



Department of Justice

STATEMENT OF

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UNITED STATES DEPARTMENT OF JUSTICE**

BEFORE THE

**COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE**

FOR A HEARING ENTITLED

**“OVERSIGHT OF THE ADMINISTRATION’S FAMILY
REUNIFICATION EFFORTS”**

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James McHenry
Director
Executive Office for Immigration Review
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Entitled
Oversight of the Administration's Family Reunification Efforts

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Mr. Chairman, Senator Feinstein, and other distinguished Members of the Committee, thank you for the opportunity to speak with you today regarding the Department of Justice's role in the current situation related to family reunifications. This is an important and sensitive subject, and I welcome this opportunity to address it from the Department of Justice's perspective.

The mission statement of the Department of Justice is: "To enforce the law and defend the interests of the United States according to the law; to ensure public safety against threats foreign and domestic; to provide federal leadership in preventing and controlling crime; to seek just punishment for those guilty of unlawful behavior; and to ensure fair and impartial administration of justice for all Americans." The Department of Justice's mission is exemplified by playing three roles relative to immigration enforcement.

First, the Department enforces the law. Through the U.S. Attorneys' offices, in conjunction with the U.S. Marshals Service and the Bureau of Prisons, the Department plays a crucial role in enforcing criminal laws and seeking punishment for those guilty of unlawful behavior. The Department of Justice's role applies no less to immigration crimes than it does to other categories of crimes.

Section 13 of the President's Executive Order 13767 directs the Attorney General to establish guidelines and allocate resources to ensure that border prosecutions enforcing the immigration laws Congress has passed are a high priority of the Department. On April 11, 2017, the Attorney General issued a memorandum to all federal prosecutors outlining certain immigration-related offenses, including improper entry under 8 U.S.C. § 1325, as high priorities. Additionally, the Attorney General directed each district to designate a Border Security Coordinator to be responsible for, among other activities, overseeing the investigation and prosecution of these offenses.

On April 6, 2018, the Attorney General issued a memorandum entitled "Zero-Tolerance for Offenses under 8 U.S.C. § 1325(a)." This memo directed federal prosecutors along the

southern border to adopt a “zero-tolerance policy for all offenses referred for prosecution under section 1325(a)” by the Department of Homeland Security. The Attorney General’s memo remains in force today, and illegal or improper entry, among other immigration crimes, remains a prosecution priority for the Department of Justice. Furthermore, the President restated the prioritization of prosecuting illegal entry crimes in Executive Order 13841, which also reiterated that the current policy is to enforce rigorously the immigration laws passed by Congress.

The Zero-Tolerance prosecution policy is simple—it prioritizes the prosecution of those who disregard our immigration laws and illegally enter the United States. Indeed, the Attorney General’s April 6, 2018 memorandum directed “each United States Attorney’s Office along the Southwest Border—to the extent practicable, and in consultation with DHS—to adopt immediately a zero-tolerance policy for all offenses referred for prosecution under section 1325(a).”

The Department of Justice does not dictate which cases are referred by the Department of Homeland Security for prosecution, nor does it maintain a general exemption from prosecution for parents. The Department of Justice also has no operational or logistical role in either the care or processing of aliens for removal, regardless of whether they are adults or children. Accordingly, it also does not play an operational or logistical role in the current reunification process.

Upon apprehension and initial processing by U.S. Customs and Border Protection, a component agency of the Department of Homeland Security, adults referred for prosecution under 8 U.S.C. § 1325 are generally transferred to the custody of the U.S. Marshals Service for the pendency of their criminal matters.

While the vast majority of aliens prosecuted under 8 U.S.C. § 1325 are adults who entered alone, many adults have illegally entered the United States with children and were prosecuted for the crimes of illegal entry or reentry. Prior to President Trump’s Executive Order of June 20, 2018—and because the U.S. Marshals Service does not and cannot house children with adults charged with criminal offenses—alien children without a parent or legal guardian were transferred by the Department of Homeland Security to the Department of Health and Human Services in accordance with the Homeland Security Act of 2002 and the Trafficking Victims Protection Reauthorization Act of 2008.

At the conclusion of the criminal proceeding and any sentence of imprisonment, the Department of Homeland Security assumes custody of the adult alien for whatever action it deems appropriate, consistent with applicable law. Criminal proceedings are separate from civil immigration proceedings, and prosecution for illegal entry under the auspices of the Zero-Tolerance policy does not necessarily foreclose an alien’s ability to make a claim to remain in the United States. Consequently, depending on the particular circumstances of the adult, he or she may make such a claim or, alternatively, may elect to be removed from or voluntarily depart the United States.

If the adult alien makes a claim to remain in the United States, that claim is generally directed to the Department of Homeland Security in the first instance. As the claim progresses, it

may eventually be reviewed by an immigration judge in the Executive Office for Immigration Review (EOIR), which is the second role played by the Department of Justice in the current situation. As the facts of a case warrant, an immigration judge will determine an adult alien's removability and adjudicate any claim to remain in the United States. Unaccompanied alien children placed in immigration proceedings pursuant to law will also have their cases heard by an immigration judge.

As the issue of family separation and reunification has reached the federal courts, however, the Department of Justice has a third role—as a litigator providing representation to those agencies that do provide care for aliens subject to removal. Consequently, I may be limited in my ability to speak to certain issues today, either because they are currently in litigation or because they are more properly directed to another agency. Nevertheless, the Department of Justice recognizes the seriousness of the present situation and is appropriately advising both the Departments of Homeland Security and Health and Human Services as they continue to abide by any orders issued by federal courts on these matters.

The current immigration system faces numerous legal and logistical challenges. For example, a lack of clarity in immigration law regarding criminal aliens, particularly on the issue of aggravated felonies, continues to impede the administration of justice. Space and resource constraints inhibit flexibility in responding appropriately to sudden influxes of illegal aliens, particularly family units. Unfortunately, nationwide policy is being dictated by court orders, rather than by sound policy choices via rulemaking or statutory enactments. Added to these challenges is the current situation regarding family separations and reunifications. Nevertheless, as the formal title of Executive Order 13841, “Affording Congress an Opportunity to Address Family Separation,” indicates, the Department of Justice stands ready to work with Congress to answer these challenges and to improve existing laws to avoid a reoccurrence of the present situation.