that cover a large number of immigration courts before they have determined whether those courts have open vacancies. When EOIR seeks to fill a vacancy or a new judge position, officials begin by determining where the judge should be located. Then, EOIR officials use the previously-issued vacancy announcements to begin identifying candidates for the positions.

would the agency be able to accomplish its goals. This briefing also cited several benefits of an e-filing system, including, among other things, reducing the data entry, filing, and other administrative tasks associated with processing paper case files; and providing the ability to file court documents from private home and office computers.

As we reported in June 2017, EOIR initiated a comprehensive e-filing effort in 2016—the EOIR Court and Appeals System (ECAS)—for which EOIR had documented policies and procedures governing how its primary ECAS oversight body—the ECAS Executive Committee—would oversee ECAS through the development of a proposed ECAS solution. However, we found that EOIR had not yet designated an entity to oversee ECAS after selection of a proposed solution during critical stages of its development and implementation. We recommended that in order to help ensure EOIR meets its cost and schedule expectations for ECAS, the agency identify and establish the appropriate entity to oversee ECAS through full implementation. EOIR concurred and stated that it had selected and convened the EOIR Investment Review Board to serve as the ECAS oversight body with the EOIR Office of Information Technology directly responsible for the management of the ECAS program.

EOIR officials told us in February 2018 that the board convened in October 2017 and January 2018 to discuss, among other things, the ECAS program. However, as we reported in June 2017, EOIR officials previously told us that the EOIR Investment Review Board was never intended to oversee ECAS implementation due to the detailed nature of this system's implementation. As of September 2018, EOIR has not demonstrated its selection of, or how the EOIR Investment Review Board is to serve as the oversight body for ECAS. Additionally, we recommended in June 2017 EOIR develop and implement a plan that is consistent with best practices for overseeing ECAS to better position the agency to identify and address any risks and implement ECAS in accordance with its cost, schedule, and operational expectations. As of September 2018, EOIR has not indicated that it has developed such a plan.

ATD Participation Increased and Costs Less than Detention; ICE Established Program Performance Measures

Participation in the ATD Program Increased and Average Daily Cost of the Program Was Lower than the Average Daily Cost of Detention

In November 2014 we reported that the number of foreign nationals who participated in the ATD program increased from 32,065 in fiscal year 2011 to 40,864 in fiscal year 2013 in part because of increases in either enrollments or the average length of time foreign nationals spent in one of the program's components.[15] For example, during this time period, the number of foreign nationals enrolled in the component of the program that was run by a contractor who maintained in-person contact with the foreign national and monitored the foreign national with either GPS equipment or a telephonic reporting system, increased by 60 percent. In addition, the average length of time foreign nationals spent in the other component of the program, which offered a lower level of supervision at a lower contract cost but still involved ICE monitoring of foreign nationals using either telephonic reporting or GPS equipment provided by a contractor, increased by 80 percent—from about 10 months to about 18 months. ICE officials stated that how long a foreign national is in the ATD program before receiving a final decision on his or her immigration proceedings depends on how quickly EOIR can process immigration cases.

We also found in our November 2014 report that the average daily cost of the ATD program was $10.55 in fiscal year 2013, while the average daily

[15]These numbers include all foreign nationals in the ATD program for each of these years—regardless of the year in which they were initially enrolled. See GAO-15-26.

cost of detention was $158.[16] While our analyses showed that the average daily cost of the ATD program was significantly less than the average daily cost of detention, the length of immigration proceedings affected the cost-effectiveness of the ATD program to varying extents under different scenarios. As previously discussed, immigration judges are to prioritize detained cases, and our June 2017 report found that EOIR data showed that median case completion times for non-detained cases were greater than for detained cases. Accordingly, the length of immigration proceedings for foreign nationals in detention may be shorter than those in the ATD program.

Specifically, in our November 2014 report, we conducted two analyses to estimate when the cost of keeping foreign nationals in the ATD program would have surpassed the cost of detaining a foreign national in a facility. Under our first analysis, we considered the average costs of ATD and detention and the average length of time foreign nationals in detention spent awaiting an immigration judge's final decision. We found that the ATD program would have surpassed the cost of detention after a foreign national was in the program for 1,229 days in fiscal year 2013—significantly longer than the average length of time foreign nationals spent in the ATD program in that year (383 days).[17] In our second analysis, we considered the average costs of ATD and detention and the average length of time foreign nationals spent in detention—regardless of whether they had received a final decision from an immigration judge—since some foreign nationals may not be in immigration proceedings or may not have

[16]We found in our November 2014 report that the cost estimate for ATD was higher than what ICE reported, as ICE's estimate was based upon the contract costs for ATD divided by the total number of participation days and did not include personnel costs. Our estimate incorporated both the cost of ATD personnel, as well as the cost of the ATD contract. Further, ICE reported the official average daily cost for detention was $118 a day, but this cost did not include personnel costs. The detention personnel costs included in our analysis included personnel who work at detention facilities, as well as support staff who support detention-related activities but were not working at the detention facilities. The ATD program and detention cost per day estimates did not include expenditures paid toward agency-wide overhead activities, such as rent or information technology services.

[17]Our analysis took into consideration the average daily cost of $10.55 for the ATD program and the average daily cost of $158 for placing a foreign national in a detention facility. Our analysis also considered the average time EOIR reported it took between DHS filing a charging document and an immigration judge issuing a final decision. For foreign nationals detained at the time of the final decision—but who may not have been detained for the entire time leading up to the completion of their case—the average was 82 days in fiscal year 2013. Specifically, we multiplied the average cost of detention with the average time foreign nationals detained at the time of the final decision waited for his or her final decision, and divided this number by the average cost of ATD.

reached their final hearing before ICE released them from detention.[18] ICE reported that the average length of time that a foreign national was in detention in fiscal year 2013 was 29 days. Using this average, we calculated the average length of time foreign nationals could have stayed in the ATD program before they surpassed the cost of detention would have been 435 days in fiscal year 2013.[19]

ICE Established ATD Performance Measures, and Took Actions to Ensure the Measures Monitored All Foreign Nationals Enrolled in the Program

We found in our November 2014 report that ICE established two program performance measures to assess the ATD program's effectiveness in (1) ensuring foreign national compliance with court appearance requirements and (2) ensuring removals from the United States, but limitations in data collection hindered ICE's ability to assess overall program performance.[20]

Compliance with court appearances. For the component of the ATD program managed by the contractor, data collected by the ATD contractor from fiscal years 2011 through 2013 showed that over 99 percent of foreign nationals with a scheduled court hearing appeared at their scheduled court hearings while participating in the ATD program. The court appearance rate dropped slightly to over 95 percent of foreign nationals with a scheduled final hearing appearing at their hearing. However, we reported that ICE did not collect similar court compliance data for foreign nationals in the component of the ATD program that ICE was responsible for managing—which accounted for 39 percent of the overall ATD program in fiscal year 2013. As a result, we recommended that ICE collect and report data on foreign national compliance with court appearance requirements for participants in this component of the ATD program.

As of June 2017, ICE reported that the ATD contractor was collecting data on foreign nationals' court appearance compliance for foreign nationals in both components of the ATD program, and at that time, was

[18]For example, a foreign national would not be in immigration proceedings if an immigration judge temporarily removed a case from an immigration judge's calendar (administrative closure). On May 17, 2018, the Attorney General determined that, except as specifically provided in regulation or a judicial settlement, immigration judges and the Board of Immigration Appeals lack general authority to administratively close removal proceedings. See *Matter of CASTRO-TUM, 27* I. & N. Dec. 271 (AG 2018).

[19]Specifically, we multiplied the average cost of detention with the average time foreign nationals spent in detention, and divided this number by the average cost of ATD.

[20]GAO-15-26.

collecting data for approximately 88 percent of foreign nationals that were awaiting a hearing. ICE officials stated that they did not expect that 100 percent of foreign nationals in the ATD program would be tracked for court appearance compliance by the contractor because there may be instances where ICE has chosen to monitor a foreign national directly, rather than have the contractor track a foreign national's compliance with court appearance requirements. Officials stated that ICE officers may decide to monitor a foreign national directly because they determined that it is in the government's best interest, or it was fiscally responsible when a foreign national's court date was far in the future and court tracking conducted by the contractor would be costly. In July 2017, ICE reported that they assessed whether ICE officers that directly monitor foreign nationals in the ATD program had reliable data to determine court appearance compliance and found no practical or appropriate way to obtain such data without devoting a significant amount of ICE's limited resources. Although ICE is not collecting court appearance compliance data for all foreign nationals in both components of the ATD program, as of July 2017, it has met the intent of our recommendation by collecting and reporting on all available data on the majority of foreign nationals in both components of the ATD program.

Removals from the United States. For this program performance measure, a removal is attributed to the ATD program if the foreign national (1) was enrolled in ATD for at least 1 day, and (2) was removed or had departed voluntarily from the United States in the same fiscal year, regardless of whether the foreign national was enrolled in ATD at the time the foreign national left the country. The ATD program met its goal for removals in fiscal years 2012 and 2013.[21] For example, in fiscal year 2013, ICE reported 2,901 removals of foreign nationals in the ATD program—surpassing its goal of 2,899 removals.

ATD program performance measures provide limited information about the foreign nationals who are terminated from the ATD program prior to receiving the final disposition of their immigration proceedings, or who

[21]There was no removal goal in fiscal year 2011, as this was the baseline year.

were removed or voluntarily departed from the country.[22] Specifically, ICE counts a foreign national who was terminated from the program and was subsequently removed from the United States toward the ATD removal performance measure as long as the foreign national was in the program during the same fiscal year he or she was removed from the country.[23] However, foreign nationals who were terminated from the program do not count toward court appearance rates if they subsequently do not appear for court. ICE officials reported that it would be challenging to determine a foreign national's compliance with the terms of his or her release after termination from the ATD program given insufficient resources and the size of the nondetained foreign national population. In accordance with ICE guidance, staff resources are instead directed toward apprehending and removing foreign nationals from the United States who are considered enforcement and removal priorities.

Chairman Johnson, Ranking Member McCaskill, and Members of the Committee, this completes my prepared statement. I would be happy to respond to any questions you or the members of the committee may have.

GAO Contact and Staff Acknowledgments

If you or your staff have any questions about this testimony, please contact Rebecca Gambler at (202) 512-8777 or gamblerr@gao.gov. Contact points for our Offices of Congressional Relations and Public Affairs may be found on the last page of this statement. GAO staff who made key contributions to this testimony are Taylor Matheson (Assistant Director), Tracey Cross, Ashley Davis, Paul Hobart, Sasan J. "Jon" Najmi, and Michele Fejfar. Key contributors for the previous work on which this testimony is based are listed in each product.

[22]ICE officers determine when a foreign national's participation in the program should be terminated. ICE terminates foreign nationals from the ATD program who are removed from the United States, depart voluntarily, are arrested by ICE for removal, or receive a benefit or relief from removal. ICE may also terminate a foreign national from the program when foreign nationals are arrested by another law enforcement entity, abscond, or otherwise violate the conditions of the ATD program. Further, ICE may terminate a foreign national from the program if ICE officers determine the foreign national is no longer required to participate. A foreign national terminated from one component of the ATD program could be subsequently enrolled in the other or same component at a later date.

[23]According to ICE officials, after a foreign national is terminated from the ATD program, the information obtained while the foreign national was in the program (i.e., contact information) may assist ICE in locating a foreign national, as necessary, and accordingly, this is why these foreign nationals are included in the official removal count.

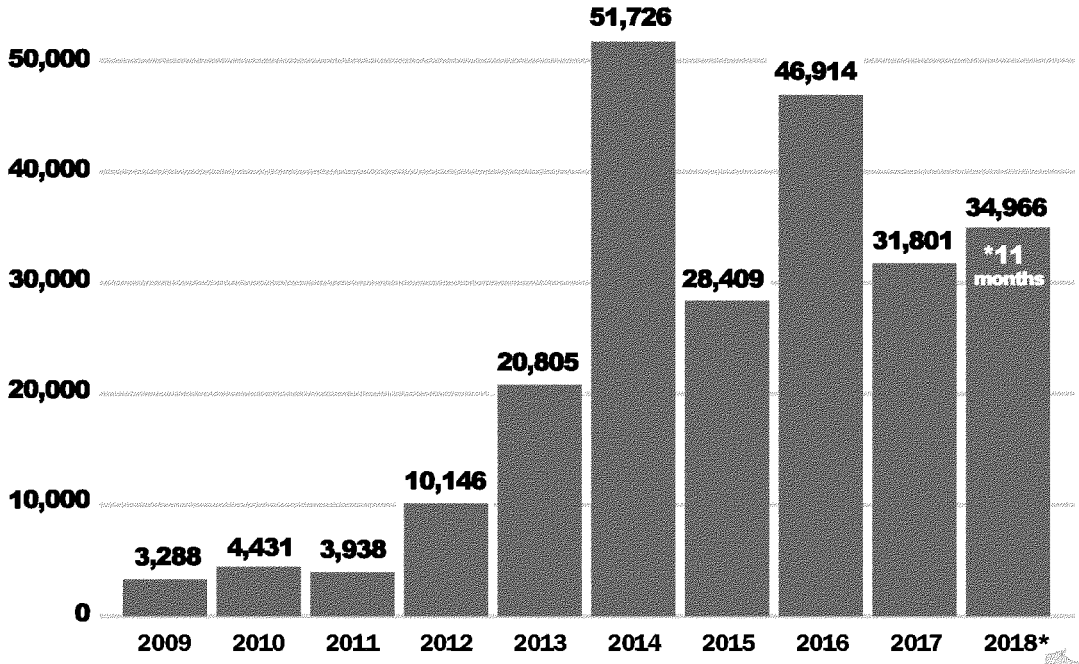
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UAC APPREHENSIONS

UNACCOMPANIED CHILDREN: HONDURAS, GUATEMALA, EL SALVADOR

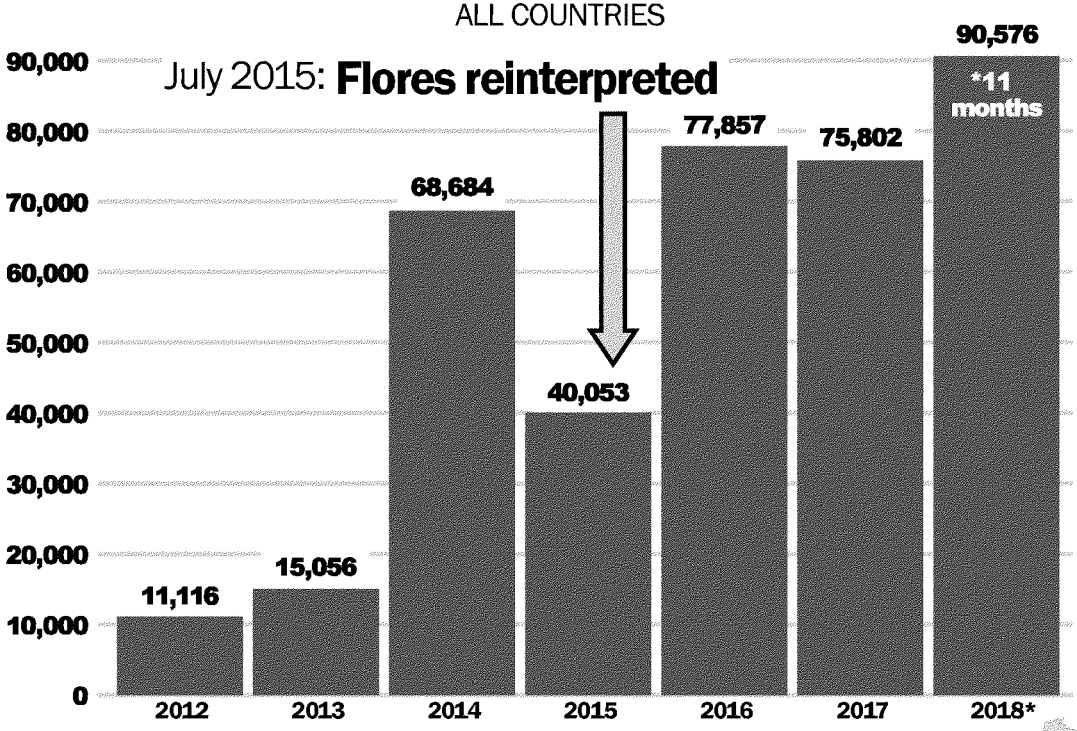


U.S. Border Patrol, U.S. Customs and Border Protection. Federal fiscal years.

RON JOHNSON U.S. SENATE

FAMILY APPREHENSIONS

ALL COUNTRIES

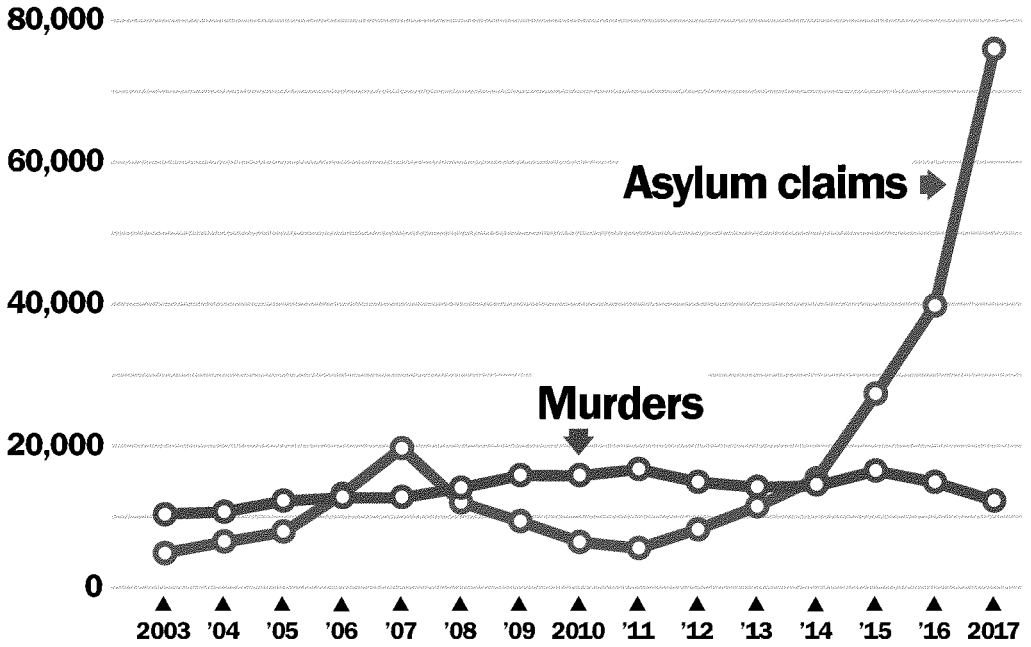


U.S. Border Patrol, U.S. Customs and Border Protection. Federal fiscal years.

RON JOHNSON U.S. SENATE

MURDERS VS. ASYLUM CLAIMS

EL SALVADOR, GUATEMALA AND HONDURAS

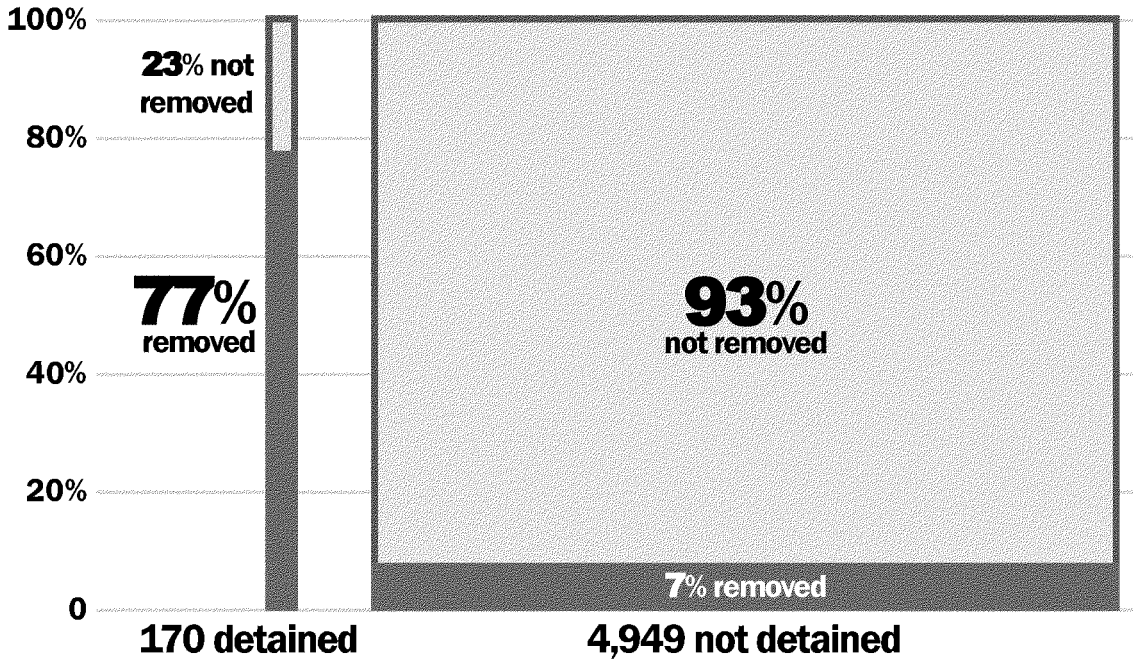


Department of Justice, United Nations Office on Drugs and Crime, InsightCrime.org. Murders by calendar year, claims by fiscal year

RON JOHNSON U.S. SENATE

HOW MANY ARE REMOVED?

FAMILIES PRESENT FOR FINAL HEARING AND ORDERED REMOVED



Institute for Defense Analyses. Outcomes for fiscal year 2014 apprehension cohort as of March 31, 2017.

RON JOHNSON U.S. SENATE

Executive Office for Immigration Review
Asylum Rates

Fiscal Year	Asylum Grants	Grant Rate	Asylum Denials	Denial Rate	Asylum Others	Other Closure Rate	Administrative Closures	Administrative Closure Rate	Total
2009	8,748	26.45%	9,625	29.10%	13,266	40.11%	1,437	4.34%	33,076
2010	8,482	27.25%	8,167	26.24%	11,698	37.58%	2,779	8.93%	31,126
2011	10,074	32.87%	9,177	29.95%	10,250	33.45%	1,144	3.73%	30,645
2012	10,651	32.55%	8,342	25.49%	9,920	30.32%	3,809	11.64%	32,722
2013	9,818	27.07%	8,736	24.09%	10,083	27.80%	7,629	21.04%	36,266
2014	8,710	24.79%	9,214	26.23%	9,832	27.99%	7,377	21.00%	35,133
2015	8,232	20.58%	8,807	22.02%	10,733	26.83%	12,231	30.58%	40,003
2016	8,775	16.93%	11,730	22.64%	12,644	24.40%	18,673	36.03%	51,822
2017	10,699	20.32%	17,707	33.63%	14,619	27.76%	9,628	18.29%	52,653
2018 (as of 6/30/2018)	10,042	22.17%	19,219	42.42%	14,187	31.32%	1,856	4.10%	45,304

Data generated July 6, 2018.

Asylum decisions on affirmative and defensive applications issued in completed removal, deportation, exclusion, and asylum-only proceedings or in proceedings that have been administratively closed.

Asylum Others have a decision of abandonment, not adjudicated, other, or withdrawn.

Administrative closure decisions for cases that have not been placed back on the docket. (Redocketing occurs following an immigration judge's grant of a party's motion to recalendar.)

IDA

Describing the Adjudication Process for Unlawful Non-Traditional Migrants

A component of a long-term analytic effort describing the flow across the Southwest Border

John Whitley, Project Leader
Dennis Kuo
Ethan Novak
Brian Rieksts

June 2017

Outline

Overview of the project

Combining the data

Describing the non-traditional flow

Future work

Project Overview
IDA

This project aims to…

Combine data on illegal border crossing

Quantify the flow of non-traditional border crossers

Describe adjudication process and its bottlenecks

Make recommendations to improve efficacy and efficiency

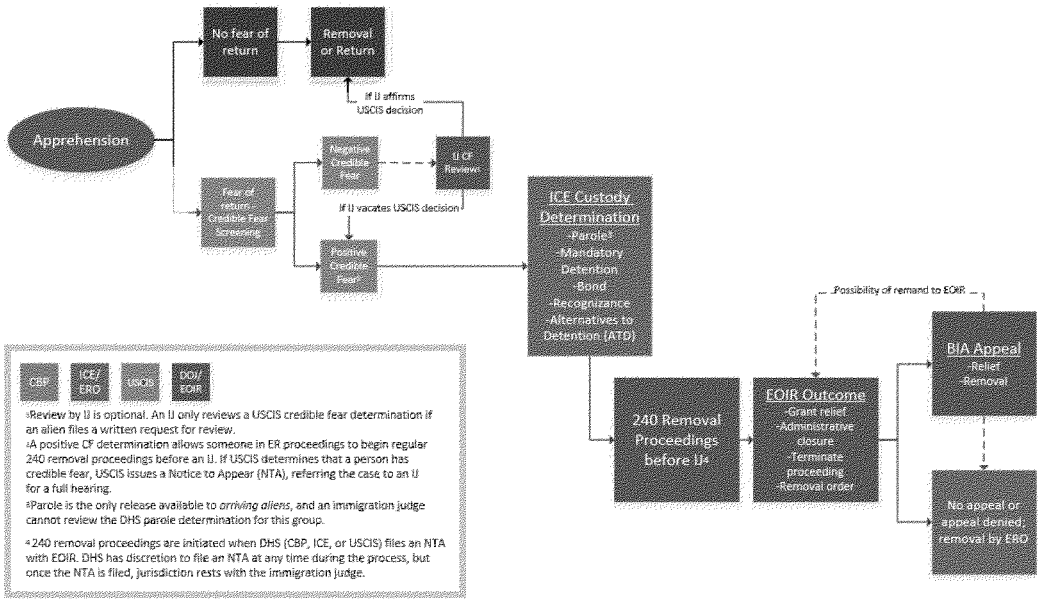
Three populations comprise the non-traditional flow.

Single adults claiming credible fear (CF) or reasonable fear (RF)

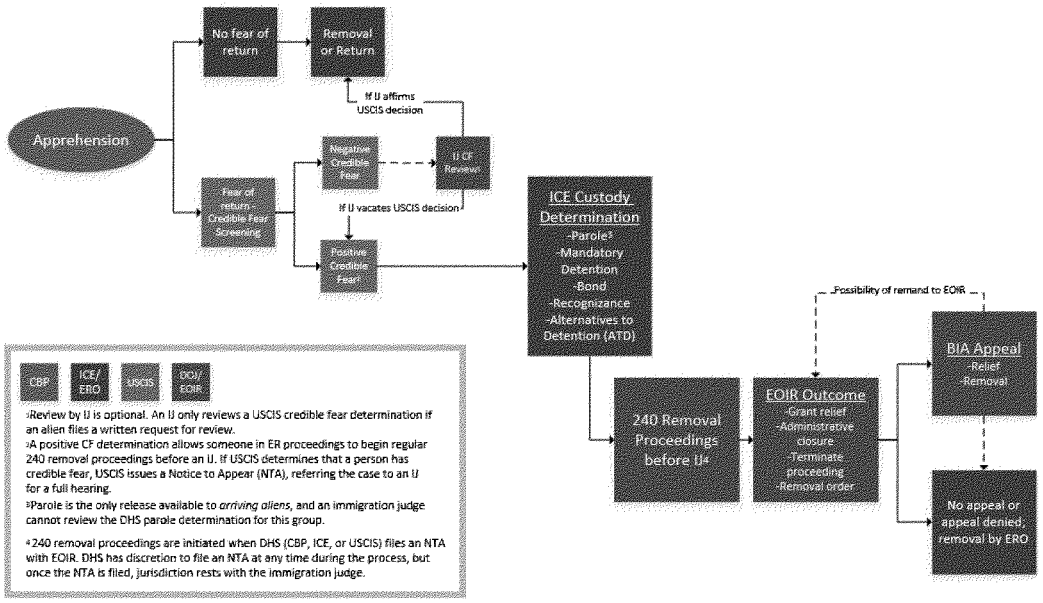
Family unit aliens (FMUAs)

Unaccompanied alien children (UACs)

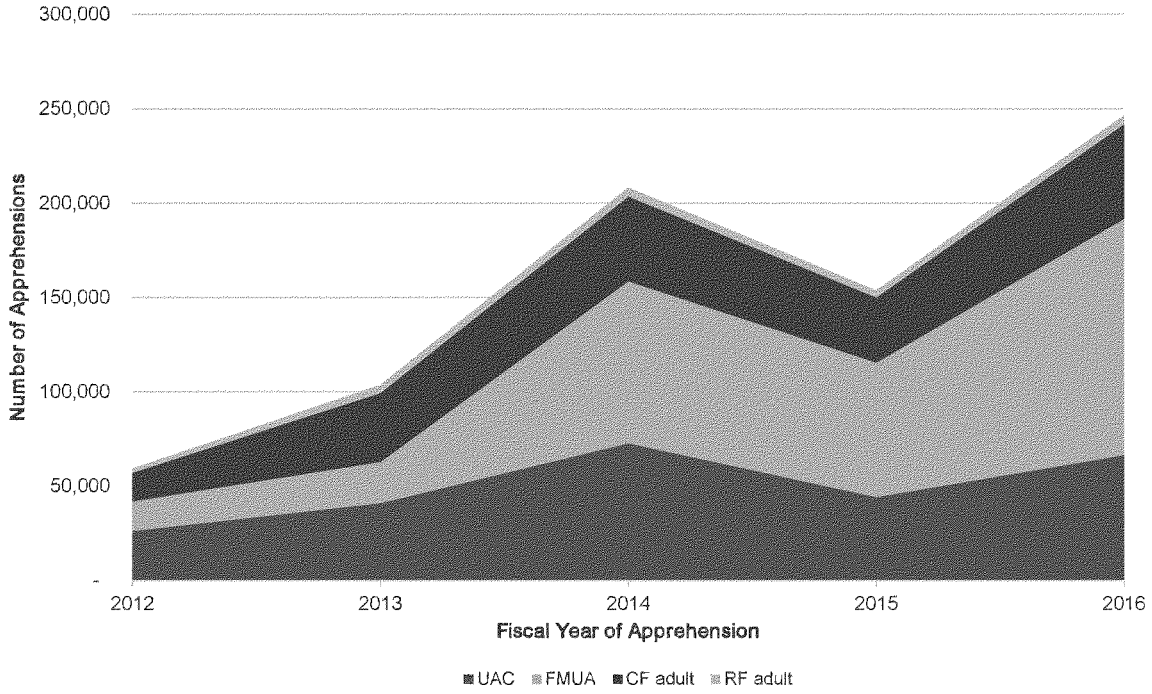
Processing non-traditional migrants requires more resources than processing traditionals.



Processing non-traditional migrants requires more resources than processing traditionals.



Apprehensions of non-traditionals increased fivefold during FY 2012–2016.



Data Organization
IDA

Combine multiple data sources.

Apprehensions by **Border Patrol** and **Office of Field Operations**

Detention and removals by **Immigration and Customs Enforcement**

Asylum and CF claims to **Citizenship and Immigration Services**

Legal proceedings with the **Executive Office for Immigration Review**

Other applications to **Citizenship and Immigration Services**

Associate all events with an apprehension.

BP and OFO record information by apprehension

ICE records detention and removal by apprehension

USCIS records fear and asylum claims by person

EOIR documents legal proceedings by person

Dates filter matches at the apprehension level.

BP/ OFO: date of apprehension

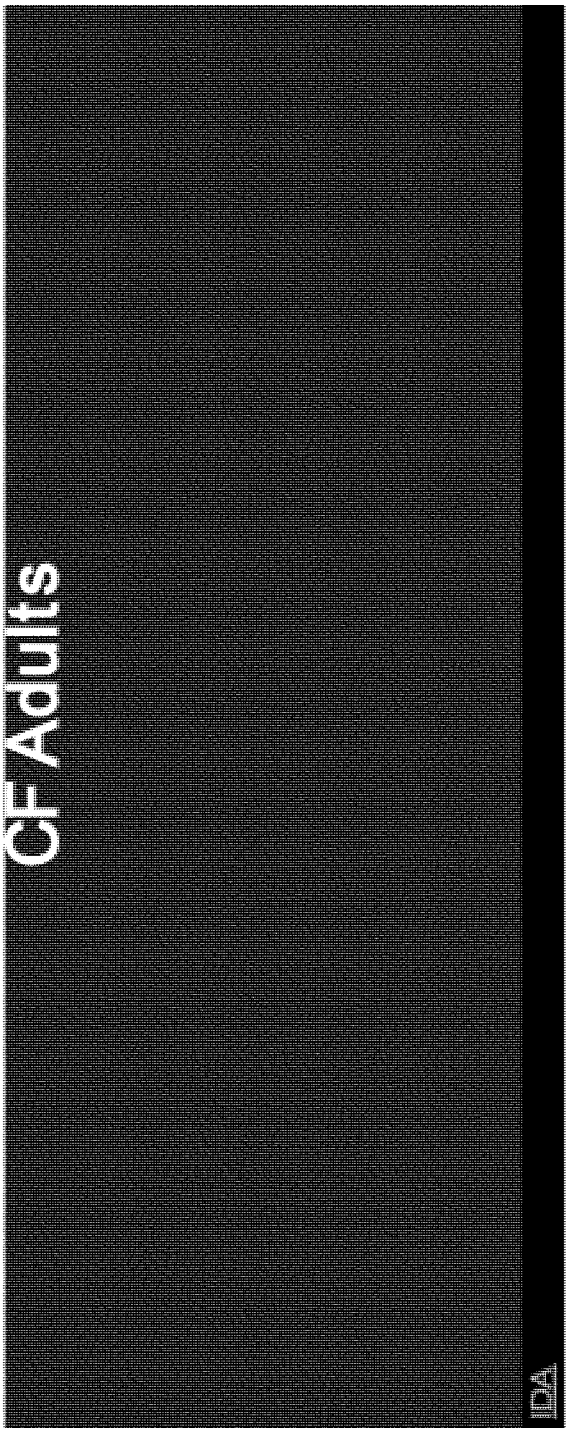
USCIS (CF): date of receipt and interviewer decision

USCIS (asylum): date of receipt and final decision

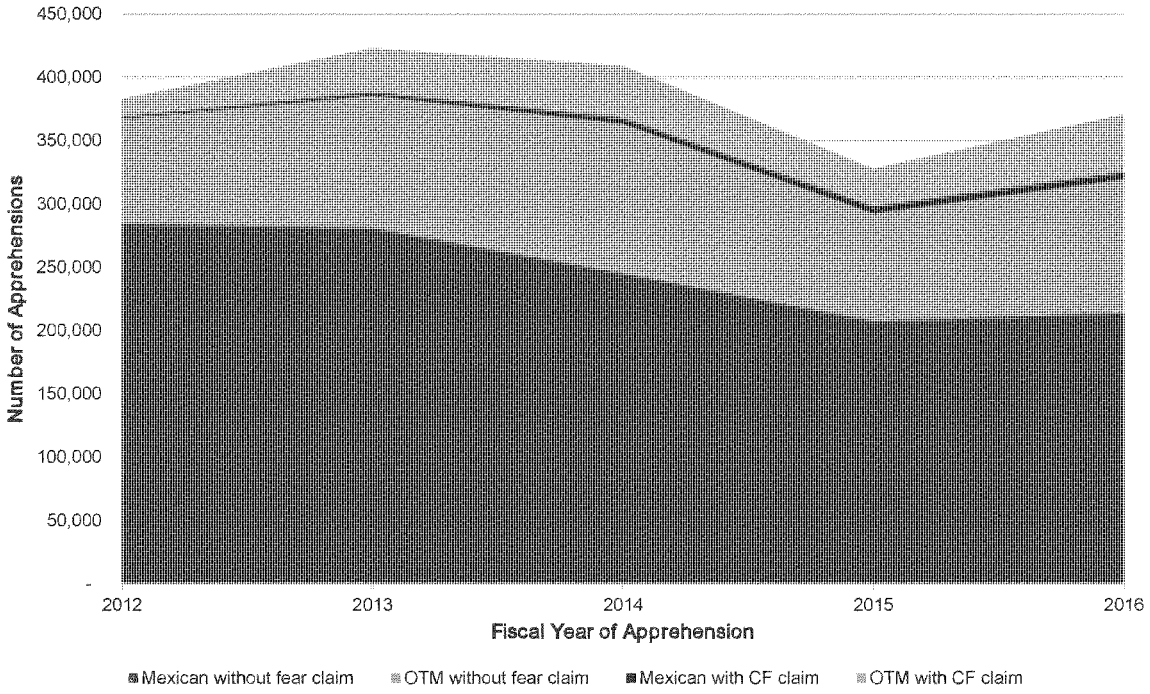
EOIR: date of NTA filing and immigration judge decision

ICE: book-in date and removal or return date

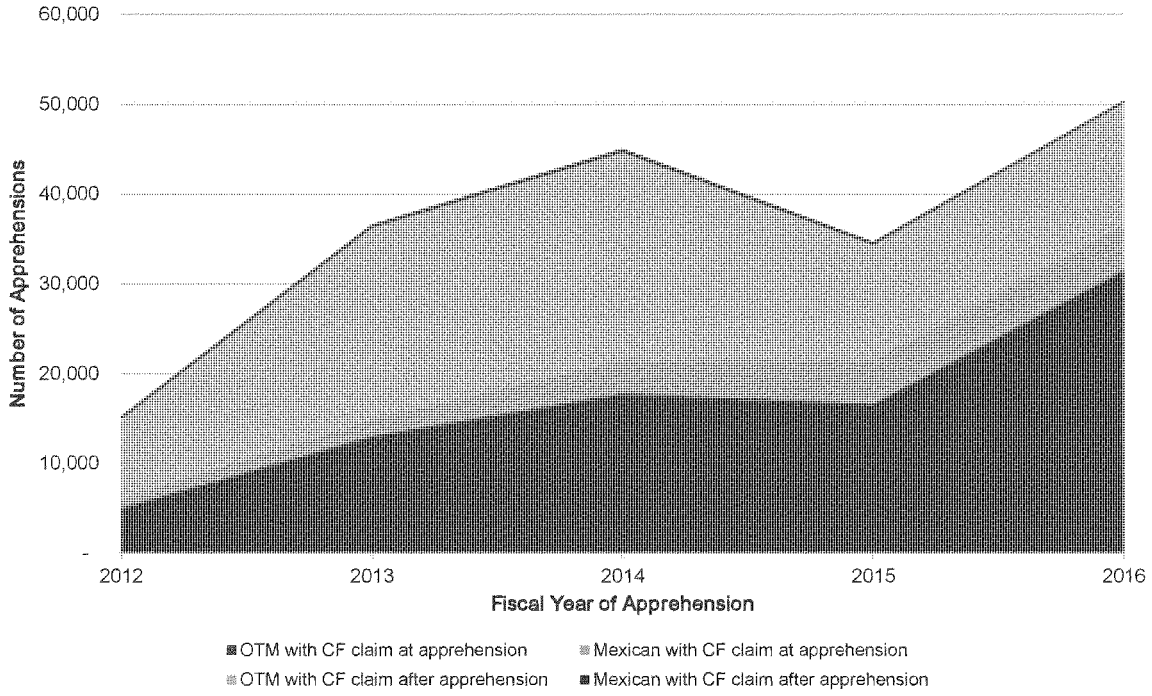
Non-Traditional Flow
IDA


CF Adults
IDA

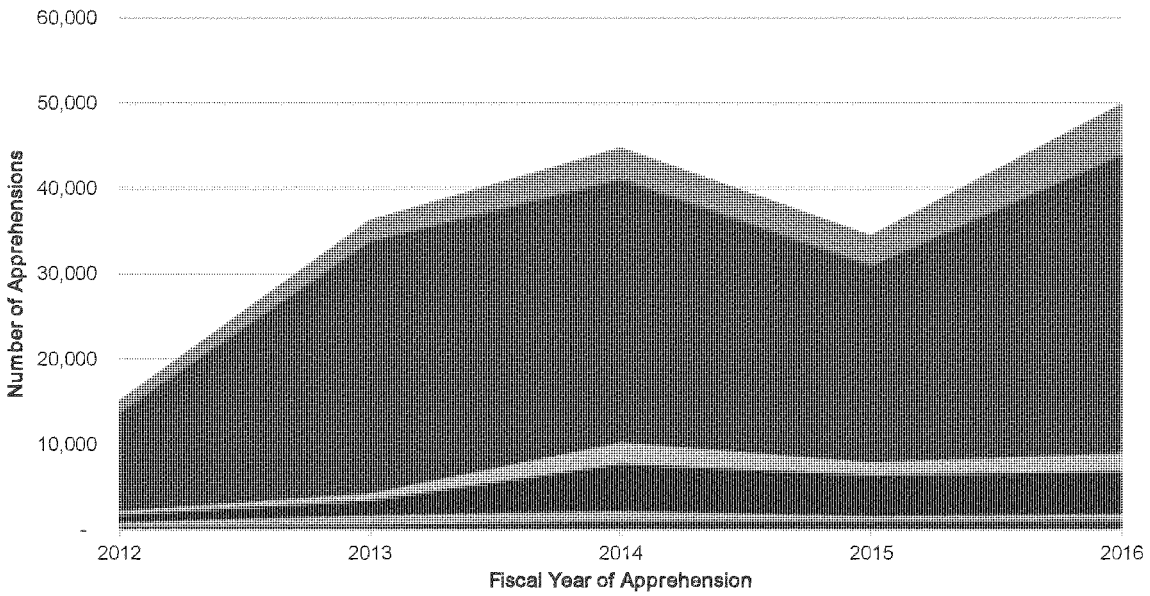
CF claims are a small share of all adult apprehensions.



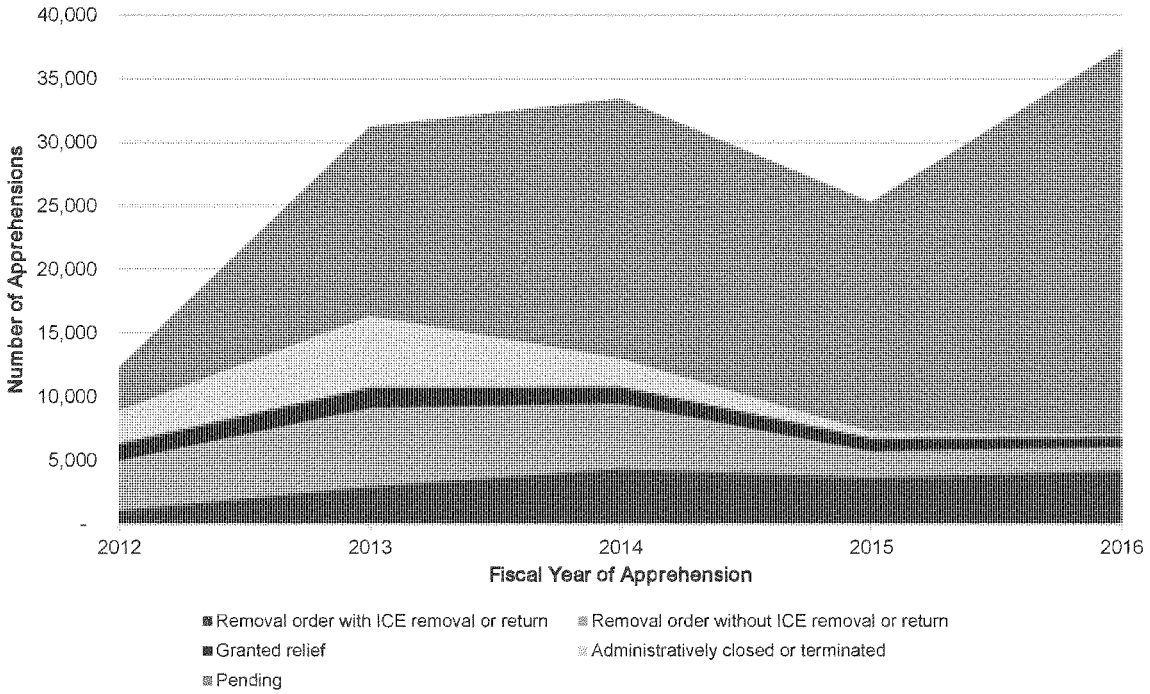
With time, a larger share of those claiming fear are doing so upon apprehension.

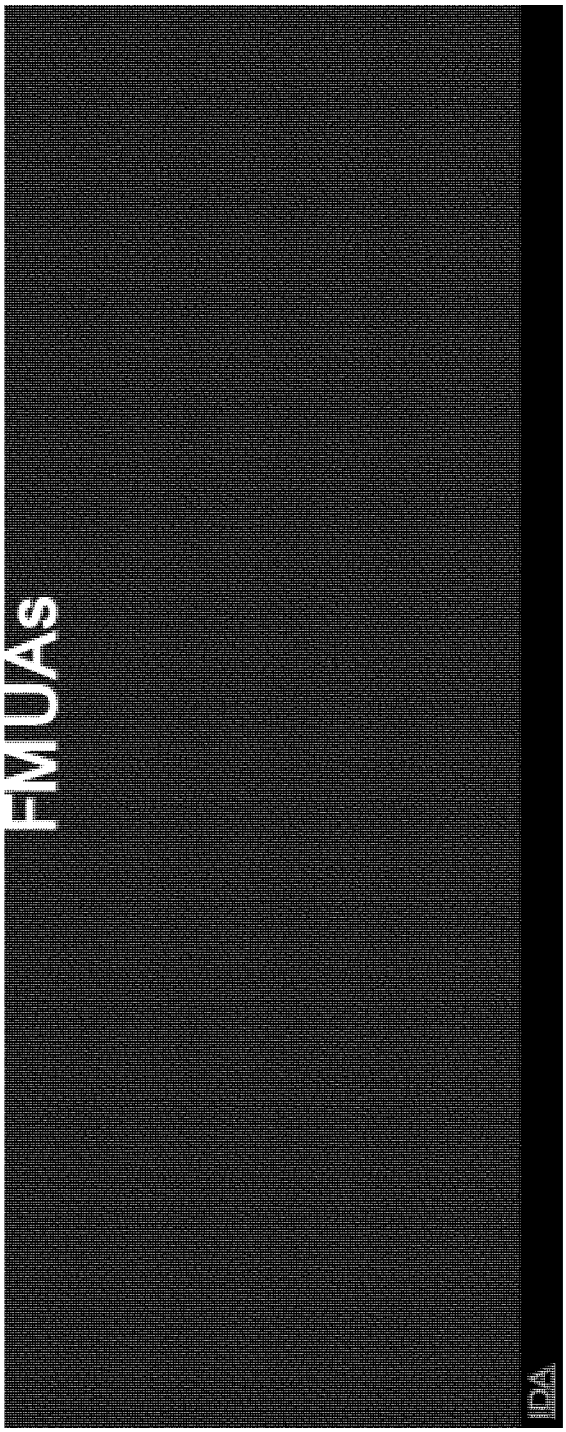


USCIS issues positive decisions on most CF claims.

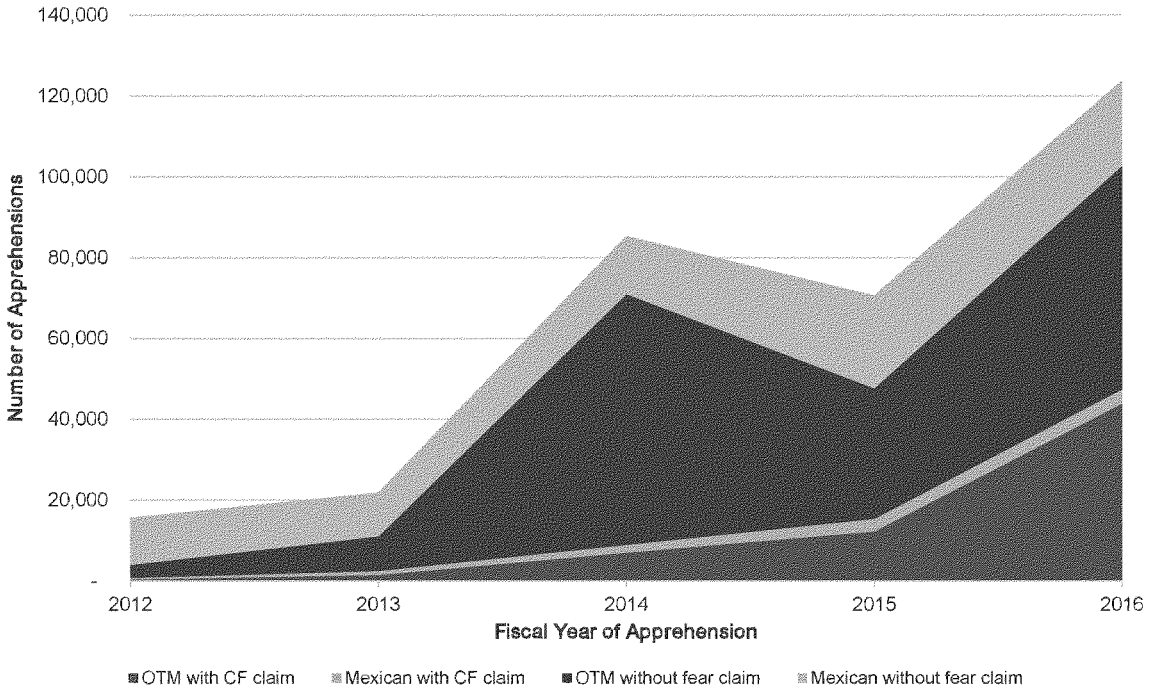


Backlog in EOIR is substantial; detention rates impact effected removal order rates.

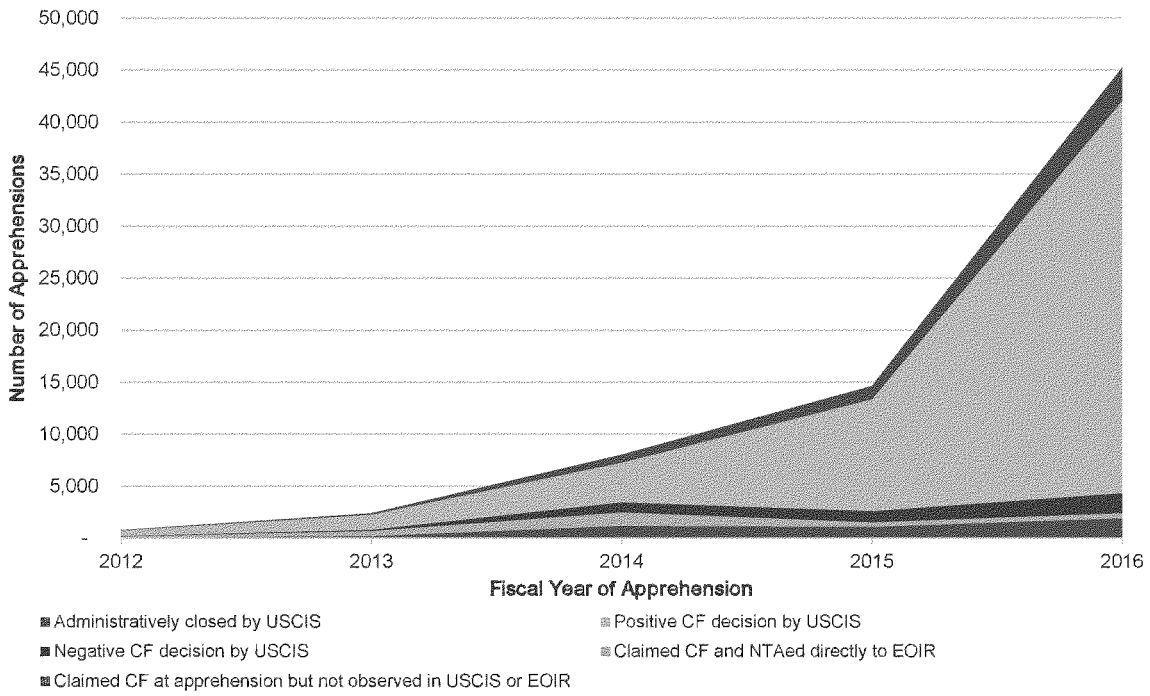



FMUAs
IDA

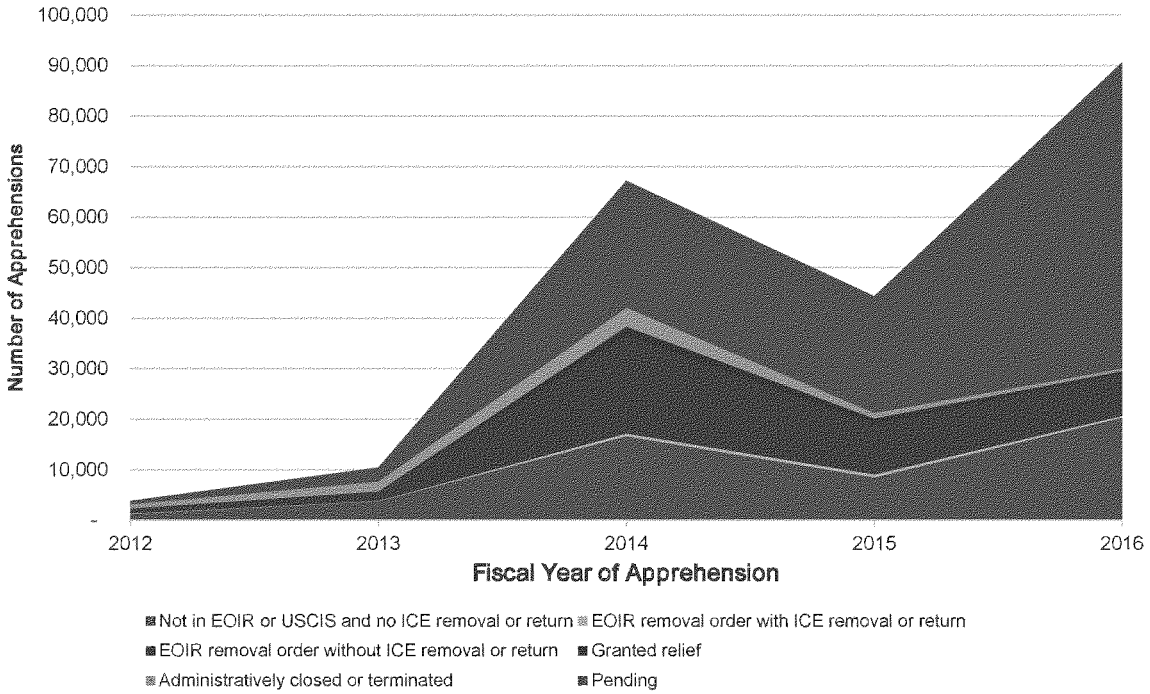
The number of OTM family apprehensions is much greater than that for Mexican families.

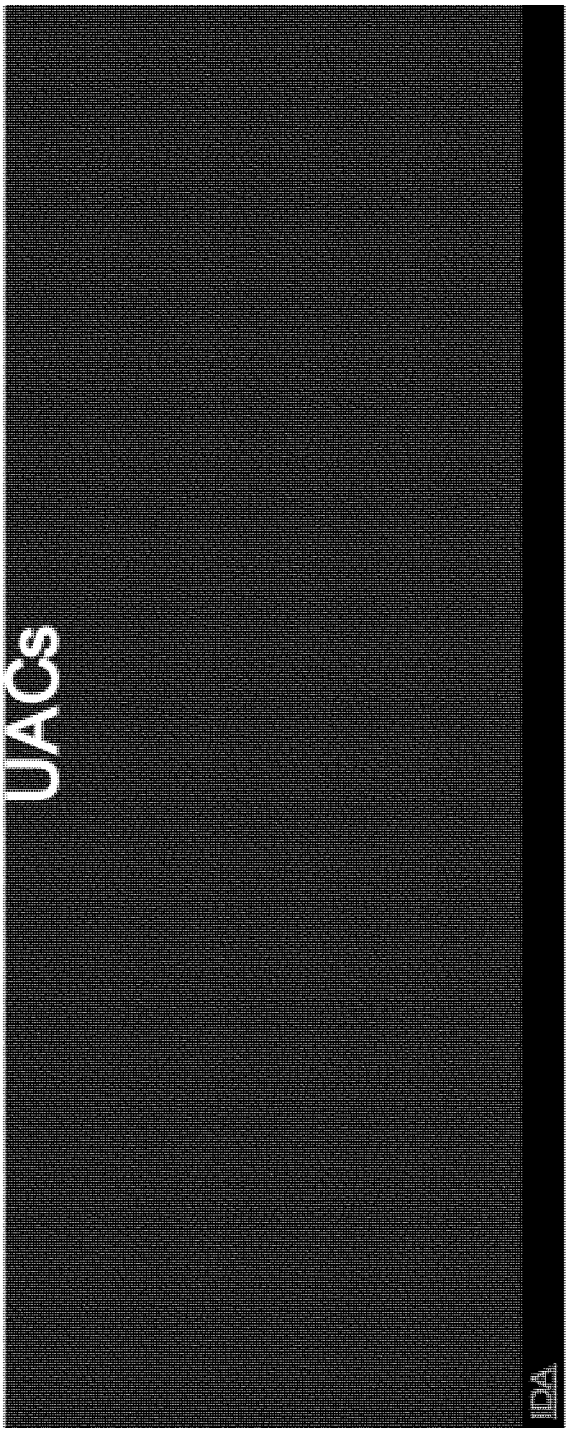


USCIS issues positive decisions on most CF claims.

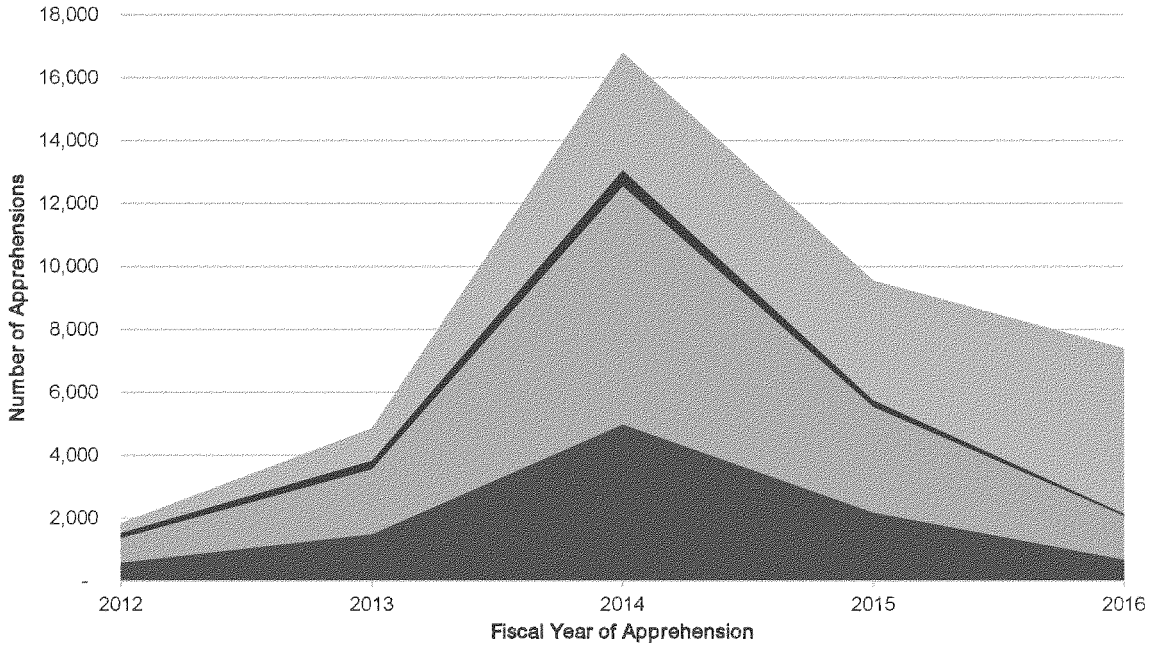


Both relief and removal are uncommon outcomes.

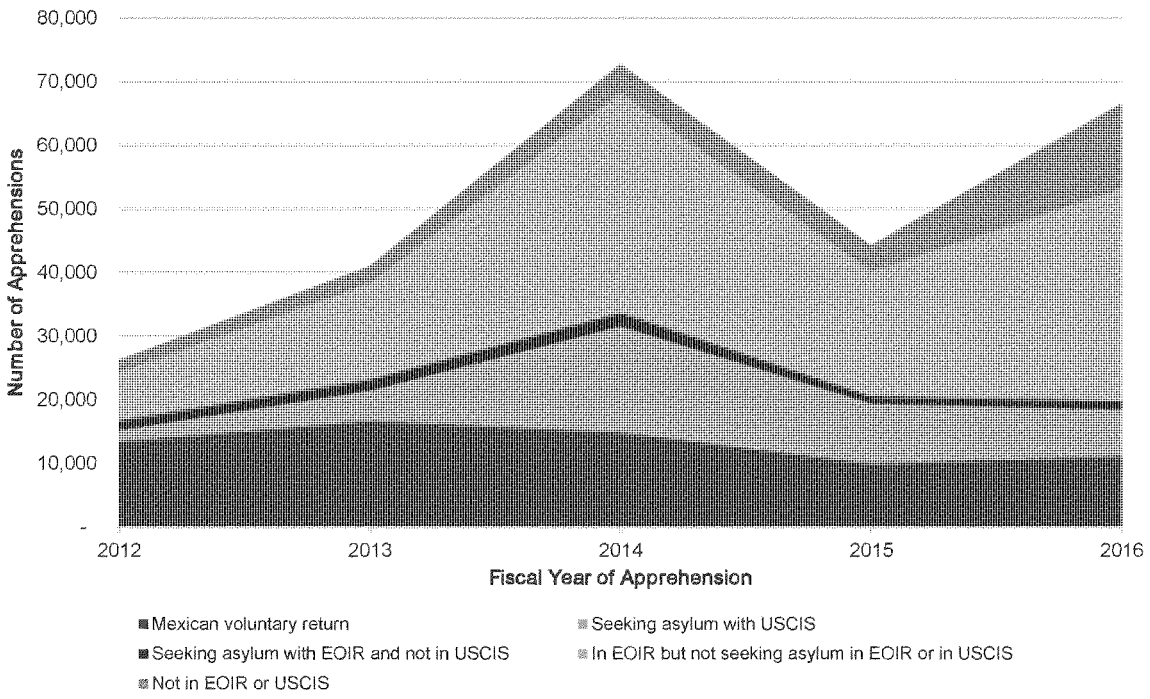



UACs
IDA

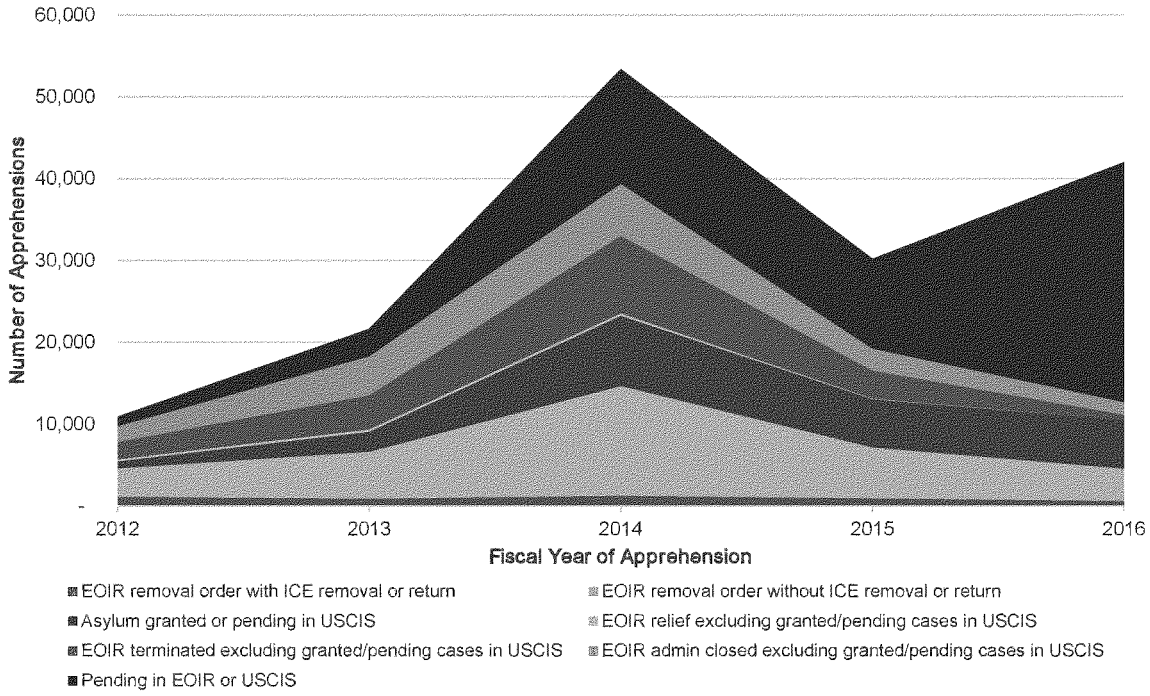
Asylum grant and deny rates are approximately equal among applications already received.



Less than half of UACs in EOIR seek asylum.



If UACs receive relief, they do so through USCIS. Removal is rare.




Outcomes
IDA

CF adults are removed at higher rates than FMUAs and UACs following a removal order finalized by an IJ.

Outcomes for FY 2014 Apprehension Cohort as of March 31, 2017

	Completed Cases	Completed Outcomes: Relief	Completed Outcomes: Removal Order	Completed Outcomes: Other	Removal Orders Effected
CF Adult	45%	6%	83%	11%	67%
FMUA	33%	7%	78%	15%	4%
UAC	51%	14%	39%	48%	9%

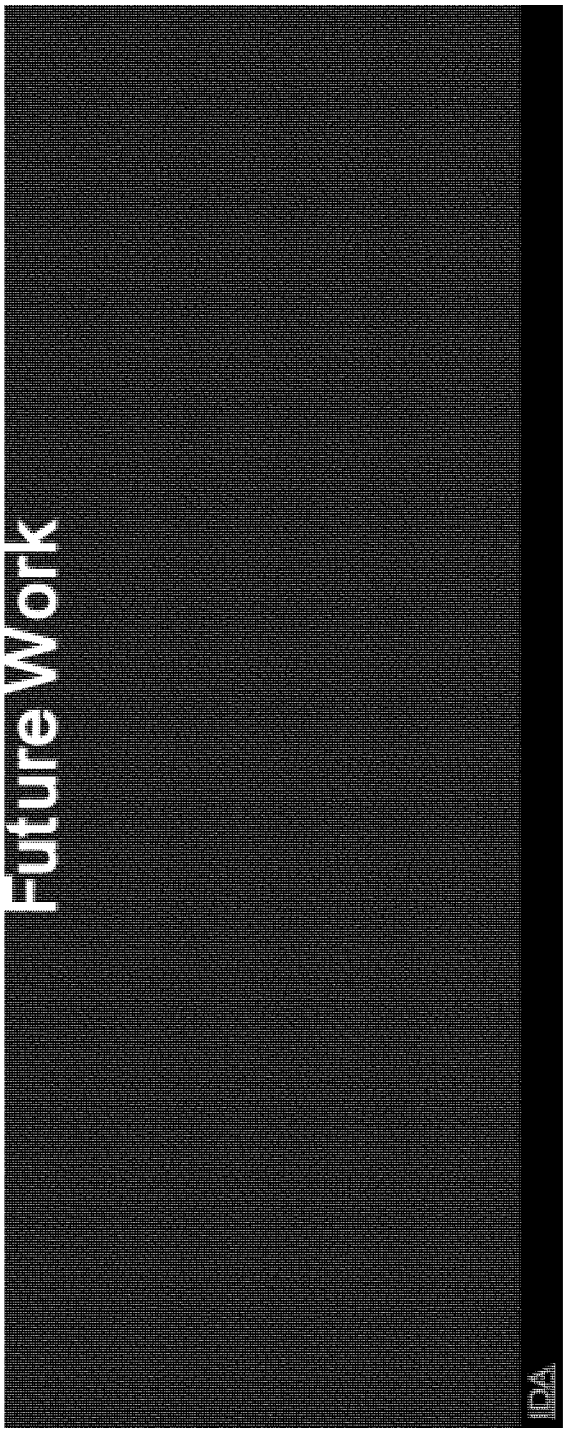
Effected removal orders are correlated with detention.

Removal/Return Rates among Removal Orders for FY 2014 Apprehensions

	Present for Removal Order		Removal Order in Absentia	
	Removal Orders	Removed	Removal Orders	Removed
CF Adult (not detained)	1,016	7%	3,981	3%
CF Adult (detained)	4,483	93%	--	--
FMUA (not detained)	4,949	7%	16,362	1%
FMUA (detained)	170	77%	--	--
UAC (not detained)	2,291	11%	11,646	3%
UAC (detained)	706	89%	--	--

Prioritization of UACs on the EOIR docket and alternate avenues of relief increase UAC completions.

	180 days	1 year	1.5 years	2 years	2.5 years
CF Adult	31%	35%	38%	41%	48%
FMUA	9%	15%	20%	24%	32%
UAC	6%	17%	30%	41%	54%


Future Work
IDA

Future work includes estimating the...

Number of UAC asylum applicants from censored cohorts

Probability of apprehension for non-traditionals

Effect on outcomes of claiming CF after apprehension

Thank you for your attention!
IDA
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September 17, 2018

Dear Executive and Legislative Branch Officials,

We are a group of scholars from across the country, with wide ranging expertise including in the areas of children's policy and child well-being. We share immediate concerns for the wellbeing of children who are being held in migrant detention centers in the United States. We implore you to consider the detrimental effects of the Trump Administration's proposed revisions to the basic safeguards for children that are protected by the Flores Settlement Agreement of 1997. This agreement secures minimum protections for migrant children that are held in custody by the Department of Homeland Security (then Immigration and Naturalization Services).[1] We, the undersigned, demand that all provisions of Flores be upheld and fully implemented, for the specific reasons outlined below.

All children deserve access to basic human rights. The Flores Agreement Settlement requires that children who are detained have a right to basic standards of care. The Office of Refugee Resettlement (ORR) and the Department of Homeland Security (DHS) are *required* by this settlement to implement procedures of care, including basic protections and access to appropriate food, shelter, medical care, education, and legal support. There is evidence that these standards of care are not being provided [2], yet they are essential to childhood well-being. We demand that access to these basic protections--at minimum--are provided to all children in detention.

Children must be cared for in the least restrictive environment. Children cannot and do not flourish in detention. The Flores Settlement Agreement restricts the number of days (3-5) that a child can be detained, and requires that an age-appropriate placement is provided in the least restrictive environment which accounts for special needs (such as mental health issues, medical need, or disability). The U. S. government is required to provide "continuous efforts towards family reunification and release."[3] The proposed revisions to these rules allow for indefinite detainment of children. This is unacceptable. It is imperative that children's time in detention be minimized, that placements prioritize a sustained connection with parents, family members, and/or loving caregivers that can provide developmentally appropriate physical and emotional support for these children. If a family placement is not possible, children must be cared for in independently licensed and non-secure placements.

Children crossing the border deserve effective procedures and developmentally appropriate, supportive services. Research indicates that detention efforts and other restrictive

deterrent efforts on the border do not stop migration. [4] Government efforts must acknowledge the root causes of migration and implement sustained support for a safe and secure environment in Central America and Mexico. Simultaneously, the U.S. government must expand the options for safe, developmentally appropriate, community-based placements for children who await reunification with their families.

We strongly oppose any changes to the minimum standards of care and protections provided by the Flores Settlement Agreement. The proposed revisions to the Flores Settlement Agreement are detrimental to the mental health, well-being, and development of children and impede their access to legal protections. The role of the government is to protect children, not perpetuate the trauma imposed by insecure care. We urge you to prioritize child wellbeing and preserve the basic protections mandated by the Flores Settlement Agreement. As scholars, practitioners and experts in children's issues, we implore the Trump Administration to enforce and expand protections for all children who have migrated in an effort to secure their wellbeing and optimal development.

* All signatures represent opinions of the individual, not necessarily their affiliated institution

Sincerely,

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[1] Chappell Deckert (2016). *Social Work, Human Rights, and the Migration of Central American Children.*

[2] Human Rights Watch (2018). *In the Freezer: Abusive conditions for women and children in U.S. Immigration Holding Cells.*

[3] Human Rights First (2016). *The Flores Settlement: A brief history and next steps.*

[4] Hiskey, J., Córdova, A., Orcés, D., Malone, M. (2016). *Understanding the Central American Refugee Crisis: Why they are fleeing and how U.S. policies are failing to deter them.*

American Immigration Council

AILA AMERICAN IMMIGRATION LAWYERS ASSOCIATION

STATEMENT OF THE AMERICAN IMMIGRATION COUNCIL AND THE AMERICAN IMMIGRATION LAWYERS ASSOCIATION

SUBMITTED TO THE SENATE COMMITTEE ON HOMELAND SECURITY & GOVERNMENTAL AFFAIRS

HEARING ON "THE IMPLICATIONS OF THE REINTERPRETATION OF THE FLORES SETTLEMENT AGREEMENT FOR BORDER SECURITY AND ILLEGAL IMMIGRATION INCENTIVES"

September 18, 2018

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The American Immigration Council ("Council") is a non-profit organization which for over 30 years has been dedicated to increasing public understanding of immigration law and policy and the role of immigration in American society. The American Immigration Lawyers Association (AILA) is the national association of immigration lawyers established to promote justice and advocate for fair and reasonable immigration law and policy. AILA has over 15,000 attorney and law professor members nationwide. We write to share our analysis and research regarding the Flores Settlement Agreement, family detention, and migration of asylum seekers from Central America.

Due to high levels of violence in parts of Central America, migration patterns have shifted in recent years, with fewer economic migrants and more asylum-seeking families and unaccompanied children seeking protection in the United States.[1] This changing face of migration has incorrectly led some administration officials and lawmakers to question whether existing laws and policies that protect children are incentivizing these new flows.[2] Earlier this month, the Departments of Homeland Security (DHS) and Health and Human Services (HHS) published a joint proposed regulation which

[1] Jonathan T. Hiskey, Ph.D., Abby Córdova, Ph.D., Diana Orcés, Ph.D. and Mary Fran Malone, Ph.D., "Understanding the Central American Refugee Crisis," February 1, 2016, https://www.americanimmigrationcouncil.org/research/understanding-central-american-refugee-crisis.

[2] "Written testimony of DHS Secretary Kirstjen Nielsen for a Senate Committee on Homeland Security and Governmental Affairs hearing titled 'Authorities and Resources Needed to Protect and Secure the United States,'" Department of Homeland Security, May 18, 2018, https://www.dhs.gov/news/2018/05/15/written-testimony-dhs-secretary-nielsen-senate-committee-homeland-security-and.

would significantly undermine the 1997 Flores Settlement Agreement that established policies to better protect the welfare of immigrant children.[3]

Among the proposed changes is the intention to detain children with a parent for the duration of their immigration proceedings, which could result in many months, if not years, of detention. From our hands-on work providing legal services to detained families through the Dilley Pro Bono Project, we have seen the physical and psychological harm caused by detaining children. Based on this experience we believed the administration should instead be prioritizing well-established alternatives to detention, which are less costly, more humane, and extremely effective at getting families to appear in immigration court.[4]

Understanding the Central American Refugee Crisis

There is no question that many migrants coming to the United States from the Northern Triangle of Central America are fleeing endemic violence and are seeking safe haven in the United States, where many have family and community who can offer shelter while they seek asylum. Those who draw a causal link between U.S. immigration and asylum policies and this migration flow overlook the push factors of violence that force them to undertake a perilous journey north. The Council's report, *A Guide to Children Arriving at the Border: Laws, Policies and Responses*, provides information about the tens of thousands of children—some traveling with their parents and others alone—who have fled their homes in Central America and arrived at our southern border. It also seeks to explain the basic protections the law affords them, what happens to the children once they are in U.S. custody, and what the government has done in response.[5]

Organized crime, gangs, and violence in places like El Salvador, Honduras, and Guatemala are driving children, families, women, and men out of their hometowns and countries, a situation detailed in the Council's report *Understanding the Central American Refugee Crisis: Why They are Fleeing and U.S. Policies are Failing to Deter Them* and the report *No Childhood Here: Why Central American Children Are Fleeing Their Homes*.[6] Of more than 300 children interviewed in the first five months of 2014 for *No Childhood Here*, 59 percent of Salvadoran boys and 61 percent of Salvadoran girls cited gangs, crime, and violence as the reasons for their emigration. Moreover, as described in *Understanding the Central American Refugee Crisis*, a survey of Central Americans considering migration concluded that crime and violence have the most powerful impact on someone's decision to migrate, and awareness of migration risks had no significant impact on this decision. These individuals have limited choices at their disposal, and the United States must adhere to its legal and moral obligations to protect them.

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[3] "American Immigration Council Condemns Administration's Proposal to Indefinitely Detain Children," American Immigration Council, September 6, 2018, https://www.americanimmigrationcouncil.org/news/american-immigration-council-condemns-administrations-proposal-indefinitely-detain-children; AILA Press Statement: Trump Administration Lines Up End Run Around Protections for Detained Children (September 6, 2018).

[4] "The Real Alternatives to Detention," American Immigration Lawyers Association et al., June 27, 2017, https://www.aila.org/infonet/the-real-alternatives-to-detention.

[5] "A Guide to Children Arriving at the Border: Laws, Policies and Responses," American Immigration Council, June 26, 2015, https://www.americanimmigrationcouncil.org/research/guide-children-arriving-border-laws-policies-and-responses. For more information on barriers to protection, see "AILA Policy Brief: New Barriers at the Border Impede Due Process and Access to Asylum" (June 1, 2018).

[6] Understanding the Central American Refugee Crisis; "No Childhood Here: Why Central American Children are Fleeing Their Homes," American Immigration Council, July 1, 2014, https://www.americanimmigrationcouncil.org/research/no-childhood-here-why-central-american-children-are-fleeing-their-homes.

Flores Settlement Agreement and Family Detention

In place for over two decades, the 1997 Flores Settlement Agreement prescribes national standards for the care, custody, and release of asylum-seeking children, including accompanied minors and unaccompanied minors detained by the Government.[7] Its purpose is to minimize the unnecessary and harmful practice of detaining children and requires—when release is not possible—that children be kept in the least restrictive setting licensed by a child welfare agency.

In 2014 the Obama administration chose to greatly expand family detention as a result of an influx of Central Americans seeking refuge in the United States.[8] Currently there are three family detention facilities in Dilley, Texas; in Karnes City, Texas; and in Berks County, Pennsylvania. Together, these three facilities have bed capacity for almost 3,500 parents and children. These facilities operate even though they likely violate the Flores Settlement Agreement. Generally, Flores prohibits the detention of immigrant minors in secure facilities that have not been licensed by a child welfare entity. None of the three existing family detention facilities are licensed by a child welfare entity, and all of them are "secure."

Further, the conditions in family detention are unacceptable. Over the last few years there has been extensive evidence presented by medical professionals who have testified that many detained families suffer from Post-Traumatic Stress Disorder (PTSD), depression and other cognitive disorders.[9] The American Immigration Council, AILA, and other organizations have submitted multiple complaints to the Department of Homeland Security (DHS) Office of Inspector General (OIG) and the Office of Civil Rights and Civil Liberties (OCRCL) documenting deplorable medical treatment for children and mothers, including pregnant women.[10] Even DHS' own Homeland Security Advisory Council called for U.S. Immigration and Customs Enforcement (ICE) to take the position that "detention is generally neither appropriate nor necessary for families- and that detention... [is] never in the best interest of children."[11] The Advisory Council further noted that "[n]umerous studies have documented how detention exacerbates existing mental trauma and is likely to have additional deleterious physical and mental health effects on immigrants–particularly traumatized persons like asylum seekers."[12]

Instead of looking for ways to expand and indefinitely detain parents and children, the administration should instead be shifting its resources to alternatives to detention (ATDs), which are widely used in the pre-trial criminal justice context.[13] ATDs are less expensive than detention; they cost an average

[7] "The Flores Settlement and Family Separation at the Border," Women's Refugee Commission, July 25, 2018, https://www.womensrefugeecommission.org/rights/resources/1647-the-flores-settlement-and-family-separation-at-the-border.
[8] Understanding the Central American Refugee Crisis.
[9] DHS OCRCL and OIG Complaint, "CARA OCRCL Complaint: Ongoing Concerns Regarding the Detention and Fast-Track Removal of Detain Children and Mothers Experiencing Symptoms of Trauma," March 29, 2016, https://www.aila.org/advo-media/press-releases/2016/cara-crcl-complaint-concerns-regarding-detention.
[10] "Increasing Numbers of Pregnant Women Facing Harm in Detention," American Immigration Council, September 26, 2017, https://www.americanimmigrationcouncil.org/advocacy/detained-pregnant-women; "Deplorable Medical Treatment at Family Detention Centers," American Immigration Council, July 30, 2015, https://www.americanimmigrationcouncil.org/news/deplorable-medical-treatment-family-detention-centers.
[11] Homeland Security Advisory Council, "Report of the ICE Advisory Committee on Family Residential Centers," Department of Homeland Security, October 7, 2016, 6, https://www.ice.gov/sites/default/files/documents/Report/2016/acfrc-report-final-102016.pdf.
[12] Ibid. 6-7.
[13] The Real Alternatives to Detention.

of $4.50 per day compared to $319.47 per day for family detention.[14] A recent report published by the American Immigration Council, *Detaining Families: A Study of Asylum Adjudication in Family Detention*, analyzed 15 years of government data and demonstrates that these alternatives to detention work well.[15] The report finds that family members who were released from detention had high compliance rates: 86 percent of released family members attended all of their court hearings that occurred during the study period. This rate was even higher among family members applying for asylum: 96 percent of asylum applicants had attended all their immigration court hearings.[16]

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When family detention expanded in 2014, the Council and AILA warned that detaining families was not the answer and un-American. As a country, we must choose policies in line with our values and end the unconscionable practice of locking up children and parents. Prolonged family detention must not be the answer to family separation. And family unity does not require imprisonment. The United States can maintain control of its borders, but also show compassion towards asylum seeking children and families in need of protection.

[14] Ibid.
[15] Ingrid Eagly, Esq., Steven Shafer, Esq. and Jana Whalley, Esq., "Detained Families: A Study of Asylum Adjudication in Family Detention," American Immigration Council, August 16, 2018, https://www.americanimmigrationcouncil.org/research/detaining-families-a-study-of-asylum-adjudication-in-family-detention.
[16] Ibid.

Senate Homeland Security and Governmental Affairs Committee

Written Testimony for the Record

From Drs. Scott Allen and Pamela McPherson

The Implications of the Reinterpretation of the Flores Settlement Agreement for Border Security and Illegal Immigration Incentives

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Chairman Johnson, Ranking Member McCaskill, and members of the Senate Homeland Security and Governmental Affairs Committee: thank you for the opportunity to provide testimony relevant to this hearing on *The Implications of the Reinterpretation of the Flores Settlement Agreement for Border Security and Illegal Immigration Incentives*, the subject matter of which relates to policies and practices regarding the apprehension, processing, care, custody, and release of alien juveniles.

Our names are Dr. Scott Allen and Dr. Pamela McPherson.[1] We currently serve as the medical and psychiatric subject matter experts in family detention for the Department of Homeland

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[1]I, Dr. Scott Allen, am a board certified in Internal Medicine and is a Fellow of the American College of Physicians. Dr. Allen is a Professor Emeritus of Medicine, a former Associate Dean of Academic Affairs and former Chair of the Department of Internal Medicine at the University of California Riverside School of Medicine. From 1997 to 2004, I was a full-time correctional physician for the Rhode Island Department of Corrections; for the final three years, I served as the State Medical Program. I have published over 25 peer-reviewed papers in academic journals related to prison health care and is a former Associate Editor of the International Journal of Prisoner Health Care. I am the court appointed monitor for the consent decree in litigation involving medical care at Riverside County Jails. I have consulted on detention health issues both domestically and internationally for the Open Society Institute and the International Committee of the Red Cross among others. I have worked with the Institute of Medicine on several workshops related to detainee healthcare and serve as a medical advisor to Physicians for Human Rights. I am the co-founder and co-director of the Center for Prisoner Health and Human Rights at Brown University and a Co-Investigator of the University of California Criminal Justice and Health Consortium. I am also the founder and medical director of the Access Clinic, a primary care medical home to adults with developmental disabilities.

I, Dr. Pamela McPherson, am a medical doctor triple boarded in general, child and adolescent, and forensic psychiatry. I have practiced medicine for over 30 years. I currently serve as the child and adolescent psychiatrist at the Shreveport Behavioral Health Center, a regional state sponsored clinic in northwest Louisiana. In addition to providing mental health care to children and their families, I teach child and adolescent psychiatry fellows and forensic psychiatry fellows at the LSU Health Sciences University in Shreveport, Louisiana as gratis faculty.

Security (DHS) Office of Civil Rights and Civil Liberties (CRCL). For the past four years, we have conducted ten investigations of family detention facilities, the Karnes and Dilley detention centers in Texas, the Berks detention center in Pennsylvania, and the one closed facility, Artesia in New Mexico. These investigations frequently revealed serious compliance issues resulting in direct harm to children, which we have documented in submitted reports to the CRCL.

In July 2018, prompted by the Administration's "zero-tolerance" immigration enforcement policy, we felt compelled to speak out to DHS leadership, the DHS Inspector General, and members of Congress, including the Senate and House Whistleblower Caucuses as well as the Senate and House Judiciary committee members, to prevent foreseeable physical and psychological harm to children in detention.[2] Our disclosures were not merely rooted in our understanding as medical and mental health experts about the lasting harm to children caused by detention generally—but by our direct familiarity with systemic problems in family detention centers.

Let us be clear: family detention places children and parents at risk of harm. This risk will be exacerbated by either increases in the numbers of families in detention or prolonged detention.

Fourteen medical professional associations, including the American Medical Association, the American Pediatric Association, that American Academy of Pediatrics, the American College of Physicians, the American Psychological Association, the American Psychiatric Association, the Association of Medical School Pediatric Department Chairs, and others, have all expressed unequivocal support for our call to prevent harm to immigrant children caused by detention and have similarly urged Congress to address this issue with the urgency it demands.[3]

I have qualified as a forensic psychiatry expert in juvenile and adult matters and have participated in research and presented at national and international conferences regarding the mental health of justice involved youth. I have a special interest in juvenile justice, specifically conditions of confinement. In addition to acting as an expert for the Civil Rights/Civil Liberties Office of DHS, I have served as an expert on mental health services to justice involved youth in pre-adjudicatory (San Francisco, Detroit, and Los Angeles) and post-adjudicatory (Montana, Louisiana, and New Mexico) juvenile facilities for the United States Department of Justice, Youth Law Center and the ACLU.

[2] See, e.g., Letter to Senators Grassley and Wyden from Drs. Allen and McPherson (July 17, 2018) (https://www.wyden.senate.gov/imo/media/doc/Doctors%20Congressional%20Disclosure%20SWC.pdf); Miriam Jordan, "Whistle-blowers Say Detaining Migrant Families 'Poses High Risk of Harm'" (July 18, 2018) (https://www.nytimes.com/2018/07/18/us/migrant-children-family-detention-doctors.html).

[3] See Letter to House Judiciary Committee, House Energy and Commerce Committee, House Homeland Security Committee, and House Appropriations Committee (July 24, 2018) (letter viewable at https://www.acponline.org/acp_policy/letters/letter_house_oversight_request_on_child_detention_centers_2018.pdf) ; Letter to Senate Judiciary Committee, Senate HELP Committee, Senate HSGAC Committee, and Senate

We are deeply concerned that, despite sharing with DHS and Congress specific information about problems in the family detention program and the foreseeable risk of harm posed to children by detention in such facilities, efforts are underway to expand and prolong detention by removing the minimal protection of a time limit for the detention of children currently afforded by the *Flores* Settlement Agreement ("FSA" or "*Flores*").

Even the *Flores* standards, which limit detention of children to 20 days among other protections, do not adequately protect children from harm posed by detention in family detention facilities. Any proposals that would expand or prolong detention in these facilities, rather than mandate its use only as a last resort option for innocent children, is, in the face of our disclosures about specific problems in the family detention system as well as the overwhelming medical consensus, the equivalent of knowingly endangering children.[4]

Since current immigration enforcement policy is increasing the numbers of children and families in detention, and the proposed rule change would further exacerbate the current risks of harm to children by removing a key protection of the time limit for the detention of children established under the Flores settlement, we offer our testimony to again share our insight about the ongoing and future threat of serious harm to children that is a direct consequence of the current implementation and proposed expansion of the family detention program.

Based on our direct experience investigating family detention facilities, and our expertise as medical and mental health professionals, we strongly believe that the policy of immigrant family and child detention should be ended rather than expanded. In the rarest cases, where absolutely no less restrictive alternative exists, children should be held for the briefest period possible in the least restrictive environment possible with provision of comprehensive age appropriate support services for children, including trauma informed care.

Appropriations Committee (July 24, 2018) (letter viewable at https://www.psychiatry.org/newsroom/news-releases/apa-joins-health-care-community-in-calling-on-congress-to-hold-hearings-on-treatment-of-children-separated-from-parents-at-border); American College of Physicians, *Internists Call for Congressional Oversight of Family Detention* (July 20, 2018), https://www.acponline.org/acp-newsroom/internists-call-for-congressional-oversight-of-family-detention.

[4] *See* DHS & HHS Proposed Rule, "Apprehension, Processing, Care, and Custody of Alien Minors and Unaccompanied Alien Children (September 7, 2018) (https://www.federalregister.gov/documents/2018/09/07/2018-19052/apprehension-processing-care-and-custody-of-alien-minors-and-unaccompanied-alien-children); Senators Grassley, Tillis and Cruz, "Fixing Flores agreement is the only solution to immigrant family separation and detention," *USA Today,* (July 29, 2018) (https://www.usatoday.com/story/opinion/2018/07/29/fix-flores-agreement-solution-immigrant-family-separation-detention-column/841342002/)

As experts of medical and mental health in detention settings, the fact that there are now more than 12,600 children in detention—a fivefold increase since May 2017, according to the *New York Times*[5]—means that children's health and safety is being directly threatened. These children all face an increased risk of significant physical and mental health consequences including, anxiety, depression, post-traumatic stress disorder and poor physical health.

To be clear, **the policy of detaining children with their families,** the substitute policy enacted after the inhumane policy of separating children from their parents was reversed after massive outrcy, **also poses high risk of harm.** Further, the prospect of indefinite detention, something specifically posed by the proposed DHS/HHS rulemaking petition to replace *Flores*, would heighten the likelihood of harm.

The use of the facilities for detention of immigrant families has been widely condemned by many, including several health professional societies such as the American Medical Association (AMA),[6] the American Academy of Pediatrics (AAP),[7] and the American College of Physicians (ACP).[8] Significantly, this position is shared by the DHS's own Advisory Committee on Family Residential Centers.[9] These are not theoretical warnings, but rather the result of peer-reviewed medical research.

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[5] Caitlin Dickerson, "Detention of Migrant Children Has Skyrocketed to Highest Levels Ever," *New York Times* (September 12, 2018) (https://www.nytimes.com/2018/09/12/us/migrant-children-detention.html)

[6] AMA Adopts New Policies to Improve Health of Immigrants and Refugees (June 12, 2017), https://www.ama-assn.org/ama-adopts-new-policies-improve-health-immigrants-and-refugees.

[7] American Academy of Pediatrics, *Detention of Immigrant Children* (March 2017), http://pediatrics.aappublications.org/content/early/2017/03/09/peds.2017-0483 ("The Department of Homeland Security facilities do not meet the basic standards for the care of children in residential settings. The recommendations in this statement call for limited exposure of any child to current Department of Homeland Security facilities (i.e., Customs and Border Protection and Immigration and Customs Enforcement facilities) and for longitudinal evaluation of the health consequences of detention of immigrant children in the United States.")

[8] ACP Says Family Detention Harms the Health of Children, Other Family Members (July 5, 2018), https://www.acponline.org/acp-newsroom/acp-says-family-detention-harms-the-health-of-children-other-family-members.

[9]Report of the DHS Advisory Committee on Family Residential Centers (September 30, 2016), https://www.ice.gov/sites/default/files/documents/Report/2016/ACFRC-sc-16093.pdf.

Written Testimony from Dr. Scott Allen and Dr. Pamela McPherson to Senate Homeland Security and Governmental Affairs Committee Hearing on *The Implications of the Reinterpretation of the Flores Settlement Agreement for Border Security and Illegal Immigration Incentives* (Hearing Date: September 18, 2018)

Our experience monitoring the existing family residential centers affirms this research. We regularly observed serious harm to children that was a direct result of gross mismanagement in the form of unsafe facilities and untrained and inadequate medical staff.

For example, in one case, a sixteen-month-old child lost 31.8% of his body weight over ten days during a diarrheal disease, yet the medical staff left him untreated. (For reference, a child losing ten percent of his body weight is critical.) In another case, we identified a 27-day-old infant who had been born in the field during the mother's journey be ignored by staff. Having never been examined by a physician this infant was at extremely high risk for medical problems but was not seen by a pediatrician until the child had a seizure in the facility five days after arrival. He was subsequently diagnosed at an outside hospital with an intracranial bleed likely present since birth and missed by the facility on arrival due to inadequately trained staff.

Another facility accidently vaccinated children *en masse* with adult doses of vaccine as a result of poor interagency coordination and the providers' unfamiliarity with pediatric dosing.

We also found numerous severe injuries to children's digits (including lacerations and fractures) due to the spring-loaded closure of heavy metal doors (the facility is a converted medium security prison); and, even when the problem was identified, mitigation efforts were slow and additional injuries occurred.

In another case, we discovered that a facility was using the medical housing unit for punitive segregation of families and children. The use of confinement in medical facilities to punish toddlers for days is not only a violation of medical autonomy and a violation of standards of medical practice, but it is in direct contradiction to the principles of trauma informed care promoted by the Substance Abuse and Mental Health Services Administration (SAMHSA) for detained persons.[10]

These individual findings are not unique. Instead, they represent systemic logistical problems which are at high risk of causing physical and mental harm to children. Detaining more children

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[10] See, e.g., https://www.samhsa.gov/criminal-juvenile-justice/behavioral-health-criminal-justice (Emerging Issues in Behavioral Health and the Criminal Justice System, SAMHSA website (last updated December 11, 2017)); https://store.samhsa.gov/shin/content/SMA11-4629/04-TraumaAndJustice.pdf (Leading Change: A Plan for SAMHSA's Roles and Actions 2011-2014, Strategic Initiative #2: Trauma and Justice.

for longer periods of time (as proposed by DHS/HHS in its rulemaking petition and by pending legislation seeking to replace *Flores*) will increase the numbers of children harmed.

Our direct experience with the DHS family detention program gives us great cause for concern about the logistical challenges associated with implementing the proposed changes, which will likely result in not only an increase in violations of federal detention standards, but an attendant increase in the risks of harm to children and parents.

Given the mental health and medical risks of confinement of children, with or without a parent(s), we are concerned that a hastily deployed expansion of family detention has unnecessarily placed children at imminent risk of significant mental health and medical harm. Also, with increases in detentions, the potential for all manner of abuse significantly rises due to challenges posed by inadequate facilities and staffing to address the needs of the growing population.

We have already filed a complaint with the DHS Office of the Inspector General, and have also registered our concerns with Cameron Quinn, the director of CRCL as well as to this Committee and other members of Congress. But the practice of incarceration continues to expand in the face of overwhelming evidence of the harm it poses to children. The events summarized above combined with the imminent threat of harm to children posed by detention trigger a professional obligation on our part to intervene to mitigate ongoing and prevent future avoidable harm to children.

Our specific complaints are as follows:

First, family detention is harmful to the health of families. The use of family detention in its current form ignores the recommendation of DHS's own advisory panel to limit or eliminate the use of family detention. Further, indefinite detention (something initially implemented by this Administration after ending its family separation policy), even for short periods, exacerbates the stress associated with detention and therefore increases the risk of harm. Indeed, even the constantly shifting practices around immigration are a huge source of stress for parents, and thus for children as well.

Second, expanding family detention carries a tremendous risk of harm to children. There has not been sufficient time for the DHS to properly devise a careful and detailed plan for how to keep children safe in the process of a rapid surge in family detention, so we fear that there is no detailed and vetted plan that ensures their safety. In light of past failures (at Artesia, in particular, which was so rife with problems that DHS ultimately heeded our recommendation to close the

facility), we would be skeptical of claims by planners that proper facilities and properly trained staff and services could be rapidly deployed. The existing facilities still have significant deficiencies that violate federal detention center standards as documented by our reports, despite repeated assurances that cited shortcomings will be corrected. Examples include:

- Facilities for the housing of children require careful and informed architectural design. Current family detention includes the retro-fitting of a medium security adult prison, and the spring-loaded heavy steel doors of the cells resulted in dozens of serious finger injuries to children (Karnes). Dilley, a facility that was supposed to be designed for family detention, lacked sufficient medical space resulting in the use of a gymnasium for medical overflow. Artesia had numerous problems with both medical space and residential space.

- DHS has likely not been able and/or will be unable in the future to staff these facilities in a timely manner with qualified pediatricians, psychiatrists, child and adolescent psychiatrists, mental health clinicians including those with expertise in treating children and toddlers, and pediatric nurses. Examples: Karnes failed to ever hire a pediatrician over the first years. Dilley has had difficulty sufficiently staffing enough pediatricians. Dilley was never able to hire a child and adolescent psychiatrist. Artesia had no pediatric providers and missed significant weight loss in a number of children and missed a critically dehydrated infant under their care. There is a nation-wide shortage of child and adolescent psychiatrists which is greatest in the rural areas where detention facilities are often located, making it nearly impossible to provide adequate mental health staffing at current, let alone future, detention facilities with increasing populations.

- DHS has likely not been able and/or will be unable in the future to rapidly hire needed bilingual teachers and meet the educational needs of youth.

- DHS has likely not been able and/or will be unable in the future to provide an adequate setting for observation of persons with suicidal ideations as this has proven difficult in some of the family detention centers.

- The current Family Residential Centers (FRC's) have mostly housed women with their children. Housing men, women and children will present new challenges, including compliance with the 2016 Revisions to the 2011 PBNDS enacted to prevent, detect and respond to sexual abuse and assault in detention facilities.

- DHS has likely not been able and/or will be unable in the future to provide appropriate training to custodial staff to care for at risk children, including recognizing signs of trauma and abuse. Misuse of medical housing unit during investigations at Dilley was an example of how ill prepared staff were to care for children.

- DHS has likely not been able and/or will be unable in the future to provide trauma informed care. Trauma informed care is the standard, facility-wide approach recommended for all detention settings and traumatized children (as has recently been affirmed in the 2018 State Department report on child victims of human trafficking). Trauma informed care was implemented only briefly then abandoned. Adequate screening for trauma was never implemented. HQ and facility staff at Dilley failed to develop an adequate plan for typical parenting challenges like two-year-old's biting or hitting peers and instead placed toddlers (with parent) in medical isolation for days. This practice is abusive and demonstrates how medical authority can be subverted in the confusion created by the numerous "authorities" controlling bits of facility operations while answering to HQ hundreds of miles away. DHS has no plan to address the diffusion of responsibility that leads to such reckless decision making.

- DHS has likely had difficulty and/or will have difficulty in the future providing language services for detainees, especially those who speak indigenous languages. This is a pervasive concern across all facilities There have been times when telephonic translation was not available in emergent situations. Telephonic translation is less than ideal and at times translators have mistranslated or added cultural biases.

- Lines of authority and coordination between different agencies and partners from programs and departments within government carry high risks of communication breakdown, lack of accountability and confusion during initial build-up and ongoing management of large programs with rapid turnover programs to house at risk children. For example, at Dilley, an IHSC nurse (Health Services Administrator) deployed a vaccination program without the approval of and during the absence of the Clinical Medical Authority and medical director, a pediatrician. The program resulted in the vaccination of numerous children with the incorrect dose of vaccine (adult doses were given) because none of the providers were familiar with the labels and markings of pediatric vaccines.

Third, Family Residential Standards (FRS) have not been updated to reflect all known risks of harm from separation and detention. Specifically:

- The FRS fail to reference the need for trauma informed care programming. FRS also fail to include language barring separation of children from their parents (except in cases where the parent represents a threat to the child).

- The FRS fail to provide for the use of standardized rating scales to screen of trauma as recommended by the American Academy of Pediatrics, DHS's Advisory Committee on Family Residential Facilities and our reports to CRCL.

- The FRS fail to state that detention of children, with or without a parent, is harmful to their health and development and should therefore only be used when there is no less restrictive community-based alternative and for the shortest possible time.

- The FRS fail to identify the additional harms of indefinite detention. Indefinite detention is known to heighten anxiety and stress of detention. In the cases where family detention cannot be avoided, strict caps (such as 20 days required by Flores) should be incorporated into the standard.

Our fourth and final complaint is that dignity and justice – basic principles of medical ethics –have largely been ignored. There is a community standard that demands children be kept in the "least restrictive environment." However, the DHS has not truly exhausted all less restrictive alternatives for innocent children of parents charged with misdemeanor crimes. Further, the DHS has not satisfactorily answered if it is absolutely necessary or justifiable to detain children because of a misdemeanor crime allegedly committed by a parent nor have they even sufficiently explored less restrictive alternatives. Placing an innocent child in confinement because of the action of a parent is unjust and places children in harm's way to advance a message of deterrence.

The problem with family detention is not in the failure of the many good people who have labored tirelessly to make the existing centers better; it is not just the risk posed by the conditions of confinement. Rather, the fundamental flaw of family detention is the incarceration of innocent children itself. In our professional opinion, there is no amount of programming that can ameliorate the harms created by the very act of confining children to detention centers.

Detention of innocent children should never occur in a civilized society, especially if there are less restrictive options, because the risk of harm to children simply cannot be justified.

This past week, American Psychological Association President Jessica Henderson Daniel released a statement declaring that "Research has shown that immigrant detainees are particularly vulnerable to psychological stress. Furthermore, *the longer the detention period, the greater the risk of depression and other mental health symptoms* for immigrants who were previously exposed to interpersonal trauma."[Emphasis added][11] As medical professionals, we further assert that research has demonstrated that *indefinite detention*, even for short periods, exacerbates the toxic stress and psychological harms of confinement.

To conclude, the implementation of the "zero tolerance" immigration policy and the traumatizing of thousands of children by either forced separation or detention raises real concerns about the ability of the federal or contractor staff to modulate and in any meaningful way impact this policy as it is hastily executed, no matter how well-intentioned or dedicated they may be to minimizing the risk of harm to children. The policy will lead directly to dangerous conditions for thousands of children.

The ethics of our profession are clear that we have a professional duty not only to intervene to prevent physical and mental harm to children, but to speak out against assaults on their dignity as well. We also have a professional duty as doctors to speak out against injustice where authority discriminates against vulnerable populations, especially when it involves children. As DHS experts, our duty is particularly pressing and enshrined by whistleblower protections that encourage federal employees and contractors to report gross mismanagement, legal violations and substantial and specific threats to health and safety. As such, we urge you, as those with the power to protect innocent children from foreseeable harm, to oppose the expansion of family detention and the proposed prolongation of that harmful practice in favor of an immigration policy that actively prevents rather than predictably produces harm.

Thank you again for this opportunity to submit written testimony.

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[11]Statement of APA President Regarding Administration's Proposal to Detain Child Migrants Longer Than Legally Allowed (September 6, 2018) (http://www.apa.org/news/press/releases/2018/09/detain-child-migrants.aspx)



CWS Statement to the U.S. Senate Homeland Security and Governmental Affairs Committee pertaining to its hearing entitled *The Implications of the Reinterpretation of the Flores Settlement Agreement for Border Security and Illegal Immigration Incentives*

Tuesday, September 18, 2018

As a 72-year old humanitarian organization representing 37 Protestant, Anglican and Orthodox communions and 22 refugee resettlement offices across the United States, Church World Service urges Committee Members to do everything in their power to end family incarceration, protect immigrant children, terminate the administration's "zero tolerance" policy, and ensure separated families are immediately reunified. CWS affirms the right of individuals fleeing persecution to seek safety and calls on Congress to recognize the importance of access to protection. To threaten families who are fleeing harm and seeking protection at our borders with separation, incarceration, and prosecution is immoral and unjust.

CWS remains deeply concerned about policies that have caused family separation at ports of entry and between ports of entry, including of asylum seekers, as well as policies that detain and prosecute parents for migration-related offenses. Tearing children away from their parents, absent a documented child protection concern, is unconscionable. Equally troubling is the expansion of family incarceration, which is plagued with systemic abuse and life-threatening, inadequate access to medical care. These conditions are unacceptable, especially for children, pregnant or nursing mothers, and others with serious medical conditions. Reports have documented guards using the threat of separation as a method of discipline, as well as children experiencing signs of psychological and physical trauma. The American Association of Pediatrics found that family detention facilities do not meet the basic standards for the care of children in residential settings and "no child should be in detention centers or separated from parents." Similar policies of detaining asylum-seeking families to deter their migration have already been found by a U.S. court to violate U.S. law.

CWS urges Senators to reject any proposal that would expand family incarceration or allow for children to be detained indefinitely. Proposals like this undermine longstanding child welfare protections that conclude children should not be detained for longer than 20 days. Moreover, family separation would persist, as they do nothing to end the "zero tolerance" policy by the Department of Justice (DOJ) and offers broad license to the Department of Homeland Security (DHS), Customs and Border Protection (CBP) to separate families. Front-line agents untrained in child welfare cannot determine if it is appropriate to separate children from their parents or refuse their asylum claim. Any effort that would authorize the construction of family detention centers, or re-prioritize the fast-tracking of immigration cases undermines due process and would result in deporting families back to harm. The Flores Settlement agreement mandates that children are not kept in unlicensed detention or restrictive settings for more than 20 days. This is an important standard and should be upheld; eliminating protections for children is not a solution. We oppose using the plight of children and families as leverage to end child welfare protections or expand family detention.

Family incarceration is not a solution to family separation. To the extent the Senate is considering alternatives to family detention, CWS urges Senators to utilize non-restrictive, community-based alternatives to detention (ATDs) as the most appropriate response for families, children, and asylum seekers. Most families crossing the border do not pose a flight risk, and need not be funneled into detention or restrictive custody. Community-based ATDs effectively reunite individuals with family members currently living in the U.S., connect people with faith-based hospitality communities, or invest in family case management which helps people navigate the legal system. ATDs are less expensive and allow for individuals to have access to services in the community while they wait for fair adjudication of their immigration and asylum claims. When utilized, ATDs prove to be effective. For example, the Family Case Management Program, which allowed families to be released and receive intensive case supervision; help with child care and education; connections to legal counsel; and more rather than simply be detained. The program was 99 percent effective at having families show up for check-ins and court appearances and also ensured departure from the United States for those who did not win asylum. And, at a cost of only $36 per day per family, it was far cheaper than family detention, which costs over $300 per person per day. While the Trump administration terminated this program in June 2017, the Committee should direct the administration to restore the successful FCMP. CWS is committed to utilizing its network of refugee and immigrant serving community-based organizations in assisting these families with case management.

Pouring more resources into the machinery of deportation and detention will not solve an outdated, punitive immigration system. As we seek an end to family separation, we urge Senators to see the administration immediately reunite the hundreds of families who remain separated. We also recognize that at least 460 parents have been deported - without a plan for family reunification. Additional oversight of these agencies and border enforcement is essential to ensure adherence to U.S. asylum and international law, while reducing funding for immigration detention, deportation, and border militarization. We also seek an expansion of access to counsel for children and their parents to ensure they have the opportunity to present their asylum claims and seek relief from persecution and life-threatening violence.

CWS urges the Committee to do everything in its power to see the administration immediately end its "zero tolerance" policy of prosecuting adults for migration-related offenses and ensure swift family reunification for families already separated. CWS calls on all Senators to uphold our moral and legal obligations for vulnerable populations like asylum seekers and unaccompanied children.



FCNL Statement to the U.S. Senate Homeland Security and Governmental Affairs Committee, pertaining to its hearing:

The Implications of the Reinterpretation of the Flores Settlement Agreement for Border Security and Illegal Immigration Incentives

Tuesday, September 18, 2018

FCNL urges members of the Homeland Security and Governmental Affairs Committee to reject replacing the cruel policy of forcible family separation with the equally devastating practice of family detention. Members of the Religious Society of Friends (Quakers) have called on the Friends Committee on National Legislation (FCNL) to pursue policies that promote and protect the rights and safety of all immigrants, refugees, and migrants. The administration's "zero-tolerance" criminal prosecution policy resulted in the cruel and abrupt separation of families without route for reunification. Its intent and impact violates the core of FCNL's foundational Quaker beliefs to respect the Divine in every person. Families should neither be separated, nor incarcerated. Family detention is not a viable nor humane solution to forcible family separation.

The answer to this self-created crisis is an end to "zero-tolerance" prosecution and a full embrace of community-based alternatives to detention for families and asylum seekers. Implementing "zero-tolerance" for family units ignores the administration's responsibility to practice prosecutorial discretion, an essential part of a fair justice system. Strong, healthy families are a core underpinning for communities to flourish spiritually and economically. Our elected leaders must design federal policies to protect the most vulnerable in our society; there are few more susceptible to harm than children.

The *Flores* settlement agreement is not a loophole, it is a legal safeguard for children. *Flores* – and its legal reiterations – requires the government to prioritize a child's welfare when they fall into federal custody, so that children are not housed in inappropriate and unsafe conditions. Under *Flores,* children must be released from custody without delay with preference for release to a parent, or, if necessary, be held in the least restrictive and appropriate setting licensed by a child welfare entity. *Flores* outlines the *minimum* standards that this country should practice in its treatment of migrant children. These standards should be abided by, even strengthened. The spirit of *Flores* should not be misinterpreted in a quest to expand family detention.

FCNL urges members to speak out against the administration's attempt to circumvent *Flores* through the recent proposed regulation and reject similar legislation. Child welfare must be front of mind when implementing policy. It is proven that detention has harmful, long-term impacts on children. Even one week in detention results in lasting psychological trauma. It is unconscionable given this knowledge and our nation's moral fortitude that the administration is not deterred from employing family detention and seeking its expansion.

FRIENDS COMMITTEE ON NATIONAL LEGISLATION
245 2ND STREET NE » WASHINGTON, DC 20002 » (800) 630-1330 » FCNL.ORG

It is essential that individuals, families, and children seeking safety at our southern border are given a full and fair opportunity to seek asylum. If our nation does not afford due process to those who are most in need we are failing in our basic duty to fellow children of God and degrading our global leadership on human rights protection. We urge members of Congress to provide oversight to the Department of Homeland Security to ensure they are protecting access to asylum, as outlined in both international and U.S. law.

We urge members to obligate the administration to utilize and expand community-based alternatives to detention for families and asylum seekers. Children should be free and experience love, not kept in the confines of a secure detention facilities. There are proven, cost-efficient ways to keep children with their family members and abide by our immigration laws and asylum obligations. The Family Case Management Program (FCMP) was ended with little explanation not halfway through a pilot program in June 2017. FCMP helped families navigate their asylum and removal proceedings with support from case managers and communities. It was 99% effective for court appearances and ICE check ins for all who were enrolled in the program.

Communities of faith have always been and will continue to be forefront of providing care to the 'least of these' in our society (Matthew 25:40). We are ready to be partners in investing in, and strengthening the efficacy and lifespan of, community-based alternatives to immigrant detention. We urge Congress partner with us in this effort and reject all attempts to expand family detention.

FRIENDS COMMITTEE ON NATIONAL LEGISLATION
245 2ND STREET NE » WASHINGTON, DC 20002 » (800) 630-1330 » FCNL.ORG

Statement for the Record

Kids in Need of Defense (KIND)

on

"The Implications of the Reinterpretation of the Flores Settlement Agreement for Border Security and Illegal Immigration Incentives"

U.S. Senate Committee on Homeland Security and Government Affairs

September 18, 2018

Kids in Need of Defense (KIND) was founded by the Microsoft Corporation and the United Nations Refugee Agency (UNHCR) Special Envoy Angelina Jolie, and is the leading national organization that works to ensure that no refugee or immigrant child faces immigration court alone. We do this in partnership with 526 law firms, corporate legal departments, law schools, and bar associations, which provide pro bono representation to unaccompanied children referred to KIND for assistance in their deportation proceedings. KIND has received more than 16,000 child referrals since we opened our doors in 2009, and trained over 25,000 pro bono attorneys. KIND also helps children who are returning to their home countries through deportation or voluntary departure to do so safely and to reintegrate into their home communities. Through our reintegration pilot project in Guatemala and Honduras, we place children with our local nongovernmental organization partners, which provide vital social services, including family reunification, school enrollment, skills training, and counseling. KIND also advocates to change law, policy, and practices to improve the protection of unaccompanied children in the United States, and is working to build a stronger regional protection framework throughout Central America and Mexico.

Mistreatment of Migrant Children in Detention Before the Flores Settlement Agreement

In 1985, a 15-year-old girl named Jenny Lisette Flores arrived in the United States. Jenny's home country, El Salvador, was embroiled in a bitter civil war. She came to the United States in search of safety and with the hope of reuniting with her aunt. However, instead of being quickly reunited with her family, the government held Jenny in detention for months. During this time, Jenny was housed with adults and repeatedly strip-searched. The government refused to release Jenny to her aunt because she was not Jenny's legal guardian. With the help of the American Civil Liberties Union, Jenny sued the government, challenging its detention and release practices. In 1997, the suit resulted in the Flores Settlement Agreement.

In the *Flores* settlement, the government agreed to adhere to at least a minimal level of care for children in federal immigration custody. The basic standards set out in the agreement

require the government to provide children in immigration custody with basic necessities, such as food, water, bathrooms, and emergency health services. The settlement also requires that children are placed in the least restrictive setting possible, with a prioritization for release. For unaccompanied children, this typically means placement in a licensed program operated through a contract with the Office of Refugee Resettlement (ORR). ORR then works to identify and place unaccompanied children with approved sponsors willing to care for them during their immigration court proceedings. These basic protections have allowed children to live in a more supportive and nurturing environment during their time of need.

Subsequent court rulings have clarified that while the *Flores* settlement requires the transfer of most children to licensed programs within 3 to 5 days, the government may in limited circumstances, such as an influx or emergency, hold children in unlicensed, secure facilities for longer periods. The court has held that the government may hold children in unlicensed, secure family detention facilities for approximately 20 days, if this period reflects the government's most expeditious efforts to transfer children to a more appropriate setting. The *Flores* settlement has stood for the past 20 years, underscoring the legitimacy and importance of the agreement.

Detention of children does not only cause unnecessary trauma and harm to children, but it hinders their ability to seek assistance with asserting a legal claim to humanitarian protection. Immigration detention makes it difficult for a child to recover from traumatic experiences children have faced in their home countries or en route to the United States. It makes it hard for them to recount past experiences of persecution or abuse, which are key to proving their claims for legal relief from deportation.

KIND believes it is important (1) for the government to preserve the minimum standards of care mandated in the *Flores* settlement and (2) for Congress to maintain its necessary oversight of DHS and HHS facilities that house migrant children. As explained below, strong oversight of these facilities is particularly important in light of ongoing reports of sexual and physical abuse, mistreatment, overuse of secure detention, and the denial of basic necessities and fair treatment in government custody.

Preserving Detention Limits and Other Basic Protections for Migrant Children

The *Flores* settlement provides basic protections to children that reflect the broad understanding, embodied in domestic and international child welfare law, that detention poses significant consequences for children and should be generally avoided. The courts, as well as the general public, have rejected the Administration's forced separation of parents from their children. Indefinitely jailing migrant children is similarly unacceptable.

Detention traumatizes children and should be avoided at all costs. In 2017, the American Academy of Pediatrics explained that detention hinders child development and causes psychological issues. Some unaccompanied children suffer from depression and post-traumatic stress disorder. Other kids contemplate suicide. The potential harm detention poses for children underscores the ongoing importance of protections mandated by *Flores*, including restrictions on prolonged detention, whether or not a child is accompanied by a parent or legal guardian.

DHS is well aware that detention is generally inappropriate for children. In October 2016, the ICE Advisory Committee on Family Residential Centers, organized under the authority of DHS, determined that "detention or the separation of families for the purposes of immigration enforcement or management are never in the best interest of children." Accordingly, the advisory committee recommended that "DHS should discontinue the general use of family detention, reserving it for rare cases . . ." It cannot become the norm for children to be indefinitely held in conditions the government knows to be against their best interests.

Oversight of DHS and HHS Facilities Holding Migrant Children

KIND believes it is completely inappropriate to house children in detention centers designed for adults. Accordingly, it appreciates that Congress wisely decided to grant ORR authority for the care and custody of unaccompanied children. Still, all government facilities housing migrant children, whether operated by HHS or DHS, require strict and consistent oversight. The need for strong oversight across the board is especially pressing considering the troubling stories that have come to light regarding the conditions and management of facilities in which children are held.

To be blunt: migrant children have suffered physical, verbal, and sexual abuse while housed in government facilities. A Southwest Key guard sexually abused a young girl in the middle of the night.[1] Another guard from the Southwest Key Casa Kokopelli facility was recently convicted of abusing multiple boys, including a child who was "in medical isolation."[2] Children in other facilities have been shackled for days on end.[3] They have been pepper sprayed.[4] They have been "strapped into chairs, and [had] bags placed over their heads."[5] These abuses cannot and should not be accepted or ignored.

Select government facilities are committing horrific healthcare violations. Some children at the Shiloh Residential Treatment Center are forcibly injected with sedatives, while others are required to take large amounts of pills every day.[6] As a result, children suffer from rapid weight

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[1] Nina Golgowski, *Employee at Migrant Children's Shelter Accused of Sexually Abusing Girl*, HUFFINGTON POST (Aug. 2, 2018), https://www.huffingtonpost.com/entry/sexual-abuse-migrant-children-facility_us_5b62f265e4b0fd5c73d6bec9.

[2] Bree Burkitt, *Jury Finds Southwest Key Employee Guilty of Molesting Unaccompanied Minors at Mesa Shelter*, AZ CENTRAL (Sept. 10, 2018), https://www.azcentral.com/story/news/politics/immigration/2018/09/10/southwest-key-worker-convicted-abusing-minors-arizona-migrant-shelter/1258594002/.

[3] Roque Planas and Hayley Miller, *Migrant Children Report Physical, Verbal Abuse in at Least 3 Federal Detention Centers*, HUFFINGTON POST (June 21, 2018), https://www.huffingtonpost.com/entry/migrant-children-abuse-detention-centers_us_5b2bc787e4b0040e2740b1b9; Brief for Plaintiff at 6, Flores v. Sessions, No. CV 84-4544-DMG (AGRx) (C.D. Cal. May 18, 2018), ECF No. 409-1, https://www.centerforhumanrights.org/PDFs/ORR_MTE2_Brief%5bDkt409-1%5d041618.pdf.

[4] Planas and Miller, *supra* note 3; Brief for Plaintiff, *supra* note 3, at 6.

[5] Planas and Miller, *supra* note 3; Brief for Plaintiff, *supra* note 3, at 6.

[6] Blake Ellis et. al., *Handcuffs, Assaults, and Drugs Called "Vitamins": Children Allege Grave Abuse at Migrant Detention Facilities*, CNN (June 21, 2018), https://www.cnn.com/2018/06/21/us/undocumented-migrant-children-detention-facilities-abuse-invs/index.html; Roque Planas, *Migrant Children Drugged Without Consent at Federal Centers, Court Documents Show*, HUFFINGTON POST (June 20, 2018),

gain and other side effects.[7] A young girl recently died after leaving an ICE facility.[8] Her death may have resulted in part from negligent care while in government detention.[9] Strong oversight of DHS and HHS facilities would help to recognize and address these troubling practices.

The living conditions in certain border facilities are shocking and unacceptable. Children have been served rotten food.[10] Baby formula is out of date.[11] Mothers and children are packed into small cells with other migrants.[12] In 2015, federal Judge Dolly M. Gee characterized certain facilities as having "widespread and deplorable conditions."[13] These failures demonstrate the need for rigorous and consistent oversight. Although these abuses are sadly not necessarily new, they still must be stopped. Therefore, we need greater oversight of *any* entity that holds children, not greater leeway for the government to avoid compliance with existing standards and child welfare practice.

Conclusion

In order to best protect the health and safety of young children, it is vital to preserve detention limits and other protections embodied in the *Flores* settlement. Additionally, it is critical that Congress continue to monitor DHS and HHS' policies and actions related to childhood detention. The recent incidents of abuse, mistreatment, and inexcusable conditions demonstrate the need for vigilant oversight.

Children and families seeking asylum in the United States are often escaping dangerous and violent conditions in their home countries. Detention will not effectively deter these asylum seekers from seeking refuge. Instead of focusing on policies of deterrence, it is important to remember the purpose behind the *Flores* settlement: the protection of vulnerable children.

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https://www.huffingtonpost.com/entry/migrant-children-drugged-without-parental-consent-at-government-institutions-court-documents-show_us_5b2a9e87e4b0321a01cd4dd3.

[7] Planas, *supra* note 6.

[8] Maria Sacchetti, *Migrant Child Died After Release from Detention, Attorney Group Alleges*, WASHINGTON POST (Aug. 1, 2018), https://www.washingtonpost.com/local/immigration/migrant-child-reportedly-dies-after-release-from-ice-family-detention-facility/2018/08/01/6a9515ea-95a8-11e8-a679-b09212fb69c2_story.html?utm_term=.9866b8ba7320.

[9] *Id.*

[10] Patricia Hurtado, *Migrant Children Describe Abuse, Hunger in U.S. Detention Facilities*, BLOOMBERG (July 24, 2018), https://www.bloomberg.com/news/articles/2018-07-24/migrant-children-detail-rough-reality-as-judge-weighs-monitoring.

[11] *Id.*

[12] *Id.*

[13] Julia Preston, *Judge Orders Release of Immigrant Children Detained by U.S.*, N.Y. TIMES (July 25, 2015), https://www.nytimes.com/2015/07/26/us/detained-immigrant-children-judge-dolly-gee-ruling.html; Civil Minutes - General at 18, *Flores v. Johnson*, No. CV 85-4544-DMG (AGRx) (C.D. Cal. July 24, 2015), EFC No. 177, http://graphics8.nytimes.com/packages/pdf/us/FloresRuling.pdf.



Lutheran Immigration
and Refugee Service

Written Statement of

Lutheran Immigration and Refugee Service

For a Hearing of the Senate Committee on Homeland Security and Government Affairs Permanent Subcommittee on Investigations

"The Implications of the Reinterpretation of the Flores Settlement Agreement for Border Security and Illegal Immigration Incentives"

Tuesday, September 18, 2018
Dirksen Senate Office Building 342

Lutheran Immigration and Refugee Service

Lutheran Immigration and Refugee Service **(LIRS)** appreciates the Senate Homeland Security & Government Affairs, Permanent Subcommittee on Investigations, for providing us an opportunity to submit this written statement for the record.

LIRS has worked with unaccompanied refugee and immigrant children in the United States for nearly forty years. We have been working with the Office of Refugee Resettlement (ORR) since they first were assigned custody of unaccompanied children in 2003. Throughout the recent child separation crisis brought about due to the administration's "zero tolerance" policy, LIRS assisted with Phase 1 and 2 of family reunification without financial assistance from the federal government. We believe, and have stated for years, that the safest and best place for children is with their families and not in detention.

From our historical vantage point and first-hand experiences working with unaccompanied children, LIRS puts forth this statement for the record to underscore the importance of maintaining child welfare protections in full accordance to the Flores Settlement Agreement (FSA). LIRS is concerned with the recently released Department of Homeland Security (DHS) and the Health and Human Services (HHS) regulations because, if adopted, the regulations would not only permit families to be detained, they would provide conditions that would allow for the indefinite detention of children. Detaining families is no solution to the family separation crisis. As a nation that prides itself on family values we have a duty, the intelligence and capability to ensure that we protect children, comply with our humanitarian obligations and laws.

At the backdrop to our statement is the recognition that the main pull factors that bring migrants from the Northern Triangle to the US include: (1) El Salvador, Honduras and Guatemala are weak states; (2) there has been an increase in gang violence and extortion that has endangered innocent citizens and business owners; (3) female victims of domestic abuse and violence are extremely vulnerable because of societal values and the government's lack of interest in prosecuting and protecting women from further violence. Thus, the main driver of families fleeing the Northern Triangle is not because they believe they can outwit our immigration system. Rather, what is precipitating higher rates of migration to the United States from the Northern Triangle region is based on credible fear migrants have for their individual safety and/or the safety of their family unit. As such, the government's proposed regulations to dismantle the FSA will not deter migrants who are making life-death decisions and will instead expose individuals and families to additional trauma.

Detention Practices and Legal and Moral Duties

Based on our experiences, medical and psychological reports[1], legal framework, and past practices, LIRS maintains that under no circumstances is short or long-term detention in the best interests of the child. We contend that placing children in the least restrictive setting that is in the best interests of the child is more appropriate. This does not include family detention. Best practice standards include home-like settings, such as, community based foster care or group care where there are no more than 20-25 children and youth at one location.

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[1] Miller, D. July 24, 2018. Pediatricians Speak Out: Detention is not the Answer to Family Separation. *AAP News and Journals* (Online at: http://www.aappublications.org/news/2018/07/24/washington072418).

As a way forward, we would like for the FSA to be honored and protected, the HHS to be more vigilant and transparent when addressing child abuse allegations at government licensed facilities, and for the Family Case Management Program (FCMP) to be reinstituted.

Children are vulnerable and deserve special care while they are in the custody of the government until the end of their immigration proceedings. That the Department of Health and Human Services (HHS) has an obligation to protect and care for unaccompanied children is a principle enshrined in HHS policy guidelines and law. Yet, there have been many news reports that highlight the inhumane conditions at detention facilities and instances of mental, physical and sexual abuse of children in government custody.

Children and parents do not have to be detained.

Not only does detaining children expose them to risks of abuse and disease, medical experts agree that detention is detrimental to the mental and physical health and wellbeing of children. The administration's own medical doctor have also weighed in and voiced their concerns on the physical and psychological harms of separating children from their parents and placing them into detention.

Alternatives to detention, such as the Family Case Management Program (FCMP) have proven to be successful, more child-friendly and a cost-effective alternative to detention. FCMP was terminated by the administration despite the fact that almost all individuals who participated on the program attended their immigration court hearings and appointments. For instance, the Office of Inspector General reports that 99% of individuals who participated in the FCMP attended their check in appointments with ICE and 100% attended their court hearings[2]. An additional benefit of FCMP is cost. Compared to detaining families, which costs the government $300 per day, the FCMP only costs $36 per day.

Unaccompanied Children and Legal Justice

The immigration legal justice system for unaccompanied minors needs to be improved. According to the Department of Justice, there are not enough judges and courtrooms to process unaccompanied children cases and this has contributed to a backlog of cases. Over 8,000 cases have taken three years to complete.

A solution to resolving the immigration backlog of cases is necessary for everyone, however, LIRS is concerned that fast-tracking unaccompanied childrens' cases in court will exacerbate the problem of children being forced to act as their own legal representative. In all areas of our legal system, children are recognized as deserving of special protection and consideration, including immigration law.

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[2] *U.S. Immigration and Customs Enforcement's Award of the Family Case Management Program Contract*. Office of Inspector General Report. November 30, 2017. (Online at: https://www.oig.dhs.gov/sites/default/files/assets/2017-12/OIG-18-22-Nov17.pdf).

According to research carried out by Syracuse University[3], children who are unrepresented at immigration court are more likely to be deported than those who are represented by an attorney.

Summary of Key Recommendations

As highlighted, children suffer harm from both short and long term detention. Detaining families together is not a solution to the family separation crisis and medical experts agree that detention is harmful to the health and mental well-being of children. The FSA should be upheld as it provides that if children are detained that they are held in the 'least restrictive setting' and in a licensed facility that is not secure.

A holistic approach must be adopted for improving the immigration justice system, as opposed to establishing a new detention system to detain families, as the DHS-HHS regulations propose. Requiring children to be detained throughout their immigration proceedings is not a solution. This will only result in longer detention for children. Problems, such as, the fact that there are not enough immigration judges and courts throughout the nation to address the backlog of immigration cases should be investigated. Further, alternatives to detention have proven to be an effective and cost-effective means of ensuring that migrants attend their court hearings.

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[3] TRAC Immigration. 2014. Representation for Unaccompanied Children in Immigration Court. (Online at: http://trac.syr.edu/immigration/reports/371/); TRAC Immigration. 2017. Children: Amid a Growing Court Backlog Many Still Unrepresented (Online at: http://trac.syr.edu/immigration/reports/482/).

The Honorable Chairman Ron Johnson
U.S. Senate Committee on Homeland Security
and Governmental Affairs
Washington, DC 20510

The Honorable Ranking Member Claire McCaskill
U.S. Senate Committee on Homeland Security
and Governmental Affairs
Washington, DC 20510

CC: Members of the U.S. Senate Committee on Homeland Security and Governmental Affairs

September 14, 2018

Dear Chairman Johnson, Ranking Member McCaskill, and Members of the U.S. Senate Committee on Homeland Security and Governmental Affairs:

We, the undersigned organizations who work on behalf of, serve, or provide care for asylum seekers, refugees, immigrants, and/or children write to urge you and your colleagues to oppose any legislation that would expand the scale and length of immigrant family detention or overturn the child protection principles currently governing the treatment of migrant children in custody.

In its June 20, 2018 Executive Order[1], the Trump administration made clear that it seeks to turn to family detention as the answer to its policies of separating families apprehended - often while legally seeking asylum - at the border. The administration has sought to modify the 1997 *Flores* Settlement Agreement (*Flores*) in order to be able to detain more children with their parents, to do so for longer periods of time, and in conditions that have clearly been demonstrated to be unsafe and inadequate. Stopped by the court,[2] it has proposed federal regulations[3] that would gut the protections that form the heart of those prescribed by *Flores*. Our organizations are deeply concerned at these plans, as well as any legislative efforts that would similarly permit such expanded and prolonged detention in inappropriate conditions, including by undermining key elements of the *Flores* Settlement Agreement.

The *Flores* Settlement Agreement resulted from over a decade of litigation over the government's policies of detaining children. Prior to *Flores*, children could be detained with unrelated adults in prison-like facilities, had little to no access to education or recreation, be subject to strip searches, and more.[4] The Agreement, which applies to all children - unaccompanied and accompanied - in U.S. immigration custody, is grounded in fundamental child protection principles, and aims to ensure that children are not subject to prolonged detention, that when necessary they are held in appropriate facilities that are not secure and are licensed by a child welfare entity, that they receive appropriate care, and that their due process rights are respected. Any measure that would undermine or overturn *Flores* creates the very real risk that children will be harmed and traumatized as a result.

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[1] *Executive Order: Affording Congress an Opportunity to Address Family Separation*, The White House, June 20, 2018, https://www.whitehouse.gov/presidential-actions/affording-congress-opportunity-address-family-separation/.
[2] Josh Gerstein, "Judge rejects Trump request to alter agreement on release of immigrant kids," *Politico*, July 9, 2018, https://www.politico.com/story/2018/07/09/judge-rejects-trump-request-flores-immigrant-children-704019.
[3] Notice of Proposed Rulemaking: Apprehension, Processing, Care, and Custody of Alien Minors and Unaccompanied Children, September 7, 2018. https://www.gpo.gov/fdsys/pkg/FR-2018-09-07/pdf/2018-19052.pdf.
[4] United States District Court Central District of California, *Flores v. Meese*, July 11, 1985, Flores v. Reno, National Center for Youth Law, https://youthlaw.org/wp-content/uploads/1997/05/Flores-Complaint.pdf.

The Department of Homeland Security (DHS) currently operates three family detention facilities: two in Texas, and a smaller facility in Pennsylvania. In addition, DHS also operated a family detention facility in Artesia, New Mexico in 2014, and used the T. Don Hutto facility in Texas for family detention from 2006 to 2009. Numerous reports and complaints document the extensive concerns over treatment, care, and length of custody in DHS's family detention facilities, none of which are licensed by a child welfare entity and all of which are secure.[5] So inappropriate are the conditions in family detention facilities and DHS's practices concerning family detention that Immigration and Customs Enforcement's (ICE) own Advisory Committee on Family Residential Centers (ACFRC) - a committee of subject matter experts that was formed to independently examine and issue guidance to ICE on how to improve family detention practices - issued as its first recommendation that ICE should discontinue the practice.[6] The American Academy of Pediatrics has similarly found that children in the custody of their parents "should never be detained."[7] More recently, two physicians who work with DHS's Office for Civil Rights and Civil Liberties and have extensively visited family detention centers also spoke out based on their concerns over the potential expansion of family detention. The physicians found egregious examples of inadequate care that included severe weight loss in children detained in family detention centers as well as "an infant with bleeding of the brain that went undiagnosed for five days."[8]

Family detention, like all immigration detention, also severely inhibits the ability to obtain legal relief. Existing detention centers are often in remote locations with extremely limited access to legal information and legal counsel. Only 14 percent of those in immigration detention have a lawyer, and the chances of success increase ten-fold with representation.[9] Family detention traumatizes and re-traumatizes children and their parents, who are already often fleeing a dangerous and traumatic situation and yet forced to navigate the U.S. asylum process - and to explain their story to a judge and opposing counsel - without any legal assistance. These challenges are exacerbated further in cases where a family member speaks an indigenous language or may not be able to read or write.

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[5] Women's Refugee Commission and Lutheran Immigration and Refugee Service, *Locking Up Family Values, Again*, Women's Refugee Commission, October 2014, https://www.womensrefugeecommission.org/resources/document/1085-locking-up-family-values-again; Plaint.pdf; Human Rights First, *Long-Term Detention of Mothers and Children in Pennsylvania*, Human Rights First, August 19, 2016, https://www.humanrightsfirst.org/resource/long-term-detention-mothers-and-children-pennsylvania; Complaint: The Traumatizing Impact of Family Detention on Mental Health of Children and Mothers, June 30, 2015, https://www.aila.org/advo-media/press-releases/2015/deplorable-medical-treatment-at-fam-detention-ctrs/public-version-of-complaint-to-crcl; Complaint: ICE's Failure to Provide Adequate Medical Care to Mothers and Children in Family Detention Facilities, July 30, 2015, https://www.womensrefugeecommission.org/rights/resources/1182-crcl-complaint-2015-06; Complaints Regarding Sexual Abuse of Women in DHS Custody at Karnes County Residential Center, September 30, 2014, MALDEF, http://www.maldef.org/news/releases/maldef_other_groups_file_complaint_ice_family_detention_center_karnes_city/; American Bar Association, *Family Immigration Detention: Why the Past Cannot Be Prologue*, American Bar Association Commission on Immigration, July 31, 2015, https://www.americanbar.org/content/dam/aba/publications/commission_on_immigration/FINAL%20ABA%20Family%20Detention%20Report%208-19-15.authcheckdam.pdf; *Righting the Wrong: Why Detention of Asylum-Seeking Mothers and Children in America Must End Now*, Tahirih Justice Center, October 28, 2015, https://www.tahirih.org/wp-content/uploads/2015/10/Righting-the-Wrong-Why-Detention-of-Asylum-Seeking-Mothers-and-Children-Must-End-Now-Web-Copy.pdf.

[6] Immigration and Customs Enforcement, Advisory Committee on Family Residential Centers (ACFRC), *Report on the DHS Advisory Committee on Family Residential Centers,* October 7, 2016, https://www.ice.gov/sites/default/files/documents/Report/2016/ACFRC-sc-16093.pdf

[7] Julie M. Linton, Marsha Griffin, Alan J. Shapiro, "Detention of Immigrant Children," Council on Community Pediatrics, Pediatrics, (March 2017), http://pediatrics.aappublications.org/content/early/2017/03/09/peds.2017-0483.

[8] Miriam Jordan, "Whistle-Blowers Say Detaining Migrant Families 'Poses High Risk of Harm,'" *New York Times*, July 18, 2018, https://www.nytimes.com/2018/07/18/us/migrant-children-family-detention-doctors.html.

[9] Ingrid Eagly and Steven Shafer, *Access to Counsel in Immigration Court*, American Immigration Council Special Report, September 2016, https://www.americanimmigrationcouncil.org/sites/default/files/research/access_to_counsel_in_immigration_court.pdf.

There is more than enough evidence to illustrate clearly that DHS family detention practices result in an unacceptable treatment of children and cannot comport with the strict guidelines that *Flores* requires. The harms of family detention cannot be overstated, even when a child and her parent are detained only for a short period of time. Since *Flores* requirements are based on child protection principles to ensure that children are treated fairly and humanely, weakening them would only risk further harming children and their families. As the physicians who recently spoke out noted, "'In our professional opinion, there is no amount of programming that can ameliorate the harms created by the very act of confining children to detention centers.'"[10] Instead, DHS can and should turn to a spectrum of far more appropriate alternatives to family detention.

Detaining families is not the answer to the cruel family separation policies that resulted in thousands of children being torn from their parents. It is long past time for Congress to invest in sensible, proven, and far more humane alternatives. The government could safely release many families to sponsors in the community while the family pursues their immigration case in court. One program in particular, the Family Case Management Program (FCMP), was specifically implemented for families seeking asylum at our borders. The FCMP favored case management instead of detention for families, facilitating access to social and legal services while also supporting compliance with immigration requirements. Over 99 percent of the families enrolled in the FCMP appeared at their check-ins with ICE and their immigration court hearings.[11] At a cost of only $38 each day for a whole family, compared to the $320 each day for just one family member in detention, the program can also create huge cost savings when used as an actual alternative to family detention.[12]

Family detention is harmful, costly, and completely unnecessary. We urge you to reject any measure that would result in its expansion, allows families to be detained for longer periods of time, or weakens the safeguards that currently exist to protect children in government custody.

Sincerely,

National Organizations
ACLU
African American Ministers In Action
Al Otro Lado, Inc.
Alianza Americas
American Academy of Pediatrics
American College of Physicians
American Federation of Labor-Congress of Industrial Organizations (AFL-CIO)
American Immigration Lawyers Association

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[10] Jordan, "Whistle-Blowers", *New York Times*.
[11] Office of Inspector General, Department of Homeland Security, *U.S. Immigration and Customs Enforcement's Award of the Family Case Management Program Contract (Redacted)*, November 30, 2017, 5, https://www.oig.dhs.gov/sites/default/files/assets/2017-12/OIG-18-22-Nov17.pdf.
[12] Department of Homeland Security, Immigration and Customs Enforcement, "Budget Overview: Fiscal Year 2019 Congressional Justification", Department of Homeland Security, https://www.dhs.gov/sites/default/files/publications/U.S.%20Immigration%20and%20Customs%20Enforcement.pdf; Women's Refugee Commission, *Family Case Management Program: A Backgrounder*, published July 20, 2018, https://www.womensrefugeecommission.org/rights/resources/1653-family-case-management-program.

American Pediatric Society
American Psychiatric Association
American Psychological Association
American-Arab Anti-Discrimination Committee
Amnesty International USA
Anti-Defamation League
ASAP (Asylum Seeker Advocacy Project)
Asian & Pacific Islander American Health Forum
Asian Americans Advancing Justice
Asian Pacific Institute on Gender-Based Violence
ASISTA
Association for Child Psychoanalysis
Association of Medical School Pediatric Department Chairs
Bend the Arc Jewish Action
Casa de Esperanza: National Latin@ Network for Healthy
Center for American Progress
Center for Gender & Refugee Studies
Center for Law and Social Policy (CLASP)
Center for Victims of Torture
Center on Immigration and Child Welfare
Church World Service
Columban Center for Advocacy and Outreach
Committee in Solidarity with the People of El Salvador (CISPES)
Detention Watch Network
Earthjustice
Evangelical Lutheran Church in America
Fair Immigration Reform Movement
Faith in Public Life
Families and Communities
Farmworker Justice
First Focus
Franciscan Action Network
Freedom Network USA
Friends Committee on National Legislation
Futures Without Violence
HEAL Trafficking
HIAS
Hofstra Law School Asylum Clinic
Hope Border Institute
Human Rights Campaign
Human Rights First
Human Rights Watch
Immigrant Justice Corps
Immigration Equality

Indivisible
International Rescue Committee
Jewish Council for Public Affairs
Justice in Motion
Kids in Need of Defense
Latin America Working Group
Leadership Conference of Women Religious
Lutheran Immigration and Refugee Service
Main Street Alliance
Maryknoll Office for Global Concerns
MomsRising
National Asian Pacific American Women's Forum (NAPAWF)
National Association of Social Workers
National Center for Victims of Crime
National Coalition Against Domestic Violence
National Council of Jewish Women
National Domestic Violence Hotline
National Immigrant Justice Center
National Immigration Forum
National Immigration Law Center
National Latina Institute for Reproductive Health
National Network to End Domestic Violence
National Organization for Women
National WIC Association
National Women's Law Center
NETWORK Lobby for Catholic Social Justice
Office of Social Justice
Oxfam America
Partnership For America's Children
Pax Christi USA
Presbyterian Church (U.S.A.)
Salvadoran American National Network (SANN)
Save the Children USA
Scalabrini International Migration Network
Service Employees International Union (SEIU)
Sisters of St. Francis of Philadelphia
Sisters of St. Francis of the Neumann Communities
Society for Adolescent Health and Medicine
Society for Pediatric Research
Southeast Asia Resource Action Center (SEARAC)
Southern Poverty Law Center
Tahirih Justice Center
U.S. Committee for Refugees and Immigrants
Ujima Inc: The National Center on Violence Against Women in the Black Community

UnidosUS
Union for Reform Judaism
Women's Refugee Commission
Young Center for Immigrant Children's Rights
ZERO TO THREE

State/Local Organizations
A Safe Place
Advocates for Children of NJ
ALDEA - The People's Justice Center
Americans for Immigrant Justice
Apostle Immigrant Services
Arizona Coalition to End Sexual and Domestic Violence
Arkansas Advocates for Children and Families
Artemis Justice Center
Austin Region Justice For Our Neighbors
Ayuda
Between Friends
CAIR New York
California Partnership to End Domestic Violence
CaliforniaHealth+ Advocates
Capital Area Immigrants' Rights Coalition
Capital Area New Mainers Project
Center for Family Life in Sunset Park
Center for Family Representation
Center for Health Progress
Center for Safety and Change
Center for the Human Rights of Children, Loyola University Chicago School of Law
Center for Worker Justice of Eastern Iowa
Central American Resource Center (CARECEN) DC
Centro Legal de la Raza
Chicago Alliance Against Sexual Exploitation
Children First for Oregon
Children's Advocacy Alliance
Children's Defense Fund - New York
Children's Defense Fund - Texas
Citizens' Committee for Children of New York
Clayton Early Learning
Coalition for Humane Immigrant Rights (CHIRLA)
Colorado Children's Campaign
Colorado Fiscal Institute
Colorado Organization for Latina Opportunity and Reproductive Rights
Connecticut Association For Human Services, Inc.
Connecticut Voices for Children

DC Coalition Against Domestic Violence
DC-MD Justice For Our Neighbors
Dolores Street Community Services
Domestic Violence project at the Urban Justice Center
Dove, Inc.
End Domestic Abuse WI
First Parish Portland
First3Years
Florida Council Against Sexual Violence
Georgia Coalition Against Domestic Violence
Grassroots Leadership
Gulfcoast Legal Services
Her Justice
Hispanic Interest Coalition of Alabama
Holy Name of Jesus - St. Gregory the Great Parish
Hope Acts
Human Rights Initiative of North Texas
Idaho Voices for Children
Illinois Coalition Against Domestic Violence
Immigrant Allies of Marshalltown (Iowa)
Immigration Center for Women and Children
Indiana Coalition Against Domestic Violence
Iowa Coalition Against Domestic Violence
Iowa Conference United Methodist Women
Iowa Justice For Our Neighbors
Jane Doe Inc., the Massachusetts Coalition Against Sexual Assault and Domestic Violence
Justice Center of Southeast MA
Justice For Our Neighbors - East Texas
Justice For Our Neighbors - Houston
Justice For Our Neighbors - Michigan
Kansas Action for Children
Kansas Appleseed
Kansas Center for Economic Growth
Kansas Coalition Against Sexual and Domestic Violence
Kentucky Youth Advocates
Kids Forward
Kino Border Initiative
Latinas Unidas Por Un Nuevo Amanecer (L.U.N.A.)
Lawyers For Children
Legal Aid Justice Center
Lenox Hill Neighborhood House, Inc.
LIFT Local Immigrant Family Treasury
Maine Children's Alliance
Maine Immigrants' Rights Coalition

Maine People's Alliance
Maine WTR Resource Center
Mainers for Accountable Leadership
Mid-South Immigration Advocates
Montana Coalition Against Domestic and Sexual Violence
Mutual Ground, Inc.
NC Child
Nebraska Appleseed
Nebraska Coalition to End Sexual & Domestic Violence
Neighbors Link Community Law Practice
New Jersey Coalition to End Domestic Violence
New Mexico Voices for Children
New Sanctuary Coalition
New York Immigration Coalition
New York Legal Assistance Group
New York State Coalition Against Domestic Violence
NLG at UC Irvine Law
Northern Manhattan Coalition for Immigrant Rights
Ohio Immigrant Alliance
Pax Christi Metro DC-Baltimore
Rhode Island KIDS COUNT
RSHM LIFE Center
Sanctuary for Families
Santa Fe Dreamers Project
Schuyler Center for Analysis & Advocacy
Sosa Law
South Bronx United
Stopping Woman Abuse Now
Texans Care for Children
The Bronx Defenders
The Children's Agenda
The Children's Campaign
The Children's Partnership
The Florence Immigrant & Refugee Rights Project
The Legal Aid Society
The Legal Project, Inc.
The Resurrection Project
Tulsa Immigrant Resource Network
Turning Point, Inc.
USC Gould International Human Rights Clinic
Vermont Network Against Domestic and Sexual Violence
Voices for Children in Nebraska
Voices for Florida
Volunteers of Legal Service

Wallingford Indivisible
Washington Immigrant Solidarity Network
Washington State Coalition Against Domestic Violence
Washington State League of United Latin American Citizens (LULAC)
Wyoming Coalition Against Domestic Violence and Sexual Assault



Written Statement of

William Canny,
Executive Director
U.S. Conference of Catholic Bishops Migration and Refugee Services

For a Hearing of the
Full Senate Committee on Homeland Security and Government Affairs

"The Implications of the Reinterpretation of the Flores Settlement Agreement for Border Security and Illegal Immigration Incentives"

Tuesday, September 18, 2018
Dirksen Senate Office Building 342

1. Introduction

My name is William Canny. I am the Executive Director of the Department of Migration and Refugee Services (MRS) within the U.S. Conference of Catholic Bishops (USCCB). On behalf of USCCB/MRS, I would like to thank the Senate Homeland Security & Governmental Affairs Committee, Chairman Senator Ron Johnson (R-WI), and Ranking Member Senator Claire McCaskill (D-MO) for the opportunity to submit this written statement for the record.

USCCB/MRS has operated programs, working in a public/private partnership with the U.S. government, to help protect unaccompanied children from all over the world for nearly 40 years. Additionally, the Catholic Church in the United States has long worked to support immigrant families who have experienced immigrant detention, providing legal assistance and pastoral accompaniment and visitation within immigrant detention facilities, as well as social assistance upon release. Through this work, we have seen the importance of the protections set forth in the Flores Settlement Agreement of 1997 (Flores),[1] and we have worked to help implement and ensure government compliance with these requirements.

In this statement, I give context to what we are seeing as the primary factors leading to forced migration of children and families, share insights from our work serving unaccompanied and accompanied children and their families, and offer recommendations to: (1) address root causes of migration; (2) help ensure that immigrant children and families are protected and treated with dignity; and (3) ensure such children and families are in compliance with their immigration proceedings, while maintaining the existing protections of Flores.

2. Catholic Experience Assisting Immigrant Families and Children in Federal Custody

Since 1994, USCCB/MRS has operated the "Safe Passages" program. This program serves undocumented immigrant children apprehended by the Department of Homeland Security (DHS) and placed in the custody and care of the Office of Refugee Resettlement (ORR), within the Department of Health and Human Services (HHS). Through cooperative agreements with ORR, and in collaboration with community-based social service agencies, the Safe Passages program provides community-based residential care (foster care and small-scale shelter placements) to unaccompanied children in ORR custody, as well as family reunification services (pre-release placement screening and post-release social services for families). In fiscal year 2017, the USCCB/MRS Safe Passages program served 1,294 youth who arrived as unaccompanied children—1,042 through the family reunification program and 252 through the residential care programs.

In addition to providing programming and care for unaccompanied children, the Catholic Church has been a leading service provider for detained immigrant families, as well as a vocal opponent[2] against family

[1] Settlement Agreement, *Flores v. Reno*, Case No. CV 85-4544-RJK (C.D. CA, 1997), *available at* https://cliniclegal.org/sites/default/files/attachments/flores_v._reno_settlement_agreement_1.pdf

[2] The Catholic Bishops addressed immigrant detention explicitly in *Responsibility Rehabilitation and Restoration, A Catholic Perspective on Crime and Criminal Justice*, stating: "We bishops have a long history of supporting the rights of immigrants. The special circumstance of immigrants in detention centers is of particular concern. [The government] uses a variety of methods to detain immigrants some of them clearly inappropriate." USCCB, *Responsibility Rehabilitation and Restoration: A Catholic Perspective on Crime and Criminal Justice* (Nov. 15, 2000), *available at* http://www.usccb.org/issues-and-action/human-life-and-dignity/criminal-justice-restorative-justice/crime-and-criminal-justice.cfm Additionally, Bishop Eusebio Elizondo, then-Chairman of the U.S. Conference of Catholic Bishops' Committee on Migration, wrote to Department of Homeland Security (DHS) Secretary Jeh Johnson in 2015 opposing family detention, declaring that "it is inhumane to house young mothers with children in

detention. Immigrant detention, particularly the detention of families and children, is an explicit and long-standing concern of the Catholic Church. Each day, the Church witnesses the baleful effects of immigrant detention in ministry, including pastoral and legal work in prisons and detention centers. Catholic entities serve separated families that struggle to maintain a semblance of normal family life and host support groups for the spouses of detained and deported immigrants. We lament the growth of family detention centers, which undermine families and harm children. We have seen case after case of families who represent no threat or danger, but who are nonetheless treated as criminals and detained for reasons of enforcement. We further view immigrant detention from the perspective of Biblical tradition, which calls us to care for, act justly toward, and identify with persons on the margins of society, including newcomers and imprisoned persons.

Besides advocating for reform of the existing detention system, USCCB/MRS has operated several alternatives to detention programs to assist immigrant families and other vulnerable populations. From 1999 – 2002, INS (Immigration and Naturalization Service), the legacy DHS department, collaborated with Catholic Charities of New Orleans to work with 39 asylum seekers released from detention and 64 "indefinite detainees" who could not be removed from the United States. The court appearance rate for participants was 97%. From January 2014 to March 2015, the USCCB/MRS (in partnership with Immigration and Customs Enforcement (ICE)) ran a community support alternative to detention program through its Catholic Charities partners in Baton Rouge, Louisiana and in Boston, Massachusetts that utilized case management and served individuals who would have not been ordinarily released from detention. The program yielded an over 95% appearance rate and included four family units. Additionally, from 2015-2016, the Catholic Legal Immigration Network (CLINIC) provided direct legal service assistance to families held in the family detention facility in Artesia, New Mexico. CLINIC also currently provides direct legal assistance to families in the South Texas Family Residential Facility in Dilley, Texas through the CARA Pro Bono Project.[3]

3. Understanding the Root Causes That Are Forcing Children and Families to Flee

U.S. government officials have recently made public statements[4] attempting to frame the Flores Settlement Agreement as a pull factor for arriving asylum-seeking families coming to the United States. The reality, however, is that violence and internal displacement continue within the Northern Triangle countries (El Salvador, Guatemala, and Honduras) unabated and that much of the violence is targeted at the vulnerable families and children who are subsequently forced to flee for safety. Through our work on the ground with Catholic partners, we know that entire families, not just children, are currently facing targeted violence and displacement. It is these realities - gang and domestic violence, impunity, and lack of opportunity related

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restrictive detention facilities as if they are criminals." *USCCB Chairman Decries Opening of Family Detention Center in Dilley, Texas, Proposes More Humane Alternatives to Detention for Vulnerable Families*, USCCB (December 16, 2004), http://www.usccb.org/news/2014/14-201.cfm

[3] The CARA Pro Bono Project is a joint effort by the American Immigration Lawyers Association, American Immigration Council, Catholic Legal Immigration Network, and RAICES. It operates out of the South Texas Family Residential Facility in Dilley Texas, assisting with direct immigration services since 2015.

[4] In its September 12, 2018 statement on the August U.S. Mexico Border numbers, DHS states: "Smugglers and traffickers understand our broken immigration laws better than most and know that if a family unit illegally enters the U.S. they are likely to be released into the interior. Specifically, DHS is required to release families entering the country illegally within 20 days of apprehension." *Statement of DHS Press Secretary on August Border Numbers*, DEPARTMENT OF HOMELAND SECURITY (September 12, 2018), https://www.dhs.gov/news/2018/09/12/statement-dhs-press-secretary-august-border-numbers

to displacement and violence - that cause families to flee north for protection, not awareness of Flores and its legal litigation progeny. Due to conditions in the Northern Triangle, families face forced migration; and, many of these families are truly fleeing persecution. As such, they should not be held in detention facilities but instead be allowed to pursue their asylum claims in a more humane and cost-effective manner. Proposed changes to Flores will erode existing protections for such asylum-seeking children, while ignoring the larger holistic migration issue that must be addressed on a regional level.

The Church in Guatemala, Honduras and El Salvador is experiencing, publicly reflecting on, and responding to the escalation of violence in urban communities, in rural communities, and to family units. In his pastoral letter, "I See Violence and Strife in the City," Most Reverend José Luis Escobar Alas, Archbishop of San Salvador, stated: "[t]he faithful know that they are being monitored in their comings and goings in the communities. The same applies to pastoral agents who are constantly watched . . . The exodus of families is heartbreaking . . . It is truly unfortunate and painful that the Church cannot work because of this atmosphere of insecurity and anxiety that shakes our beloved country."[5] The Archbishop describes one parish alone that in one year was "exposed to murder, persecution, exodus, and extortion," including the murder of six active parishioners by stabbing, dismemberment, or firearms.[6]

The presence of the gangs is widespread and continues to grow. Some studies assert there are 70,000 gang members in El Salvador alone, while others cite lower numbers for El Salvador but up to 22,000 members in Guatemala.[7] Extortion is the driving force behind the gang growth and control. It represents a direct cost to businesses of $756 million/year in El Salvador.[8] Extortion is considered one of the leading causes of forced displacement of families in gang-controlled communities. In many cases, gang violence directed at a person involves threats to his or her whole family group and breaks down the social fabric of communities, as people are forced to flee with their families.

This targeting of entire families is a relatively newer element in the Northern Triangle and corresponds to the higher numbers of asylum-seeking families that the U.S. has apprehended in the last few years.[9] Many Catholic and other civil society NGO service organizations that serve people affected by violence and forced displacement[10] have attempted to attend to people who frequently leave their homes against their will to

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[5] Most Reverend Jose Luis Escobar Alas, *I See Violence and Strife in the City: A Pastoral Letter on the Occasion of the Feast of the Beloved Blessed Oscar Romero*, 18 (March 24, 2016).

[6] *Id.* at 15.

[7] INTERNATIONAL CRISIS GROUP, MAFIA OF THE POOR: GANG VIOLENCE AND EXTORTION IN CENTRAL AMERICA 17 (2017), *available at* https://d2071andvip0wj.cloudfront.net/062-mafia-of-the-poor_0.pdf ; United Nations Office of Drugs and Crime (UNODC)Transnational Organized Crime in Central America and the Caribbean, a threat assessment", 2012.

[8] *Id.*

[9] *See, e.g., United States Border Patrol Southwest Family Unit Subject and Unaccompanied Alien Children Apprehensions Statement on Fiscal Year 2013- 2016*, CUSTOMS AND BORDER PROTECTION (Oct. 18, 2016), https://www.cbp.gov/newsroom/stats/southwest-border-unaccompanied-children/fy-2016 .

[10] The issue of forced internal displacement is especially troublesome in El Salvador and Honduras. In 2016, El Salvador was second in the world in terms of the number of new displacements relative to population size, exceeding countries such as Libya, South Sudan, and Afghanistan. There are an estimated 220,000-400,000 internally displaced persons (IDPs) in El Salvador, many displaced by violence but not officially recognized by the government. The Salvadoran government's inability to publicly acknowledge the issue of IDPs who are displaced due to violence prevents larger measures to address protection frameworks from being implemented to assist with this migration phenomenon. In Honduras, UNHCR estimates that there are 174,000 IDPs. A recent study estimates that from 2004 - 2014, approximately 41,000 households within 20 municipalities were internally displaced because of violence or

save their own and their families' lives. Many families initially seek safety in other areas within their home countries. As these families have been victimized to the point of being forced to move and be displaced from their homes, they then often struggle to acclimate to the new communities in which they are living. Facing hardships relating to finding employment and securing safety (given the widespread gang networks), families begin to feel increasingly desperate to migrate to find safe and secure living conditions. As such they begin to look to leave their home countries and migrate internationally in search of protection. This was the case for Reyna[11] and her family:

Reyna and her two daughters lived in El Salvador in a neighborhood that was contested gang territory. The dangers of the area were evidenced by the murders of her children's fathers. Reyna lived near a house that gang members would bring women they kidnapped. One evening, eight gang members come and informed Reyna that she knew too much about the gang's involvement; they informed her that she must join the gang as a girlfriend or be killed. Reyna and her daughters fled her community and moved to another town in El Salvador. For a short time, Reyna was able to prosper, but the gangs quickly found her. This time, they threatened her and demand that both she and her daughter join the gang as girlfriends. Reyna fled north immediately with no possessions. Reyna was detained at the South Texas Family Residential Facility in Dilley, Texas, in 2016 with her two daughters. She was assisted by the CARA Pro Bono Project and passed her credible fear interview and was subsequently released from family detention. She is currently applying for asylum.

Reyna and her family have experienced extreme trauma with mental health consequences. When interviewed about her experience, Reyna, like many asylum-seeking parents who make the dangerous journey with their children, spoke of the desire to stay in El Salvador, her efforts to relocate prior to migrating north, and her desire to find safety and protection for her daughters.

Amending the Flores Settlement Agreement will not stop mothers like Reyna from coming and seeking protection in the United States. Rather, it will ensure that more families like Reyna and her daughters experience the long-lasting consequences of prolonged detention.

4. <u>Altering Flores to Expand Family Detention Would Harm Both Children and Taxpayers</u>

The Flores Settlement Agreement was the result of over a decade of litigation. Flores sets forth foundational principles and critical protections regarding the care, custody, and release of immigrant children – both accompanied and unaccompanied – who are in federal custody.[12] The agreement, which the federal government voluntarily entered into, requires (in part) that: facilities provide children in their custody with access to sanitary and temperature-controlled conditions, water, food, medical assistance, ventilation, adequate supervision, and contact with family members;[13] facilities ensure that children are not held with

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insecurity. INTERNAL DISPLACEMENT MONITORING CENTRE, 2016 GLOBAL REPORT INTERNAL DISPLACEMENT IN 2016 (2017), *available at* http://internal-displacement.org/global-report/grid2017/ ; UNHCR HONDURAS FACT SHEET (March 2017), *available at* http://reporting.unhcr.org/sites/default/files/UNHCR%20Honduras%20Fact%20Sheet%20-%20March%202017.pdf ; INTERINSTITUTIONAL COMMISSION FOR PROTECTION OF DISPLACED PEOPLE DUE TO VIOLENCE, CHARACTERIZATION OF INTERNAL DISPLACEMENT IN HONDURAS 12 (2015).

[11] Name and identifying information changed to protect client confidentiality.

[12] When the U.S. government began detaining family units together in 2014, the U.S. District Court for the Central District of California ruled that "accompanied" children were also protected under the principles of Flores, including those who were being held in family detention facilities. The Ninth Circuit Court affirmed this decision in 2016.

[13] *Flores, supra* note 1, at 7-8.

unrelated adults;[14] the government release children from detention without unnecessary delay to parents or other approved sponsors;[15] and if a child cannot be released from care, the child be placed in the "least restrictive" setting appropriate, based on his or her age and needs.[16] As it relates to the custody of children, Flores also mandates that the government typically transfer immigrant children to facilities that are licensed by the state for childcare.[17]

The three family detention facilities - Karnes County Residential Center, Berks Family Residential Center, and South Texas Family Residential Center - currently operate a combined 3,326 beds.[18] These facilities are not licensed for childcare in their respective states and, as such, fail to meet basic child welfare requirements set forth in Flores. Further, because the family detention centers are unlicensed, the federal government is limited in the amount of time it can detain an accompanied child in these facilities. The District Court for the Central District of California has previously allowed that during times of influx or emergency, the government may detain children in unlicensed facilities for a period of 20 days and still meet its obligations under Flores;[19] however, in its latest petition to the court, the government sought to detain children in unlicensed facilities indefinitely.[20] The court rejected this request.[21] Nevertheless, the Administration continues to suggest that amending this requirement is necessary.[22]

Proposals such as these are deeply troubling and would have severe implications for accompanied children, their families, and the U.S. taxpayer. If Flores is amended or limited, many of the accompanied children entering the country with their parents would face the possibility of being forced to remain in detention through the duration of their immigration proceedings. Such changes would allow these children to be held for periods longer than 20 days and in detention facilities that are not licensed to care for them. Licensing requirements are vital to ensure that facilities meet basic child welfare standards and children are protected from abuse. Further, holding children in family detention has been proven to have long-lasting negative consequences. For instance, the American Academy of Pediatrics has reported that detained children experience developmental delay, poor psychological adjustment, post-traumatic stress disorder, anxiety, depression, suicidal ideation, and other behavioral problems. Even brief stints in detention can lead to psychological trauma and lasting mental health risks.[23]

Additionally, detaining families that do not present a flight or safety risk is an unnecessary use of limited DHS resources. Costs in FY 2019 are anticipated to be $319 per individual/per day for those in family

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[14] *Id.* at 8.
[15] *Id.* at 6.
[16] *Id.* at 4.
[17] *Id.* at 5-6.
[18] Apprehension, Processing, Care, and Custody of Alien Minors and Unaccompanied Alien Children, 83 Fed. Reg. 45,486, 45,512 (Sept. 7, 2018).
[19] *Jenny L. Flores, et al. v. Jefferson B. Sessions, III, et al.*, Case No. CV 85-4544, Dkt. No. 363, 30-31 (C.D. Cal. June 27, 2017), *available at* https://www.aila.org/File/Related/14111359v.pdf .
[20] *Jenny L. Flores, et al. v. Jefferson B. Sessions, III, et al.*, Case No. CV 85-4544, Dkt. No. 455, 3-4 (C.D. Cal. July 9, 2018), *available at* https://www.aila.org/File/Related/14111359ac.pdf .
[21] *Id.* at 7.
[22] 83 Fed. Reg. at 45,494.
[23] JULIE M. LINTON, ET AL., AMERICAN ACADEMY OF PEDIATRICS, DETENTION OF IMMIGRANT CHILDREN 6 (2017), *available at* http://pediatrics.aappublications.org/content/pediatrics/early/2017/03/09/peds.2017-0483.full.pdf .

detention.[24] In comparison, alternative programs such as the Family Case Management Program cost only $36 per individual/per day and had a 99% compliance rate.[25] Proposals to alter Flores consistently ignore the fact that DHS has a spectrum of humane, proven, and cost-effective alternatives to detention that it can utilize (and is utilizing in some cases) to monitor released families.

5. Recommendations to Maintain Existing Flores Protection While Ensuring Humane Enforcement

In light of these concerns and vulnerabilities, we recommend the following ways in which we can provide humane care to immigrant children and families in accordance with Flores and still ensure compliance with our immigration laws and fairness to U.S. taxpayers:

- **Invest Robustly in a Variety of Alternatives to Detention.** Congress should more robustly fund alternatives to detention in the DHS budget. Congress should also ensure that DHS is working to undertake and pilot diverse alternatives to detention programming - in the form of the Intensive Supervision Appearance Program (ISAP) as well as alternatives to detention programming that utilize case management and, in some cases, NGO civil society participation. Congress should instruct DHS to publicly report on the outcomes of these programs and ensure that a continual pilot period is undertaken to secure transparent and viable data on the effectiveness of such programs.

- **Create Greater Capacity for Effectuating Legal Outcomes for Asylum-Seeking Families.** Congress should further invest in augmenting the capacity of the immigration courts by hiring more judges and providing additional funding for new courtroom facilities. Additionally, Congress should ensure robust funding for legal information programs such as the Legal Orientation Program and the Information Help Desk, which do not fund immigration counsel but help provide information to detained and released immigrants to ensure they know more about compliance requirements.

- **Address Root Causes of Migration with Trauma-Informed Responses.** More interdisciplinary programming and funding needs to be implemented to address root causes of migration in the Northern Triangle. Programming must address the actual social service needs of vulnerable children and families who are currently in forced migration situations. Special consideration should be given to funding initiatives like safe repatriation services, home country needs assessments and referrals, and aid that strengthens educational and work opportunities.

- **Maintain Existing Protections for Unaccompanied and Accompanied Children.** Given the long-lasting physical and mental consequences of detention on children, proposals seeking to alter existing safeguards relating to such detention must be firmly rejected. Immigrant children should be viewed as children first and foremost.

- **Augment Existing Trafficking Training and Prevention Tools to Ensure Customs and Border Protection (CBP) Can Adequately Screen and Identify Trafficking Situations.** To the extent there

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[24] DEP'T OF HOMELAND SECURITY, U.S. IMMIGRATIONS AND CUSTOMS ENFORCEMENT BUDGET OVERVIEW CONGRESSIONAL JUSTIFICATION, FISCAL YEAR 2018, 128 (2018), *available at* https://www.dhs.gov/sites/default/files/publications/CFO/17_0524_U.S._Immigration_and_Customs_Enforcement.pdf .

[25] GEO CARE, SUMMARY REPORT: FAMILY CASE MANAGEMENT PROGRAM 2 (2017).

are concerns about traffickers using children to enter the U.S. and avoid detention, Congress should ensure that appropriate funding and resources are dedicated to the training of CBP officers on this topic. In particular, CBP should utilize NGOs with experience and expertise in anti-trafficking in their training efforts.

Conclusion

As always, USCCB/MRS stands ready to offer our assistance to Congress and the Administration to address the root causes of forced migration and ensure families are treated with dignity but also understand and comply with their immigration requirements.

Post-Hearing Questions for the Record
Submitted to Matthew Albence & Robert Perez
From Senator Claire McCaskill

"The Implications of the Re-interpretation of the Flores Settlement Agreement for Border Security and Illegal Immigration Incentives"

October 3, 2018

Question#:	1
Topic:	Projected Detention Costs
Hearing:	The Implications of the Re-interpretation of the Flores Settlement Agreement for Border Security and Illegal Immigration Incentives
Primary:	The Honorable Claire McCaskill
Committee:	HOMELAND SECURITY (SENATE)

Question: The Government Accountability Office (GAO) released a report in April of this year, which found that U.S. Immigration and Customs Enforcement (ICE) had a number of inaccuracies in the agency's calculations for projected detention costs. One example, from fiscal year (FY) 2015, showed that ICE underestimated their immigration detention expenses for that year by $129 million. GAO made five recommendations to ICE to ensure that ICE's methodology for determining detention costs are sound.

Has ICE taken steps to implement the recommendations put forth by GAO?

Response: U.S. Immigration and Customs Enforcement (ICE) has taken necessary steps to improve business practices and implement procedures based on the U.S. Government Accountability Office's (GAO) recommendations. These include, but are not limited to, implementing a prioritization model to rank all agency resource requests, multiple third-party assessments of ICE's bed rate calculation methodologies, and implementing cost modeling and statistical analysis into ICE's budget requests to ensure repeatable processes.

Question: How will ICE ensure that any estimation of the cost of family detention is accurate going forward?

Response: ICE's family detention estimates are based on firm-fixed-priced contracts, which enable ICE to ensure a high level of accuracy in its cost estimating. ICE continues to assess the accuracy of family detention costs. ICE has three Family Residential Centers, all of which are firm-fixed-price structured contracts. These contracts provide for a price that is not subject to any adjustment based on the contractor's cost experience in performing the contract. It provides maximum incentive for the contractor to "control" costs and perform "effectively," and also imposes a

Question#:	1
Topic:	Projected Detention Costs
Hearing:	The Implications of the Re-interpretation of the Flores Settlement Agreement for Border Security and Illegal Immigration Incentives
Primary:	The Honorable Claire McCaskill
Committee:	HOMELAND SECURITY (SENATE)

minimum administrative burden upon the contracting parties. This allows ICE to conduct better assessments and reviews related to forecasting resources for family detention.

Question: As a matter of policy, do you think that ICE should develop cost models for detention prior to expanding detention significantly?

Respouse: ICE developed cost models to estimate resources needed to support fluctuations in the average daily population. ICE continues to improve these models to ensure processes are repeatable.

Question#:	2
Topic:	Funds Reprogrammed
Hearing:	The Implications of the Re-interpretation of the Flores Settlement Agreement for Border Security and Illegal Immigration Incentives
Primary:	The Honorable Claire McCaskill
Committee:	HOMELAND SECURITY (SENATE)

Question: Historically, U.S. Immigration and Customs Enforcement has had to request that funds be reprogrammed to cover the cost of additional detention beds. For the past five fiscal years (FY), please provide the amount that has had to be reprogrammed to cover the cost of detention budget overruns.

Response: The table below provides the reprogramming amount for custody operations only. The source of the data in the table is the U.S. Department of Homeland Security (DHS) Fiscal Year (FY) 2018 Transfer and Reprogramming Notification. The FY 2018 reprogramming amount for Custody Operations was $118 million.

PPA	2014	2015	2016	2017	2018
Custody Operations	$261 million	-	$127 million	$135 million	$118 million
	To accommodate the large number of family apprehensions in FY 2014; funds were used to open the Artesia and South Texas FRC facilities.	No reprogramming for Custody Operations in 2015.	To cover increasing adult detention costs and healthcare costs for higher than anticipated Average Daily Population (ADP) levels and an increase in adult bed rate.	To cover a funding shortfall due to an updated ADP projection of 39,250 detention beds (36,250 adults and 2,500 family) at an adult bed rate of $132.59 and a family bed rate of $319.37.	To support an increase in ADP over the enacted level.

One of the constraints and challenges of our annual appropriation is ensuring resources can support an ever-changing immigration enforcement operational environment and the associated population. The reprogrammed amounts for Custody Operations should not be characterized as budget overruns but more so, the cost of maintaining immigration detention operations due to an increase in population growth above appropriated levels.

Question#:	3
Topic:	Estimated Cost for 15,000 Beds
Hearing:	The Implications of the Re-interpretation of the Flores Settlement Agreement for Border Security and Illegal Immigration Incentives
Primary:	The Honorable Claire McCaskill
Committee:	HOMELAND SECURITY (SENATE)

Question: According to ICE, to house all families for 30 days, ICE would need approximately 15,000 beds. What is the estimated cost for adding an additional 15,000 family residential beds? Please provide a breakdown that includes the cost of construction, facility management staff (medical, educational, security), the average daily bed rate, and any other significant cost drivers.

Given adequate funds, how quickly would ICE be able to construct facilities that could house 15,000 beds? How quickly would ICE be able to finds adequate staff?

Response: U.S. Immigration and Customs Enforcement continues to review and assess programmatic requirements for detention management due to changes in the operational environment.

The total estimated reoccurring cost of an additional 15,000 family residential beds is $1.77 billion. Construction costs are not known due to multiple factors, such as the size of the facility or the available locations able to meet the standards for a Family Residential Center (FRC). Current FRC costs are fixed price contract agreements, which do not vary based on occupancy rates.

Question#:	4
Topic:	Detaining Families or Adults
Hearing:	The Implications of the Re-interpretation of the Flores Settlement Agreement for Border Security and Illegal Immigration Incentives
Primary:	The Honorable Claire McCaskill
Committee:	HOMELAND SECURITY (SENATE)

Question: Part of ICE's mission is to promote homeland security and public safety. Given limited resources, do you believe that it is more important to spend taxpayer dollars detaining families or detaining individual adults? Which of those categories of migrants do you consider more of a threat to public safety?

Response: U.S. Immigration and Customs Enforcement (ICE) focuses its resources on individuals who pose a threat to national security, public safety, and border security. Therefore, all of those in violation of U.S. immigration laws may be subject to immigration arrest, detention, and, if subject to a final order of removal, removal from the United States.

ICE expends significant resources to ensure those who pose a public safety or national security threat are apprehended, detained, and removed. However, ICE also enforces immigration laws against those who threaten the security of the country's borders and immigration system. Notably, in Fiscal Years 2017 and 2018, approximately 90 percent of ICE arrests involved an alien with a criminal conviction, a pending criminal charge, or a prior removal order that was subject to reinstatement. Provided an alien is not subject to mandatory detention, ICE considers the danger and risk of flight posed by an alien's release in making custody determinations. Determinations are made on a case-by-case basis considering all available information.

The influx of family units and others across the Southwest Border, which began in 2014 and has primarily consisted of individuals from the Northern Triangle countries of Guatemala, El Salvador, and Honduras, has strained the capabilities of federal agencies, as well as communities within the interior of the United States. Many of these individuals have attempted to illegally enter the country, posing a threat to border security and violating U.S. immigration laws.

ICE found that many recently arrived families do not appear for court hearings and ignore lawfully issued orders of removal; even those who are placed on Alternatives to Detention abscond at a higher rate than other participants.[1] Because this population has demonstrated a high flight risk, ICE believes that detention is a necessary tool to effectuate removal in cases where it is legally appropriate.

[1] In Fiscal Year 2018 through July, the absconder rate for family units was 27.7 percent, while it was 16.4 percent for non-family unit participants.

Question#:	4
Topic:	Detaining Families or Adults
Hearing:	The Implications of the Re-interpretation of the Flores Settlement Agreement for Border Security and Illegal Immigration Incentives
Primary:	The Honorable Claire McCaskill
Committee:	HOMELAND SECURITY (SENATE)

Question: Would you support reallocating funds that are currently funding adult beds to cover the cost of additional family beds?

Response: ICE does not currently require reallocation of funds from adult beds to cover the cost of additional family beds, but would go through the reprogramming process should the operational environment require such a change.

One issue that continues to limit the efficacy of adding additional family beds is judicial decisions interpreting the *Flores* Settlement Agreement (FSA). Under the court's interpretation of the FSA, the U.S. Department of Homeland Security generally may only detain alien children with a parent or legal guardian for approximately 20 days before releasing them from ICE custody. In some circumstances, this results in family units being released into the interior of the United States.

Question#:	5
Topic:	Alternatives to Detention I
Hearing:	The Implications of the Re-interpretation of the Flores Settlement Agreement for Border Security and Illegal Immigration Incentives
Primary:	The Honorable Claire McCaskill
Committee:	HOMELAND SECURITY (SENATE)

Question: What is the average length of time an individual or family is monitored through alternatives to detention (ATD)?

At the hearing, you indicated that some immigrants are on ATD through to the final adjudication of their immigration cases. Please provide the number of individuals or families for each year between FY 2015 through FY 2018 that were on ATD throughout the entire adjudication of their immigration case up to and including when they were deported or granted asylum and the specific program that these individuals were a part of. How many of these individuals absconded?

At the hearing, there was general agreement that ATD had a 97-99% success rate in ensuring appearances at immigration proceedings. Since ATDs appear successful in getting families to show up to court, why does ICE believe that families need to be detained before this point in the process? Has ICE considered using existing detention space to detain families after their asylum claims are rejected rather than before?

Response: Generally, due to limited Alternatives to Detention (ATD) resources, an individual's participation in the ATD program is limited to 14-18 months. This happens typically when individuals must be terminated from the program to make room for new participants, many of whom are recent border crossers. Thus, it is very uncommon for an individual to remain on the program throughout the pendency of their removal proceedings.

U.S. Immigration and Customs Enforcement (ICE) is unable to provide information on the number of individuals who remained in the program throughout their removal proceedings. However, given that it typically takes several years for immigration cases to conclude once assigned to the non-detained docket, ICE expects this number to be very small.

The below charts illustrate how many family units and non-family units were terminated from the program from Fiscal Years (FY) 2015 to 2018, including information related to absconders, removals, and benefits granted during this time. However, ICE notes that widely reported "compliance rates" above 90 percent refer to whether an alien attended a specific, scheduled court hearing, but do not address success across the entire immigration process. Such compliance rates do not account for all individuals who later abscond—something which becomes more frequent once an individual has been ordered

Question#:	5
Topic:	Alternatives to Detention I
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removed—or who are arrested for criminal offenses and subsequently removed from the program as a result.

In addition, while ATD is generally effective at monitoring compliance with release conditions and appearance at court hearings for its vetted participants, it is not a soulation applicable to all current challenges to the enforcement of immigration law. It is not an effective tool for monitoring those who have already been ordered removed or for recent arrivals with no community ties. In fact, because most recently arrived family units have no existing ties to the community, and may not even know their final geographic destination (which is necessary for effective ATD monitoring), they abscond at much higher rates than traditional participants. In FY 2018, the absconder rate for family units was 27.4 percent, compared to 16.40 percent for non-family unit participants. ATD was designed to monitor a relatively small, vetted portion of the non-detained docket and is not a viable substitute for detention, as it is not effective at ensuring those with final orders depart as required.

ICE supports increased detention capacity; however, there will always be some segment of the population who are not or cannot be detained for various reasons. For these individuals, ATD is usually more appropriate than release with no monitoring at all. Again, ATD is not a viable substitute for detention, but rather a tool to increase compliance rates and monitoring of those who are released from custody and assigned to the non-detained docket.

As long as resource and legal constraints prevent ICE from detaining all individuals through the pendency of their removal proceedings, there will be a need for ATD programs. There is an extremely large number of aliens who are not held in custody, nor assigned to ATD Intensive Supervision of Appearance Program III, but nevertheless are required to attend U.S. Department of Justice Executive Office for Immigration Review hearings and comply with release conditions. ICE Enforcement and Removal Operations does not have the resources to appropriately monitor those cases, keep the aliens in question informed, and immediately enforce removal orders when received. ATD allows for closer monitoring for at least a fraction of all these non-detained cases.

Below you will find the total number of ATD terminations for family units and non-family units from FYs 2015 to 2018.

Question#:	5
Topic:	Alternatives to Detention I
Hearing:	The Implications of the Re-interpretation of the Flores Settlement Agreement for Border Security and Illegal Immigration Incentives
Primary:	The Honorable Claire McCaskill
Committee:	HOMELAND SECURITY (SENATE)

FY 2015 - FY 2018 (through August) ATD Non-Family Unit Terminations					
FY	**Total Terminations**	**Removals***	**Absconders**	**Relief/Benefit Granted****	**All Other Terminations**
FY 2015	12,509	1,191	1,107	363	9,848
FY 2016	12,925	768	1,580	358	10,219
FY 2017	16,056	944	2,432	436	12,244
FY 2018 (through August)	18,026	1,180	2,908	584	13,354
Total	**59,516**	**4,083**	**8,027**	**1,741**	**45,665**

FY 2015 - FY 2018 (through August) ATD Family Unit Terminations					
FY	**Total Terminations**	**Removals***	**Absconders**	**Relief/Benefit Granted****	**All Other Terminations**
FY 2015	3,747	153	967	76	2,551
FY 2016	8,462	207	2,630	304	5,321
FY 2017	20,135	339	4,635	492	14,669
FY 2018 (through August)	26,606	344	7,314	347	18,601
Total	**58,950**	**1,043**	**15,546**	**1,219**	**41,142**

*Removals identified on the basis of ATD termination code A[2] or L[3]. Removals indicate number of removals from the United States.

**Relief/Benefit Granted identified on the basis of ATD termination code B[4]. Data from BI Inc. Participants Report, August 31, 2018. U.S. Border Patrol (USBP) Arrest Data October 1, 2013, through August 31, 2018. Family Unit subject apprehensions represent all USBP apprehensions of adults (18-years-old and over) with a Family Unit classification who were subsequently enrolled into ATD.

[2] Termination Code A is issued to any participant who has a final order of removal and their departure has been verified.
[3] Termination Code L is issued to any participant who has been issued a voluntary departure order and their departure has been verified.
[4] Termination Code B is issued to any participant who has been issued a benefit and is no longer required to participate in the ATD program. Types of benefits include, but are not limited to: cancellation of removal, adjustment of status, grant of asylum, or a grant of admission.

Question#:	5
Topic:	Alternatives to Detention I
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With regard to utilizing existing detention space to detain families after their asylum claims are denied by an immigration judge (IJ), when an IJ issues a removal order, such a removal order is not final unless the alien waives appeal. Many aliens reserve their right to appeal and ultimately file an appeal to the Board of Immigration Appeals (Board) within the 30-day window for appeal. Such aliens are not subject to mandatory detention until and unless a final removal order is issued by the Board or they fail to file an appeal within the 30 days. Thus, while ICE could take the alien into custody when an IJ issues a non-final removal order, the aliens would still be eligible for a bond from an IJ. While some IJs will decline to issue such aliens a bond during the pendency of their appeals, it has been ICE's experience that many IJs will nevertheless issue a bond to such aliens while their appeal is pending, making it a waste of resources for ICE to arrest such aliens when the IJ issues a non-final removal order in many cases. Moreover, for those cases on the non-detained docket, the vast majority receive multiple continuances and calendar resets, and many aliens ordered removed by an IJ on the non-detained docket are ordered removed *in absentia* and thus are not physically present in court at the time removal is ordered.

If ICE were to arrest aliens at the time an IJ issues a non-final removal order, it is estimated that ICE ERO would need personnel and equipment resources akin to its existing Fugitive Operations footprint 129 teams, at a cost of approximately $159 million to cover all locations. Currently, ICE does not have the funding to support such an expansion. ICE would need additional Family Residential Center space to house such family units, and while continuing to comply with the *Flores* Settlement Agreement and subsequent judicial decisions.

Question#:	6
Topic:	Family Units Absconded
Hearing:	The Implications of the Re-interpretation of the Flores Settlement Agreement for Border Security and Illegal Immigration Incentives
Primary:	The Honorable Claire McCaskill
Committee:	HOMELAND SECURITY (SENATE)

Question: ICE data indicates that 28.4% of family units absconded in FY 2018. Yet ICE data also indicates that 99% of families on ATD go to their court appearances. Assuming no family units absconded while in detention, how can both be true?

Response: The Alternatives to Detention (ATD) Intensive Supervision Appearance Program III (ISAP III) is a supplemental release condition and a means of ensuring compliance with other conditions of release. When participants are assigned to ATD – ISAP III, U.S Immigration and Customs Enforcement (ICE) Enforcement and Removal Operations is able to obtain accurate, up-to-date information about participants that otherwise would not be captured for those on the non-detained docket. This information may be used to support Fugitive Operations teams in the recovery of those individuals who fail to comply with their release conditions and abscond.

The 27.4 percent represents 8,299 out of 30,322 families assigned to ATD – ISAP III in Fiscal Year 2018 who absconded, and were therefore unenrolled from the program. The court appearance rate calculation of 99 percent, however, only includes those individuals who are "active" participants at the time of their hearing. Individuals who abscond and individuals who are criminally arrested while on ATD, among others, are immediately unenrolled from the ATD program. Therefore, individuals who are unenrolled from the program before their scheduled hearing would not impact court appearance rates based on current methodology. This methodology is currently under review as it can be misleading.

In addition, because of delays in scheduling at immigration courts, many individuals are not required to attend any court hearings during the short period they are enrolled in ATD and the significant backlog in proceedings for those assigned to the non-detained docket. In some locations, aliens on the non-detained docket may wait more than one year for their first hearing. It is noteworthy that nearly all of the hearings attended by ATD participants are not final merits hearings where an alien's relief application(s) may be denied and the alien ordered removed. In other words, the majority of the hearings attended by ATD participants are initial master calendar hearings or subsequent master calendar hearings at which aliens are most likely to appear.

Thus, while it is important to understand how often ATD participants attend their scheduled hearings, this metric cannot be used in isolation to measure program success.

Question#:	6
Topic:	Family Units Absconded
Hearing:	The Implications of the Re-interpretation of the Flores Settlement Agreement for Border Security and Illegal Immigration Incentives
Primary:	The Honorable Claire McCaskill
Committee:	HOMELAND SECURITY (SENATE)

ICE continues to work with the U.S. Department of Justice's Executive Office for Immigration Review, on ways to expedite the ATD docket so that court appearance rates, as well as compliance with immigration judge orders, can produce more functional statistics for the ATD program in the future.

Question#:	7
Topic:	Families Not Detained
Hearing:	The Implications of the Re-interpretation of the Flores Settlement Agreement for Border Security and Illegal Immigration Incentives
Primary:	The Honorable Claire McCaskill
Committee:	HOMELAND SECURITY (SENATE)

Question: Are all families that are not detained put on ATD? If not, why not? If the reason is resource constraints, has the administration requested additional resources for ATD in any of its budget requests between FY 2016 and FY 2018?

Response: No, not all families released from custody are assigned to the Alternatives to Detention (ATD) program. Due to limited ATD resources and the length of time it takes for an individual's case to conclude on the non-detained docket, U.S. Immigration and Customs Enforcement (ICE) is unable to keep individuals enrolled in the ATD program through the pendency of their removal proceedings at current funding levels and apprehension rates.

The ATD program is not available in all locations throughout the United States; depending on where the individual resides, coverage may not be available for all family units. Additionally, at current apprehension rates, the number of ATD slots that would be needed to enroll all family units in ATD (assuming there are no coverage issues) for the duration of immigration court proceedings would be cost prohibitive, with no guarantee that the individual will comply with the judge's removal order in the end.

Increases in ATD funding have been requested in previous years to expand the program and to ensure sufficient monitoring and oversight of the current population. Significant investment in ATD, without fixing the immigration court backlog or gathering additional information on whether individuals would comply with the judge's decision in the end, would not be a prudent use of government resources.

ICE continues to work with the U.S. Department of Justice's Executive Office for Immigration Review, on ways to expedite the ATD docket and improve court appearance rates as well as compliance with immigration judge orders.

Question#:	8
Topic:	Children Detained
Hearing:	The Implications of the Re-interpretation of the Flores Settlement Agreement for Border Security aud Illegal Immigration Incentives
Primary:	The Honorable Claire McCaskill
Committee:	HOMELAND SECURITY (SENATE)

Question: Do you believe there should be an upper limit on how long a child should be detained? If so, how long?

Response: U.S. Immigration and Customs Enforcement (ICE) notes the length of time an individual or family unit spends in detention varies based on many case-specific factors. ICE believes immigration cases should be heard in a timely fashion, and supports the hiring of additional immigration judges by the U.S. Department of Justice and additional attorneys by the ICE Office of Principal Legal Advisor to help address current case backlogs. However, ICE also believes detention is an essential tool to effectuate removal, and notes many recently arrived families do not appear for court hearings and ignore lawfully issued orders of removal. Notably, for family units encountered at the Southwest Border in Fiscal Year (FY) 2014, as of the end of FY 2017, 44 percent of those who remained in the United States were subject to a final removal order, of which 53 percent were issued *in absentia*. ICE's immigration detention aids in ensuring that an alien in detention is present for immigration hearings where they may request and receive relief for which he or she has applied and is eligible, or is available for removal when such relief applications are denied.

ICE's immigration detention lasts only as long as needed. Detention is not indefinite, in that the process provided ensures an alien will either obtain relief from removal (for which he or she has applied and is eligible) and be released, or obtain a final order of removal and be removed. Moreover, aliens who are eligible may request a bond hearing before an immigration judge.

Question#:	9
Topic:	Family Units Arrested for Removal
Hearing:	The Implications of the Re-interpretation of the Flores Settlement Agreement for Border Security and Illegal Immigration Incentives
Primary:	The Honorable Claire McCaskill
Committee:	HOMELAND SECURITY (SENATE)

Question: In FY 2018, how many family units has U.S. Immigration and Customs Enforcement (ICE) arrested for removal?

Response: 26 family unit aliens were booked in with U.S. Immigration and Customs Enforcement (ICE) as the arresting agency. Seven of these aliens have subsequently been removed.

Question: How many of these family units:

Have one or more members that had been convicted or charged with any criminal offense, or committed acts that constitute a criminal offense (excluding violations of immigration law)?

Response: All 26 aliens are immigration violators and did not have past criminal charges or convictions at the time of arrest.

Question: Have engaged in fraud or willful misrepresentation in connection with any official matter or application before a government agency?

Response: ICE is unable to statistically report on this information, as this question refers to all government agencies involved in various parts of the process, including HHS and DOJ, and ICE only has access to its own system of record.

Question: Were brought or guided to this country illegally by a smuggler?

Response: ICE is unable to statistically report on this information. While ICE believes this phenomenon to be widespread, many of those who have been guided by a human smuggler are unlikely to provide law enforcement with this information.

Question: Used false personal documentation to gain illegal entry in the United States?

Were posing as part of a family unit that was determined to be fraudulent?

Response: ICE is unable to statistically report on this information.

Question: Have abused any program related to receipt of public benefits?

Response: ICE is unable to report on this information, as it does not possess data on public benefits programs.

Question#:	9
Topic:	Family Units Arrested for Removal
Hearing:	The Implications of the Re-interpretation of the Flores Settlement Agreement for Border Security and Illegal Immigration Incentives
Primary:	The Honorable Claire McCaskill
Committee:	HOMELAND SECURITY (SENATE)

Question: Are subject to a final order or removal?

Response: ICE's system of record indicates that seven of the aforementioned family unit aliens had final orders of removal. Please see below for additional information:

Fiscal Year 2018 Book-ins of Family Unit Aliens Arrested by ICE through September 15, 2018	
Final Order Status	**Book-ins**
With Final Order	7
No Final Order	19
Total	26

Question: Pose a risk to public safety or national security?

Response: None of the aforementioned family unit aliens fall within the two requested categories.

Question: Do not fall under any of the above criteria?

Response: ICE is unable to provide this information, as many of the answers to these questions cannot be statistically reported.

Question: Have one or more members enrolled in the Deferred Action for Childhood Arrivals (DACA) program?

Response: Out of the 26 A-Numbers provided, none of them are associated with the submission of an I-821D, Consideration of Deferred Action for Childhood Arrivals form.

Question#:	10
Topic:	New Flores Rule
Hearing:	The Implications of the Re-interpretation of the Flores Settlement Agreement for Border Security and Illegal Immigration Incentives
Primary:	The Honorable Claire McCaskill
Committee:	HOMELAND SECURITY (SENATE)

Question: On September 6, 2018, the Department of Homeland Security (DHS) and the Department of Health and Human Services (HHS) announced the proposal of a new rule that would implement some aspects of the Flores Settlement Agreement and allow ICE to hold families with children in family residential centers for longer than the current 20-day practice.

How will ICE identify and devote resources to implement this rule which would result in a change in the composition of beds needed and used?

How many family beds will ICE need to fully implement this rule?

If the number of family beds needed exceed the capacity of the South Texas Family Residential Center, the Karnes Family Residential Center, and the Berks Family Residential Center, where will ICE place family units in detention?

If additional ICE officers are needed to be placed in family residential centers, where will ICE transfer those personnel from?

What will ICE need to do in order to transition family residential centers to become settings for more long-term stays, as opposed to how the centers are arranged now which is for primarily short-term stays?

How will ICE ensure that there are enough attorneys to prosecute immigration court cases in order to reduce the backlog of the detained docket?

Response: The proposed amendments to the DHS and HHS regulations on the *Apprehension, Processing, Care, and Custody of Alien Minors and Unaccompanied Alien Children,* were published in the Federal Register on September 7, 2018, and were open for public comment through November 6, 2018. In this Notice of Proposed Rulemaking (NPRM), U.S. Immigration and Customs Enforcement (ICE) states that, "at this time, ICE is unable to determine how the number of Family Residential Centers (FRCs) may change due to this proposed rule. There are many factors that would be considered in opening a new FRC, some of which are outside the scope of this proposed regulation, such as whether this type of facility would be appropriate, based on the population of aliens crossing the border, anticipated capacity, projected average daily population, and projected costs." 83 FR 45519 (Sept. 7, 2018).

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Additionally, the NPRM states that "this proposed rule would implement the *Flores* Settlement Agreement (FSA) by putting in regulatory form, measures that materially parallel its standards and protections, and by codifying the current requirements for complying with the FSA, the Homeland Security Act, and the Trafficking Victims Protection Reauthorization Act." *Id.* at 45488.

The capacity of the three FRCs provides for a total of 3,326 beds. As a practical matter, given varying family sizes, each family's gender composition and housing standards, not every available bed will be filled at any given time, and the facilities may still be considered at capacity even if every available bed is not filled. In other words, as the NPRM states, "while the Department of Homeland Security (DHS) acknowledges that this rule may result in additional or longer detention for certain minors, DHS is unsure how many individuals will be detained at FRCs after this rule is effective or for how much longer individuals may be detained because there are so many other variables to consider. Therefore, DHS is unable to provide a quantified estimate of any increased FRC costs." *Id.* at 45514.

The operational standards of the FRCs are outlined in great detail in Exhibit 1 of the FSA. The standards of the FSA, which ICE proposes to codify, "at a minimum … must include, but are not limited to: proper physical care (including living accommodations), food, clothing, routine medical and dental care, family planning services, emergency care (including a screening for infectious disease) within 48 hours of admission, a needs assessment (including both educational and special needs assessments), educational services (including instruction in the English language), appropriate foreign language reading materials for leisure time reading, recreation and leisure time activities, mental health services, group counseling, orientation (including available legal assistance), access to religious services of the minor's choice, visitation and contact with family members, a reasonable right to privacy of the minor, and legal and family reunification services." *Id.* at 45501.

Due to the Executive Office for Immigration Review's (EOIR) current hiring levels and continued expansion, and without concurrent ICE Office of the Principal Legal Advisor (OPLA) appropriations or funding, OPLA will be unable to meet its immigration court litigation responsibilities, including reducing the backlog of the detained docket, without a substantial increase in attorneys and support staff. OPLA is confronting attorney and support staff shortages, while EOIR steadily increases its immigration judge (IJ) corps. At the beginning of Fiscal Year (FY) 2018, ICE was short 243 attorneys and 149 legal

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support staff.[5] ICE received only 70 new attorney positions in FY 2018.[6] Meanwhile, EOIR was fully funded to fill its 50 vacant positions and hire 100 additional IJs, more than double ICE's forecast. Once EOIR has onboarded its currently budgeted 484 IJs, ICE personnel shortages will balloon to more than 600 attorneys and nearly 300 legal support staff. If EOIR hires 100 IJs in FY 2019,[3] OPLA's staffing shortfall will increase by an additional 279 attorneys, 87 support staff, and 28 supervisory attorneys. With the additional field resources, ICE would be able to appear in an additional 459,800 hearings, complete an additional 114,240 Notice to Appear reviews, and, in coordination with EOIR, reduce the number of cases currently pending before the court.

The resource disparity between ICE and EOIR means that ICE will soon reach a point where it will not have personnel or facilities to appear before the new immigration courts, causing severe delays in immigration court dockets. For example, ICE will not be capable of adequately staffing immigration courts or managing the existing court docket and backlog in cooperation with EOIR. In addition, DHS priority cases will not get the attention they deserve (e.g., bond hearings, criminal alien cases, cases involving terrorist or human rights abusers), immigration fraud perpetrated by aliens in removal proceedings will be detected less often, and immigration violators in general will be more likely granted relief by IJs (who will know that ICE lacks the resources to appeal or otherwise contest adverse decisions). ICE will also have limited resources to respond to the ongoing Southwest Border activity and meet any number of other legal and operational support requirements resulting from increased immigration enforcement activity.

ICE's ability to provide day-to-day support to ICE operational components will be severely degraded as ICE personnel assigned to direct support roles will be recalled to appear in immigration court. For instance, ICE will be required to end the very successful Special Assistant U.S. Attorneys (SAUSA) program and recall ICE Homeland

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[5] ICE has spent years developing a Workload Staffing Model, which the ICE Office of the Chief Financial Officer validated as that model relates to ICE's immigration court litigators.

[6] Of note, the Consolidated Appropriations Act of 2018 Explanatory Statement indicates that the 70 attorneys were to be used to augment the, "Homeland Security Investigations Law Division," an ICE headquarters division currently comprised of less than 40 attorneys. Although not legally binding, the Explanatory Statement reflects that Congress did not even intend to augment ICE's capacity to cover immigration court. Of course, given the Homeland Security Act's assignment of responsibility to ICE to perform that function, these enhancements are being allocated accordingly. No facilities funding or vacant office space exists to accommodate 70 new headquarters attorneys.

[3] The House version of the FY 2019 budget provides for 100 additional IJs. Meanwhile, OPLA will only receive 48 total positions according to the House mark or no positions if the Senate allocation is implemented.

Question#:	10
Topic:	New Flores Rule
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Security Investigations-embedded attorneys to fill immigration court attorney requirements. SAUSAs have already been recalled due to staffing shortages to cover immigration court in OPLA field offices located in Baltimore, Maryland; El Paso, Texas; and Eloy, Arizona. Additionally, one SAUSA departed ICE for an opportunity in the U.S. Department of Justice, reducing the number of attorneys assigned as full-time SAUSAs from 24 to 20. SAUSAs have played a key role in support of prosecuting criminal immigration and customs laws.

Without additional resources, the only way ICE can ensure it can prosecute cases on the detained docket is by pulling in embeds, SAUSAs, and managers to cover court. In addition, on a case-by-case basis, OPLA may not send attorneys to prosecute the non-detained immigration court cases to cover the detained docket.

Currently, OPLA resources are so limited that OPLA is detailing attorneys and support staff to cover two new EOIR dockets (with four IJs) in Chaparral, New Mexico, and in Jena, Louisiana (five IJs). OPLA offices are sending staff to these locations at the expense of their own limited resources. EOIR also plans to open new courtrooms in Sacramento and Van Nuys, California, in 2019; OPLA has no presence in either location, thus, requiring more details in the future. The current strain on OPLA resources is untenable.

Question#:	11
Topic:	Known or Suspected Terrorists
Hearing:	The Implications of the Re-interpretation of the Flores Settlement Agreement for Border Security aud Illegal Immigration Incentives
Primary:	The Honorable Claire McCaskill
Committee:	HOMELAND SECURITY (SENATE)

Question: According to information provided by ICE, as of September 2018, there were over nine times as many known or suspected terrorists (KST) on ICE's non-detained docket as on the detained docket in FY 2018. Why were those individuals not prioritized for detention? Do you believe that ICE is adequately prioritizing resources to detain individuals who pose the greatest threat to national security?

Response: U.S. Immigration and Customs Enforcement (ICE) focuses its enforcement resources on individuals who pose a threat to national security, public safety, and border security, though all of those in violation of U.S. immigration laws may be subject to immigration arrest, detention, and, if subject to a final order of removal, removal from the United States. Aliens identified as known or suspected terrorists (KSTs) are among the cases that ICE prioritizes for detention and removal; the agency has not diverted resources away from conducting enforcement action against this population.

In response to your previous inquiry on this subject, ICE provided data on individuals in its system who an officer had noted could be a potential national security or public safety threat. However, upon detailed examination of these records, ICE determined the vast majority of such aliens are not KSTs, and more common reasons that an officer may note a potential safety concern include suspected gang membership or serious criminal history.

Below, please find updated information on KSTs on ICE's docket as of October 20, 2018:

Currently Detained	Non-Detained	Total
56	118	**174**

Please note that while these 118 aliens account for only a small fraction of the approximately 2.6 million aliens on ICE's non-detained docket, ICE takes any potential nexus to terrorism extremely seriously. However, there are a number of legal reasons that a KST may not currently be detained in ICE custody or cannot be removed.

Following coordination with law enforcement partners, and consistent with applicable statute and regulation, ICE considers a wide array of factors in making bond determinations. Information that led ICE to make a designation in its internal databases that a particular alien is a KST is one of many relevant factors. While information leading to such a designation is a negative factor when considering bond for an alien, in many cases, immigration judges within the U.S. Department of Justice's Executive Office

Question#:	11
Topic:	Known or Suspected Terrorists
Hearing:	The Implications of the Re-interpretation of the Flores Settlement Agreement for Border Security and Illegal Immigration Incentives
Primary:	The Honorable Claire McCaskill
Committee:	HOMELAND SECURITY (SENATE)

for Immigration Review (EOIR) have jurisdiction to reconsider ICE's bond determinations and may order an alien released on bond regardless of ICE's assessment. Consequently, many of the aliens who are granted a bond are released pursuant to a decision made by EOIR, not by ICE. However, in instances where ICE has information suggesting that an alien presents a national security or public safety risk, ICE coordinates, as appropriate, with relevant law enforcement partners to mitigate any known risk to the public.

Additionally, ICE notes that pursuant to the Supreme Court decision in *Zadvydas* v. *Davis*, 553 U.S. 678 (2001), a person cannot be detained indefinitely, and post-removal-period detention should only be used when there is a significant likelihood that an alien will be removed in the reasonably foreseeable future. As a result of this decision, many aliens who cannot be removed must be released from ICE custody. This may include KSTs. However, as noted above, in cases where ICE has information that an alien may present a serious national security or public safety risk, ICE coordinates with law enforcement partners to address any such risk.

Question#:	12
Topic:	Inadmissible Family Units
Hearing:	The Implications of the Re-interpretation of the Flores Settlement Agreement for Border Security and Illegal Immigration Incentives
Primary:	The Honorable Claire McCaskill
Committee:	HOMELAND SECURITY (SENATE)

Question: Between fiscal year (FY) 2015 and FY 2018, how many family units did Customs and Border Protection (CBP) encounter that were inadmissible?

Response:

Fiscal Year	USBP Family Unit Apprehensions	OFO Family Unit Inadmissible Aliens	CBP Family Unit Totals
2018	107,212	53,901	161,113
2017	75,622	33,924	109,546
2016	77,674	35,476	113,150
2015	39,838	-	39,838

NOTE: Family Unit represents the number of children under 18 years oldand parent or legal guardian with whom the child is apprehended withby the U.S. Border Patrol (USBP) or children under 18 years old deemed inadmissible with a parent or legal guardian by the Office of Field Operations (OFO). FY 2015 data for the Office of Field Operations (OFO) is unattainable as Family Units were not tracked until March 2016.

Question: How many of these family units:

Had one or more members that were convicted or charged with any criminal offense, or committed acts that constitute a criminal offense (excluding violations of immigration law)?

Response:

Fiscal Year	USBP Totals	OFO Totals	CBP Total
2018	87	135	222
2017	99	240	339
2016	123	142	265
2015	126	-	126

NOTE: FY 2015 data for the Office of Field Operations is unattainable as Family Units were not tracked until March 2016.

Question: Have engaged in fraud or willful misrepresentation in connection with any official matter or application before a government agency?

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Hearing:	The Implications of the Re-interpretation of the Flores Settlement Agreement for Border Security and Illegal Immigration Incentives
Primary:	The Honorable Claire McCaskill
Committee:	HOMELAND SECURITY (SENATE)

Response: CBP does not collect/track this type of information.

Question: Were brought or guided to this country illegally by a smuggler?

Response:

Fiscal Year	USBP Totals	OFO Totals	CBP Total
2018	8,298	-	8,298
2017	7,859	-	7,859
2016	14,826	-	14,826
2015	11,146	-	11,146

OFO does not collect/track this type of information.

Question: Used false personal documentation to attempt to gain illegal entry in the United States?

Response:

Fiscal Year	USBP Totals	OFO Totals	CBP Total
2018	22	-	22
2017	14	-	14
2016	12	-	12
2015	16	-	16

OFO does not collect/track this type of information

Question: Were posing as a family unit that was determined to be fraudulent?

Response:

Fiscal Year	USBP Totals	OFO Totals	CBP Total
2018	502 (since 4/19/18)	-	502
2017	-	-	-
2016	-	-	-
2015	-	-	-

CBP did not start tracking Fraudulent Family Units until April 2018. OFO does not collect/track this type of information.

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Topic:	Inadmissible Family Units
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Primary:	The Honorable Claire McCaskill
Committee:	HOMELAND SECURITY (SENATE)

Question: Were subject to a final order or removal?

Response: This is a determination that occurs generally subsequent to their processing by CBP; therefore, CBP has no metrics on this subject.

Questiou: Were determined to pose a risk to public safety or national security?

Response: The data below refers to individuals who were found inadmissible based on Section 212(a)(3) of the *Immigration and Nationality Act*, Security and Related Grounds,.

Fiscal Year	USBP Totals	OFO Totals	CBP Total
2018	0	28	28
2017	0	30	30
2016	0	12	12
2015	0	-	-

Question: Did not fall under any of the above criteria?

Response:

Fiscal Year	USBP Totals	OFO Totals	CBP Total
2018	98,303	53,738	152,041
2017	67,650	33, 654	101,304
2016	62,713	35,464	98,177
2015	28,550	-	28,550

Question: Had one or more members that were enrolled in the Deferred Action for Childhood Arrivals (DACA) program?

Response:

Fiscal Year	USBP Totals	OFO Totals	CBP Total
2018	0	-	0
2017	3	-	3
2016	2	-	2
2015	15	-	15

OFO does not have access to data that would indicate if the subject is enrolled in the DACA program.

Question#:	13
Topic:	Children Detained at Ports of Entry
Hearing:	The Implications of the Re-interpretation of the Flores Settlement Agreement for Border Security and Illegal Immigration Incentives
Primary:	The Honorable Claire McCaskill
Committee:	HOMELAND SECURITY (SENATE)

Question: On September 27, 2018, the Department of Homeland Security (DHS) Office of Inspector General (OIG) released a report which found that that during the family separation crisis hundreds of children were detained at ports of entry and Border Patrol Stations longer than the required 72 hours. What steps has CBP taken to ensure that children are no longer held for such long periods of time?

Response: Each port of entry has a finite capacity in which to accomplish multiple missions: national security, counter-narcotics, facilitation of law trade, and processing of all travelers. CBP must manage this limited space to best ensure safety and security for travelers and our officers, while facilitating timely processing for U.S. citizens and lawful permanent residents, visitors with appropriate travel documents, and individuals without documents sufficient for admission or other lawful entry. This processing occurs in conjunction with inspections for drugs and prohibited items as we strive to protect the homeland. Processing individuals without documentation is particularly resource intensive. It may take hours before the necessary sworn statements, consulate checks, and paperwork are complete. These checks are necessary for CBP to verify the identity and criminal history of these individuals seeking to enter the United States without proper documentation.

- CBP processes all aliens who arrive at a U.S. port of entry.
    - All administrative admissibility processing is separate from any criminal prosecution.
    - CBP closely monitors the processing of cases to ensure that cases are processed expeditiously in accordance with the applicable law.
    - When CBP completes its administrative processing, the aliens are referred for custody with ICE ERO to wait further interviews with USCIS and/or hearings before an Immigration Judge.
    - CBP prioritizes the processing of Unaccompanied Alien Children (UAC) and families ahead of the processing of other cases in secondary inspection.

CBP only maintains custody of inadmissible aliens for the minimum time necessary to complete the inspection and for another agency to accept custody.

Expanding physical capacity (buildings and infrastructure) at Ports of Entry is a challenge. Most POEs have a restricted footprint and were designed decades ago when volumes were significantly lower. CBP continues to work to expand capacity through

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hiring additional CBP Officers. CBP has made tremendous strides in hiring new CBP officers for the southwest border through judicious use of recruitment and retention incentives, and continues to expand best practices for hiring, such a "Fast-Track" hiring. On a daily basis, Port Directors work to maximize the available capacity to accomplish multiple mission requirements, including the processing of lawful trade and travel, to address our counter-narcotics mission, and the processing of individuals without travel documents. The number of inadmissible travelers CBP is operationally capable to process varies depending on overall port volume and enforcement actions. Because the mission ebbs and flows and changes, this number will also fluctuate from day to day. Importantly, CBP only holds individuals for the limited period of time necessary to complete processing and transfer to ICE ERO. Increasing the availability of additional custodial space at ICE/ERO facilities along with transportation support is critical. Diverting agency resources from outside the Southwest Border is neither sustainable nor suitable as it places additional stresses on those areas, creating longer wait times at airports and slower cargo processing in those areas from where CBP officers are being diverted.

The *Trafficking Victims Protection Reauthorization Act of 2008* (TVPRA) states that an unaccompanied alien child (UAC) must be transferred from DHS to the U.S. Department of Health and Human Services, Office of Refugee Resettlement (HHS/ORR) custody within 72-hours upon determining the alien is a UAC, absent exceptional circumstances. Consistent with the TVPRA, CBP notifies HHS/ORR upon such a determination and maintains continuous communication with HHS/ORR regarding placements of all UACs it processes. CBP monitors custodial durations of UACs held in CBP facilities to ensure proper resources are available to meet

Additionally, CBP is mandated to process UACs as expeditiously as possible in accordance with the *Flores* Settlement Agreement as through CBP's internal policies and procedures, including CBP's National Standards on Transport, Escort, Detention and Search (TEDS).

CBP whenever possible prioritizes the processing of UACs and family units. CBP strives to ensure all minors in its custody are treated with dignity, respect, and with special concern for their vulnerability as minors.

On September 28, 2018, the DHS Office of the Inspector General released a report titled, *Results of Unannounced Inspections of Conditions for Unaccompanied Alien Children in CBP Custody*. The OIG report found that CBP facilities were generally in compliance

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with the CBP TEDS policy and the *Flores* Settlement Agreement, regardless of how long the minor was held in our custody.

Question#:	14
Topic:	IT Failures
Hearing:	The Implications of the Re-interpretation of the Flores Settlement Agreement for Border Security and Illegal Immigration Incentives
Primary:	The Honorable Claire McCaskill
Committee:	HOMELAND SECURITY (SENATE)

Question: On September 27, 2018, DHS OIG released a report that found that DHS and CBP were not completely prepared to implement the Zero Tolerance Policy or manage the after-effects of the Policy. Specifically, DHS OIG identified issues regarding lack of integration between component information technology systems, unreliable data reporting on family separations, and dissemination of inconsistent or inaccurate information to detainees. What steps have been taken to remedy the IT failures that led to inaccurate or incomplete information being transferred between CBP and other DHS components of federal agencies?

Response: U.S. Immigration and Customs Enforcement (ICE) and U.S. Customs and Border Protection (CBP) have independent information technology (IT) systems that are designed to efficiently enforce immigration laws under their respective authorities. As such, each IT system is designed according to the enforcement business process of each agency. However, all data is stored in the Enforcement Integrated Database (EID), which serves as the combined data repository for ICE and CBP applications and contains immigration data related to encounters, subjects, arrests, detentions, and removals.

Regarding family separations and reunification, ICE has longstanding policies and procedures that govern these processes. However, such separations have typically occurred when there are concerns about a child's health, safety, and well-being. As a result, ICE did not have a systematic process in place to track these limited cases prior to the zero tolerance policy. While ICE worked with other involved agencies to bring about reunifications, as ordered by the court in *Ms. L* v. *ICE*, No. 18-cv-428 (S.D. Cal.), the agency also worked concurrently to update its systems so that, going forward, ICE personnel will be able to easily identify any alien that CBP flags as a member of a family unit.

In August 2018, CBP implemented system updates to track family separations. The EID was updated to ensure family separations were captured upon apprehension and available for use during immigration enforcement activities. ICE was then able to use the information to identify members of family units and separated individuals through IT system notifications and reports.

Post-Hearing Questions for the Record
Submitted to Matthew Albence & Robert Perez
From Senator Rob Portman

"The Implications of the Re-interpretation of the Flores Settlement Agreement for Border Security and Illegal Immigration Incentives"

October 3, 2018

Question#:	15
Topic:	Case Backlog
Hearing:	The Implications of the Re-interpretation of the Flores Settlement Agreement for Border Security and Illegal Immigration Incentives
Primary:	The Honorable Rob Portman
Committee:	HOMELAND SECURITY (SENATE)

Question: The backlog of pending immigration court cases exceeds 700,000 cases. What resources would the Department of Justice and Department of Homeland Security need to reduce that backlog by half over a two-year time frame? Please specify what those resources are, how they would enable the federal government to reduce the backlog, and an estimate of how much they would cost.

Response: Based on current dockets before the U.S. Department of Justice's (DOJ) Executive Office for Immigration Review (EOIR), pending immigration court cases have grown to more than 797,000 as of October 31, 2018. Though, with current staffing levels, the backlog is projected to easily exceed 1 million cases by the start of Fiscal Year (FY) 2020. To reduce the current number of pending immigration cases by 50 percent over two years, the U.S. Immigration Customs and Enforcement (ICE) Office of the Principal Legal Advisor (OPLA) would require an additional 1,713 total resources, including 1,187 line attorneys, 368 field legal support staff, and 158 field supervisory attorneys. This would result in a first-year personnel cost of approximately $81.9 million, and additional cost of $123.3 million for associated facilities. This effort would essentially double the size of the program and, as a practical matter, require multiple years to recruit and onboard the necessary resources and provide for the corresponding facility needs.

Since FY 2018, EOIR has received funding to hire 180 new Immigration Judge (IJ) teams (1,080 positions), including 30 IJ teams in a supplemental appropriation associated with the FY 2019 Humanitarian Assistance and Security at the Southern Border Act, while OPLA has received only 120 positions and no positions associated with the supplemental appropriation. For FY 2019, the House mark recommended 100 additional IJ teams; which, if appropriated, would further increase OPLA's need for additional personnel.

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OPLA only received 70 positions in FY 2018, despite OPLA's request for 195. For FY 2019, OPLA's budget submission included 338 attorney positions; however, the Senate mark provided no positions and the House mark would only fund 46 positions, which is again significantly less than required. OPLA needs an additional 830 resources, including 505 field line attorneys, to respond to the IJ allocation in FY 2018 and the House mark in FY 2019. When Congress appropriates new EOIR personnel and construction dollars for new courtrooms, OPLA must concurrently be appropriated a corresponding number of attorneys, support staff, and construction dollars to appear before the new IJs in the new courtrooms.

Additionally, OPLA is also facing a critical shortage in facilities-related funding to keep pace with new courtroom construction by EOIR. EOIR is fully funded for construction of new courtrooms across the country, some of which are in cities that OPLA currently has no presence in. To build offices for OPLA staff to meet this unprecedented EOIR courtroom expansion, OPLA requires $9.9 million in FY 2019 and $27.2 million through FY 2020. Further, because few OPLA facility projects meet the $2 million threshold for procurement, construction, and improvement funding, OPLA must fund nearly all field facility projects with operations and support funding, which negatively affects payroll and general expenses necessary for personnel and other mission-critical requirements.

OPLA recognizes that it must operate in a resource-constrained environment and does not advance these resource needs lightly. However, without an appropriately trained, equipped, and resourced ICE legal program, the following adverse consequences transcend OPLA:

- Unchecked IJs will terminate and indefinitely continue removal proceedings;
- Terrorists, human rights abusers, and criminal aliens will be granted release on bond by IJs and receive immigration benefits leading to U.S. citizenship;
- Immigration fraud will go undetected, undermining the very integrity of our immigration system; and
- Removal proceedings will be less fair for the aliens themselves, as ICE OPLA attorneys will not be there to help IJs identify viable legal claims that aliens may be able to assert and ensure appropriate development of the record.

In addition to the resource challenges facing ICE OPLA, ICE Enforcement and Removal Operations would also require corresponding resources to complete additional removals of those receiving final orders. Because detention is necessary in most cases to successfully carry out removals, these resources would include additional detention bedspace and personnel.

Post-Hearing Questions for the Record
Submitted to Matthew Albence & Robert Perez
From Senator Heidi Heitkamp

"The Implications of the Re-interpretation of the Flores Settlement Agreement for Border Security and Illegal Immigration Incentives"

October 3, 2018

Question#:	16
Topic:	Proposed Rule
Hearing:	The Implications of the Re-interpretation of the Flores Settlement Agreement for Border Security and Illegal Immigration Incentives
Primary:	The Honorable Heidi Heitkamp
Committee:	HOMELAND SECURITY (SENATE)

Question: On September 6, 2018, the Department of Homeland Security ("DHS") and Department of Health and Human Services ("HHS") jointly announced a proposed rule ("NPRM" or "proposed rule") that would address the terms of the Flores settlement agreement ("FSA"). Examining this proposed rule, including its impact, costs, and benefits, was relevant to the topic of the hearing held on Tuesday, September 18, 2018, but went largely unaddressed. The proposed rule represents a clear statement on how the Administration seeks to end the FSA.

Why did your testimony, both submitted to the Committee prior to the hearing and presented at the hearing, not address the proposed rule that was recently published by DHS and HHS?

Response: The proposed amendments to DHS and HHS regulations on the *Apprehension, Processing, Care, and Custody of Alien Minors and Unaccompanied Alien Children*, were published in the Federal Register on September 7, 2018, and the proposed rule was open for public comment through November 6, 2018. This Notice of Proposed Rulemaking is the official document that announced and explained the agency's plan to address the relevant and substantive terms of the Flores Settlement Agreement (FSA) in regulation. DHS welcomed comments on the proposed rule and encouraged them to be submitted as part of the public docket.

All significant issues raised in public comments received will be addressed in the final rulemaking.

Question#:	17
Topic:	Full Cost-Benefit Analysis
Hearing:	The Implications of the Re-interpretation of the Flores Settlement Agreement for Border Security and Illegal Immigration Incentives
Primary:	The Honorable Heidi Heitkamp
Committee:	HOMELAND SECURITY (SENATE)

Question: The Office of Management and Budget classified the proposed rule as "significant," which means that it requires a full cost-benefit analysis under Executive Orders 12866 and 13563. Additionally, the FSA has been in effect since 1997. However, despite two decades implementation experience, throughout the proposed rule, the DHS and HHS state they are unable to quantify the cost of the changes they propose due to a myriad of factors, variables, and uncertainties. The NPRM states no less than a half-dozen times that DHS and HHS are unable to present estimates for the costs of this rule.

If the NPRM seeks to merely codify the Flores agreement with a few changes, why are you struggling to provide a detailed quantitative analysis of the impact of these changes?

What are the "other variables to consider" that are preventing DHS, HHS, and the Department of Justice ("DOJ") from formulating the cost of this proposed rule?

Response: In the notice of proposed rulemaking (NPRM), *Apprehension, Processing, Care, and Custody of Alien Minors and Unaccompanied Alien Children*, published on September 7, 2018, as part of the baseline analysis for the proposed rule DHS provides the existing annual costs of the current three Family Residential Centers (FRCs) and a description of the type of services provided by the private contractors as well as the variable costs charged to U.S. Immigration and Customs Enforcement (ICE). In 2015, the three FRCs cost ICE $323,264,774; in 2016 $312,202,420; and in 2017, $231,915,415. These are costs that ICE currently incurs to operate under the *Flores Settlement Agreement* (FSA) and are not considered a cost of the proposed rule.

The rule proposes to adopt provisions that parallel the relevant and substantive terms of the FSA, with some modifications to reflect intervening statutory and operational changes. These modifications may result in additional or longer detention for certain minors. It is for these impacts that DHS was unable to provide a quantified cost estimate because there are many variable that would affect them. DHS discusses the multiple variables and their particular complications or how they are beyond the scope of the proposed rule, which impact the number of future aliens, the length of stay, and potentially the costs of detention. DHS states, "Among other factors, these may include the number of minors and their accompanying adults who arrive in a facility on a given day; the timing and outcome of immigration court proceedings before an immigration judge; whether an individual is eligible for parole or bond; issuance of travel documents by foreign governments; transportation availability and scheduling; the availability of bed space in a Family Residential Center (FRC); and other laws, regulations, guidance, and

Question#:	17
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policies regarding removal not subject to this proposed rule." 83 FR 45518 (Sept. 7, 2018)

One of the factors listed above is the number of minors and their accompanying adults who arrive in a facility on a given day. As explained in the NPRM, from year-to-year, the number of family units seeking entry into the country fluctuates. In the first five months of Fiscal Year (FY) 2018, the number of families increased by significant levels. An unprecedented number of family units from Central America illegally entered or were found inadmissible to the United States in recent years. In FY 2013, the total number of family units apprehended entering the United States illegally on the Southwest Border was 14,855. From October 2017 through July 2018, that figure increased to 77,802 family units apprehended at the Southwest Border, an almost 40 percent average annual increase in apprehensions since FY 2013.

DHS explains in the proposed rule, 83 FR 45518, "although DHS cannot reliably predict the increased average length of stay for affected minors and their accompanying adults in FRCs, DHS recognizes that generally only certain groups of aliens are likely to have their length of stay in an FRC increased as a result of this proposed rule, among other factors. For instance, aliens who have received a positive credible fear determination, and who are not suitable for parole, may be held throughout their asylum proceedings. Likewise, aliens who have received a negative credible fear determination, have requested review of the determination by an immigration judge, had the negative determination upheld, and are awaiting removal, are likely to be held until removal can be effectuated." Further, DHS states that in FY 2017, the total number of minors who might have been detained longer at an FRC is estimated to be the number of minors in an FRC who were not paroled or released on order of their own recognizance (131), plus the number of such minors who had negative credible fear determinations (349), plus administratively closed cases (1,465), plus those who were released and either had final orders of removals at the time of their release or subsequently received final orders following their release (842), for a total of 2,787.

As stated in the NPRM, 83 FR 45513, "Two of the FRCs are operated by private contractors, while one is operated by a local government, under contract with ICE. These are the amounts that have been paid to private contractors or to the local government to include beds, guards, health care, and education. The FRC costs are fixed-price agreements with variable costs added on a monthly basis. Overall, the fixed-price agreements are not dependent on the number of detainees present or length of stay, with some exceptions. At [the Berks Family Residential Center] Berks, the contract includes a

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per-person fee charged in addition to the monthly fixed rate. At two of the FRCs, Berks and [Karnes County Residential Center] Karnes, education is provided per the standards of a licensed program set forth in the FSA, at a per-student, per-day cost. Since FRCs are currently at limited available capacity and the configuration of limited available capacity varies from day to day across all FRCs, the number of children and adults vary at Berks day to day and the number of children at Karnes vary day to day. Thus, these costs charged to ICE vary from month to month."

DHS also discusses the complications of forecasting new FRCs in the proposed rule, 83 FR 45519. "At this time, ICE is unable to determine how the number of FRCs may change due to this proposed rule. There are many factors that would be considered in opening a new FRC, some of which are outside the scope of this proposed regulation, such as whether such a facility would be appropriate, based on the population of aliens crossing the border, anticipated capacity, projected average daily population, and projected costs."

Question#:	18
Topic:	Cost of Detention
Hearing:	The Implications of the Re-interpretation of the Flores Settlement Agreement for Border Security and Illegal Immigration Incentives
Primary:	The Honorable Heidi Heitkamp
Committee:	HOMELAND SECURITY (SENATE)

Question: In her testimony, Ms. Gambler and the GAO state that in FY 2013, the average daily cost of detention was $158 compared to $10.55 per day for alternatives-to-detention programs ("ATDs"). In the FY2018 budget justification from DHS, the daily cost of detention based on the average daily population for family beds is estimated to be $319.37, while adult beds are estimated at $143.01 per day.

What is the daily cost to detain:

an adult?

a child?

a family?

Response: The average daily bed rate enacted by Congress provided in the Omnibus is $126.52. This estimate is revisited during the course of the fiscal year as invoices are received to understand cost trends. U.S. Immigration and Customs Enforcement (ICE) will not know the final Fiscal Year (FY) 2019 average daily bed rate until it receives all FY 2019 invoices, which invariably is in the late fall timeframe. ICE does not track the costs of unaccompanied alien children (UAC)in the custody of the U.S. Department of Health and Human Services (HHS). However, ICE spends approximately $50 million per year on the temporary housing and transport of UAC from the U.S. Department of Homeland Security (DHS), pending their transfer to shelter facilities designated by the HHS Office of Refugee Resettlement. For FY 2019, ICE projects the daily cost to detain a family to be $318.79, per family member.

Question: How will those costs increase or decrease based on the implementation of the NPRM? In other words, what is the quantifiable benefit of codifying Flores through the rulemaking process?

Response: ICE does not expect a change in the daily detention costs for family detention as it relates to codifying *Flores*, because DHS already incurs the costs of implementing the standards for the care and custody of minors set forth in the *Flores* Settlement Agreement (FSA). The baseline discussion in the Notice of Proposed Rulemaking (NPRM), *Apprehension, Processing, Care, and Custody of Alien Minors and Unaccompanied Alien Children*, published on September 7, 2018, beginning at 83 FR 45513 – 45514, discusses the costs already incurred to implement the FSA. The NPRM goes on to state that, "the

Question#:	18
Topic:	Cost of Detention
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Primary:	The Honorable Heidi Heitkamp
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primary benefit of the proposed rule would be to ensure that applicable regulations reflect the current conditions of DHS detention, release, and treatment of minors and UACs, in accordance with the relevant and substantive terms of the FSA, the Homeland Security Act of 2002, and the William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008." 83 FR 45520.

Question#:	19
Topic:	Reaching Out to Stakeholders
Hearing:	The Implications of the Re-interpretation of the Flores Settlement Agreement for Border Security and Illegal Immigration Incentives
Primary:	The Honorable Heidi Heitkamp
Committee:	HOMELAND SECURITY (SENATE)

Question: In your cost-benefit analysis of the NPRM, you cite Executive Order 13563 as a guide. Executive Order 13563 directs agencies to assess costs by reaching out to industry stakeholders before the NPRM is issued.

Did you reach out to industry stakeholders before issuing the NPRM?

Did your failure to reach out to stakeholders lead to your incomplete analysis of the costs and benefits of this rule?

How do you expect stakeholders to provide substantive comment on the rule's effect on them if you did not provide a thorough cost-benefit analysis in the NPRM?

Response: In the *Apprehension, Processing, Care, and Custody of Alien Minors and Unaccompanied Alien Children* notice of proposed rulemaking (NPRM), published on September 7, 2018, the Department of Homeland Security (DHS) analyzed the impact on affected industries, specifically those contracted with DHS to operate Family Residential Centers (FRCs). As stated in the NPRM, "This proposed rule would directly regulate DHS and HHS. DHS contracts with private contractors and a local government to operate and maintain FRCs, and with private contractors to provide transportation of minors and UACs. This rule would indirectly affect these entities to the extent that DHS contracts with them under the terms necessary to fulfill the *Flores Settlement Agreeement*. To the degree this rule increases contract costs to DHS private contractors, it would be incurred by the Federal Government in the cost paid by the contract."

In the NPRM, DHS encouraged comments, views, and data from all interested parties on all aspects of the proposed rule.

All significant issues raised in public comments received will be addressed in the final rule.

Question#:	20
Topic:	Benefits to Children
Hearing:	The Implications of the Re-interpretation of the Flores Settlement Agreement for Border Security and Illegal Immigration Incentives
Primary:	The Honorable Heidi Heitkamp
Committee:	HOMELAND SECURITY (SENATE)

Question: At its core, Flores provides key protections for children in detention facilities. It does not relax its standards for an influx of children due to a humanitarian crisis or a crisis of the Administration's own making. However, the NPRM that seeks to codify Flores is not rooted in protecting migrant children. Instead, it focuses on the benefits on the easing of administrative burdens of the Departments subject to Flores.

What are the benefits to children for easing the administrative burdens on the government required by Flores?

What are the projected costs to a child's health, psychological welfare, social development, education, and familial relationships related to the NPRM's aim of allowing children to stay in government detention centers for longer than 20 days to ease administrative burdens?

What are you currently doing to ensure that the costs of childhood detention do not outweigh its administrative benefits?

Response: The Notice of Proposed Rulemaking (NPRM), *Apprehension, Processing, Care, and Custody of Alien Minors and Unaccompanied Alien Children*, published on September 7, 2018, codifies the existing protections for minors and unaccompanied alien children (UAC) who are in the care and custody of the U.S. Department of Homeland Security (DHS) and U.S. Department of Health and Human Services (HHS). The existing operational standards of U.S. Immigration and Customs Enforcement's (ICE) Family Residential Centers (FRCs) are outlined in the *Flores* Settlement Agreement, and in greater detail in Exhibit 1 of the agreement. The standards of the *Flores* Settlement Agreement, which ICE proposes to codify, "at a minimum ... must include, but are not limited to, proper physical care (including living accommodations), food, clothing, routine medical and dental care, family planning services, emergency care (including a screening for infectious disease) within 48 hours of admission, a needs assessment (including both educational and special needs assessments), educational services (including instruction in the English language), appropriate foreign language reading materials for leisure-time reading, recreation and leisure-time activities, mental health services, group counseling, orientation (including legal assistance that is available), access to religious services of the minor's choice, visitation and contact with family members, a reasonable right to privacy of the minor, and legal and family reunification services," as stated in the NPRM at 83 FR 45501 (Sept. 7, 2018). Furthermore, ICE's FRCs are designed to ensure the well-being of their residents, particularly children. Families have unsupervised freedom of movement throughout FRCs, are provided with three meals a day and 24-hour access to snacks and beverages, and may wear their own clothes or non-institutional clothing, which is provided by the facility.

Question#:	20
Topic:	Benefits to Children
Hearing:	The Implications of the Re-interpretation of the Flores Settlement Agreement for Border Security and Illegal Immigration Incentives
Primary:	The Honorable Heidi Heitkamp
Committee:	HOMELAND SECURITY (SENATE)

The FRCs include communal activity rooms, social and law libraries, dining rooms with enhanced child-specific and culturally sensitive food choices, televisions, and recreation and toddler play areas with a variety of indoor and outdoor daily recreation activities for children and adults. All school-age children receive educational services provided by state-certified teachers, and families receive mental health screenings upon admission, as well as ongoing medical and mental health care as needed.

All FRCs must maintain compliance with applicable state and federal regulations, as well as ICE's Family Residential Standards, and are subject to an independent compliance inspection program through a contracted team of juvenile subject matter experts.

Provisions of the *William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008*, Pub. L. 110-457 (Dec. 23, 2008), require ICE and other DHS components to transfer all UAC to the custody of HHS within 72 hours of a DHS determination that the child is a UAC, absent exceptional circumstances. ICE therefore defers to HHS for a response on UAC health and welfare.

Question#:	21
Topic:	Children's Welfare
Hearing:	The Implications of the Re-interpretation of the Flores Settlement Agreement for Border Security and Illegal Immigration Incentives
Primary:	The Honorable Heidi Heitkamp
Committee:	HOMELAND SECURITY (SENATE)

Question: A New York Times article published on September 12, 2018, cited HHS data stating 12,800 migrant children are currently detained in one of the many detention facilities across the United States. That number is five times the amount of children detained in May 2017, and detention centers are now nearing capacity.

What are the costs to children's health and welfare when they are crammed into detention centers operating at 90 percent capacity?

What environmental risks are children likely to encounter in these detention centers that are operating at or near capacity? For example, how does the Department evaluate the environmental effects of weather and the ability to play or go outside, access to fresh food and water, or the ability to feel safe and secure on a child's welfare?

Response: U.S. Immigration and Customs Enforcement (ICE) notes that the New York Times article mentioned above describes U.S. Department of Health and Human Services (HHS) shelters, rather than ICE facilities, and defers to HHS for additional information on facility capacity and its effects.

ICE's three Family Residential Centers (FRCs) house family units together and are designed to ensure the well-being of their residents, particularly children. Families have unsupervised freedom of movement throughout FRCs, are provided with three meals a day and 24-hour access to snacks and beverages, and have the option of wearing their own clothes or non-institutional clothing that is provided by the facility.

The FRCs include communal activity rooms, a social library, a law library, dining rooms with enhanced child-specific and culturally diverse food choices, televisions, recreation areas and toddler play areas; they also schedule a variety of indoor and outdoor daily recreation and exercise activities for both children and adults. All children of school age receive educational services provided by state certified teachers, and families receive mental health screenings upon admission, as well as ongoing medical and mental health care as needed.

All FRCs must maintain compliance with applicable state and federal regulations, as well as ICE's Family Residential Standards (FRS). The FRCs are also subject to an independent compliance inspection program through a contracted team of juvenile subject matter experts.

Question#:	22
Topic:	Appearing Without an Attorney
Hearing:	The Implications of the Re-interpretation of the Flores Settlement Agreement for Border Security and Illegal Immigration Incentives
Primary:	The Honorable Heidi Heitkamp
Committee:	HOMELAND SECURITY (SENATE)

Question: A justification for longer detention periods is to ensure detainees appear for their immigration court hearings.

How do you assess the costs and benefits of allowing children to appear in immigration courts without an attorney, parent, or legal guardian present?

Response: U.S. Immigration and Customs Enforcement (ICE) is required by the *Trafficking Victims Protection Reauthorization Act of 2008* to transfer UAC to U.S. Department of Health and Human Services custody within 72 hours of determining the child is a UAC, absent exceptional circumstances. 8 U.S.C. § 1232(b)(3). To the extent this question refers to children in the custody of HHS, ICE defers to HHS.

Post-Hearing Questions for the Record
Submitted to Matthew Albence & Robert Perez
From Senator James Lankford

"The Implications of the Re-interpretation of the Flores Settlement Agreement for Border Security and Illegal Immigration Incentives"

October 3, 2018

Question#:	23
Topic:	Federal Licensing
Hearing:	The Implications of the Re-interpretation of the Flores Settlement Agreement for Border Security and Illegal Immigration Incentives
Primary:	The Honorable James Lankford
Committee:	HOMELAND SECURITY (SENATE)

Question: As you know, the Flores v. Lynch ruled that alien minors must be released or transferred to a "licensed program" "as expeditiously as possible," and that a "licensed program" must both be: (1) "licensed by an appropriate State agency to provide residential, group, or foster care services for dependent children" and (2) "non-secure as required under state law." Does the federal government have the authority to license facilities instead of relying on state agencies?

Response: The U.S. Department of Homeland Security (DHS), and the U.S Department of Health and Human Services (HHS) are not proposing federal licensing instead of state licensing. DHS, in conjunction with HHS, published a Notice of Proposed Rulemaking (NPRM), *Apprehension, Processing, Care, and Custody of Alien Minors and Unaccompanied Alien Children* in the Federal Register for public comment on September 7, 2018.

As stated in the NPRM, licensing by an appropriate state agency "requirement is sensible for unaccompanied alien children because all states have licensing schemes for the housing of unaccompanied juveniles who are by definition 'dependent children'." Additionally, "if no such licensing regime is available...DHS proposes that it will employ an outside entity to ensure that the facility complies with the family residential standards established by U.S. Immigration and Customs Enforcement (ICE) and that meet the requirements for licensing under the *Flores* Settlement Agreement thus fulfilling the intent of obtaining a license from a state or local agency. That would thus provide effectively the same substantive assurances that the state-licensing requirement exists to provide."

Question#:	23
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Primary:	The Honorable James Lankford
Committee:	HOMELAND SECURITY (SENATE)

To clarify, the proposed rule states that if state licensing is unavailable, DHS will provide oversight of family residential centers by hiring an outside entity to ensure compliance with the ICE's family residential standards, which include the same requirements listed in Exhibit 1 of the *Flores* Settlement Agreement. ICE encouraged the public to submit comments on the rulemaking. The comment period closed on November 6, 2018; all significant issues raised in public comments will be addressed in the final rulemaking.

Question#:	24
Topic:	Single Parents
Hearing:	The Implications of the Re-interpretation of the Flores Settlement Agreement for Border Security and Illegal Immigration Incentives
Primary:	The Honorable James Lankford
Committee:	HOMELAND SECURITY (SENATE)

Question: Are family detention facilities equipped to detain single fathers and/or single mothers with children of both genders?

Response: U.S. Immigration and Customs Enforcement (ICE) Enforcement and Removal Operations manages and operates three Family Residential Centers (FRCs), in Pennsylvania and Texas. FRCs are ICE-run facilities used to accommodate alien families in ICE custody, including single parents with children of both genders. The facilities house families who were placed in administrative immigration proceedings.

FRCs maintain family unity upon intake. Housing assignment classifications conform to the familial relationship and adherence to the age/gender requirements. There are no restrictions on rooming related children together with their parent; however, there are restrictions by age and gender that inform whether more than one family unit can be housed together as outlined in head of household classifications. These restrictions limit the availability of bed space at FRCs.

Currently, the Berks Family Residential Center (BFRC) in Berks County, Pennsylvania, is the only FRC that can detain male head of household family units. BFRC can house male and female head of household family units with children of both genders.

Question#:	25
Topic:	Alternatives to Detention II
Hearing:	The Implications of the Re-interpretation of the Flores Settlement Agreement for Border Security and Illegal Immigration Incentives
Primary:	The Honorable James Lankford
Committee:	HOMELAND SECURITY (SENATE)

Question: Is the Alternatives to Detention program a viable alternative to placing illegal immigrants in detention facilities? If so, how much larger would the program need to be to allow individuals to use the program while also ensuring that all participants fully comply with their hearing schedule and, if ordered, actually leave the country?

Response: No, the Alternatives to Detention (ATD) program is not a substitute for detention, and U.S. Immigration and Customs Enforcement (ICE) does not support the release of individuals who pose a public safety risk or flight risk that cannot be mitigated with ATD. The use of ATD does not guarantee that individuals will attend their hearings or comply with a removal order if/when issued by an immigration judge. ATD does allow for closer monitoring of a small segment of the 1.6 million individuals assigned to the non-detained docket, but is not effective at ensuring court appearances and compliance with court orders.

It must be further noted that individuals are not released from custody because the ATD program exists, but rather because a determination has been made that detention is not possible or necessary. ATD is a compliance monitoring tool that is added to release requirements to increase the likelihood that a vetted, enrolled participant will comply with conditions of release.

For example, when determining whether an individual should be enrolled in the ATD program, numerous factors are taken into account during each individual case review. Factors considered include, but are not limited to, criminal and immigration history, supervision history, family and/or community ties, status as a caregiver or provider, and other humanitarian or medical considerations. ICE notes that an individual on ATD is provided the opportunity to demonstrate compliance with release conditions and potentially earn less stringent reporting requirements.

Due to limited ATD resources and the length of time it takes for an individual's case to conclude on the non-detained docket, it is generally not possible to keep individuals enrolled in the ATD program throughout the entirety of their removal proceedings, which may last for years, without significantly reducing the number of individuals who are able to participate in the program. Further, the most important factor that determines if an alien will actually be removed when a final order is issued is whether the person is in detention when this occurs. If an alien is not detained at the time, in many cases, ICE will have to expend significant resources to locate, detain, and subsequently remove the alien in accordance with the final order.

Question#:	25
Topic:	Alternatives to Detention II
Hearing:	The Implications of the Re-interpretation of the Flores Settlement Agreement for Border Security and Illegal Immigration Incentives
Primary:	The Honorable James Lankford
Committee:	HOMELAND SECURITY (SENATE)

Question: Please list the methods DHS uses to track the locations of those in the ATD program and how DHS determines which type of monitoring to use. Are there other types of tracking technology that DHS has or is considering to increase the Department's ability to track individuals in a non-invasive but effective way?

Response: Currently, the only consistent way for the ATD Intensive Supervision Appearance Program (ISAP) III to actively track a participant is through the assignment of a GPS ankle monitor. ICE is exploring the use of limited GPS data-point collection through the SmartLINK[7] application, but, at this time, there is no available data or analyses to truly compare against the GPS ankle monitor with regard to successes and failures. Further, the SmartLINK application was not intended to replace the GPS ankle monitor, but rather to provide another technology option for use for appropriate participants.

ATD's efficacy drops off sharply when used to monitor those who have already been ordered removed or for recent arrivals with no community ties, including the many family units who are being apprehended by U.S. Customs and Border Protection while attempting to cross the Southwest Border. When an individual fails to comply with their conditions of release, the ATD contractor informs the assigned deportation officer who updates the case management system and takes enforcement action as appropriate.

However, it is important to note that ICE fugitive operations budget is very limited, and that its fugitive operations have been limited as it has had to reallocate staff to respond to the crisis along the southwest border. These limitations adversely impact ICE's ability to rapidly respond when an alien fails to comply and to locate those who abscond. ICE also notes that while ATD can complement other immigration enforcement efforts when used appropriately on a vetted and monitored population of participants, the program was not designed to facilitate ICE's mission of removing aliens with final orders, and the agency lacks sufficient resources to locate and arrest the significant number of participants who abscond. Detention is the only method that will ensure court appearances and compliance with court orders of removal.

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[7] SmartLINK is a smart phone application that enables supervising officers and case managers to keep participants focused on the conditions of release by smart phone or tablet. The participant is able perform a recurring check-in, have identity verified, determine their location at the time of check-in, and quickly collect status change information. The application also allows for push notifications for meetings or appointments, turn-by-turn directions, and direct contact with the case specialist/case officer, and also has a searchable database for services.

Question#:	25
Topic:	Alternatives to Detention II
Hearing:	The Implications of the Re-interpretation of the Flores Settlement Agreement for Border Security and Illegal Immigration Incentives
Primary:	The Honorable James Lankford
Committee:	HOMELAND SECURITY (SENATE)

Question: How many individuals on ATD abscond before a final removal order or decision is made in their case?

Response: There were 8,517 pre-order absconders in Fiscal Year 2018. This figure only includes individuals who were actively enrolled in the ATD program at the time they absconded. An absconder in this context is defined as an individual who has failed to report, who has been unresponsive to attempts by the U.S. Government to contact, and whom the U.S. Government has been unable to locate (i.e., a participant who cuts off the GPS unit, fails to return calls, ignores contact attempts, and the U.S. Government is unable to locate him or her physically).

Question: Are any unaccompanied or accompanied minor children monitored on ATD after being placed with a sponsor?

Response: No one under the age of 18 is allowed to participate in ATD as a head-of-household. They may, however, be dependents and thus be eligible to receive some of the services provided.

Question#:	26
Topic:	Access to an Attorney
Hearing:	The Implications of the Re-interpretation of the Flores Settlement Agreement for Border Security and Illegal Immigration Incentives
Primary:	The Honorable James Lankford
Committee:	HOMELAND SECURITY (SENATE)

Question: Is there any situation where a minor in custody would not be given an attorney or advocate while going through the legal proceedings? Does every minor have access to an attorney or advocate?

Response: As a preliminary matter, all aliens in removal proceedings have the right to retain and be represented by counsel of their choosing, at no cost to the government. *See* 8 U.S.C. § 1362. The U.S. Department of Homeland Security (DHS) is committed to ensuring that everyone in its custody has timely access to counsel.

Federal law and DHS policy mandate that DHS transfers any unaccompanied alien child (UAC) in its custody to the custody of the Secretary of Health and Human Services not later than 72 hours after determining that the child is a UAC, absent exceptional circumstances. 8 U.S.C. § 1232(b)(3). As a result, DHS defers to the Department of Health and Human Services for a response regarding access to attorneys and advocates for UAC in their custody.

Question#:	27
Topic:	Tracking Removals
Hearing:	The Implications of the Re-interpretation of the Flores Settlement Agreement for Border Security and Illegal Immigration Incentives
Primary:	The Honorable James Lankford
Committee:	HOMELAND SECURITY (SENATE)

Question: How are removals tracked after a final order of removal is given?

Response: Removals are tracked in U.S. Immigration and Customs Enforcement's (ICE) system of record—the ENFORCE Alien Removal Module—and closed out in the system of record upon removal. Deportation officers assigned to individual cases track the progress of those cases throughout the removal process and execute the removal order once it is final and executable.

Question: Who pays for an immigrant on the non-detained docket who has been given a final order of removal to return to his or her home country?

Response: If ICE apprehends the alien and returns the alien to his or her country of origin, ICE pays for the removal. Otherwise, the alien pays for their own removal, often through purchasing a commercial airline ticket.

Question: How many immigrants have been released into the interior of the United States because his or her home country would not accept them after a final order of removal was issued in the United States?

Response: While most countries adhere to international obligations to accept the timely return of their citizens, ICE has confronted unique challenges with some countries that are either uncooperative in repatriating their citizens or unduly delay the acceptance of their citizens. In addition, ICE generally cannot detain an alien under a final order of removal for longer than 6 months once the alien has entered the period for removal, unless there is a significant likelihood that the alien will be removed in the reasonably foreseeable future. *See Zadvydas* v. *Davis*, 533 U.S. 678 (2001). As such, 5,307[8] immigrants have been released into the interior of the United States because his or her home country would not accept him or her after a final order of removal was issued in the United States.

Question: Does DHS track those individuals until deportation or removal is available?

Response: Yes, these individuals remain on the ICE non-detained docket and are assigned to officers for case management purposes.

[8] Fiscal Year 2018 year-to-date ICE detention data is current through September 22, 2018.

Question#:	28
Topic:	UAC Entry
Hearing:	The Implications of the Re-interpretation of the Flores Settlement Agreement for Border Security and Illegal Immigration Incentives
Primary:	The Honorable James Lankford
Committee:	HOMELAND SECURITY (SENATE)

Question: Do you have data to show why UACs attempt to enter the US illegally instead of crossing legally at a port of entry? Is there any data that demonstrates a correlation between the spike in UACs crossing the border and the policy to place them with undocumented sponsors?

Response: CBP does not have data sets to show why UACs attempt to enter the U.S. illegally instead of crossing legally at a port of entry.

Question: Is there any data that demonstrates a correlation between the spike in UACs crossing the border and the policy to place them with undocumented sponsors?

Response: CBP does not have data that demonstrates a correlation between the spike in UACs crossing the border and the policy to place them with undocumented sponsors.

Post-Hearing Questions for the Record
Submitted to Matthew Albence & Robert Perez
From Senator Gary Peters

"The Implications of the Re-interpretation of the Flores Settlement Agreement for Border Security and Illegal Immigration Incentives"

October 3, 2018

Question#:	1
Topic:	Mental Health Risks for Children
Hearing:	The Implications of the Re-interpretation of the Flores Settlement Agreement for Border Security and Illegal Immigration Incentives
Primary:	The Honorable Gary Peters
Committee:	HOMELAND SECURITY (SENATE)

Question: Our top priority should be the welfare and care of children. Numerous medical organizations agree that even brief stays in detention can lead to psychological trauma and lasting mental health risks. As follow up to the September 18, 2018 hearing, please respond to the following questions.

How long is too long to detain a child?

In proposing rollbacks to the Flores Settlement Agreement, has the Department of Homeland Security reviewed the extensive literature discussing the long-term health consequences that detention can have on children?

How does the Department of Homeland Security intend to mitigate the almost certain negative consequences of the detention of children?

Response: U.S. Immigration and Customs Enforcement (ICE) notes that the length of time an individual or family spends in detention varies based on many case-specific factors. Furthermore, ICE believes that immigration cases should be heard in a timely fashion and supports the hiring of ICE Office of Principal Legal Advisor attorneys and additional immigration judges by the U.S. Department of Justice to help address current case backlogs, and to reduce periods of detention for all detainees, including family units. However, it is worth noting that many recently arrived families do not appear for court hearings and ignore lawfully issued orders of removal, which is why ICE maintains the belief that detention is a necessary tool to effectuate removal in cases where it is legally appropriate.

Question#:	1
Topic:	Mental Health Risks for Children
Hearing:	The Implications of the Re-interpretation of the Flores Settlement Agreement for Border Security and Illegal Immigration Incentives
Primary:	The Honorable Gary Peters
Committee:	HOMELAND SECURITY (SENATE)

ICE stands by its testimony that its three Family Residential Centers (FRCs) are safe and humane. ICE's FRCs were developed in consultation with non-governmental organizations with relevant expertise, and are specifically designed to ensure the well-being of their residents. They offer an extensive range of services, including medical care, educational and legal resources, religious services seven days a week, and numerous daily indoor and outdoor recreational activities.

ICE takes its responsibility to provide appropriate care seriously, particularly when it comes to children, many of whom have recently endured a hazardous journey to the Southwest Border through no choice of their own. The FRCs are designed with the particular needs of this vulnerable population in mind, and ICE strongly believes the services they provide are appropriate. In fact, as detailed in the June 2017 DHS Inspector General's report,[1] ICE's FRCs were found to be "...clean, well-organized, and efficiently run," and the agency was found to be "...addressing the inherent challenges of providing medical care and language services and ensuring the safety of families in detention."

Unlike traditional detention facilities, FRC residents have unsupervised freedom of movement throughout indoor and outdoor areas of the facility. Residents also have the option of wearing their own clothes or non-institutional clothing that is provided to them by the facility, depending on personal preference, and have access to free laundry services, as well as an onsite barber shop. The FRCs also feature child-friendly décor and furniture, as well as toddler play areas, multiple gymnasiums, and communal spaces for dining, studying, and engaging in recreational activities.

All three FRCs offer a variety of indoor and outdoor daily recreation activities for both children and adults, and a monthly recreational schedule is posted within communal areas in each facility. Indoor activities offered include a variety of sports (e.g., basketball, badminton, indoor soccer, and volleyball), group exercise classes (e.g., Zumba), arts and crafts classes, karaoke, movie nights, and seasonal and holiday-themed activities. Outdoor recreational facilities include soccer fields, sand volleyball courts, handball courts, sand boxes, and play structures with slides and jungle gyms. In addition, residents also have access to musical instruments, as well as a law library and a social library, where additional scheduled activities include crochet, **Rosetta Stone** language learning

[1] "Results of Office of Inspector General FY 2016 Spot Inspections of U.S. Immigration and Customs Enforcement Family Detention Facilities." June 2, 2017. https://www.oig.dhs.gov/sites/default/files/assets/2017/OIG-17-65-Jun17.pdf?utm_source=E-mail+Updates&utm_campaign=e1d1c3e779-EMAIL_CAMPAIGN_2017_06_16&utm_medium=email&utm_term=0_7dc4c5d977-e1d1c3e779-45096257

Question#:	1
Topic:	Mental Health Risks for Children
Hearing:	The Implications of the Re-interpretation of the Flores Settlement Agreement for Border Security and Illegal Immigration Incentives
Primary:	The Honorable Gary Peters
Committee:	HOMELAND SECURITY (SENATE)

classes, coloring activities and drawing contests, and reading sessions with parents and children. A wide selection of books are available in multiple languages, with an approximate 10-to-1 ratio of books to residents.

Educational services are also provided to all children from pre-K through high school, and include in-class instruction, as well as field trips. An initial aptitude test is provided within 72 hours of arrival to determine appropriate placement, and students are taught by state-certified and bilingual/ESL-certified teachers. Education is provided in accordance with state standards, and education records are provided to U.S. public schools upon request.

Dining at FRCs includes three free "all you can eat" meals each day, which are based on a six-week rotating menu that has been verified and approved by a licensed dietician, and feature child-friendly and culturally relevant options. Residents are also provided with 24-hour access to snacks and juice, and have the option of buying additional supplies from the commissary.

The FRCs also offer comprehensive medical care, and staffing includes registered nurses and licensed practical nurses, licensed mental health providers, mid-level providers that include a physician's assistant and nurse practitioner, a physician, dental care, and access to 24-hour sick call and emergency services, as well as a full pharmacy and immunizations. In addition, all families receive mental health screenings upon admission, as well as ongoing medical and mental health care as needed. Both individual and group therapy is offered, and mental health staff have biweekly meetings with educational staff to identify at-risk students and ensure that their needs are addressed.

Residents are able to receive family visitors seven days a week from 8 a.m. to 8 p.m., and have access to counsel seven days a week from 7 a.m. to 8 p.m. The FRCs provide legal orientation presentations every Monday, Wednesday, and Friday; play a "*Know Your Rights*" video in multiple languages on a loop on a dedicated channel in the common areas; and provide free telephone calls in support of all legal cases and credible fear interviews. Licensed childcare services are available from 8 a.m. to 8 p.m. to allow parents to meet with legal counsel, participate in the voluntary work program, or attend credible fear interviews, court, or medical appointments.

In addition, all FRCs must maintain compliance with applicable state and federal regulations, as well as ICE's Family Residential Standards, and are subject to an independent compliance inspection program through a contracted team of juvenile subject matter experts. Despite recent media reports, ICE believes these facilities offer

Question#:	1
Topic:	Mental Health Risks for Children
Hearing:	The Implications of the Re-interpretation of the Flores Settlement Agreement for Border Security and Illegal Immigration Incentives
Primary:	The Honorable Gary Peters
Committee:	HOMELAND SECURITY (SENATE)

the best possible environment for family units that are waiting to have their cases heard by an immigration court. ICE believes that the treatment residents receive at the FRCs is appropriate and humane, and ICE continually monitors, evaluates, and makes improvements to programs as necessary.

Finally, regarding the proposed "rollback" of the *Flores* Settlement Agreement (FSA), as the U.S. Department of Homeland Security (DHS) states in the Notice of Proposed Rulemaking, "*Apprehension, Processing, Care, and Custody of Alien Minors and Unaccompanied Alien Children,*" the rule proposes to satisfy the basic purpose of the FSA in ensuring that all minors and unaccompanied alien children in DHS custody are treated with dignity, respect, and special concern for their particular vulnerability.

Post-Hearing Questions for the Record
Submitted to Matthew Albence & Robert Perez
From Senator Kamala Harris

"The Implications of the Re-interpretation of the Flores Settlement Agreement for Border Security and Illegal Immigration Incentives"

October 3, 2018

Question#:	2
Topic:	Summer Camps
Hearing:	The Implications of the Re-interpretation of the Flores Settlement Agreement for Border Security and Illegal Immigration Incentives
Primary:	The Honorable Kamala D. Harris
Committee:	HOMELAND SECURITY (SENATE)

Question: Last year, the American Academy of Pediatrics warned that DHS facilities "do not meet the basic standards for the care of children in residential settings." On July 17, 2018, two doctors working on behalf of DHS publicly documented negligent and even abusive treatment at ICE family detention facilities in a letter to members of the U.S. Senate, concluding that, "there is no amount of programming that can ameliorate the harms created by the very act of confining children to detention centers."

You testified before the Senate Judiciary Committee on July 31, 2018, "With regard to the FRCs [the ICE Family Residential Centers], I think the best way to describe them is to be more like a summer camp." When pressed on this statement, you stated that you were "very comfortable" with the treatment of immigrants at these centers.

You reaffirmed this position in response to my questioning at the September 18, 2018 HSGAC hearing. I asked you if you believed these facilities were like summer camps and you responded, "I believe the standards under which they [children] are kept are very safe; they're humane." I asked if you have children or know children who have attended summer camp and whether you would send your children to one of these facilities. You responded that the "question is not applicable."

Please explain why you persist to describe ICE detention facilities that medical experts argue fail to meet acceptable standards for the care of children as "summer camps."

Please answer my question from the September 18, 2018 hearing-would you willingly send your children to stay in a family residential center?

Question#:	2
Topic:	Summer Camps
Hearing:	The Implications of the Re-interpretation of the Flores Settlement Agreement for Border Security and Illegal Immigration Incentives
Primary:	The Honorable Kamala D. Harris
Committee:	HOMELAND SECURITY (SENATE)

Response: U.S. Immigration and Customs Enforcement (ICE) stands by its testimony that its three Family Residential Centers (FRCs) are safe and humane. ICE's FRCs are specifically designed to ensure the well-being of their residents, and offer an extensive range of services, including medical care, educational and legal resources, religious services seven days a week, and numerous daily indoor and outdoor recreational activities.

ICE takes its responsibility to provide appropriate care very seriously, particularly when it comes to children, many of whom have recently endured a hazardous journey to the Southwest Border through no choice of their own. The FRCs are designed with the particular needs of this vulnerable population in mind, and ICE strongly believes the services they provide are appropriate. In fact, as detailed in the June 2017 DHS Inspector General's report,[2] ICE's FRCs were found to be "clean, well-organized, and efficiently run," and the agency was found to be "addressing the inherent challenges of providing medical care and language services and ensuring the safety of families in detention."

Unlike traditional detention facilities, FRC residents have unsupervised freedom of movement throughout indoor and outdoor areas of the facility. Residents also have the option of wearing their own clothes or non-institutional clothing, which is provided to them by the facility, depending on personal preference, and have access to free laundry services and an onsite barber shop. The FRCs also feature child-friendly décor and furniture, as well as toddler play areas, multiple gymnasiums, and communal spaces for dining, studying, and engaging in recreational activities.

All three FRCs offer a variety of indoor and outdoor daily recreation activities for children and adults, and a monthly recreational schedule is posted within communal areas in each facility. Indoor activities offered include a variety of sports (e.g., basketball, badminton, indoor soccer, and volleyball), group exercise classes (e.g., Zumba), arts and crafts classes, karaoke, movie nights, and seasonal and holiday-themed activities. Outdoor recreational facilities include soccer fields, sand volleyball courts, handball courts, sand boxes, and play structures with slides and jungle gyms. In addition, residents also have access to musical instruments, as well as a law library and a social library, where additional scheduled activities include crochet, **Rosetta Stone** language learning

[2] "Results of Office of Inspector General FY 2016 Spot Inspections of U.S. Immigration and Customs Enforcement Family Detention Facilities." June 2, 2017. https://www.oig.dhs.gov/sites/default/files/assets/2017/OIG-17-65-Jun17.pdf?utm_source=E-mail+Updates&utm_campaign=e1d1c3e779-EMAIL_CAMPAIGN_2017_06_16&utm_medium=email&utm_term=0_7dc4c5d977-e1d1c3e779-45096257

Question#:	2
Topic:	Summer Camps
Hearing:	The Implications of the Re-interpretation of the Flores Settlement Agreement for Border Security and Illegal Immigration Incentives
Primary:	The Honorable Kamala D. Harris
Committee:	HOMELAND SECURITY (SENATE)

classes, coloring activities and drawing contests, and reading sessions with parents and children. A wide selection of books is available in multiple languages, with an approximate a 10-to-1 ratio of books to residents.

Educational services are also provided to all children from pre-K through high school, and include in-class instruction and field trips. An initial aptitude test is provided within 72 hours of arrival to determine appropriate placement, and students are taught by state-certified and bilingual/English as a Second Language-certified teachers. Education is provided in accordance with state standards, and education records are provided to U.S. public schools upon request.

Dining at the FRCs includes three free "all you can eat" meals each day, which are based on a six-week rotating menu that has been verified and approved by a licensed dietician and feature child-friendly and culturally relevant options. Residents are also provided with 24-hour access to snacks and juice, and have the option of buying additional supplies from the commissary.

The FRCs also offer comprehensive medical care, and staffing includes registered nurses and licensed practical nurses, licensed mental health providers, mid-level providers that include a physician's assistant and nurse practitioner, a physician, dental care, and access to 24-hour sick call and emergency services, as well as a full pharmacy and immunizations. In addition, all families receive mental health screenings upon admission, as well as ongoing medical and mental health care as needed. Both individual and group therapy is offered, and mental health staff have bi-weekly meetings with educational staff to identify at-risk students and ensure their needs are addressed.

Residents can receive family visitors from 8 a.m. to 8 p.m., seven days a week, and have access to counsel from 7 a.m. to 8 p.m., seven days a week. The FRCs provide legal orientation presentations every Monday, Wednesday, and Friday; play a "*Know Your Rights*" video in multiple languages, on a loop, on a dedicated channel in the common areas; and provide free telephone calls in support of all legal cases and credible fear interviews. Licensed childcare services are available from 8 a.m. to 8 p.m. to allow parents to meet with legal counsel, participate in the voluntary work program, or attend credible fear interviews, court, or medical appointments.

Finally, all FRCs must maintain compliance with applicable state and federal regulations, as well as ICE's Family Residential Standards, and are subject to an independent compliance inspection program through a contracted team of juvenile subject matter experts. ICE believes that the treatment residents receive at the FRCs is appropriate and

Question#:	2
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humane, and ICE continually monitors, evaluates, and makes improvements to programs, as necessary.

Question#:	3
Topic:	Doctors' Recommendations
Hearing:	The Implications of the Re-interpretation of the Flores Settlement Agreement for Border Security and Illegal Immigration Incentives
Primary:	The Honorable Kamala D. Harris
Committee:	HOMELAND SECURITY (SENATE)

Question: Have you or other ICE officials directly consulted with the two doctors working with the DHS Office of Civil Rights and Civil Liberties who sent the July 17, 2018 letter to Senators about what they observed during their investigations of ICE family detention facilities? Please provide written documentation.

What specific actions have you or other ICE officials taken to address these doctors' recommendations? Please provide written documentation.

Response: Dr. Allen and Dr. McPherson are contract consultants who participate in site visits with the U.S. Department of Homeland Security's (DHS) Office for Civil Rights and Civil Liberties (CRCL). Consistent with its statutory oversight authorities at 6 U.S.C. § 345 and 42 U.S.C. § 2000ee-1, DHS CRCL reviews and investigates complaints alleging violations of individual rights and liberties in DHS policies or activities. In these investigations, DHS CRCL at times engages the assistance of contracted subject-matter experts (SMEs) who participate in site visits and prepare reports of their findings. In those instances, DHS CRCL then prepares final recommendation memoranda, which include general and specific policy recommendations. U.S. Immigration and Customs Enforcement (ICE) carefully reviews such recommendations and responds to DHS CRCL, indicating whether it concurs with each recommendation. DHS CRCL has provided, and continues to provide, ICE with policy recommendations on a variety of issues, including ones related to specific detention facilities. ICE and DHS CRCL work to resolve ongoing concerns, and DHS CRCL's annual reports provide an overview of these efforts each year. Other than when DHS CRCL's contract consultants are on site in its facilities, ICE does not generally have direct contact with them.

Family Residential Centers (FRCs) are required to meet the ICE Family Residential Standards and are subject to an independent compliance inspection program through a contracted team of juvenile SMEs. Notably, ICE's Family Residential Standards were written with input from various SMEs, as well as government and non-government organizations.

ICE's three FRCs are safe and humane, and are specifically designed to ensure the well-being of their residents. ICE's FRCs offer an extensive range of services, including medical care, educational and legal resources, religious services 7 days per week, and numerous daily indoor and outdoor recreational activities. Additionally, as detailed in a June 2017 report by the DHS Office of Inspector General, ICE's FRCs were found to be "...clean, well-organized, and efficiently run," and the agency was found to be

Question#:	3
Topic:	Doctors' Recommendations
Hearing:	The Implications of the Re-interpretation of the Flores Settlement Agreement for Border Security and Illegal Immigration Incentives
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"...addressing the inherent challenges of providing medical care and language services and ensuring the safety of families in detention." Drs. Allen and McPherson themselves noted several improvements in medical and mental health care, as well as educational services in the FRCs following their last site visit in 2017; another DHS CRCL expert who also participated in the site visit indicated that she "[did] not anticipate a need for [DHS] CRCL to conduct further follow-up progress reviews." In sum, ICE takes its responsibility to provide appropriate care seriously, particularly when it comes to children. The FRCs are designed with the unique needs of this vulnerable population in mind, and ICE strongly believes the services they provide are appropriate.

Question#:	4
Topic:	Professional Organizations
Hearing:	The Implications of the Re-interpretation of the Flores Settlement Agreement for Border Security and Illegal Immigration Incentives
Primary:	The Honorable Kamala D. Harris
Committee:	HOMELAND SECURITY (SENATE)

Question: Have you or other ICE officials met with the American Medical Association or American Academy of Pediatrics to discuss ICE family detention facilities? Please provide written documentation.

Response: U.S. Immigration and Customs Enforcement (ICE) stands by its testimony that its three Family Residential Centers (FRCs) are safe and humane. ICE's FRCs were developed in consultation with non-governmental organizations with relevant expertise, and are specifically designed to ensure the well-being of their residents. The FRCs offer an extensive range of services, including medical care, educational and legal resources, daily religious services, and numerous daily indoor and outdoor recreational activities.

ICE takes its responsibility to provide appropriate care seriously, particularly when it comes to children, many of whom have recently endured a hazardous journey to the Southwest Border through no choice of their own. The FRCs are designed with the particular needs of this vulnerable population in mind, and ICE strongly believes the services they provide are appropriate. In fact, as detailed in the June 2017 DHS Inspector General's report, ICE's FRCs were found to be "...clean, well-organized, and efficiently run," and the agency was found to be "...addressing the inherent challenges of providing medical care and language services and ensuring the safety of families in detention."

All three of ICE's FRCs offer a variety of indoor and outdoor daily recreation activities for children and adults, and a monthly recreational schedule is posted within communal areas in each facility. Indoor activities offered include a variety of sports (e.g., basketball, badminton, indoor soccer, and volleyball), group exercise classes (e.g., Zumba), arts and crafts classes, karaoke, movie nights, and seasonal and holiday-themed activities. Outdoor recreational facilities include soccer fields, sand volleyball courts, handball courts, sand boxes, and play structures with slides and jungle gyms. In addition, residents also have access to musical instruments, as well as a law library and a social library, where additional scheduled activities include crochet, *Rosetta Stone* language learning classes, coloring activities and drawing contests, and reading sessions with parents and children. A wide selection of books are available in multiple languages, with an approximate 10-to-1 ratio of books to residents.

Educational services are also provided to all children from pre-K through high school and include in-class instruction and field trips. An initial aptitude test is provided within 72 hours of arrival to determine appropriate placement, and students are taught by state-certified and bilingual/English as a second language-certified teachers. Education is

Question#:	4
Topic:	Professional Organizations
Hearing:	The Implications of the Re-interpretation of the Flores Settlement Agreement for Border Security and Illegal Immigration Incentives
Primary:	The Honorable Kamala D. Harris
Committee:	HOMELAND SECURITY (SENATE)

provided in accordance with state standards, and education records are provided to U.S. public schools upon request.

Dining at FRCs includes three free "all you can eat" meals each day, which are based on a six-week rotating menu that has been verified and approved by a licensed dietician, and feature child-friendly and culturally relevant options. Residents are also provided with 24-hour access to snacks and juice and have the option of buying additional supplies from the commissary.

The FRCs also offer comprehensive medical care, and staffing includes registered nurses and licensed practical nurses, licensed mental health providers, mid-level providers that include a physician's assistant and nurse practitioner, a physician, dental care, and access to 24-hour sick call and emergency services, as well as a full pharmacy and immunizations. In addition, all families receive mental health screenings upon admission, as well as ongoing medical and mental health care as needed. Both individual and group therapy is offered, and mental health staff have biweekly meetings with educational staff to identify at-risk students and ensure their needs are addressed.

Question#:	5
Topic:	Referred for Trafficking
Hearing:	The Implications of the Re-interpretation of the Flores Settlement Agreement for Border Security and Illegal Immigration Incentives
Primary:	The Honorable Kamala D. Harris
Committee:	HOMELAND SECURITY (SENATE)

Question: At the September 18, 2018 HSGAC hearing, I repeated a request I have made many times to DHS officials for information on the number of cases where an adult accompanied by a child along the Southwest Border was referred to the Department of Justice for prosecution or investigation for trafficking. I asked for this information by the end of the week and you responded that you would consult with your agency. Please explain the delay in providing me this information. What is the number and status of all cases since January 2017 where ICE or any other DHS Component has referred an adult accompanied by a child to DOJ for investigation or prosecution for trafficking? What are ICE's and DHS's policies for tracking this information? Please provide written documentation.

Response: Human trafficking is an involuntary, exploitation-based crime involving force, fraud, or coercion of either U.S. citizens or foreign nationals. Human trafficking victims do not have to cross a border to be trafficked, whereas human smuggling is transportation based and requires crossing an international border. Individuals who are smuggled into the United States do so voluntarily. As of August 31, 2018, U.S. Immigration and Customs Enforcement (ICE) Homeland Security Investigations (HSI) initiated more than 700 investigations of human trafficking, which resulted in more than 1,400 criminal arrests, 425 convictions, and more than 300 victims rescued.

ICE HSI does not track cases that have been referred to the U.S. Department of Justice (DOJ) for investigation or prosecution for trafficking that specifically involve children accompanied by adults apprehended at the Southern border, nor does ICE HSI have a policy for tracking such cases.

Question#:	6
Topic:	Family Case Management Program Termination
Hearing:	The Implications of the Re-interpretation of the Flores Settlement Agreement for Border Security and Illegal Immigration Incentives
Primary:	The Honorable Kamala D. Harris
Committee:	HOMELAND SECURITY (SENATE)

Question: Until ICE terminated it in June 2017, the Family Case Management Program educated families about legal requirements and reportedly resulted in their attending 99 percent of ICE check-ins and immigration court hearings. It also reportedly cost the government $36 per day per family, as compared to the over $300 per day to hold a family in an ICE family residential center. Were you involved in the June 2017 decision to terminate the ICE Family Case Management Program? If not, who made the decision to terminate this program? Please provide me with all written documentation about ICE's decision to terminate the Family Case Management Program.

Response: U.S. Immigration and Customs Enforcement's (ICE) decision to terminate the Family Case Management Program (FCMP) pilot was based primarily on cost and the fact that both the FCMP and Alternatives to Detention (ATD) program had very similar compliance rates, though FCMP resulted in far fewer removals. At the time of the decision, the FCMP cost $38.47 per day, while ATD cost $4.40 per day. For the cost of monitoring one family via the FCMP, ICE could enroll nearly 10 families (heads of households) on ATD. ICE enrolled record levels of individuals on ATD in Fiscal Year 2018, due in part to the decision to terminate the FCMP pilot.

The FCMP cost $6.1 million in Fiscal Year (FY) 2015, $4 million in FY 2016, and $7.4 million in FY 2017 before its discontinuation. During its lifespan, the program cost a total of $17.5 million, and resulted in the removal of only 15 individuals from the country, as opposed to more than 5,500 from ATD during the same period. Because a key component of ICE's mission involves the removal of those who are illegally present in the country and have received a final order, ICE does not consider this to be a successful or appropriate use of resources, and has no plans to reinstate the FCMP at this time.

Question#:	7
Topic:	Alternatives to Detention Analysis
Hearing:	The Implications of the Re-interpretation of the Flores Settlement Agreement for Border Security and Illegal Immigration Incentives
Primary:	The Honorable Kamala D. Harris
Committee:	HOMELAND SECURITY (SENATE)

Question: Has ICE undertaken any analysis about the effectiveness of alternatives to detention for immigrant families, including the Family Case Management Program?

If so, please provide written documentation.

If not, will you commit to conduct such analysis to ensure that ICE is pursuing the most humane and effective policies with respect to asylum-seeking families?

Response: Yes, U.S. Immigration and Customs Enforcement (ICE) has conducted analysis on the effectiveness of its Alternatives to Detention (ATD) program. The ATD program is not as effective as detention at ensuring the removal of aliens from the United States when ordered by an immigration judge, ensuring the whereabouts of aliens when their cases have concluded, ensuring cases are adjudicated quickly before the courts, or ensuring that all individuals required to attend immigration hearings appear for them. The ATD program is thus not an effective substitute for detention and is not effective at ensuring that individuals are monitored through the duration of their removal proceedings. The ATD program is not sufficiently resourced to ensure that all family units can be enrolled in ATD through the duration of their proceedings, or to ensure that ICE can quickly respond to alerts or provide adequate oversight of program participants. ATD is less effective than detention at ensuring compliance with removal orders issued by immigration judge.

However, the ATD program is effective at keeping better track of whether hearings are attended; whether individuals abscond or are arrested for criminal offenses; and whether other release conditions are being met. The ATD program is effective at more closely monitoring a small segment of the non-detained population and allows for much greater oversight than traditional release with very little supervision at all.

ICE analyzed the effectiveness of the Family Case Management Program (FCMP). In furtherance of the Administration's efforts to act as good stewards of taxpayer dollars, ICE decided to conclude the FCMP pilot in June 2017 and invest those resources back into pre-existing and more cost-effective ICE ATD programs, allowing more individuals to participate in the program. In fact, for the cost of monitoring one family via the FCMP, ICE could enroll nearly 10 families (heads of households) on ATD. The FCMP ($38.47 per day per family; roughly $16.73 per individual) was a more expensive enforcement tool compared to ATD ISAP III ($4.40 per day). The FCMP cost $6.1 million in Fiscal Year (FY) 2015, $4 million in FY 2016, and $7.4 million in FY 2017

Question#:	7
Topic:	Alternatives to Detention Analysis
Hearing:	The Implications of the Re-interpretation of the Flores Settlement Agreement for Border Security and Illegal Immigration Incentives
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before its discontinuation. During its lifespan, the program cost a total of $17.5 million, and resulted in the removal of only 15 individuals from the country, as opposed to more than 5,500 from ATD during the same period. The fact that ATD ISAP III was more effective than FCMP in leading to removal orders at a fraction of the cost played a role when determining the most appropriate use of taxpayer dollars.

ICE is committed to implementing policies that are humane to all individuals, including asylum-seeking families, consistent with current immigration laws.

Question#:	8
Topic:	Coercion and Abuse Allegations I
Hearing:	The Implications of the Re-interpretation of the Flores Settlement Agreement for Border Security and Illegal Immigration Incentives
Primary:	The Honorable Kamala D. Harris
Committee:	HOMELAND SECURITY (SENATE)

Question: Legal advocates have filed a complaint with the DHS Office of Inspector General and the DHS Office of Civil Rights and Civil Liberties alleging coercion and abuse of parents separated from their children to compel them to forgo their legal rights - including their right to reunify with their children or to lawfully seek asylum. This complaint alleges that DHS officers and agents verbally and physically threatened, insulted, denied food, and withheld feminine hygiene products from parents and even falsely told them that their children would be permanently taken from them. Some DHS officers and agents allegedly presented some parents with forms with options pre-selected and did not provide some with any explanation of their rights.

When did you become aware of these allegations?

What did actions, if any, did ICE take in response to these allegations? Please provide written documentation.

Has ICE conducted its own inquiry into these allegations?

If so, when will the inquiry be completed and will you publish it?

If not, will you commit to commencing an inquiry immediately?

Response: The U.S. Department of Homeland Security cannot comment on an ongoing internal investigation.

Question#:	9
Topic:	Guidelines I
Hearing:	The Implications of the Re-interpretation of the Flores Settlement Agreement for Border Security and Illegal Immigration Incentives
Primary:	The Honorable Kamala D. Harris
Committee:	HOMELAND SECURITY (SENATE)

Question: Will you commit to establishing clear, enforceable, and written guidelines and to conduct training with ICE officers and agents to ensure that there will never be coercion or abuse when forms are presented to individuals in custody to sign that may ask them to relinquish their legal rights?

Response: U.S. Immigration and Customs Enforcement (ICE) detention standards and policies ensure access to interpreter services for any detainee who has limited English proficiency. Please note that interpretation services are readily accessible for most languages; though, some less common and/or indigenous languages may require pre-scheduled appointments.

Regarding your other concerns, ICE employees are held to the highest integrity and ethical standards, and are expected to perform their duties in accordance with existing laws, regulations, policies, and/or procedures that govern their conduct and performance. Existing federal ethics statutes and regulations, along with ICE policies (e.g., the Employee Code of Conduct, the Memorandum on Reporting Misconduct, and the Table of Offenses Penalties) are disseminated routinely and reinforced annually through integrity awareness and ethics training.

ICE takes all allegations of employee misconduct seriously. The U.S. Department of Homeland Security Office of Inspector General reviews all allegations of misconduct involving ICE employees and reserves the right to take the lead on any investigation. Additionally, the ICE Office of Professional Responsibility (OPR) thoroughly, objectively, and impartially reviews and/or investigates all complaints brought forward. Allegations of misconduct by ICE employees can be reported to OPR, which promotes public trust and confidence by ensuring organizational integrity is maintained through a multi-layered approach using security, inspections, and investigations. Allegations of misconduct can also be directed to the Joint Intake Center via email at Joint.Intake@dhs.gov, via telephone at 1-877-2INTAKE, or via U.S. Mail at the following address:

U.S. Immigration and Customs Enforcement
Office of Professional Responsibility
P.O. Box 14475 Pennsylvania Avenue, NW
Washington, DC 20044

Question#:	10
Topic:	OIG Report I
Hearing:	The Implications of the Re-interpretation of the Flores Settlement Agreement for Border Security and Illegal Immigration Incentives
Primary:	The Honorable Kamala D. Harris
Committee:	HOMELAND SECURITY (SENATE)

Question: A DHS OIG report issued on September 27, 2018 found that DHS officials provided no or inconsistent information to parents accompanied by children who were impacted by the Zero Tolerance Policy, which resulted in some parents not understanding that their children would be separated from them and some being unable to communicate with their children.

Will you commit to commencing an inquiry in response to this report immediately?

Response: U.S. Customs and Border Protection and U.S. Immigration and Customs Enforcement (ICE) perform an essential role in securing our Nation's borders at and between ports of entry and enforcing U.S. immigration law in the interior of the country. As part of securing the borders and enforcing immigration laws, both are committed to treating all people humanely. As noted in the U.S. Department of Homeland Security (DHS) response to the recent Office of the Inspector General draft report, the report makes no mention of the Department's significant effort to reunify families. DHS coordinated with the U.S. Department of Health and Human Services (HHS), which deployed HHS staff to ICE detention locations to ensure that communication between the parents and their children occurred. The Court in the *Ms. L. v. ICE* litigation specifically acknowledged the Government's strides in facilitating communication.

Question#:	11
Topic:	Communicating with Children I
Hearing:	The Implications of the Re-interpretation of the Flores Settlement Agreement for Border Security and Illegal Immigration Incentives
Primary:	The Honorable Kamala D. Harris
Committee:	HOMELAND SECURITY (SENATE)

Question: Please provide written documentation of ICE and DHS policies and procedures for alerting parents about their separation from their children and how they can communicate with their children while separated.

Response: U.S. Immigration and Customs Enforcement (ICE) cannot speak to the policies and procedures of U.S. Customs and Border Protection (CBP) for notifying parents about their separation and defers to CBP and other Department of Homeland Security Components for additional information.

However, if a family unit is separated while in ICE custody, ICE explains to the adult the reason why the family is being separated, where the adult is going to be detained, that the child(ren) will be in the custody of the U.S. Department of Health and Human Services (HHS), and how the adult will be able to get in contact with the child(ren) after the separation. Additionally, all detained parents must be provided a written and verbal "Notice of Potential Rights for Certain Detained Alien Parents Separated from their Minor Children." A posting of the Notice is also posted in all detention facilities, as required by the Court in *Ms. L* v. *ICE*.

In the event the parent or legal guardian is in ICE custody and the child(ren) is/are in HHS Office of Refugee Resettlement (ORR) custody following separation by CBP, the two Components collaborate to establish options for communication between the parent/legal guardian and the child(ren). ICE Enforcement and Removal Operations (ERO) officers and ORR staff and contractors collaborate to schedule communications via telephone, Skype, or FaceTime. ICE deportation officers assigned to a parent's case will work with ICE ERO's Custody Management division to provide information to the parent about the child and follow-up on questions regarding the separation.

ICE ERO has created posters in multiple languages that explain to a parent or legal guardian how to request an opportunity to communicate with his or her child(ren), and provided a phone number to the Detention Information and Reporting Line (DRIL) so parents could call if they were having trouble locating or communicating with a child placed in ORR custody or a local child welfare system.

ICE ERO officers in adult detention facilities, working with ICE ERO Field Office juvenile coordinators or the Custody Programs Child Welfare Team, identify the HHS facility in which the child(ren) is/are being housed and coordinate with HHS on possible

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times for the parent/guardian to communicate with the child(ren). Whenever possible, communication is conducted via video, but, at a minimum, is conducted telephonically.

Lastly, ICE notes that during the recent court-ordered reunification process, all parents were able to place free phone calls to their child(ren) who had been separated. Parents were not charged for these calls, although the frequency of these calls depended on logistical factors, including the number of available phones and facilitators to receive calls at ORR facilities.

Question#:	12
Topic:	Familes Separated
Hearing:	The Implications of the Re-interpretation of the Flores Settlement Agreement for Border Security and Illegal Immigration Incentives
Primary:	The Honorable Kamala D. Harris
Committee:	HOMELAND SECURITY (SENATE)

Question: At the September 18, 2018 HSGAC hearing, I asked you if any families have been separated at the border since June 20, 2018, when the President issued his Executive Order.

You responded that "we [CBP] are not separating families at the border, at or between ports of entry" and that the only instances in which parents would be separated from an accompanying child would be if there were elements of false parentage, a criminal situation, or a health and safety concern. You said you would provide me with specific numbers.

Have families have been separated at the Southwest border since the June 20, 2018 Executive Order?

If so, please provide documentation of all cases, including the nationality and ages of adults and accompanying children, locations of the separation, and the specific reasons for each separation.

Response: The U.S. Customs and Border Protections Office of Field Operations and U.S. Border Patrol reported 156 adults and children that had been separations between June 20, 2018 and September 18, 2018.

CBP Family Separations
June 20, 2018 - September 18, 2018

Sector/Field Office: Age Group	ELSAL	GUATE	HONDU	MEXIC	NICAR	PERU	US	Grand Total
OFO-EL PASO		**3**			**1**			**4**
6-12		2						2
26-35		1			1			2
OFO-LAREDO			**6**	**5**				**11**
6-12			2	3				5
13-17			1					1
18-25				1				1
26-35			2	1				3
46-55			1					1
OFO-SAN DIEGO				**2**				**2**

Question#:	12
Topic:	Familes Separated
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Primary:	The Honorable Kamala D. Harris
Committee:	HOMELAND SECURITY (SENATE)

6-12				1				1
26-35				1				1
USBP-TCA		**2**		**4**				**6**
6-12		1						1
13-17				2				2
26-35		1						1
36-45				1				1
46-55				1				1
USBP-RGV	**23**	**16**	**28**	**4**	**2**	**3**	**1**	**77**
0-5	3	2	6		1	2		14
6-12	3	3	2	1			1	10
13-17	6	3	6	1				16
18-25			1					1
26-35	6	3	5	1	1	1		17
36-45	4	3	6					13
46-55	1	2	2	1				6
USBP-EPT	**3**	**6**	**8**					**17**
0-5	1	1	1					3
6-12			3					3
13-17		2	1					3
18-25	1	1						2
26-35	1		2					3
36-45		2	1					3
USBP-YUM		**18**	**4**	**2**				**24**
0-5		1	1					2
6-12		5						5
13-17		2	1	1				4
18-25		2	1					3
26-35		6						6
36-45		1		1				2
46-55		1	1					2
USBP-BBT				**1**				**1**
36-45				1				1
USBP-SDC	**3**		**2**	**2**				**7**
6-12	1			1				2
13-17	1		1					2
26-35	1			1				2
36-45			1					1
USBP-DRT			**4**					**4**
0-5			1					1

Question#:	12
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6-12			1					1
26-35			1					1
36-45			1					1
USBP-ELC		**2**	**2**					**4**
0-5			1					1
13-17		1						1
18-25			1					1
36-45		1						1
USBP-LRT			**2**					**2**
13-17			1					1
36-45			1					1
Grand Total	**29**	**47**	**56**	**20**	**3**	**3**	**1**	**159**

Question#:	13
Topic:	Training Regarding Children
Hearing:	The Implications of the Re-interpretation of the Flores Settlement Agreement for Border Security and Illegal Immigration Incentives
Primary:	The Honorable Kamala D. Harris
Committee:	HOMELAND SECURITY (SENATE)

Question: As you know, there has been great public outrage at images of young children being held in CBP facilities. According to a June 18, 2018 NBC News article, young migrants were held in large metal detention cages and given just mylar blankets and camping pads to sleep on concrete floors for multiple nights. Further, affidavits have been filed this summer in litigation alleging that children faced limited access to food and water, spoiled food, freezing temperatures, and verbal and physical assault while in DHS facilities. Also, on August 16, 2018, Health and Human Services Commander Jonathan White testified to HSGAC that "In this year, we have seen many more who are what we call tender age, that is to say below 12 and under." These young children have been passing through CBP custody.

I have previously asked DHS officials about specific employee training pertaining to children and young children, including trauma-informed training where family separation is involved. I have yet to receive a response. I followed up on these requests at the September 18, 2018 HSGAC hearing, when I asked you what training CBP employees receive pertaining to children, including the handling of the youngest children in detention facilities. You said that you would provide me with this information.

What specific training and guidance do CBP employees receive about the handling, treatment, and care of children and young children, particularly trauma informed-care? Please provide written documentation.

Response: U.S. Customs and Border Protection (CBP) recognizes the importance of training frontline officers and agents in the care and welfare of all individuals, including children. For example, CBP Officers and Agents receive training on the proper processing, treatment, and referral of aliens. For Officers and Agents, training begins in their respective basic academies, reinforced through post academy mentoring and advanced training, and through periodic issuance of memoranda and policy reminders/musters. The Border Patrol Academy and Field Office Academy provides specific training on the *Flores* Settlement Agreement and the Trafficking Victims Protection Reauthorization Act of 2008 (TVPRA). The Border Patrol Academy teaches CBP's National Standards on Transport, Escort, Detention (TEDS) policy and its provisions specific to juveniles, training devoted to screening for trafficking victims, child safety, and determining familial relationships. CBP law enforcement officers also receive training via an online training platform known as the Performance and Learning Management System (PALMS). Related courses include Human Trafficking and *Reno v.*

Question#:	13
Topic:	Training Regarding Children
Hearing:	The Implications of the Re-interpretation of the Flores Settlement Agreement for Border Security and Illegal Immigration Incentives
Primary:	The Honorable Kamala D. Harris
Committee:	HOMELAND SECURITY (SENATE)

Flores. It is required for all CBP employees who encounter Unaccompanied Alien Children (UAC) to take these courses at a minimum.

Per CBP's interim Medical Directive signed on January 28, 2019, all juvenile aliens in custody receive a mandatory health interview during initial processing. Where contracted medical resources (Physician Assistants or Nurse Practitioners) are on staff, they also receive a mandatory medical assessment. This is an overall health evaluation and is not specific to "trauma informed" care.

Question: When was this training and guidance last updated?

Response: CBP continually updates its various policies regarding the care and treatment of young children. These policy updates are listed below:

- Human Trafficking Awareness (C102) - 7/18/18 update
- Cultural Diversity And Law Enforcement (C280c) - 8/31/18 update
- Personal Search Policy And Procedures (S340c) - 10/05/18 update
- Arrest And Detention (S360c) - 9/4/18 update

On October 5, 2018, CBP implemented the current version of CBP's National Standards on Transport, Escort, and Detention.

Question: Which child welfare and pediatric experts have you or other CBP officials consulted with in the development of this training and guidance? Please provide written documentation.

Response: In 2015, U.S. Customs and Border Protection (CBP) published its National Standards on Transport, Escort, Detention, and Search (TEDS) policy, the agency-wide policy setting nationwide standards governing CBP's interaction with detained individuals. TEDS governs CBP's commitment to the safety, security, and care of those in our custody. TEDS policy was developed in consultation with Subject Matter Experts from CBP's Office of Field Operations, the U.S. Border Patrol, DHS Civil Rights and Civil Liberties (CRCL), key government stakeholders and non-governmental organizations. It incorporates best practices developed in the field while reflecting legal and regulatory requirements.

Question#:	14
Topic:	Encouraging Asylum-Seekers
Hearing:	The Implications of the Re-interpretation of the Flores Settlement Agreement for Border Security and Illegal Immigration Incentives
Primary:	The Honorable Kamala D. Harris
Committee:	HOMELAND SECURITY (SENATE)

Question: Under the Immigration and Nationality Act, Section 8 U.S.C. 1225 and the U.N. 1967 Protocol to 1951 Refugee Convention and customary international law principle of non-refoulement, nearly all people who reach U.S. soil have the right to petition our government for asylum or other humanitarian protection, regardless of how they arrived.

However, a DHS OIG report issued on September 27, 2018 highlights that that CBP employees practice "metering" to limit asylum-seeker crossing of the international line from Mexico onto U.S. soil. On July 18, 2018, CBP Commissioner McAleenan informed the Senate Finance Committee that on any given day, CBP employees may ask asylum seekers at our three busiest ports to wait in Mexico. He noted that over 1,000 people were waiting in Mexico to enter the San Ysidro Port in California - some for as long as one to two weeks. According to the American Civil Liberties Union further, CBP employees allegedly prevented asylum seekers from accessing certain "non-designated" ports of entry.

Is it still DHS policy to encourage asylum-seekers to present themselves at ports of entry along the Southwest border for processing, rather than to enter between the ports?

Response: All applicants for admission to the United States should present themselves at a port of entry for inspection and processing. At times, due to operational capacity, as necessary to facilitate orderly processing, and to maintain the security and safety of the traveling public, individuals may need to wait in Mexico before being permitted to enter the POE. It is illegal to enter the United States at a location other than a designated port of entry. All aliens who arrive in the United States may apply for asylum.

Question#:	15
Topic:	Delay Tactics
Hearing:	The Implications of the Re-interpretation of the Flores Settlement Agreement for Border Security and Illegal Immigration Incentives
Primary:	The Honorable Kamala D. Harris
Committee:	HOMELAND SECURITY (SENATE)

Question: Would tactics to deny a person access to a U.S. port of entry because they seek humanitarian protection contradict international human rights norms?

Response: U.S. Customs and Border Protection (CBP) does not practice, coordinate, nor encourage tactics to deny a person access to a Port of Entry (POE). CBP does not turn asylum-seekers away from the POEs. At times, due to operational capacity, as necessary to facilitate orderly processing, and to maintain the security and safety of the traveling public, individuals may need to wait in Mexico before being permitted to enter the POE. Upon reaching the U.S. side of the border, all individuals are processed.

Question: Have CBP officials ever coordinated with Mexican officials - in San Ysidro or elsewhere - to deny asylum-seekers access to a port of entry at a time of their choosing?

Response: U.S. Customs and Border Protection (CBP) officials often work with Mexican officials on operational issues at the ports of entry. However, CBP processes individuals arriving at ports of entry in accordance with its own laws and does not interfere in Mexico's ability to enforce its own laws. CBP does not deny asylum seekers access to a POE at any time. At times, due to operational capacity, as necessary to facilitate orderly processing, and to maintain the security and safety of the traveling public, individuals may need to wait in Mexico before being permitted to enter the POE. Upon reaching the U.S. side of the border, all individuals are processed.

Question#:	16
Topic:	Asylum-Seeker Policy
Hearing:	The Implications of the Re-interpretation of the Flores Settlement Agreement for Border Security and Illegal Immigration Incentives
Primary:	The Honorable Kamala D. Harris
Committee:	HOMELAND SECURITY (SENATE)

Question: Has CBP headquarters established any policy or guidance for port directors on how to address circumstances when there is a larger influx of asylum-seekers attempting to enter a port?

If so, please provide written documentation.

If not, why has CBP failed to coordinate a national strategy to best allocate resources and ensure smooth processing of asylum applicants?

Response: The laws of the United States, as well as international treaties to which we are a party, allow people to seek asylum on the grounds that they fear being persecuted outside of the United States due to their race, religion, nationality, membership in a particular social group, or political opinion. U.S. Customs and Border Protection (CBP) understands the importance of complying with these laws and takes its legal obligations seriously. Accordingly, CBP has designed policies and procedures based on these legal standards in order to protect vulnerable and persecuted persons in accordance with enshrined legal obligations. CBP remains operationally agile, responding to influxes at our ports of entry with additional staffing as required.

CBP's Office of Field Operations processes all persons who apply for admission at Ports of Entry and does not turn away anyone who seeks asylum. At times, due to operational capacity, as necessary to facilitate orderly processing, and to maintain the security and safety of the traveling public, individuals may need to wait in Mexico before being permitted to enter the Port of Entry (POE). Upon reaching the U.S. side of the border, all individuals are processed.

If an individual arriving in the United States at a POE is subject to expedited removal, and the individual expresses a fear of return to his or her country of origin, his or her case is referred to an USCIS asylum officer and must be detained until a credible fear interview is completed, pursuant to Section 235(b)(1) of the *Immigration and Nationality Act* (INA). CBP maintains discretion to refer cases directly to Immigration Judges for proceedings under Section 240 of the INA.

Question#:	17
Topic:	Coercion and Abuse II
Hearing:	The Implications of the Re-interpretation of the Flores Settlement Agreement for Border Security and Illegal Immigration Incentives
Primary:	The Honorable Kamala D. Harris
Committee:	HOMELAND SECURITY (SENATE)

Question: Legal advocates have filed a complaint with the DHS Office of Inspector General and the DHS Office of Civil Rights and Civil Liberties alleging coercion and abuse of parents separated from their children to compel them to forgo their legal rights - including their right to reunify with their children or to lawfully seek asylum. This complaint alleges that DHS officers and agents verbally and physically threatened, insulted, denied food, and withheld feminine hygiene products from parents and even falsely told them that their children would be permanently taken from them. Some DHS officers and agents allegedly presented some parents with forms with options pre-selected and did not provide some with any explanation of their rights.

When did you become aware of these allegations?

What did actions, if any, did CBP take in response to these allegations? Please provide written documentation.

Has CBP conducted its own inquiry into these allegations?

If so, when will the inquiry be completed and will you publish it?

If not, will you commit to commencing an inquiry immediately?

Response: The U.S. Department of Homeland Security cannot comment on an ongoing internal investigation.

Question#:	18
Topic:	Guidelines II
Hearing:	The Implications of the Re-interpretation of the Flores Settlement Agreement for Border Security and Illegal Immigration Incentives
Primary:	The Honorable Kamala D. Harris
Committee:	HOMELAND SECURITY (SENATE)

Question: Will you commit to establishing clear, enforceable, and written guidelines and to conduct training with CBP officers and agents to ensure that there will never be coercion or abuse when forms are presented to individuals in custody to sign that may ask them to relinquish their legal rights?

Response: U.S. Customs and Border Protection (CBP) recognizes the importance of thoroughly training our frontline officers. Customs and Border Protection Officers (CBPOs) receive training on the proper processing, treatment, and referral of aliens. This training begins with CBP Field Operations Academy, and is reinforced through Post Academy training and the periodic issuance of memoranda and policy reminders/musters. The current training program for CBPOs, from academy training and continuing through post-academy mentoring and training, reinforces CBP officers must not coerce any alien to sign any forms.

DHS policy specifically prohibits any employee from improperly encouraging the alien(s) to withdraw their application for admission, failing to refer an alien(s) who claims a fear of return for an interview by an Asylum Officer for a credible fear determination, or incorrectly removing or sending back an alien who claims a fear of return to a country from which he/she/they claims fear.

CBP continuously issues guidance to CBPOs on this subject and has addressed processing inadmissible children within the past six months.

Question#:	19
Topic:	OIG Report II
Hearing:	The Implications of the Re-interpretation of the Flores Settlement Agreement for Border Security and Illegal Immigration Incentives
Primary:	The Honorable Kamala D. Harris
Committee:	HOMELAND SECURITY (SENATE)

Question: A DHS OIG report issued on September 27, 2018 found that DHS officials provided no or inconsistent information to parents accompanied by children who were impacted by the Zero Tolerance Policy, which resulted in some parents not understanding that their children would be separated from them and some being unable to communicate with their children.

Will you commit to commencing an inquiry in response to this report immediately?

Response: U.S. Customs and Border Protection (CBP) is committed to monitoring and enforcing the integrity and professionalism of its workforce. To that end, CBP's Office of Professional responsibility (OPR) conducts investigations into all allegations of criminal conduct and/or serious misconduct. Matters that do not warrant an OPR investigation are referred to component management for processing. OPR will continue to process complaints and when warranted, investigate those matters so requiring further review.

Question#:	20
Topic:	Communicating with Children II
Hearing:	The Implications of the Re-interpretation of the Flores Settlement Agreement for Border Security and Illegal Immigration Incentives
Primary:	The Honorable Kamala D. Harris
Committee:	HOMELAND SECURITY (SENATE)

Question: Please provide written documentation of CBP and DHS policies and procedures for alerting parents about their separation from their children and communication with their children while separated.

Response: Whenever U.S. Border Patrol (USBP) Agents determine that a family separation is warranted under the standards outlined in the *Ms. L v. ICE* preliminary injunction, USBP agents provide written information to parents explaining that they are being separated from their child and the procedures to locate their children and be updated on their welfare. This documentation provides the phone numbers and emails for both the U.S. Immigration and Customs Enforcement and U.S. Health and Human Services Office of Refugee Resettlement call centers.

CBP officers receive annual refresher training on the implementation of the *Flores Settlement Agreement* and TVPRA, including the processing of unaccompanied children.

CBP officers have been instructed to notify the parent when circumstances warrant separating a child from his or her traveling companion. This notification is also documented in the case processing system and on *Form I-213*.

Post-Hearing Questions for the Record
Submitted to Joseph Edlow
From Senator Claire McCaskill

"The Implications of the Re-interpretation of the Flores Settlement Agreement for Border Security and Illegal Immigration Incentives"

October 3, 2018

1. For each year between fiscal year (FY) 2013 and FY 2018, please provide the following information:

   a. How many family units had representation during the course of their immigration proceedings? How long was the duration of that representation?

   b. How many family units were represented when they were ordered removed?

   c. How many family units were ordered removed? How many were subsequently removed by Immigration and Customs Enforcement (ICE)?

   d. How many family units have cases that are still pending before the Executive Office for Immigration Review (EOIR)?

   e. How many family units were ordered removed in absentia? How many of those family units that were ordered removed in absentia had representation?

2. For each year between FY 2013 and FY 2018, please provide a breakdown of the length of time it took to process family unit cases on the detained docket, broken down by case type. Please provide a similar breakdown for the non-detained docket.

3. How are families provided notice of where and when their immigration court proceedings will take place?

4. Has EOIR observed increased appearance for family units that are on alternatives to detention? If so, please provide any relevant statistics.

5. How many immigration judges would EOIR need to hire to eliminate the current backlog?

6. How many immigration judges would be needed to process all cases within one year?

7. If no additional immigration judges were hired and family cases were prioritized, would the current backlog grow?

8. Currently EOIR is not operating on a digital file system. I understand that EOIR has a pilot to expand the use of digital files. Please provide an update on this pilot and EOIR's plans to expand the use of digital filing and case management.

9. Even if EOIR's pilot to digitize filing and case management is expanded, I understand that it would not be applied to cases in the backlog. How long does EOIR anticipate it will take to digitize cases in the backlog?

10. On average, how long does it take to process an asylum case on the detained docket?

11. On average, how long does it take to process the asylum case of a family unit?

12. In addition to adding more immigration judges, what other resources would EOIR need to a) eliminate the current backlog, and b) process all cases in less than one year?

The U.S. Department of Justice failed to provide responses to questions submitted for the record by time of printiug.

Post-Hearing Questions for the Record
Submitted to Joseph Edlow
From Seuator Rob Portman

"The Implications of the Reinterpretation of the Flores Settlement Agreement for Border Security and Illegal Immigration Incentives"
September 18, 2018

The backlog of pending immigration court cases exceeds 700,000 cases. What resources would the Department of Justice and Department of Homeland Security need to reduce that backlog by half over a two-year time frame? Please specify what those resources are, how they would enable the federal government to reduce the backlog, and an estimate of how much they would cost.

The U.S. Department of Justice failed to provide responses to questions submitted for the record by time of printing.

Post-Hearing Questions for the Record
Submitted to Joseph Edlow
From Senator James Lankford

"The Implications of the Reinterpretation of the Flores Settlement Agreement for Border Security and Illegal Immigration Incentives"
September 18, 2018

1. If an individual fails to appear at a hearing, what is DHS' procedure for tracking down the individual?

2. What are the In Absentia Rates for families compared with single adults and UACs?

3. How are removals tracked after a final order of removal is given? Who pays for an immigrant on the non-detained docket who has been given a final order of removal to return to his or her home country? How many immigrants have been released into the interior of the United States because his or her home country would not accept them after a final order of removal was issued in the United States? Does DHS track those individuals until deportation or removal is available?

4. This year the median time to complete cases involving detained individuals is 38 days. In FY08, that number was 6. What has caused the increase?

5. Has the department considered tracking the immigration status of those to whom it gives custody of UACs? Please provide statistics for UACs who fail to appear at required hearings (either the first hearing or subsequent hearings) and those who fail to appear for deportation after ordered removed by a court.

6. How long does an immigrant need to wait in immigration proceedings before he or she is able to receive a work permit? If the immigrants apply for a change of location, does that delay impact the time frame of a work permit? Are there any other delays in immigration proceedings that would impact the timeline of a work permit?

8. Is there any situation where a minor in custody would not be given an attorney or advocate while going through the legal proceedings? Does every minor have access to an attorney or advocate?

9. How many immigration judges are needed to complete the backlog of cases and maintain a short time for due process for all immigration court proceedings? How much court room space is needed to accommodate the judges?

The U.S. Department of Justice failed to provide responses to questions submitted for the record by time of printing.

Post-Hearing Questions for the Record
Submitted to Joseph Edlow
From Senator Gary Peters

"The Implications of the Reinterpretation of the Flores Settlement Agreement for Border Security and Illegal Immigration Incentives"

September 18, 2018

1. Child detention: Our top priority should be the welfare and care of children. Numerous medical organizations agree that even brief stays in detention can lead to psychological trauma and lasting mental health risks. As follow up to the September 18, 2018 hearing, please respond to the following question.

   a. How long is too long to detain a child?

2. Child detention: As follow up to the September 18, 2018 hearing, please respond to the following questions.

   a. In proposing rollbacks to the Flores Settlement Agreement, has the Department of Justice reviewed the extensive literature discussing the long-term health consequences that detention can have on children?

   b. How does the Department of Justice intend to mitigate the almost certain negative consequences of the detention of children?

The U.S. Department of Justice failed to provide responses to questions submitted for the record by time of printing.

GAO U.S. GOVERNMENT ACCOUNTABILITY OFFICE
441 G St. N.W.
Washington, DC 20548

November 15, 2018

The Honorable Ron Johnson
Chairman
Committee on Homeland Security and Governmental Affairs
United States Senate

"The Implications of the Reinterpretation of the Flores Settlement Agreement for Border Security and Illegal Immigration Incentives": Responses to Post-Hearing Questions for the Record

Dear Mr. Chairman:

On September 18, 2018, I testified before the Committee on Homeland Security and Governmental Affairs on our work on the immigration court system and the Alternatives to Detention (ATD) program.[1] This letter responds to the two questions for the record that we received from Ranking Member McCaskill on October 4, 2018. The questions and my responses are enclosed.

If you have any questions about this letter or need additional information, please contact me at (202) 512-6912 or gamblerr@gao.gov.

Sincerely yours,

Rebecca Gambler

Rebecca Gambler, Director
Homeland Security and Justice Issues

Enclosure

[1]GAO, *Immigration: Progress and Challenges in the Management of Immigration Courts and Alternatives to Detention Program*, GAO-18-701T (Washington, D.C.: Sept. 18, 2018).

Responses to Post-Hearing Questions for the Record
Submitted by Senator Claire McCaskill

1. **The Government Accountability Office (GAO) released a report in April of this year, which found that Immigration and Customs Enforcement (ICE) had a number of inaccuracies in the agency's calculations for projected detention costs. One example, from FY 2015, showed that ICE underestimated its immigration detention expenses for that year by $129 million. GAO made five recommendations to ICE to ensure that ICE's methodology for determining detention costs are sound.**

    a. **Has ICE taken steps to implement the recommendations put forth by GAO? If so, what steps have been taken?**

    In April 2018, ICE concurred with all five of the recommendations from our report *Immigration Detention: Opportunities Exist to Improve Cost Estimates* (GAO-18-343).[2] As of October 2018, ICE has taken actions toward addressing each of these recommendations. However, the recommendations remain open and we are monitoring ICE's actions to fully address them.

    In regard to our first recommendation for ICE to document and implement a review process to ensure accuracy in its budget documents, ICE provided us with documentation showing the agency has implemented a review process to prioritize all agency resource requests and document management approval. Currently, we are awaiting documentation pertaining to decisions regarding the average daily population (ADP) and bed rate calculations for fiscal years 2019 and 2020 that demonstrate this process provided an assurance of accuracy in ICE's budget documents.

    Our second recommendation was for ICE to assess the adult bed rate methodology and determine the most appropriate method of projecting the bed rate, including any inflation rates used. The Department of Homeland Security's (DHS) Office of Program Analysis and Evaluation engaged with a third party to assess the adult bed rate during the spring of 2018. According to DHS, the assessment was part of its efforts to verify and validate the completeness and reliability of data to meet the GPRA Modernization Act of 2010 requirements. Although ICE received a favorable score in that assessment for the data reliability and adult bed rate calculations, it is unclear from the documentation ICE provided the extent to which the assessment meets the intent of the recommendation that ICE examine the methodology of the adult bed rate calculations. We are working with ICE to learn more about this assessment and to obtain documentation to help us in evaluating their actions and closing the recommendation.

    Regarding our third recommendation for ICE to update its adult bed rate methodology based upon its assessment from our second recommendation, and to ensure the use of appropriate inflation rates and the removal of family beds from all calculations, ICE developed a bed rate calculator that ICE officials told us ensures the use of proper

[2]GAO, *Immigration Detention: Opportunities Exist to Improve Cost Estimates*, GAO-18-343 (Washington, D.C.: April 18, 2018).

inflation rates and removed family beds from any adult bed rate calculation. While we have received some documentation showing changes to the calculations, we are awaiting documentation from ICE that demonstrates the use of appropriate inflation rates and the removal of family beds from its budget calculations.

For our fourth recommendation on the use of a statistical model for ADP projections in its budget justifications, ICE provided us with the model documentation and methodology during our review in November 2017. Since we conducted our review, ICE has utilized the model during the fiscal years 2019 and 2020 budget cycles. We are currently reviewing documentation detailing the use of the model during the fiscal year 2020 budget cycle that ICE provided to assess whether it addresses our recommendation.

For our fifth recommendation for ICE to improve its cost estimating process to more fully meet best practices, ICE has provided documentation showing that it is working toward addressing this recommendation. For example, ICE has developed a sliding bed rate scale from conducting a sensitivity analysis and has detailed some of its calculations and assumptions for the adult bed rate. We will continue to work with ICE to obtain additional documentation needed to evaluate the agency's efforts to improve its detention cost estimating practices.

2. **I understand that GAO studied alternatives to detention like ankle monitoring in 2014 and found that the average daily cost of alternatives to detention (ATD) was significantly less than the average daily cost of detention. I also understand that GAO found that the cost of ATD would only surpass the cost of detention after 1,229 days. Is ATD still a cost effective means of monitoring immigrants while they await their immigration court proceedings?**

We have not assessed the cost-effectiveness of ICE's ATD program since issuing our November 2014 report.[3]

In our November 2014 report, we found that the average daily cost of the ATD program per participant was $10.55 in fiscal year 2013 and the average daily cost of detention per detainee was $158.[4] While our analyses showed that the average daily cost of the ATD program was significantly less than the average daily cost of detention, the length of immigration proceedings affected the cost-effectiveness of the ATD program to varying extents. As we reported in November 2014, ICE officials stated that how long a foreign national is in the ATD program before receiving a final decision on his or her immigration proceedings depends on how quickly the Department of Justice's Executive Office for

[3]GAO, *Alternatives to Detention: Improved Data Collection and Analyses Needed to Better Assess Program Effectiveness*, GAO-15-26 (Washington, D.C.: Nov. 13, 2014).

[4]We found in our November 2014 report that the cost estimate for ATD was higher than what ICE reported, as ICE's estimate was based upon the contract costs for ATD divided by the total number of participation days and did not include personnel costs. Our estimate incorporated both the cost of ATD personnel, as well as the cost of the ATD contract. Further, ICE reported the official average daily cost for detention was $118 per day, but this cost did not include personnel costs. The detention personnel costs included in our analysis encompassed personnel who work at detention facilities, as well as support staff who support detention-related activities but were not working at the detention facilities. The ATD program and detention cost per day estimates did not include expenditures paid toward agency-wide overhead activities, such as rent or information technology services.

Immigration Review (EOIR) can process immigration cases. EOIR officials stated that the length of time before a foreign national receives a final decision had been much longer for foreign nationals released from detention under the ATD program or other release options than for detained foreign nationals. We conducted two analyses to estimate when the cost of keeping foreign nationals in the ATD program in 2013 would have surpassed the cost of detaining them in a facility.[5] Under these two scenarios, we found that the ATD program would have surpassed the cost of detention after a foreign national was in the program for 1,229 days or 435 days in fiscal year 2013—depending upon the scenario. In addition, we found that ICE had not collected complete data on court compliance for foreign nationals in the ATD program, and recommended that ICE do so. Since that time, ICE has addressed our recommendation by collecting and reporting on the majority of foreign nationals in the ATD program, which helps strengthen overall performance measurement for the program.

Further, ICE officials have reported that the agency started a new iteration of the ATD program in November 2014. In its fiscal year 2019 Congressional Budget Justification, ICE reported that its current ATD program cost was $0.73 less per day per participant from the prior iteration of the program. We have not assessed ICE's methodology for estimating this program cost.

[5]Under our first analysis, we considered the average costs of the ATD program and detention and the average length of time foreign nationals in detention spent awaiting an immigration judge's final decision. Under our second analysis, we considered the average costs of the ATD program and detention and the average length of time foreign nationals spent in detention—regardless of whether they had received a final decision from an immigration judge—since some foreign nationals may not be involved in immigration proceedings or may not have reached their final hearing before ICE released them from detention.

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