



TESTIMONY OF

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BEFORE

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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”

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## **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.