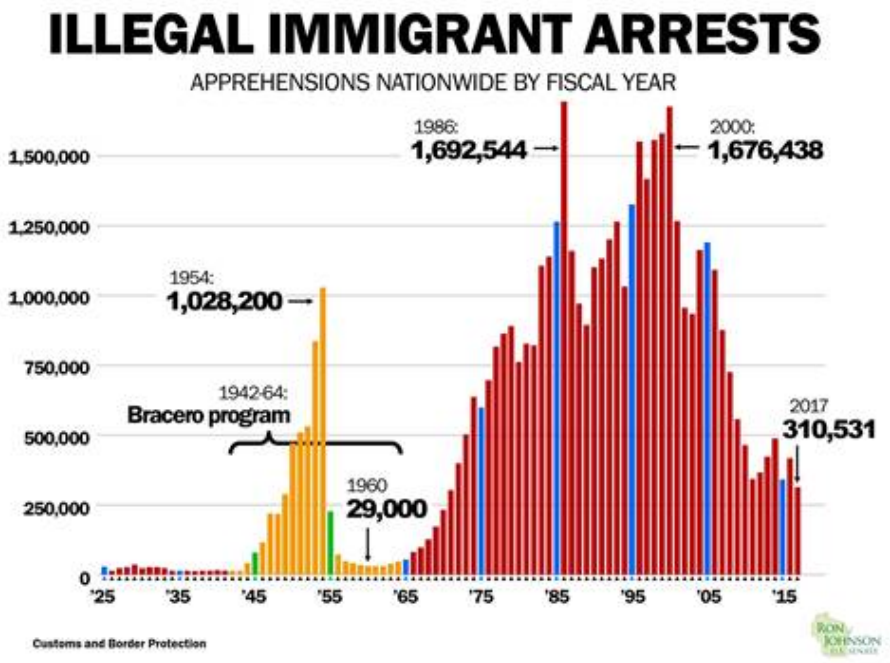
Judicial Rulings Ending the Obama Administration's Family Detention Policy: Implications for Illegal Immigration and Border Security

Majority Staff Report of the
Committee on Homeland Security and Governmental Affairs
United States Senate
Senator Ron Johnson, Chairman

January 10, 2019

FOREWORD

The political debate over immigration—both legal and illegal—has become steadily more divisive over the last few decades, resulting in a policy stalemate. The complexity, inadequacy of information, and changing nature of the problem only deepen the challenge of finding solutions. The chart shown below demonstrates how the problem has changed over time:



No one really knows how many people enter the United States illegally each year, or how many people currently reside in the country illegally. The number of apprehensions is often used as a surrogate statistic to estimate the levels of illegal immigration and residency. It is an imperfect surrogate to say the least. To illustrate one distortion, some Mexican migrants living close to the border who attempt to enter the country illegally may be apprehended multiple times. Migrants from Central America who are apprehended and returned to their countries of origin do not have the same opportunity for multiple illegal crossings. As a result, multiple apprehensions of Mexicans tend to overstate the assumed extent of illegal immigration. Even the definition of "apprehension" itself has changed over time, further distorting the numbers.

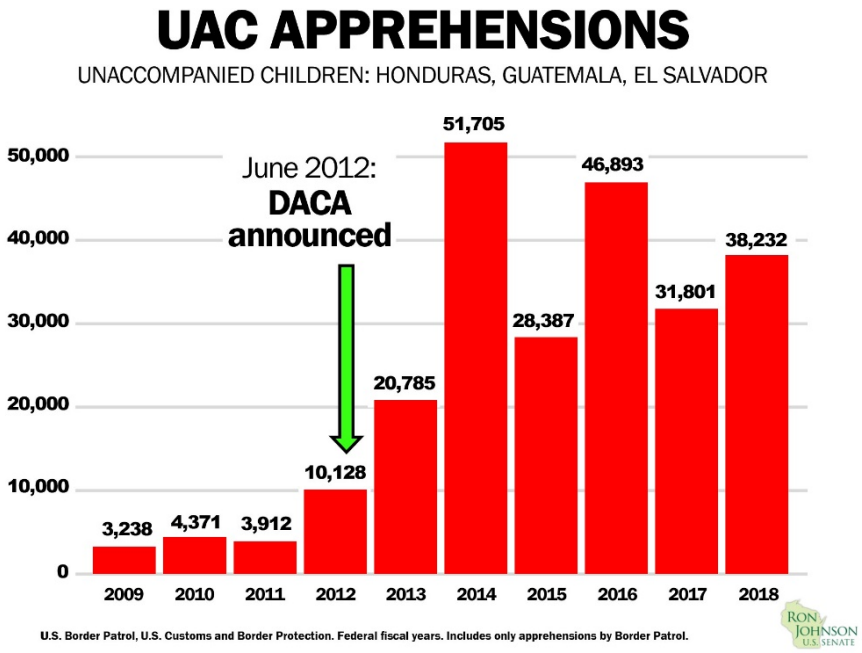
The chart clearly shows how apprehensions have increased and decreased over time. Multiple factors and historical events can be cited to explain this ebb and flow. Prior to the 1950s, the United States put little emphasis on southern border migration enforcement. In fact, many workers freely traveled back and forth between the United States and Mexico for work (circular immigration). After a significant spike in apprehensions, the United States began a major enforcement action from 1954 to 1956, deporting over a million migrants. Increased deportations in combination with the Bracero program, which allowed guest workers from Mexico to obtain legal employment in the United States, significantly reduced the incentive for illegal entry. As a result, apprehensions dramatically decreased for the decade 1955-1965. Unfortunately, the Bracero program ended in 1965, creating greater incentives for migrants to

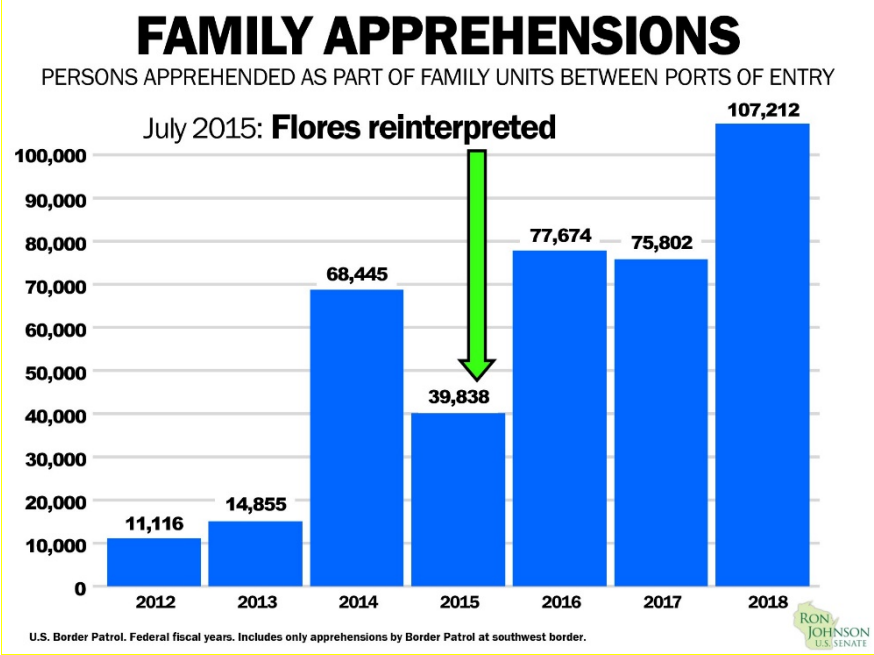
stay permanently in the United States rather than return to Mexico on an annual basis, effectively ending circular immigration and increasing the number of illegal residents.

From 1965 through 2000, apprehensions steadily increased, peaking in 1986 when the United States passed a major immigration reform law granting amnesty in exchange for border security. Unfortunately, even though amnesty was granted, the border security provisions were never effectively implemented. Instead of fixing the problem, the 1986 law's amnesty, together with a strong U.S. economy, created added incentives for increased illegal immigration. Apprehensions peaked again in 2000, and then began to decline as Mexico's economy strengthened due to NAFTA.

Since 2000, increasing numbers of Mexicans have found employment in a stronger Mexican economy. At the same time, a rise in drug cartels, gangs, public corruption and poverty dramatically weakened the economies and public institutions in Central America, and produced a new wave of migration from that region. In addition to these "push factors" for Central American migration, our strong economy, immigration laws, policy changes, and legal rulings in the United States provide enormous incentives, or "pull factors," for illegal immigration. In particular, our broken immigration system is being exploited by human smugglers and traffickers to entice Central American unaccompanied alien children ("UACs") and family units to undertake the dangerous journey through Mexico and into the United States.

Although people from all over the world continue to illegally enter the United States or overstay their visas, our illegal immigration problem has shifted from being primarily associated with Mexican economic migrants to unaccompanied alien children and family units fleeing Central America. The charts below show the extraordinary growth in these categories since 2012.





For the six-year period of fiscal years 2013 through 2018, 601,629 people were apprehended as an unaccompanied alien child from Central America or as part of a family unit crossing illegally between the ports of entry. In just the first three months of FY2019, the number of family unit apprehensions alone was reportedly 75,805. This dramatic increase in children and family apprehensions is overwhelming our system. Some of these individuals will be granted asylum, but a majority will have their asylum claims denied as they will be deemed an economic migrant. Because the adjudication process can take years to conclude, and we have very limited detention facilities with legal limitations on the length of time anyone can be detained, only a very small percentage of these individuals will actually be removed. This creates an incentive for more people to exploit our broken system and continue to increase the flow.

The goal of any immigration reform should be to deter and reduce the number of people entering illegally, overstaying a visa, or entering without proper documentation. Immigration should be a legal and controlled process. Over the last 30 years, Congress has passed multiple bills that are either primarily designed to fix this problem or that have elements that attempt to address it. As the chart below demonstrates, in spite of these attempted legislative fixes, the problem has only continued to grow.

LAWS AND NUMBER OF ILLEGAL ALIENS

		Estimated unauthorized population
1986	Immigration Reform and Control Act	**3,200,000**
1990	Immigration Act of 1990	**3,500,000**
1996	Illegal Immigrant Reform and Immigration Responsibility Act	**5,600,000**
2001	Patriot Act	**8,900,000**
2002	Enhanced Border Security and Visa Entry Reform Act	**9,300,000**
2004	Intelligence Reform and Terrorism Prevention Act	**10,100,000**
2006	Secure Fence Act	**11,310,000**
2007	9/11 Commission Recommendations Act	**11,780,000**

CRS, Department of Homeland Security

When the 1986 Immigration Reform and Control Act was passed, it was estimated that 1.5 million people would avail themselves of the amnesty. Instead, 2.7 million people were granted amnesty. Since 1986, the estimated number of individuals in our country illegally has steadily increased. Using one modeling method, the generally accepted number is currently around 12 million. However, two Yale University researchers recently used a different statistical modeling method and estimated a range between 16 and 30 million people in the United States illegally. No one really knows the true number of illegal immigrants in the U.S.: further evidence that this problem is out of control.

Better barriers, erected in the appropriate border areas, are a necessary first step in solving this growing problem. But changes in law are just as crucial to eliminate the incentives and rewards that fuel an increasing number of unaccompanied alien children and family units to enter the United States illegally. Obvious changes required to actually fix the problem include: differentiating the hurdle to establish credible fear for legal versus illegal entry; replacing the courts' reinterpretation of the *Flores* settlement agreement with standards that allow for an adequate detention period; repealing the law that treats unaccompanied alien minors differently based on where they come from; and placing limits on the number of appeals allowed for denied asylum claims. Any immigration reform proposal that does not include these elements will simply add to the long list of failed legislation that has come before.

Sincerely,

Ron Johnson
Chairman
Senate Homeland Security & Governmental Affairs Committee

EXECUTIVE SUMMARY

As Mexico's economy has grown and Central American drug gangs have strengthened, the make-up of illegal immigration has shifted. Greater opportunity within Mexico reduced the incentive for Mexicans to migrate, whereas weakened public institutions and worsening conditions in Central America produced a surge of migration from that region.[1] In particular, new laws, policy changes, and legal rulings in the United States are being exploited by human smugglers and traffickers to entice Central American unaccompanied alien children ("UACs") and family units to illegally enter the United States.[2]

Over the four fiscal years (FY) prior to the 2012 implementation of Deferred Action on Childhood Arrivals ("DACA") (FY2008-FY2011), a total of 15,852 unaccompanied alien children from Central America were apprehended coming into this country illegally.[3] Over the last four fiscal years (FY2015-FY2018), that total grew nearly tenfold to 145,313.[4] Although DACA did not apply to new arrivals, coyotes used the change in policy as an incentive to entice more unaccompanied alien children to the United States.[5]

The number of family units apprehended entering illegally has also seen a dramatic increase. In FY2012, 11,116 individuals entering illegally as part of a family unit were apprehended.[6] By FY2014, that number had increased to 68,445.[7] As a result of this significant increase, the Obama administration began detaining family units to ensure they could be removed in the event their asylum claim was denied. Then-Homeland Security Secretary Jeh Johnson explained that decision this way: "Frankly, we want to send a message that our border is

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[1] Gabriel Lesser and Jeanne Batalova, *Central American Immigrants in the United States*, Migration Policy Inst. (Apr. 5, 2017), https://www.migrationpolicy.org/article/central-american-immigrants-united-states; Max Bearak, *Even Before Trump, More Mexicans Were Leaving the U.S. Than Arriving*, Wash. Post (Jan. 27, 2017), https://www.washingtonpost.com/news/worldviews/wp/2017/01/27/even-before-trump-more-mexicans-were-leaving-the-us-than-arriving/?utm_term=.c00f69e2c2c4.

[2] *Ongoing Migration from Central America: An Examination of FY2015 Apprehensions: Hearing Before the S. Comm. on Homeland Sec. & Governmental Affairs*, 114th Cong. (Oct. 21, 2015), *available at* https://www.hsgac.senate.gov/hearings/ongoing-migration-from-central-america-an-examination-of-fy2015-apprehensions (statement of Kimberly Gianopoulos, Dir., Int'l Affairs & Trade); Briefing with Homeland Sec. Investigation Official, U.S. Immigration & Customs Enforcement (Aug. 29, 2018); Briefing with U.S. Customs & Border Protection Official, U.S. Customs & Border Protection (Sept. 10, 2018).

[3] Dep't of Homeland Security Border Metrics Report (May 1, 2018), *available at* https://www.dhs.gov/sites/default/files/publications/BSMR_OIS_2016.pdf [hereinafter DHS Border Metrics Report].

[4] *Id*. *See also* U.S. Border Patrol, Southwest Border Apprehensions FY2017-2018 (2018) (on file with Comm. majority staff) [hereinafter Southwest Border Apprehension Data FY2017-FY2018].

[5] *Ongoing Migration from Central America: An Examination of FY2015 Apprehensions: Hearing Before the S. Comm. on Homeland Sec. & Governmental Affairs*, 114th Cong. (Oct. 21, 2015), *available at* https://www.hsgac.senate.gov/hearings/ongoing-migration-from-central-america-an-examination-of-fy2015-apprehensions (statement of Kimberly Gianopoulos, Dir., Int'l Affairs & Trade); Briefing with Homeland Sec. Investigation Official, U.S. Immigration & Customs Enforcement (Aug. 29, 2018); Briefing with U.S. Customs & Border Protection Official, U.S. Customs & Border Protection (Sept. 10, 2018).

[6] DHS Border Metrics Report, *supra* note 3.

[7] *Id*.

not open to illegal migration, and if you come here, you should not expect to simply be released."[8] The policy worked: In FY2015, the number decreased by 41.8 percent to 39,838.[9]

But in 2015, a federal district court ruled that the Obama administration's family detention policy violated the government's 1997 *Flores* settlement agreement ("*Flores*").[10] The court's decision reinterpreted *Flores*, ruling for the first time that the government must release minors even if they are apprehended with their families. The ruling forced the Department of Homeland Security ("DHS" or "the Department") to choose between separating families by detaining adults and releasing children within 20 days, or simply "catching and releasing"[11] the apprehended family within the 20-day period.[12] The Obama administration chose the latter.

The rate of family units migrating to the United States illegally has increased significantly following the ruling. Between FY2016 and FY2018, U.S. Border Patrol apprehended more than 260,000 people arriving as family units between the nation's ports of entry, with 107,212 apprehended in FY2018 alone—almost 10 times more than in FY2012.[13] During just the first three months of FY2019, 75,805 people were apprehended as part of a family unit, with December 2018 having the highest total on record.[14] The problem is not going away; rather, it is escalating.

On April 6, 2018, the Trump administration instituted a "zero-tolerance" policy to fully enforce immigration law by prosecuting all illegal border crossers, resulting in adults being detained and separated from their children.[15] After overwhelming public outcry, President Trump signed an executive order in June 2018 ending the separation of children from their parents.[16] The administration was forced to revert to the policy of catching and releasing families

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[8] Julia Preston, *Detention Center Presented as Deterrent to Border Crossings*, N.Y. Times (Dec. 15, 2014), https://www.nytimes.com/2014/12/16/us/homeland-security-chief-opens-largest-immigration-detention-center-in-us.html.

[9] DHS Border Metrics Report, *supra* note 3.

[10] *Flores v. Johnson*, 212 F. Supp. 3d 864, 875 (C.D. Cal.), *clarified on denial of reconsideration sub nom. Flores v. Lynch*, 212 F. Supp. 3d 907 (C.D. Cal. 2015), *aff'd in part, rev'd in part and remanded*, 828 F.3d 898 (9th Cir. 2016).

[11] The phrase "catch and release" has been used by DHS to describe the policy of releasing aliens after apprehension. Former Secretary Jeh Johnson has repeatedly used the term "catch and release" in the context of his advocacy of continuing family detention to prevent the government from "engaging in catch and release." *See, e.g.*, Mike Lillis, *DHS Chief Defends Child Detention*, The Hill (Aug. 3, 2016), https://thehill.com/policy/national-security/290316-dhs-chief-defends-child-detention-practices.

[12] *Flores v. Lynch*, 828 F.3d 898, 910 (9th Cir. 2016).

[13] DHS Border Metrics Report, *supra* note 3; Southwest Border Apprehension Data FY2017-FY2018, *supra* note 4.

[14] U.S. Customs and Border Protection, *Southwest Border Migration, FY 2019*, *available at* https://www.cbp.gov/newsroom/stats/sw-border-migration [hereinafter Southwest Border Migration Data FY2019]; Alan Gomez, *Central American migrants keep heading toward US, even as Trump focuses on stopping caravans*, USA Today (Jan. 9, 2019), https://www.usatoday.com/story/news/politics/2019/01/09/migrant-caravan-trump-crackdown-has-not-slowed-flow-families-us/2523034002/ (reporting that "Border Patrol agents apprehended 27,518 members of family units in December, the highest monthly total on record.").

[15] Office of the Att'y Gen., *Memorandum for Federal Prosecutors Along the Southwest Border* (Apr. 6, 2018), *available at* https://www.justice.gov/opa/press-release/file/1049751/download.

[16] Exec. Order No. 13,841, 83 Fed. Reg. 29435 (June 20, 2018), *available at* https://www.federalregister.gov/documents/2018/06/25/2018-13696/affording-congress-an-opportunity-to-address-family-separation.

who enter illegally without being able to verify whether an actual family bond exists. Without that verification, there is a real risk that human traffickers will exploit the current system.

It is reasonable to assume that most of the apprehended and released family members will join the millions of people living illegally in the shadows within the United States. Historically, fewer than 10 percent of non-detained aliens ordered removed are actually removed from the country.[17] Yet only roughly one in five aliens who applied have been granted asylum.[18]

In the 115th Congress, both the House and Senate failed to enact improvements to our immigration system, appropriate funds for more border barriers, or address the plight of hundreds of thousands of Dreamers. In the spring of 2018, a bipartisan group of Senate Judiciary Committee members tried to negotiate a possible solution to the enforcement and family separation dilemma, but those talks stalled.[19]

In June, Chairman Ron Johnson, after consulting with Senate Judiciary Committee colleagues, directed his staff to begin crafting legislation to fix *Flores* that would fall under the Homeland Security and Governmental Affairs Committee's juridiction. As a starting point, Chairman Johnson introduced the *Fixing America's Marred Immigration Laws to Improve and Ensure Security Act*, or the *FAMILIES Act*.[20] The bill would authorize DHS to keep families together during their immigration proceedings, provide some additional resources to help process the cases on a prioritized basis, and require reporting to help inform future action.

On September 18, 2018, the Committee held a hearing to examine the legislation and the implications of the *Flores* reinterpretation.[21] Chairman Johnson announced his commitment to finding areas of agreement and a fact-based, non-partisan solution that: (1) secures our borders; (2) enforces our immigration laws; (3) maintains reasonable asylum standards; and (4) keeps asylum-seeking families together.[22] The Committee held more than 20 bipartisan staff briefings, went on staff delegation trips to family residential centers and an immigration court, continued oversight related to the reinterpretation of *Flores* and current immigration challenges, and met to discuss the bill at a business meeting on September 26, 2018.

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[17] John Whitley, Dennis Kuo, Ethan Novak & Brian Rieksts, *Describing the Adjudication Process for Unlawful Non-Traditional Migrants*, Institute for Defense Analyses (June 2017) (on file with Comm. majority staff).
[18] U.S. Dep't of Justice, Exec. Office for Immigration Review, Statistics Yearbook Fiscal Year 2017 (2017), *available at* https://www.justice.gov/eoir/page/file/1107056/download; U.S. Dep't of Justice, Exec. Office for Immigration Review, Adjudication Statistics: Asylum Decision Rates (2018), *available at* https://www.justice.gov/eoir/page/file/1104861/download.
[19] Jordain Carney, *Deal to Fix Family Separations Hits Snag in the Senate*, The Hill (July 17, 2018), https://thehill.com/homenews/senate/397744-deal-to-fix-family-separations-hits-snag-in-the-senate.
[20] The FAMILIES Act, S. 3478 (115th Cong.), *available at* https://www.congress.gov/bill/115th-congress/senate-bill/3478.
[21] *The Implications of the Reinterpretation of the Flores Settlement Agreement for Border Security and Illegal Immigration Incentives: Hearing Before the S. Comm. on Homeland Sec. & Governmental Affairs*, 115th Cong. (2018), *available at* https://www.hsgac.senate.gov/hearings/the-implications-of-the-reinterpretation-of-the-flores-settlement-agreement-for-border-security-and-illegal-immigration-incentives [hereinafter *HSGAC Hearing on Flores Settlement*].
[22] *Id.*

Through these ongoing oversight efforts, it has become clear that the *FAMILIES Act* as introduced does not adequately address the problems created by *Flores* and other aspects of our broken immigration system. For example, the Committee has discovered that for every new immigration judge, Immigrations & Customs Enforcement ("ICE") would need three prosecutors to handle the caseload. Based on the current level of illegal immigration, ICE also needs more detention space and beds. In addition, the almost endless appeals process significantly adds to the huge immigration case backlog, and the low bar to claim asylum for those entering illegally between the ports of entry provides no incentive to apply for asylum legally.

The purpose of this report is to inform the Committee's problem-solving process. It makes the following findings:

1. The *Flores* reinterpretation requires DHS to "catch and release" apprehended families at the southern border, incentivizing more illegal immigration. The number of family unit members apprehended by U.S. Customs and Border Protection ("CBP") since FY2012 has increased by a staggering 864 percent, and the problem is only getting worse: In the first three months of FY2019 alone, the number of family unit members apprehended was reportedly 75,805, compared to 107,212 in all of FY2018.

2. The *Flores* reinterpretation, combined with limited detention facilities, has forced ICE to release all families—including male-headed families traveling with teenage girls—within days of apprehension and without sufficient screening for human trafficking or child welfare. In other words, CBP and ICE do not have sufficient time to determine if the adult male is the father or a sex trafficker, or whether the teenage girl is his daughter or sex slave.

3. In FY2018, the United States determined that more than 75 percent of illegal aliens had a "credible fear" of returning home—halting their removal while the case proceeds—yet less than 21 percent of those who applied for asylum ultimately received it.

4. From FY2015-FY2018, only 7 percent of non-detained illegal immigrant families were removed from the United States; conversely, 77 percent of detained illegal immigrant families were removed.

5. Alternatives to detention ("ATD") as currently implemented by ICE have not proved effective in ensuring that aliens whose asylum claims are denied are available for removal.

6. The median adjudication time for initial case completion for an alien in detention has increased from 8 days in FY2008 to 40 days in FY2018.

7. ICE is meeting *Flores* requirements for humane and safe standards, but the requirement that detainees live in state-licensed facilities creates significant challenges.

8. Push factors in Central America such as high crime and murder rates, gang extortion, drug cartel brutality, and lack of economic opportunity play a significant role in migrants' decision to make the dangerous journey to the United States.

Committee staff have also identified the following questions that require additional information and oversight:

1. How long would apprehended families need to be detained if the law was changed to restore the Obama administration's policy to allow for family detention beyond 20 days? Or, stated another way, what would be a reasonable time limit for families to be detained?

2. What additional resources, including bed space, judges, government lawyers, and others, would be required to swiftly move families through immigration court proceedings so that the agreed upon time limit could be adhered to?

3. What would it cost to implement ATD in a manner that ensures that aliens can be returned to custody for removal, and how would that compare with detention costs?

4. What are the long-term implications for children placed in detention: a) unaccompanied; or b) detained with at least one parent?

5. To what extent are smugglers and traffickers using DHS's policy of "catch and release" for apprehended families to smuggle and/or traffic people, including unrelated minors, into the country?

TABLE OF CONTENTS

I. BACKGROUND

In 1985, four unaccompanied minors were apprehended separately for illegally crossing the border.[23] The children were detained at a facility in California pending removal proceedings.[24] The policy of the U.S. Immigration and Naturalization Services ("INS") facility was to release minors only to parents or lawful guardians.[25]

One of the unaccompanied children was Jenny Flores, a 15-year-old from El Salvador.[26] On July 11, 1985, the Center for Human Rights and Constitutional Law filed a class action lawsuit on behalf of her and other detained children, arguing that the government's policies violated the children's right to equal protection and due process under the U.S. Constitution.[27]

The case was ultimately appealed to the Supreme Court. In 1993, the Supreme Court held that the government could detain unaccompanied immigrant minors in government facilities or with willing-and-able private custodians, as long as they met minimum standards.[28] The case was remanded for further proceedings.[29]

The government and class action plaintiffs eventually agreed to the 1997 consent decree that established "a nationwide policy for the detention, release, and treatment of minors" in immigration custody, commonly referred to as the *Flores* settlement agreement.[30] Under *Flores*, minors must be placed in the least restrictive setting, appropriate to the minor's age and special needs, provided that such setting is consistent with ensuring the minor's timely appearance before the federal authorities and immigration courts and to protect the minor's well-being and that of others.[31] Specifically, the minor must be placed in a "safe and sanitary,"[32] non-secure facility that is licensed by the state to provide residential, group, or foster care services for dependent children.[33] Under a 2001 stipulation agreement, *Flores* was to stay in effect until "45 days after the federal government promulgates final regulations implementing the Agreement."[34]

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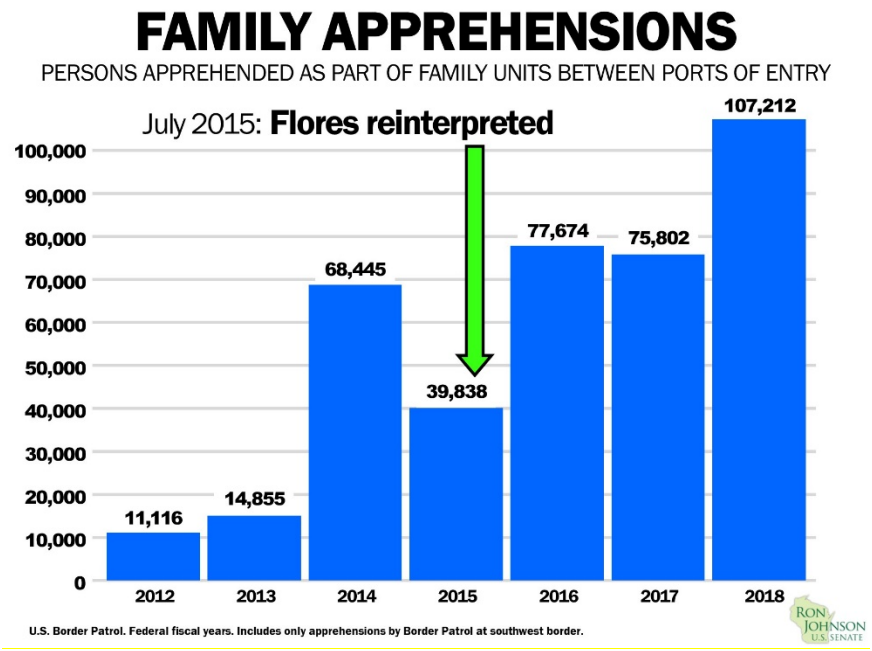
[23] VOA Immigration Unit, *A History of the Flores Settlement*, Voice of Am. News (June 21, 2018), https://www.voanews.com/a/a-history-of-the-flores-settlement-/4449350.html; *Flores v. Meese*, Slip Op. 85 4544, at 5-6 (C.D. Cal. July 11, 1985), https://www.clearinghouse.net/chDocs/public/IM-CA-0002-0001.pdf.
[24] Sarah Herman Peck & Ben Harrington, Cong. Research Serv., R45297, The "*Flores* Settlement" and Alien Families Apprehended at the U.S. Border: Frequently Asked Questions (Sept. 17, 2018), *available at* https://fas.org/sgp/crs/homesec/R45297.pdf.
[25] *Id*.
[26] VOA Immigration Unit, *supra* note 23.
[27] *See generally Flores by Galvez-Maldonado v. Meese*, 934 F.2d 991 (9th Cir. 1990), *opinion vacated and superseded on reh'g*, 942 F.2d 1352 (9th Cir. 1991), *rev'd sub nom. Reno v. Flores*, 507 U.S. 292, 113 S. Ct. 1439 (1993).
[28] *Reno v. Flores*, 507 U.S. 292, 113 S. Ct. 1439 (1993).
[29] Sarah Herman Peck & Ben Harrington, Cong. Research Serv., R45297, The "*Flores* Settlement" and Alien Families Apprehended at the U.S. Border: Frequently Asked Questions (Sept. 17, 2018).
[30] Stipulated Settlement Agreement at 6, *Jenny Lisette Flores, et al. v. Janet Reno*, No. CV 85-4544-RJK(Px), 2014 WL 7152078, *available at* https://www.clearinghouse.net/chDocs/public/IM-CA-0002-0005.pdf.
[31] *Id*.
[32] *Id*.
[33] *Id*.
[34] *Flores v. Reno*, Case No. CV 85-4544-RJK(Px), Stipulation Extending the Settlement Agreement and for Other Purposes, and Order Thereon (C.D. Cal., Dec. 7, 2001).

A. The Obama administration's 2014 family detention policy.

In FY2012, the first year that CBP began tracking the data, 11,116 family units were apprehended at the southern border.[35] In FY2013, the number modestly increased to 14,855 family units.[36] In FY2014, the number jumped to 68,445 family units—a 361 percent increase from FY2013.[37] In addition to these family units, CBP apprehended 51,705 unaccompanied alien children from El Salvador, Guatemala, and Honduras in FY2014 compared to 20,785 in FY2013, 10,128 in FY2012, and only 3,912 in FY2011.[38]

The influx of children and families created significant challenges for DHS. To put the FY2014 numbers into context, see Figures 1 and 2 showing historical trends of family unit and unaccompanied alien children apprehension at the southern border, and Figures 3 and 4 for data showing a breakdown of age and gender of apprehended unaccompanied alien children.

Figure 1: Family Apprehensions at the Southern border, FY2012 to FY2018[39]



[35] DHS Border Metrics Report, *supra* note 3 at 22.
[36] *Id.*
[37] *Id.*
[38] *Id.*
[39] *Id;* Southwest Border Apprehension Data FY2017-FY2018, *supra* note 4. All figures in this report will be available on the Committee's website.

Figure 2: UAC Apprehensions, FY2009 to FY2018[40]

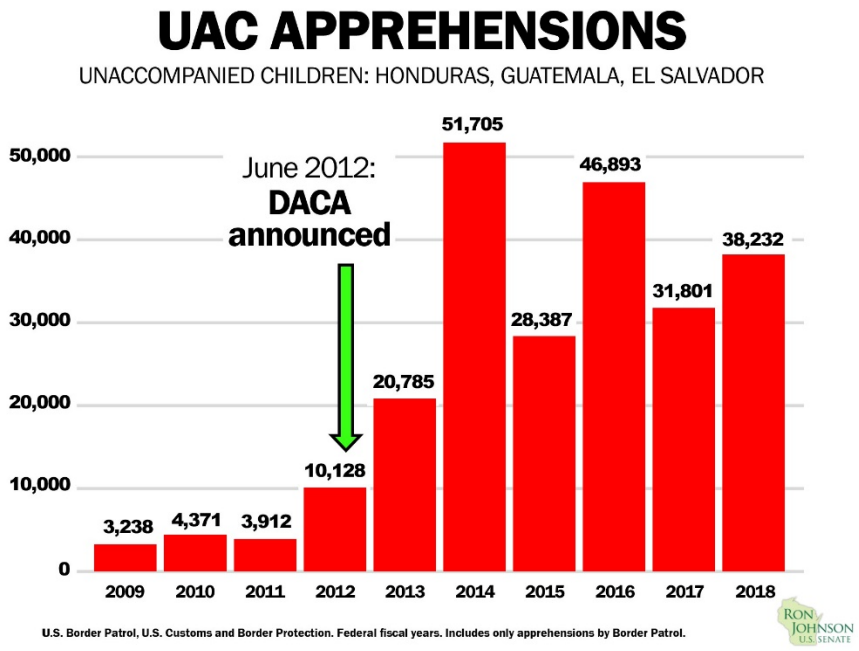
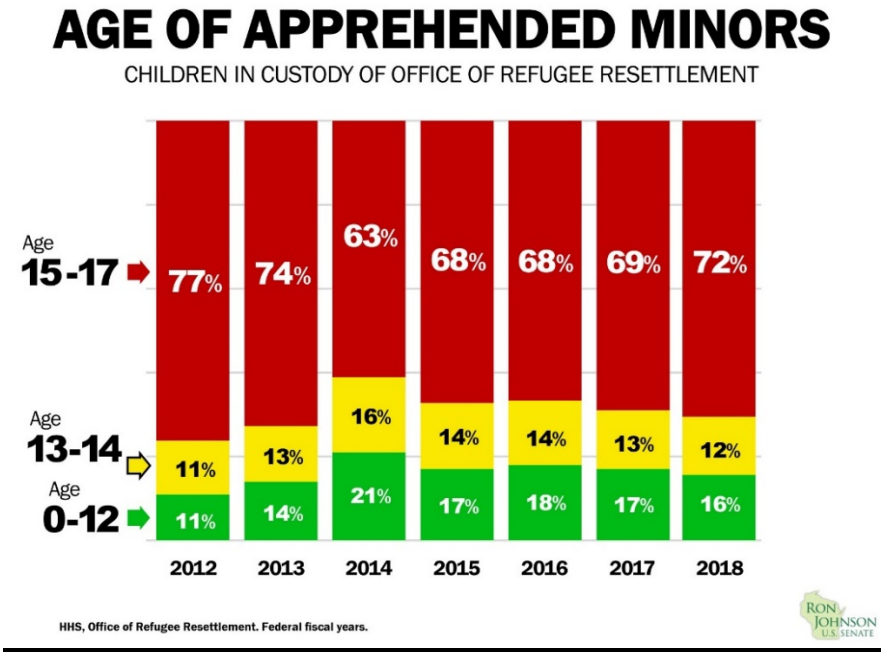
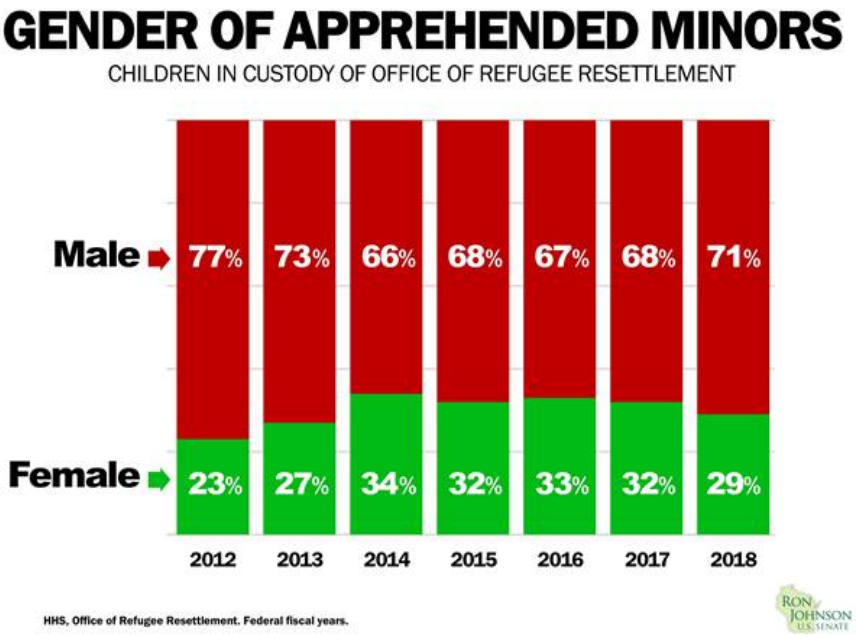


Figure 3: Age of UAC, FY2012 to FY2018[41]



[40] DHS Border Metrics Report, *supra* note 3; Southwest Border Apprehension Data FY2017-FY2018, *supra* note 4.
[41] Dep't of Health and Human Services, Office of Refugee Resettlement, Facts and Data (2018), *available at* https://www.acf.hhs.gov/orr/about/ucs/facts-and-data (last updated Dec. 20, 2018).

Figure 4: Gender of UAC, FY2012 to FY2018[42]



In response to the sharp influx in family units crossing the southern border, the Obama administration initiated a new policy in December 2014—detaining family units—to deter illegal immigration.[43] Then-Homeland Security Secretary Jeh Johnson explained the Department's objective: "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."[44] DHS opened two permanent family residential facilities in Texas and a temporary facility in New Mexico to handle the surge of family units.[45]

The number of apprehended families decreased from 68,445 in FY2014 to 39,838 in FY2015 (a decrease of 28,607, or 41.8 percent).[46]

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[42] *Id*.
[43] Julia Preston, *Detention Center Presented as Deterrent to Border Crossings*, N.Y. Times (Dec. 15, 2014), https://www.nytimes.com/2014/12/16/us/homeland-security-chief-opens-largest-immigration-detention-center-in-us.html.
[44] *Id*.
[45] Dep't of Homeland Sec., Fact Sheet: Artesia Temporary Facility for Adults with Children in Expedited Removal, (June 20, 2014), *available at* https://www.dhs.gov/sites/default/files/publications/FACT-SHEET-ARTESIA-TEMPORARY-FACILITY-FOR-ADULTS-WITH-CHILDEN-IN-EXPEDITED-REMOVAL_0.pdf; Press Release, U.S. Immigration and Customs Enforcement, ICE's New Family Detention Center in Dilley, Texas to Open in December (Nov. 17, 2014), https://www.ice.gov/news/releases/ices-new-family-detention-center-dilley-texas-open-december.
[46] DHS Border Metrics Report, *supra* note 3.

B. Legal challenges to the Obama administration's family detention policy.

On February 2, 2015, the Center for Human Rights and Constitutional Law filed a class action lawsuit on behalf of detained illegal immigrants arguing that the Obama administration's policy to apprehend families violated the terms of *Flores*.[47] In defending its policy, the Obama administration described the challenges facing DHS at the southern border and the impact the new policy was having:

> This unprecedented influx constituted a serious humanitarian situation, as large numbers of alien children—coming both with and without their parents—arrived at our border hungry, thirsty, exhausted, scared, and, at times, in need of urgent medical attention. In response to this situation, the U.S. Department of Homeland Security ("DHS") created additional, family-appropriate immigration detention capacity to hold families apprehended at the border, without requiring separation of parents from their children. These family residential facilities provide for the safety, security, and medical needs of both parents and children. They also ensure both the maintenance of family units and DHS's ability to efficiently and effectively process removal cases involving families. As a result of these actions, the number of both UACs and accompanied children illegally entering the United States has decreased significantly.[48]

The Obama administration asserted that the policy change was necessary to deter illegal immigration because "[the] release of accompanied children and their parents gives families a strong incentive to undertake the dangerous journey to this country."[49] Deciding against the government, the Obama administration argued, "threatens family unity and ignores the significant growth in the number of children (both accompanied and unaccompanied) apprehended while unlawfully crossing the southwest border."[50] Further, the government argued the *Flores* "Agreement is clearly crafted in a manner that indicates that the parties did not intend its provisions to apply to accompanied children."[51]

On July 24, 2015, a U.S. district court in California ruled that *Flores* generally requires the government to release minors as well as their accompanying parents.[52] The Obama administration appealed, arguing that compliance with the district court's ruling in the "face of a new surge of children and families would almost certainly require [DHS] to divert substantial resources away from other critical immigration, humanitarian, national security, and border

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[47] *See* Mem. in Supp. of Mot. to Enforce Settlement of Class Action, *Flores, et al. v. Johnson et al.,* No. CV 85-4544-RJK(Px) (C.D.Cal.), *available at* https://www.aila.org/File/Related/14111359g.pdf.
[48] Defs.' Resp. in Opp'n to Pls.' Mot. to Enforce Settlement of Class Action at 1-2, *Flores, et al. v. Holder et al.,* No. 2:85-cv-04544-DMG-AGR, 2015 WL 13648967 (C.D.Cal. 2015).
[49] *Flores v. Johnson*, 212 F. Supp. 3d 864, 875 (C.D. Cal.), *clarified on denial of reconsideration sub nom. Flores v. Lynch*, 212 F. Supp. 3d 907 (C.D. Cal. 2015), *aff'd in part, rev'd in part and remanded*, 828 F.3d 898 (9th Cir. 2016).
[50] *Id.*
[51] *Id.*
[52] *Id.* at 886-67.

security-related operations."[53] On July 6, 2016, the U.S. Court of Appeals for the Ninth Circuit held that *Flores* "unambiguously applies both to minors who are accompanied and unaccompanied by their parents."[54] However, the court ruled that *Flores* does not require DHS to release the adults accompanying a child.[55]

When Committee staff spoke with former Secretary Jeh Johnson in August 2018, he was clear about his continued disagreement with the Ninth Circuit's ruling in *Flores*:

> I will tell you that strictly as a legal matter that *Flores* was wrongly decided. It is clear that what the parties intended when they settled that case in 1997 was only with respect to unaccompanied children. It is clear from the certified class, the scope of the certified class. But the language of the settlement terms was not so limited. This applies to accompanied children as well. I disagreed then and disagree now.[56]

As a result of the Ninth Circuit's ruling, DHS and its components were forced to decide between "catching and releasing" apprehended families within 20 days, or releasing accompanied children while continuing to detain their parents. The Obama administration, in general, chose "catch and release".[57]

The data speaks for itself: in FY2016, there were 77,674 family unit apprehensions by CBP at the southern border;[58] in FY2017, 75,802;[59] in FY2018, the number increased to 107,212, a 169 percent increase from FY2015, the year of the *Flores* reinterpretation, and a staggering 864 percent from FY2012; and during just the first three months of FY2019, 75,805 people were apprehended as part of a family unit.[60] In the last five fiscal years, a total of 368,971 individuals (73,794 average per year) have been apprehended entering the country illegally in a family unit compared to only 11,116 in FY2012.[61]

C. The Trump administration's 2018 zero-tolerance policy and family separations.

In early 2018, the Trump administration recognized the increasing trend of illegal migration and apprehensions at the southern border compared to prior years and month-over-month data. In April 2018, DHS reported a 299 percent increase in illegal border crossings

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[53] Mot. Pursuant to Circuit Rules 27-12 and 34-3 to Expedite Briefing and Hr'g Schedule for Appeal at 3, *Flores v. Lynch*, 828 F.3d 898, 901 (9th Cir. 2016), *available at* https://www.aila.org/File/Related/14111359q.pdf.
[54] *Flores v. Lynch*, 828 F.3d 898, 900 (9th Cir. 2016).
[55] *Id.* at 908.
[56] Telephone Interview with Jeh Johnson, former Sec'y of Homeland Sec. (Aug. 28, 2018) (notes on file with Comm. majority staff).
[57] *Id.*
[58] DHS Border Metrics Report, *supra* note 3.
[59] Southwest Border Apprehension Data FY2017-FY2018, *supra* note 4.
[60] *Id*; Alan Gomez, *Central American migrants keep heading toward US, even as Trump focuses on stopping caravans*, USA Today (Jan. 9, 2019), https://www.usatoday.com/story/news/politics/2019/01/09/migrant-caravan-trump-crackdown-has-not-slowed-flow-families-us/2523034002/ (reporting that "Border Patrol agents apprehended 27,518 members of family units in December, the highest monthly total on record.").
[61] DHS Border Metrics Report, *supra* note 3; Southwest Border Apprehension Data FY2017-FY2018, *supra* note 4.

between March 2017 (16,794) and March 2018 (50,357), and a 37 percent increase between February 2018 (36,751) and March 2018 (50,357).[62]

On April 6, 2018, Attorney General Jeff Sessions directed all U.S. Attorney offices along the southern border to prosecute offenses of attempted illegal entry and illegal entry into the United States.[63] The policy has been referred to as the "zero-tolerance" policy. Attorney General Sessions explained:

> The situation at our Southwest Border is unacceptable. Congress has failed to pass effective legislation that serves the national interest—that closes dangerous loopholes and fully funds a wall along our southern border. As a result, a crisis has erupted at our Southwest Border that necessitates an escalated effort to prosecute those who choose to illegally cross our border.[64]

Because of the *Flores* reinterpretation, prosecuting all illegal border crossers required authorities to separate any children from an accompanying adult as the adult awaited their criminal proceedings.[65] Children were referred to Health and Human Services ("HHS") Office of Refugee Resettlement ("ORR") and recategorized as unaccompanied alien children.[66] From May 5, 2018, through June 20, 2018, 2,667 children were separated from their parents: 2,564 were ages 5 through 17, and 103 were under the age of 5.[67]

On June 6, 2018, the American Civil Liberties Union filed a federal lawsuit to end family separations and require the Trump administration to quickly reunite the separated families.[68] On June 20, 2018, President Trump signed an executive order mandating that families illegally entering the United States be kept together in family residential centers, except where there is a fear for the child's welfare.[69] If space is not available to house these family units, they are often released into the ATD program or on parole.[70] The executive order also directed agencies to find additional appropriate locations to house family units.[71]

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[62] Press Release, U.S. Dep't of Justice, Attorney General Announces Zero-Tolerance Policy for Criminal Illegal Entry (Apr. 6, 2018), *available at* https://www.justice.gov/opa/pr/attorney-general-announces-zero-tolerance-policy-criminal-illegal-entry; Southwest Border Migration Data FY2019, *supra* note 14.
[63] Press Release, U.S. Dep't of Justice, Attorney General Announces Zero-Tolerance Policy for Criminal Illegal Entry (Apr. 6, 2018), *available at* https://www.justice.gov/opa/pr/attorney-general-announces-zero-tolerance-policy-criminal-illegal-entry.
[64] *Id*.
[65] Tim O'Shea and Theresa Cardinal Brown, *Why Are Families Being Separated at the Border? An Explainer*, Bipartisan Policy Center (June 13, 2018), https://bipartisanpolicy.org/blog/why-are-families-being-separated-at-the-border-an-explainer/.
[66] William A. Kandel, Cong. Research Serv., R45266, The Trump Administration's "Zero Tolerance" Immigration Enforcement Policy (2018), *available at* https://www.hsdl.org/?view&did=814001.
[67] Joint Status Report, *Ms. L, et al., Petitioners-Plaintiffs, v. U.S. Immigration & Customs Enforcement, et al., Respondents-Defendants* 4 (S.D.Cal. 2018), *available at* https://www.aclu.org/sites/default/files/field_document/ms_l_v_ice_-_joint_status_report_1.pdf.
[68] *See Ms. L. v. U.S. Immigration & Customs Enf't*, 302 F. Supp. 3d 1149 (S.D. Cal. 2018).
[69] Exec. Order No. 13,841, 83 Fed Reg. 29435 (June 20, 2018).
[70] *Id*.
[71] *Id.*

On June 26, 2018, a group of 17 states and the District of Columbia filed a federal lawsuit to reunite all children with their parents.[72] On June 29, 2018, a district court judge ordered the government to reunite separated families by certain deadlines: children under the age of five by July 10, 2018, and children five years or older by July 26, 2018.[73] Figure 5, below, shows the government's progress as of December 12, 2018.

Figure 5: Family Reunification Progress[74]

Family reunification figures

Official figures as of Dec. 12, 2018

Originally identified as separated:			**2,667**
Reunited with separated parent.	2,131		
Reunited with family member, family friend, aged out, or other situation.	377		
Reunited, total:		**2,508**	
Still in HHS care because parent is red-flagged, parent was deported and wants child to remain, or other situation.		**123**	
Not actually separated		**28**	
Still waiting to be reunified		**8**	
Total			**2,667**

President Trump ended family separations on June 20, 2018, while insisting that the zero-tolerance policy was still in effect.[75] In reality, the United States' immigration policy reverted to "catch and release" for all illegal alien families at the southern border.[76]

On September 6, 2018, Secretary of Homeland Security Kirstjen Nielsen and HHS Secretary Alex Azar announced a new proposed rulemaking to amend the terms of *Flores*:

> The rule would satisfy the basic purpose of the [*Flores* Settlement Agreement] FSA in ensuring that all juveniles in the government's custody are treated with

[72] Joseph De Avila, *States Sue Trump Administration Over Immigrant Family Separation Policy*, Wall St. J. (June 26, 2018), www.wsj.com/articles/states-sue-trump-administration-over-immigrant-family-separation-policy-1530050363?mod=article_inline.
[73] *Ms. L. v. U.S. Immigration & Customs Enf't ("ICE")*, 310 F. Supp. 3d 1133, 1149–50 (S.D. Cal. 2018).
[74] *Id*.
[75] Exec. Order No. 13,841, 83 Fed Reg. 29435; *see also* John Wagner, Nick Miroff & Mike DeBonis, *Trump Reverses Course, Signs Order Ending His Policy of Separating Families at the Border*, Wash. Post (June 20, 2018), https://www.washingtonpost.com/powerpost/gop-leaders-voice-hope-that-bill-addressing-family-separations-will-pass-thursday/2018/06/20/cc79db9a-7480-11e8-b4b7-308400242c2e_story.html?utm_term=.93519b6b0121.
[76] *Id.*

dignity, respect, and special concern for their particular vulnerability as minors, while doing so in a manner that is workable in light of subsequent changes. The rule would also implement closely related provisions of the HSA and TVPRA. Most prominently, the rule would create an alternative to the existing licensed program requirement for family residential centers, so that ICE may use appropriate facilities to detain family units together during their immigration proceedings, consistent with applicable law.[77]

D. Committee efforts to achieve bipartisan support for reform.

Since the 1985 court cases began, the policy issues related to *Flores* and apprehended alien children and families have largely been decided through litigation, court rulings, consent decree, and executive action. Congress has not passed legislation to codify *Flores*, nor has it passed legislation to supplant it.[78] When U.S. District Court Judge Dolly Gee rejected the Trump administration's attempt to alter the 1997 agreement, she pointed to congressional inaction as a cause for the ongoing legal challenges regarding *Flores*. She wrote, "[i]t is apparent that Defendants' Application is a cynical attempt, on an ex parte basis, to shift responsibility to the Judiciary for over 20 years of Congressional inaction and ill-considered Executive action that have led to the current stalemate."[79]

On June 21, 2018, Senator Thom Tillis introduced the *Keep Families Together and Enforce the Law Act*, legislation that would require the government to keep apprehended families together while exempting DHS from the *Flores* reinterpretation requirement that it release alien children who are accompanied by a parent within 20 days.[80] Among other provisions, the legislation would also establish legal guidelines for detaining families and would prioritize accompanied minors and family units for immigration court proceedings.[81] On July 25, 2018, Senator Tillis sought to pass the measure by unanimous consent on the Senate floor.[82] Senator Mazie Hirono objected, and the effort stalled.[83]

Chairman Ron Johnson, after consulting with Senate Judiciary Committee colleagues, introduced the *Fixing America's Marred Immigration Laws to Improve and Ensure Security Act*,

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[77] Apprehension, Processing, Care, and Custody of Alien Minors and Unaccompanied Alien Children, 83 Fed. Reg. 45486-01 (proposed Sept. 7, 2018) (to be codified at 8 C.F.R. pt. 212 & 236, 45 CFR pt. 410), *available at* https://www.federalregister.gov/documents/2018/09/07/2018-19052/apprehension-processing-care-and-custody-of-alien-minors-and-unaccompanied-alien-children.
[78] Sarah Herman Peck & Ben Harrington, Cong. Research Serv., R45297, The "*Flores* Settlement" and Alien Families Apprehended at the U.S. Border: Frequently Asked Questions (Sept. 17, 2018).
[79] Order Den. Defs.' "Ex Parte Application For Limited Relief From Settlement Agreement" at 7, *Jenny L. Flores, et al. v. Jefferson B. Sessions, III, et al*, No. CV 85-4544-DMG (AGRx) (C.D. Cal. July 9, 2018).
[80] Keep Families Together and Enforce the Law Act, S. 3093, 115th Cong. (2018), *available at* https://www.congress.gov/bill/115th-congress/senate-bill/3093/text.
[81] *Id.*
[82] Jordain Carney, *Family Separation Bills Blocked on Senate Floor*, The Hill (July 25, 2018), http://thehill.com/blogs/floor-action/senate/398842-family-separation-bills-blocked-on-senate-floor.
[83] *Id.*

or the *FAMILIES Act*.[84] As introduced, the bill: requires DHS to keep parents and their accompanied children together in family residential centers through the outcome of their immigration proceedings; authorizes 1,000 beds for family units and 225 immigration judges; requires the Department of Justice ("DOJ") and DHS to prioritize cases for families in DHS custody; and requires watchdogs and relevant agencies to provide reports and statistics on conditions of family detention centers, allegations of abuse, apprehensions, family reunification efforts, asylum claims, removal orders, and unaccompanied alien children in HHS facilities. It also codifies immigration information gathering and reporting requirements to help inform future administrative and legislative action.

On August 1, 2018, Chairman Johnson hosted a Committee meeting to discuss the challenges related to the current policy of "catch and release" at the southern border following the reinterpretation of *Flores*.[85] On September 18, 2018, the Committee held a hearing titled *The Implications of the Reinterpretation of the Flores Settlement Agreement for Border Security and Illegal Immigration Incentives*, featuring representatives of ICE, CBP, DOJ, and the Government Accountability Office ("GAO").[86]

To obtain additional information for members, the Committee held 21 bipartisan briefings for all Committee staff. These briefings included representatives from government departments and agencies, including DHS, HHS, and DOJ, CBP (including both Border Patrol and Office of Field Operations), U.S. Citizenship and Immigration Services ("USCIS"), ICE (including both Enforcement and Removal Operations ("ERO") and Homeland Security Investigations ("HSI")), and DHS's Office of Civil Rights and Civil Liberties ("CRCL").

Committee staff received briefings from nonpartisan government watchdogs and experts, including GAO, the DHS Office of Inspector General ("OIG"), and Congressional Research Services ("CRS"). Committee staff also spoke with two former secretaries of homeland security, Jeh Johnson and Michael Chertoff, as well as other former government officials, including a former immigration judge and contractors to CRCL. The Committee also received briefings from a range of experts and organizations, including an ATD contractor, GeoCare, the Institute for Defense Analyses ("IDA"), Washington, D.C. Pretrial Services, the American Association of Pediatrics, and the American Immigration Lawyers Association.

[84] The FAMILIES Act, S. 3478 (115th Cong.), *available at* https://www.congress.gov/bill/115th-congress/senate-bill/3478.
[85] Member Meeting, S. Comm. on Homeland Sec. & Governmental Affairs (Aug. 1, 2018).
[86] *HSGAC Hearing on Flores Settlement*, *supra* note 21.

II. KEY FACTS AND DATA IDENTIFIED BY THE COMMITTEE'S OVERSIGHT

To inform the Committee's problem solving process, the majority staff presents the following findings drawn from the Committee's bipartisan oversight:

A. The *Flores* reinterpretation requires DHS to "catch and release" apprehended families at the southern border, incentivizing more illegal immigration. The number of family unit members apprehended by CBP since FY2012 has increased by a staggering 864 percent, and the problem is only getting worse: In the first three months of FY2019 alone, the number of family unit members apprehended was reportedly 75,805, compared to 107,212 in all of FY2018.

DHS dating back to the Obama administration and non-partisan watchdogs at GAO have testified that migrants are aware of U.S. immigration policies, such as the current policy of "catch and release" for apprehended families.[87] ICE officials briefed staff that migrants believe that they will be released and provided with a notice to appear if they are apprehended at the southern border with a child.[88]

Migrants also understand that they will have the opportunity to live and work in the United States once they are released. According to ICE officials, defensive asylum applicants—those applying after having been determined ineligible for asylum by USCIS or placed into removal proceedings—are eligible to receive an employment authorization document after 180 days.[89] Once living in the United States, alien children can enroll in public school[90] and families can access other social services such as emergency services through Medicaid.[91]

This catch and release policy for apprehended families creates strong incentives for adults to enter the United States illegally with children, risking the dangerous journey to the United States. In its arguments before the district court in 2015, the Obama administration provided testimony from a Border Patrol agent that:

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[87] *Ongoing Migration from Central America: An Examination of FY2015 Apprehensions: Hearing before S. Comm. on Homeland Sec. & Governmental Affairs 114 Cong.* (2015) (Statement of Kimberly Gianopoulos, Dir., Int'l Affairs & Trade, and statement of Chris Cabrera, Border Patrol Agent, U.S. Customs & Border Protection).

[88] Briefing with Enforcement & Removal Operations Official, U.S. Immigration & Customs Enforcement (Aug. 7, 2018) (notes on file with Comm. majority staff).

[89] *Id.*; U.S. Citizenship & Immigration Services, Exec. Office for Immigration Review, The 180-Day Asylum EAD Clock Notice (May 9, 2017), *available at* https://www.uscis.gov/sites/default/files/USCIS/Humanitarian/Refugees%20%26%20Asylum/Asylum/Asylum_Clock_Joint_Notice_-_revised_05-10-2017.pdf.

[90] Andorra Bruno, Cong. Research Serv., RL33863, Unauthorized Alien Students: Issues and "DREAM Act" Legislation (2018), https://fas.org/sgp/crs/misc/RL33863.pdf (CRS stated that "[u]nauthorized aliens in the United States are able to receive free public education through high school").

[91] Alison Siskin, Cong. Research Serv., RL33809, Noncitizen Eligibility for Federal Public Assistance: Policy Overview (2016), https://fas.org/sgp/crs/misc/RL33809.pdf.

> [F]amily units apprehended by Border Patrol . . . claimed that a principal motive for entering the United States was to take advantage of the "permisos" that the United States was granting to family units. The term "permiso" in this context is used to refer to a Notice to Appear which permits aliens to depart the Border Patrol station without detention . . . . While this impression [that the U.S. government was planning to stop issuing "permisos" in June or July 2014] was incorrect, it speaks to the understanding of the family units that detention, and the ability to simply depart a Border Patrol station, factor strongly into their determination on when and whether to cross into the United States . . . . Based on my experience as a Border Patrol Agent, the use of detention has historically been effective at deterring aliens (specifically aliens from countries other than Mexico) from entering the United States through the South Texas region.[92]

Secretary Johnson viewed family detention as an important tool in DHS's toolbox to deter illegal immigration.[93] Following the Obama administration's implementation of family detention, the number of family units crossing the southern border went from 68,445 in FY2014 to 39,838 in FY2015, a 41.8 percent decrease.[94]

Then, from FY2016-FY2018—following the court rulings that forced the Obama administration to abandon its family detention policy—the Border Patrol apprehended more than 260,000 family units crossing between the nation's ports of entry.[95] According to CBP, 107,212 people in family units crossed the southern border and were apprehended by the Border Patrol in FY2018 alone—an increase of 169 percent from FY2015, the year of the *Flores* reinterpretation, and a staggering 864 percent from FY2012.[96]

Because the United States has returned to a policy of catch and release, it is reasonable to expect this number to continue to escalate in FY2019. Indeed, in the first three months of FY2019 alone, the Border Patrol apprehended 75,805 family unit members.[97]

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[92] *Flores v. Johnson*, 212 F. Supp. 3d at 875.
[93] Tim Hains, *Obama DHS Sec. Jeh Johnson: I Freely Admit We Detained Children, "It Was Necessary"*, Real Clear Politics (June 24, 2018), https://www.realclearpolitics.com/video/2018/06/24/obama_dhs_sec_jeh_johnson_we_detained_children_it_was_necessary.html.
[94] DHS Border Metrics Report, *supra* note 3; Southwest Border Apprehension Data FY2017-FY2018, *supra* note 4.
[95] *Id*.
[96] *Id*.
[97] Southwest Border Migration Data FY2019, *supra* note 14; Alan Gomez, *Central American migrants keep heading toward US, even as Trump focuses on stopping caravans*, USA Today (Jan. 9, 2019), https://www.usatoday.com/story/news/politics/2019/01/09/migrant-caravan-trump-crackdown-has-not-slowed-flow-families-us/2523034002/.

B. The *Flores* reinterpretation, combined with limited detention facilities, has forced ICE to release all families—including male-headed families traveling with teenage girls—within days of apprehension and without sufficient screening for human trafficking or child welfare. In other words, CBP and ICE do not have sufficient time to determine if the adult male is the father or a sex trafficker, or whether the teenage girl is his daughter or sex slave.

ICE officials briefed Committee staff on their inability to detain apprehended family units with men as the head-of-household. Only one of ICE's family residential centers, Berks Family Residential Center in Pennsylvania, is designed to house adult men as heads of household with minors.[98] Berks Family Residential Center only has 96 beds and is located far from the southern border.[99] Another facility, Karnes County Residential Center in Texas, can hold up to 830 and only recently became able to detain male-headed families.[100] Additionally, family composition severely limits the capacity of these facilities to accommodate male-headed families, and particularly male-headed families with girls. This is because a male head of household that has a female child must be housed separately from other families, reducing the maximum capacity of a room from between 6 and 12 beds for multiple families to just as few as two beds for one family.[101] Due to this overall limited detention capacity, ICE's policy is nearly automatic "catch and release" for family units with men as heads of household.[102]

The problems related to this policy are compounded by document fraud and insufficient time to perform background checks. ICE told staff that migrants obtain false birth certificates to claim that an alien is related to a child when arriving in the United States.[103] Migrants are told to offer information consistent with the birth certificate to avoid suspicion.[104] Given that there is no picture on a birth certificate, the task of verifying migrant identities can be extremely difficult. CBP uses a number of strategies to verify documents and well trained agents also use intuition and questioning to assess familial relationships.[105] However, these tactics are not foolproof. CBP told staff that if there are no documents to prove familial relationship and there is no reason to believe there is fraud or trafficking, CBP agents must take the word of the family and minor that they are indeed a "bona fide" family unit.[106] ICE told staff that it is further limited by the

[98] Briefing with Enforcement & Removal Operations Official, U.S. Immigration & Customs Enforcement (Aug. 7, 2018); E-mail from U.S. Immigration & Customs Enforcement Official, U.S. Immigration and Customs Enforcement, to Comm. majority staff (Sept. 12, 2018) (on file with Comm. majority staff).
[99] *Id*.
[100] U.S. Immigration & Customs Enforcement, Follow-Up Questions – HSGAC Berks Tour (Oct. 25, 2018) (on file with Comm. staff).
[101] U.S. Immigration & Customs Enforcement, HSGAC Berks Tour (Oct. 18, 2018) (on file with Comm. staff).
[102] Briefing with Enforcement & Removal Operations Official, U.S. Immigration & Customs Enforcement (Aug. 7, 2018).
[103] E-mail from U.S. Immigration & Customs Enforcement Official, U.S. Immigration and Customs Enforcement, to Comm. majority staff (Sept. 12, 2018) (on file with Comm. majority staff).
[104] *Id*.
[105] E-mail from U.S. Customs & Border Patrol Official, U.S. Customs & Border Patrol, to Comm. majority staff (Sept. 6, 2018) (on file with Comm. majority staff).
[106] Briefing with U.S. Customs & Border Protection Official, U.S. Customs and Border Protection (Sept. 10, 2018).

very brief time period that it can detain families with adult males.[107] According to ICE, this policy of quickly releasing adult male-headed households is becoming well known among would-be migrants in Central America and among smugglers, leading to a significant increase in illegal immigration by male-headed households.[108] See Figure 6 below.

Figure 6: USBP Southwest Border Apprehended Family Units by Gender of Lead, FY2016 through FY2018[109]

fiscal year	*2016*	*2017*	*2018*	*2016-18*
Male adult "lead"	7,896	9,181	20,166	37,243
Female adult "lead"	27,145	25,219	29,524	81,888
Two adults	220	91	312	623
total	**35,261**	**34,491**	**50,002**	**119,754**

Quickly releasing male heads-of-household family units may have significant unintended consequences, such as increasing the incentive for men to traffic or smuggle minors into the country and endangering child welfare. ICE officials told staff that adult migrants are "renting" or taking children from their homes to traffic them into the United States to take advantage of the "catch and release" policy.[110] DHS and its components have reported problems related to transnational criminal organizations ("TCOs") involved with human smuggling and trafficking. Homeland Security Secretary Nielsen underscored how TCOs are benefiting financially from these smuggling operations in testimony before Congress in May 2018: "To be clear — human smuggling operations are lining the pockets of transnational criminals. They are not humanitarian endeavors. Smugglers prioritize profit over people. And when aliens pay them to get here, they are contributing $500 million a year — or more — to groups that are fueling greater violence and instability in America and the region."[111]

[107] Briefing with Enforcement & Removal Operations Official, U.S. Immigration & Customs Enforcement (Aug. 7, 2018); Briefing with Homeland Sec. Investigation Official, U.S. Immigration & Customs Enforcement (Aug. 29, 2018).
[108] *Id*.
[109] E-mail from U.S. Customs & Border Patrol Official, U.S. Customs and Border Patrol, to Comm. majority staff (Sept. 21, 2018) (on file with Comm. majority staff).
[110] Briefing with Enforcement & Removal Operations Official, U.S. Immigration & Customs Enforcement (Aug. 7, 2018); Briefing with Homeland Sec. Investigation Official, U.S. Immigration & Customs Enforcement (Aug. 29, 2018).
[111] *Authorities and Resources Needed to Protect and Secure the United States: Hearing Before the S. Comm. on Homeland Sec. and Governmental Affairs*, 115 Cong. (2018) (Testimony of Kristjen Nielsen, Sec'y of Homeland Sec.).

HSI officials briefed Committee staff on intelligence about how TCOs are exploiting the *Flores* reinterpretation by smuggling people into the country.[112] Cartels control the routes into the United States and oversee the smuggling activities.[113] About half of migrants are brought by smugglers while the others are generally coached to cross illegally by family and social media.[114] Interviews with migrants indicate that they are told they will get "permisos" to be allowed to stay if they reach the United States.[115] All who cross must pay a tax to the cartels, which differs based on where they are from. Migrants from Mexico pay as much as $2,000 while those from Central America pay as much as $5,000.[116] Aliens from Africa or Asia may pay as much as $10,000 to cross.[117] TCOs also smuggle criminals and key organized crime figures into the United States to run their operations.[118]

HSI reported that some migrants smuggled into the United States are forced into sexual slavery or other human trafficking conditions.[119] For example, according to HSI, Chinese migrants often do not pay smugglers, but rather serve as indentured servants for between one to three years after their arrival.[120] Their indentured servitude can sometimes be in the sex trade, manual labor, or other businesses but is controlled by gangs or smuggling organizations in China working with other criminal organizations from Mexico or the United States.[121] ICE also told staff that *Flores* is causing some of the smuggling, and migrants are often used as mules to transport drugs or as a diversion for smuggling operations.[122]

An April 2018 CBP assessment confirmed that the number of apprehended illegal immigrant family units that falsely claim a parental relationship is rising.[123] The Committee is already aware of one instance of an adult bringing a minor into the country who was not his child and later being charged with crimes, including rape.[124] In another unfortunate example, an illegal alien with an outstanding warrant for homicide in Honduras unlawfully entered the United States

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[112] Briefing with Enforcement & Removal Operations Official, U.S. Immigration & Customs Enforcement (Aug. 7, 2018); Briefing with Homeland Sec. Investigation Official, U.S. Immigration & Customs Enforcement (Aug. 29, 2018).
[113] *Id.*
[114] Briefing with Homeland Sec. Investigation Official, U.S. Immigration & Customs Enforcement (Aug. 29, 2018).
[115] Briefing with Enforcement & Removal Operations Official, U.S. Immigration & Customs Enforcement (Aug. 7, 2018); Briefing with Homeland Sec. Investigation Official, U.S. Immigration & Customs Enforcement (Aug. 29, 2018) (in Spanish, "permisos" means permits, referring to a notice to appear in immigration court often misperceived to mean that the immigrant is authorized to stay in the U.S.).
[116] *Id.*
[117] *Id.*
[118] Briefing with Homeland Sec. Investigation Official, U.S. Immigration & Customs Enforcement (Aug. 29, 2018).
[119] *Id.*
[120] *Id.*
[121] *Id.*
[122] *Id.*
[123] E-mail from U.S. Customs and Border Protection Officials to Comm. majority staff (Sept. 18, 2018, 5:00 PM) (on file with Comm. majority staff).
[124] In one publicly reported case, authorities in California charged a man with crimes, including rape, after he entered the country illegally with a minor whom he claimed as his daughter and was released under the policy of "catch and release" for illegal immigrant families. Stephen Dinan, *Police Nab Illegal Immigrant 'Family' After Man Found to have Raped Girl*, Wash. Times (Aug. 7, 2018), https://www.washingtontimes.com/news/2018/aug/7/illegal-immigrant-family-nabbed-after-man-found-ha/.

near McAllen, Texas with a minor child in May 2018.[125] He and the child were released and they moved to Massachusetts.[126] CBP reportedly was not aware of the arrest warrant at the time of the alien's apprehension.[127] The United States later determined that the alien used fraudulent documents to convince a U.S. court that he was no longer wanted for homicide in Honduras.[128] He is now back in ICE custody and in removal proceedings.[129]

C. In FY2018, the United States determined that more than 75 percent of illegal aliens had a "credible fear" of returning home—halting their removal while the case proceeds—yet less than 21 percent of those who applied for asylum ultimately received it.

When members of apprehended families are released from ICE custody, they are placed on the DOJ Executive Office for Immigration Review ("EOIR") non-detained docket and given a notice to appear. An apprehended illegal alien can claim to have a credible fear of returning home at any point during his or her adjudication and removal proceedings.[130] If credible fear is established, the alien is entitled to a hearing to determine whether he or she is eligible for asylum. This legal process can take years, during which time the individual can remain in the United States.

After CBP apprehends an illegal alien and places him or her in expedited removal proceedings, the alien may claim asylum as a defense against removal.[131] Under the Convention Against Torture and U.S. law, an alien seeking this form of asylum may claim they have a "credible fear" of persecution or torture if they return to their home country.[132] According to USCIS:

> An individual will be found to have a credible fear of persecution if he or she establishes that there is a "significant possibility" that he or she could establish in a full hearing before an Immigration Judge that he or she has been persecuted or has a well-founded fear of persecution or harm on account of his or her race,

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[125] Eric Rasmussen and Jason Solowski, *25 Investigates: Honduran Murder Suspect Enters U.S. Illegally, Moves to Mass.*, Boston 25 News (Nov. 12, 2018), https://www.boston25news.com/news/25-investigates-honduran-murder-suspect-enters-us-illegally-moves-to-mass/868702410; Telephone interview with whistleblower (July 15, 2018) (notes on file with Comm. majority staff).
[126] *Id*.
[127] *Id*.; Telephone Interview with U.S. Customs and Border Protection official, U.S. Customs and Border Protection (July 25, 2018) (on file with Comm. majority staff).
[128] Eric Rasmussen, *supra* note 125.
[129] *Id*.
[130] Note, the one-year limitation still applies. An individual claiming defensive asylum must apply for asylum within one year of the "alien's arrival in the United States." 8 U.S.C. 1158(a)(2)(B); *see also* U.S. Citizenship & Immigration Services, Obtaining Asylum in the United States (last updated Oct. 19, 2015), https://www.uscis.gov/humanitarian/refugees-asylum/asylum/obtaining-asylum-united-states.
[131] U.S. Citizen & Immigration Services, Obtaining Asylum in the United States (last updated Oct. 19, 2015), https://www.uscis.gov/humanitarian/refugees-asylum/asylum/obtaining-asylum-united-states. Defensive asylum occurs in three ways, 1) when the alien was apprehended at the border trying to enter illegally, 2) in the United States without proper documentation or "in violation of their immigration status," or 3) at the end of the affirmative asylum process. *Id*.
[132] U.S. Citizenship & Immigration Services, Credible Fear FAQ, https://www.uscis.gov/faq-page/credible-fear-faq.

> religion, nationality, membership in a particular social group, or political opinion if returned to his or her country.[133]

The individual can satisfy the "significant possibility" standard by showing only "a 10 percent chance" that the individual will be persecuted if returned to his or her home country.[134] Once this low threshold is met, the United States may not deport the alien until an immigration court has considered his or her asylum claim,[135] a process that can take years.

According to GAO, the average case completion time for a non-detained case took 535 days in 2015.[136] ICE officials told the Committee that it could take as long as three to five years for non-detained cases to be completed.[137] Figure 7, below, shows that wait times for immigration court in some large United States cities exceed three years.

Figure 7: Immigration Court Wait Times in Select U.S. Cities, as of April 2017[138]

Comparing figures 8 and 9, below, shows that many aliens claim credible fear when they do not have a legitimate fear of persecution, allowing them to remain in the United States for years while their case is processed. From FY2009 to FY2018, the average asylum grant rate per

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[133] *Id*.
[134] *INS v. Cardoza-Fonseca*, 480 U.S. 421 (1987).
[135] *See* 8 U.S.C. § 1225(b)(1)(A)(ii) and § 1225(b)(1)(B)(ii).
[136] U.S. Gov't Accountability Office, GAO-17-438, Actions Needed to Reduce Case Backlog and Address Long-Standing Management and Operational Challenges (2017), *available at* https://www.gao.gov/assets/690/685022.pdf.
[137] Briefing with Enforcement & Removal Operations Official, U.S. Immigration & Customs Enforcement (Aug. 7, 2018).
[138] Trac Immigration, *Despite Hiring, Immigration Court Backlog and Wait Times Climb*, Syracuse University (May 15, 2017), http://trac.syr.edu/immigration/reports/468/.

year ranged between a low of 17.6 percent in FY2016 to a high of 32.1 percent in 2011.[139] In FY2018, the asylum grant rate was 20.9 percent.[140]

Figure 8: Percent of All Referred Cases Where Credible Fear Was Found[141]

Percent of all cases in which credible fear was found

fiscal year									
2009	*2010*	*2011*	*2012*	*2013*	*2014*	*2015*	*2016*	*2017*	*2018*
66.6%	**74.8%**	**82.7%**	**81.2%**	**85.5%**	**73.0%**	**72.7%**	**79.6%**	**77.1%**	**75.8%**

Figure 9: Asylum Decision Rates[142]

fiscal year	*2009*	*2010*	*2011*	*2012*	*2013*	*2014*	*2015*	*2016*	*2017*	*2018*
Grants	10,277	9,890	11,524	11,957	11,044	9,653	9,004	9,638	11,620	14,271
% of total	26%	27%	32%	31%	25%	25%	21%	18%	21%	21%
Denials	11,333	9,615	10,611	9,588	9,897	10,069	9,527	12,525	18,699	28,229
% of total	28%	26%	30%	25%	23%	26%	22%	23%	33%	41%
other	15,951	14,131	12,257	11,963	12,457	11,896	12,436	14,444	16,340	24,092
% of total	40%	38%	34%	31%	29%	31%	29%	26%	29%	35%
Adm closure	2,260	3,368	1,463	4,977	10,003	7,244	11,954	18,227	9,224	1,703
% of total	6%	9%	4%	13%	23%	19%	28%	33%	17%	2%
total	**39,821**	**37,004**	**35,855**	**38,485**	**43,401**	**38,862**	**42,921**	**54,834**	**55,883**	**68,295**

D. From FY2015-FY2018, only 7 percent of non-detained illegal immigrant families were removed from the United States; conversely, 77 percent of detained illegal immigrant families were removed.

Once put on the non-detained docket, most illegal immigrants will remain in the country even after they receive a final removal order. The Institute for Defense Analyses ("IDA"), a not-for-profit organization that runs Federally-Funded Research and Development Centers, conducted an analysis of the outcomes of people apprehended in 2014.[143] IDA found that seven percent of family unit members who were released from detention but were present for their final hearings and ordered removed were actually removed from the country.[144]

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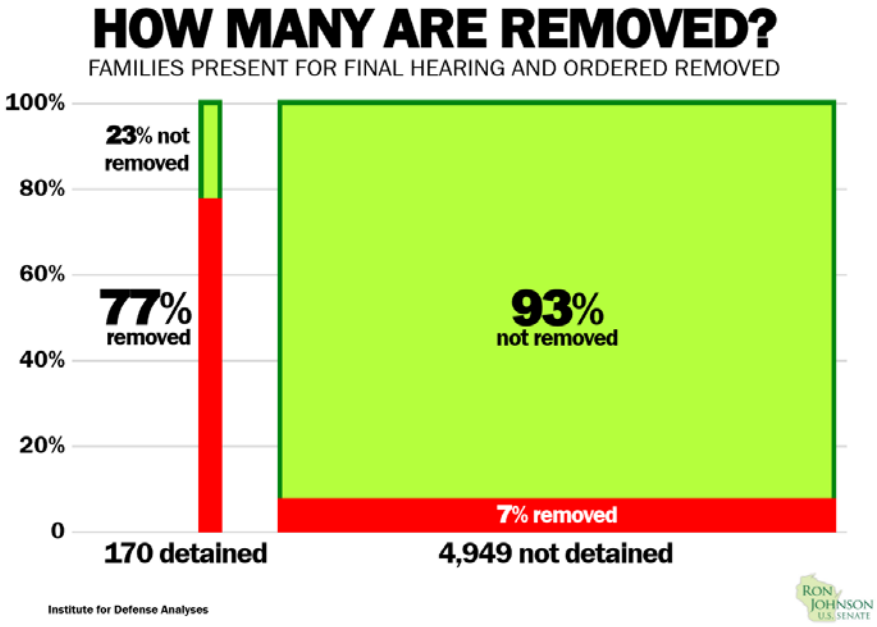
[139] U.S. Dep't of Justice, Exec. Office for Immigration Review Adjudication Statistics, Asylum Decision Rates (2018), *available at* https://www.justice.gov/eoir/page/file/1104861/download.
[140] *Id.*
[141] U.S. Citizenship & Immigration Services, Credible Fear Reasonable Fear Statistics Nationality Reports (2017-2018), *available at* https://www.uscis.gov/sites/default/files/USCIS/Outreach/Upcoming%20National%20Engagements/FY18CFandRFstats_2018_06_30.pdf.
[142] *Id.*
[143] John Whitley, Dennis Kuo, Ethan Novak & Brian Rieksts, *Describing the Adjudication Process for Unlawful Non-Traditional Migrants*, Institute for Defense Analyses (June 2017) (on file with Comm. majority staff).
[144] *Id.*

Figure 10: Removal Rates by Detained vs Not Detained[145]



Only one percent of family unit members who were not detained and not present for their final hearing and ordered removed were actually removed from the country.[146]

ICE reported that its non-detained docket currently stands at about 2.6 million people, of which about 1 million people remain in the country in defiance of final removal orders.[147] More than 500,000 of these immigrants are considered fugitives by the agency.[148] ICE told the committee that whether aliens on the non-detained docket adhere to removal orders largely depends on the actions of the alien.[149] A senior ICE official stated that "immigrants on the non-

[145] *Id.*

[146] E-mail from Researcher, Institute for Defense Analyses, to Comm. majority staff (Sept. 14, 2018) (on file with Comm. majority staff). IDA explained that there were several possible reasons why a detained alien may not be removed after their final hearing: "It may not have been possible to get travel orders for some detained [family units]—some countries may have refused to recognize the person as their national, or simply refused to accept their return. Some migrants may have appealed the immigration judge's removal order, and the appeal was in process with the [Board of Immigration Appeals]." *Id.*

[147] Briefing with Enforcement & Removal Operations Official, U.S. Immigration & Customs Enforcement (Aug. 7, 2018).

[148] Telephone Interview with Exec. Assoc. Dir., Enforcement & Removal Operations, U.S. Immigration & Customs Enforcement (Sept. 11, 2018) (notes on file with Comm. majority staff).

[149] ICE explained to Committee majority staff that, given the limited resources that exists to apprehend fugitive aliens, non-criminal aliens adherence to removal orders that are on the non-detained docket is either based on the desire of the alien to comply or random chance ICE apprehends that alien in an enforcement action or the alien is detained for another criminal action. These latter two instances are very rare. *See* Briefing with Enforcement & Removal Operations Official, U.S. Immigration & Customs Enforcement (Aug. 7, 2018) (notes on file with Comm. majority staff).

detained docket are basically assured of not being removed unless they want to be removed," as long as they do not commit a crime, due to resource constraints and enforcement priorities.[150]

Conversely, data show that detention is an effective tool in ensuring that illegal immigrants adhere to final orders of removal. The IDA found that among people apprehended in 2014, 77 percent of members of family units who were detained, present for their final hearing, and ordered removed were actually removed from the country.[151] See Figure 10 above.

E. ATD as currently implemented by ICE have not proved effective in ensuring that aliens whose asylum claims are denied are available for removal.

ICE has used ATD, including electronic monitoring, for certain aliens while they are on the non-detained docket to try to increase attendance at court proceedings. Although aliens have a high court attendance rate while on ATD, available data suggests ATD is not an effective tool to ensure that aliens whose asylum claims are denied adhere to final orders of removal.

ICE estimated that aliens' court attendance rates while on ATD were between 97 and 99 percent.[152] Separately, a GAO report found that 99 percent of aliens attended court proceedings while on one "full service" ATD program.[153] However, both GAO and ICE cautioned that there is insufficient data to inform whether ATD is an effective mechanism for ensuring that aliens *comply* with final removal orders.[154] Aliens have an incentive to attend court hearings when they may still receive immigration benefits or relief, but they do not have an incentive to adhere to final removal orders.[155]

The DHS OIG has studied ATD, including a specific ATD program that involves GPS monitoring, phone check-ins, curfews, and intensive case management. The DHS OIG's examination of the ATD pilot program found that ICE is unable to "definitively determine" whether this ATD program "has reduced the rate at which aliens, who were once in the program but who are no longer participating, have absconded or been arrested for criminal acts," in part since the agency does not track the participants throughout the duration of their removal proceedings.[156]

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[150] *Id*.
[151] John Whitley, *supra* note 17; *see also* E-mail from Researcher, Institute for Defense Analyses, to Comm. majority staff (Sept. 14, 2018) (on file with Comm. majority staff).
[152] *Id*.
[153] U.S. Gov't Accountability Office, GAO-15-26, Alternatives to Detention: Improved Data Collection and Analyses Needed to Better Assess Program Effectiveness (2014), *available at* https://www.gao.gov/assets/670/666911.pdf.
[154] *Id*.
[155] Briefing with Enforcement & Removal Operations Official, U.S. Immigration & Customs Enforcement (Aug. 7, 2018); Telephone Interview with Exec. Assoc. Dir., Enforcement & Removal Operations, U.S. Immigration & Customs Enforcement (Sept. 11, 2018) (notes on file with Comm. majority staff).
[156] U.S. Dep't Homeland Security, OIG-15-22, U.S. Immigration and Customs Enforcement's Alternatives to Detention (2015), *available at* https://www.oig.dhs.gov/assets/Mgmt/2015/OIG_15-22_Feb15.pdf.

Many aliens' court proceedings continue long after the alien leaves the ATD program.[157] The typical duration of an alien's time participating in an ATD program lasts about one and a half years,[158] yet the average immigration court completion time for a person on the non-detained docket can last between three to five years.[159] ICE only has the ability to include 85,000 aliens in ATD at any time.[160] Accordingly, the agency cycles aliens out of the ATD program as new aliens arrive.[161] This is a significant challenge for determining the effectiveness of the program.

Moreover, data provided by ICE show that, on average, approximately one in five aliens participating in ATD abscond. See Figure 11, below. Members of apprehended family units are more likely to abscond than the general population. In FY2018, the absconding rate for the general population of illegal aliens was 23.1 percent and the rate for members of family units was 28.4 percent.[162] As ICE Executive Associate Director Matthew Albence testified before the Committee: "Nearly three in ten family units are cutting off their ankle bracelets at the beginning of the process, when they have been released from our custody within days and weeks."[163]

Figure 11: Absconding Rates While Enrolled in Alternatives to Detention, Overall Population vs. Members of Apprehended Family Units (FY2016 through FY2018)[164]

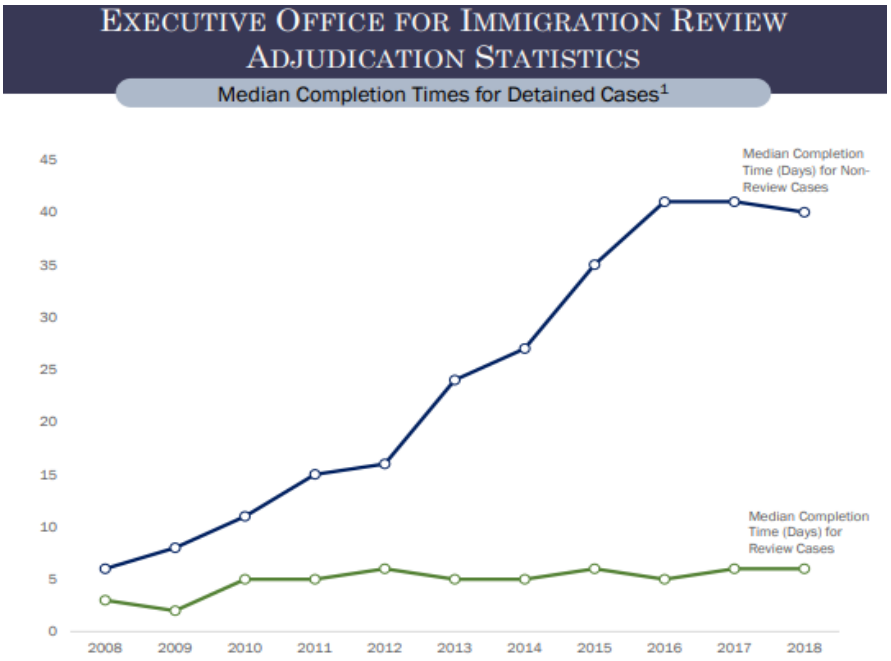
fiscal year	*2016*	*2017*	*2018*
Overall population absconding rate	19.6%	19.9%	23.1%
Apprehended family unit absconding rate	31.3%	23.0%	28.4%

[157] Briefing with Enforcement & Removal Operations Official, U.S. Immigration & Customs Enforcement (Aug. 7, 2018).
[158] *Id.*
[159] *Id.*
[160] *Id.* (ICE provided a breakdown of the number of aliens served by different types of ATD monitoring, including 36,000 aliens on GPS, 45,000 on telephonic, and 3,000 on a facial recognition program on smart phone devices called smart link).
[161] *Id.*
[162] Briefing with Enforcement & Removal Operations Official, U.S. Immigration & Customs Enforcement (Aug. 7, 2018).
[163] *HSGAC Hearing on Flores Settlement, supra* note 21.
[164] Briefing with Enforcement & Removal Operations Official, U.S. Immigration & Customs Enforcement (Aug. 7, 2018).

F. The median adjudication time for initial case completion for an alien in detention has increased from 8 days in FY2008 to 40 days in FY2018.

The U.S. government does not provide an estimate for the average length of adjudication times for aliens in detention and, therefore, on the detained docket. Available government estimates vary. The DOJ reports that it completes 91 percent of all detained docket cases within six months.[165] The median timeline is significantly shorter than six months. In FY2018, the median completion time for detained cases was 40 days, up from just 8 days in FY2008.[166]

Figure 12: Median Completion Times for Detained Cases, FY2008-FY2018[167]



Fiscal Year	Median Completion Time (Days) (Non-Review Cases[2])	Median Completion Time (Days) (Review Cases[3])
2008	6	3
2009	8	2
2010	11	5
2011	15	5
2012	16	6
2013	24	5
2014	27	5
2015	35	6
2016	41	5
2017	41	6
2018	40	6

Data Generated: October 24, 2018
[1] Status as "detained" indicates the status at the time of the initial case completion. Excludes mental competency/*Franco* litigation, Institutional Hearing Program, and HHS-detained unaccompanied alien child cases.
[2] Non-review cases are removal, deportation, exclusion, asylum-only, and withholding-only cases.
[3] Review cases are credible fear reviews, reasonable fear reviews, and claimed status reviews.

[165] U.S. Dep't of Justice, Exec. Office of Immigration Review: Percentage of DHS-Detained Cases Completed Within Six Months (July 6, 2018), *available at* https://www.justice.gov/eoir/page/file/1083216/download.
[166] U.S. Dep't of Justice, Exec. Office of Immigration Review: Median Completion Times (in Days) for Detained Cases (2018) (on file with Comm. majority staff).
[167] *Id.*

However, GAO presented data to the Committee that highlight the challenge of trying to extrapolate an average time in detention based on the median. GAO's data, contained in Figure 13, below, shows a breakdown of the number of days that detained immigration court cases have been pending at the beginning of the fiscal year, from FY2006 to FY2015. The data provide a snapshot of the length of time that aliens' cases had been pending at that specific moment in time. In 2015, the median number of days was 28 days, the mean was 84, and the maximum was 5,642.[168] Staff asked ICE for an explanation about why a detainee would remain in custody for as long as 5,642 days.[169] To date, ICE has not provided an explanation to staff.

Figure 13: Detained Immigration Court Cases Days Until Initial Completion[170]

fiscal year	*2006*	*2007*	*2008*	*2009*	*2010*	*2011*	*2012*	*2013*	*2014*	*2015*
Mean days	29	30	30	32	40	49	55	74	71	84
Median days	7	8	7	8	12	15	17	24	23	28
Maximum days	2,314	2,649	3,229	3,617	3,795	4,069	4,466	4,938	4,929	5,642

G. ICE is meeting *Flores* requirements for humane and safe standards, but the requirement that detainees live in state-licensed facilities creates significant challenges.

ICE officials told Committee staff that all ICE family residential centers adhere to humane and safe standards that deal with the delicate nature of detaining families.[171] *Flores* set minimum standards of care for minors in custody, which have been included in the new regulations proposed by DHS and HHS.[172] Beyond the food, water, toilets and sinks that are provided as a matter of course, the standards include living quarters that have reasonable temperature controls and ventilation, as well as recreational and educational activities for the children.[173]

A DHS OIG report from 2017 confirms that ICE is complying with applicable standards. The report of OIG's spot inspections of ICE family detention centers found that "[d]uring our July 2016 unannounced spot inspections of ICE's three family detention facilities, we observed conditions that generally met ICE's 2007 Family Residential Standards."[174] The OIG further explained, "The facilities were clean, well-organized, and efficiently run. Based on our

[168] E-mail from Dir., Homeland Sec. and Justice, Government Accountability Office, to Comm. majority staff (Aug. 17, 2018) (on file with Comm. majority staff).
[169] *Id.*
[170] *Id.*
[171] Briefing with Enforcement & Removal Operations Official, U.S. Immigration & Customs Enforcement (Aug. 7, 2018).
[172] Stipulated Settlement Agreement at 6, *Flores, et al. v. Reno*, No. CV 85-4544-RJK(Px), 2014 WL 7152078, *available at* https://www.clearinghouse.net/chDocs/public/IM-CA-0002-0005.pdf.
[173] *Id.*
[174] U.S. Dep't Homeland Security, OIG-17-65, Results of Office of Inspector General FY 2016 Spot Inspections of U.S. Immigration and Customs Enforcement Family Detention Facilities (2017), *available at* https://www.oig.dhs.gov/sites/default/files/assets/2017/OIG-17-65-Jun17.pdf.

observations, interviews, and document reviews, we concluded that, at all three facilities, ICE was satisfactorily addressing the inherent challenges of providing medical care and language services and ensuring the safety of families in detention."[175] DHS OIG further stated that "[m]edical care at all three facilities was readily available, followed up on as needed, and was well documented.[176]

In addition, Committee staff conducted delegation trips to visit and conduct oversight of family detention facilities in Texas and Pennsylvania in 2018. Staff observed that the family residential centers in Texas and Pennsylvania do not resemble a jail; families are able to roam the facility and access the multiple recreation areas or libraries at their leisure.[177] Staff observed bedrooms, bathrooms, classrooms, medical units, cafeterias, libraries, court rooms or designated areas for interviews with asylum officers or legal services, recreation areas, a hair salon, a mini market, and child care facilities at the family residential centers.[178] Staff learned in most cases when a resident is kept beyond 20 days it is due to a pending case, the resident hasn't secured travel arrangements to sponsors' location, or the resident claims credible fear toward the end of his or her stay at the facility.[179]

A major challenge facing ICE is the *Flores* requirement that family residential centers be licensed by the state. According to a recent regulation issued by DHS about family detention, the state-licensing regime has created severe operational constraints for family residential centers because "many States did not have, and have not succeeded in putting in place, licensing schemes governing facilities that hold family units together."[180] According to DHS, "the lack of state licensing for [family residential centers] and the release requirements for minors, have effectively prevented the Government from using family detention for more than a limited period of time, and in turn often led to the release of families."[181]

The Trump administration has proposed an alternative approach: "a federal licensing process" to "provide similar substantive protections regarding the conditions of such facilities, and thus implement the underlying purpose of the state-licensing requirement."[182]

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[175] *Id.*
[176] *Id.*
[177] U.S. Immigration & Customs Enforcement, Follow-up Questions – HSGAC Berks Tour (2018) (on file with Comm. majority staff).
[178] *Id.*
[179] *Id.*
[180] Apprehension, Processing, Care, and Custody of Alien Minors and Unaccompanied Alien Children, 83 Fed. Reg. 45486-01 (proposed Sept. 7, 2018) (to be codified at 8 C.F.R. pt. 212 & 236, 45 CFR pt. 410), *available at* https://www.federalregister.gov/documents/2018/09/07/2018-19052/apprehension-processing-care-and-custody-of-alien-minors-and-unaccompanied-alien-children.
[181] *Id.*
[182] *Id.*

H. Push factors in Central America such as high crime and murder rates, gang extortion, drug cartel brutality, and lack of economic opportunity play a significant role in migrants' decision to make the dangerous journey to the United States.

Officials from DHS told the Committee that both push and pull factors impact migrants' decision to come to the United States. Acting Deputy Commissioner Robert Perez of CBP stated that migrants "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."[183] Former Homeland Security Secretary Michael Chertoff told Committee staff that push factors would continue to affect illegal immigration: "During my tenure, we saw largely economic migrants. I think it is one thing to deter a person looking to move for a better job. It's another to deter a person who wants to move because they are afraid of getting shot. Deterrence is not going to be effective in that situation."[184]

An April 2018 CBP intelligence report cited both push factors such as crime and violence and pull factors, such as economic opportunity and lax enforcement and detention policies, that drive family unit migration to the southern border.[185] CBP assessed that family unit migration will continue absent significant reform of U.S. immigration law.[186]

[183] *HSGAC Hearing on Flores Settlement* (statement of Robert E. Perez, Acting Deputy Comm'r, U.S. Border Patrol), *supra* note 21.
[184] Telephone Interview with former Secretary Chertoff (Sept. 4, 2018).
[185] (U) U.S. Customs & Border Protection, Intelligence Bulletin, Spotlight: Family Unit Alien Migration Trends, (Apr. 12, 2018) (on file with the Comm. majority staff).
[186] *Id.*

III. ADDITIONAL INFORMATION AND OVERSIGHT NEEDED

Committee staff also identified areas where additional information and oversight is needed to help resolve potential areas of disagreement to achieve a non-partisan solution. This is informed by members' statements and lines of questioning at the September 18, 2018 hearing, and questions raised through the Committee's oversight and staff briefings.

A. How long would apprehended families need to be detained if the law was changed to restore the Obama administration's policy to allow for family detention beyond 20 days? Or stated another way, what would be a reasonable time limit for families to be detained?

Several members of the Committee have raised concerns that modifying the law to allow ICE to detain families beyond 20 days would allow for the "indefinite detention" of families and children. For example, former Ranking Member Claire McCaskill stated at the September 18, 2018 hearing:

> 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.[187]

Senator Maggie Hassan also spoke strongly about her concern regarding potential indefinite detention of children: "What this 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 . . . that is, frankly, not who we are as a country, and it is not what the United States should become."[188]

Chairman Johnson concurred that he was not interested in establishing a policy of indefinite detention: "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."[189]

In briefings with DHS, Committee staff sought to determine how allowing family detention beyond 20 days would affect the case completion timelines for cases on the detained docket. EOIR officials explained that the detained docket wait times are not affected by adding new cases to the docket: EOIR shifts resources from the non-detained docket to the detained docket to meet the needs of the detained docket and prioritize certain cases.[190]

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[187] *HSGAC Hearing on Flores Settlement* (statement of Sen. Claire McCaskill), *supra* note 21.
[188] *Id.* (statement of Sen. Maggie Hassan).
[189] *Id.* (statement of Chairman Ron Johnson).
[190] Briefing with Exec. Office for Immigration Review Official, Dep't of Justice (Aug. 10, 2018) (notes on file with Comm. majority staff).

DHS officials also told the Committee that allowing family detention would not lead to "indefinite" detention. The executive associate director for ICE's ERO explained: "There is no indefinite detention in the ICE detention portfolio just as there is no indefinite detention in the pre-trial criminal proceedings. There is [a] determinant amount of time that some will stay in custody over the course of their proceedings."[191] DHS and immigration judges still have discretion to release an alien subject to compliance with certain conditions.[192] Currently, the only aliens who are subject to mandatory detention are criminal aliens who fall under the categories in INA 236(c), including convictions for aggravated felonies, crimes of moral turpitude, possession of drug, and terrorism or national security concerns.[193] The Supreme Court has held that the government cannot detain anyone longer than six months post-final order of removal unless the person is a national security threat.[194]

Moreover, with current bed capacity, ICE can only detain 37 percent of family units apprehended.[195] Without a substantial increase in family residential centers, ICE would still be unable to detain the vast majority of apprehended families.[196] The remaining family units would still be released and given a notice to appear.

The Committee has requested more information from ICE and DOJ regarding the period of time that families would potentially be detained during the course of their immigration court proceedings, and, if Congress were to place a cap on the length of time that a family could be detained beyond 20 days, what an appropriate period of time might be. In addition, Congress should understand what mechanisms would be available to aliens to extend their court proceedings beyond the period of time that they are in detention, if a timeline were established, to ensure the process cannot be manipulated.

B. What additional resources, including bed space, judges, government lawyers, and others, would be required to swiftly move families through immigration court proceedings so that the agreed upon time limit could be adhered to?

One potential area of agreement that members of the Committee discussed was the need for more resources for immigration court proceedings, ranging from judges and immigration enforcement lawyers to electronic records and case management system for immigration court.[197]

Members of the Committee appeared to agree on the need for additional judges to reduce the immigration court backlog. EOIR told the Committee that to reduce the backlog, it would

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[191] Telephone Interview with Exec. Assoc. Dir., Enforcement & Removal Operations, U.S. Immigration & Customs Enforcement (Sept. 11, 2018) (notes on file with Comm. majority staff).
[192] *Id.*
[193] 8 U.S.C. § 1226(c) (1996); 8 U.S.C. § 1182 (2012).
[194] *Zadvydas v. Davis*, 533 U.S. 678, 700–01, 121 S. Ct. 2491, 2504–05 (2001).
[195] Briefing with Enforcement & Removal Operations Official, U.S. Immigration & Customs Enforcement (Aug. 7, 2018).
[196] *Id*.
[197] *See id.*

need to be fully staffed at 700 judges.[198] DOJ also discussed the need for immigration lawyers and court space.[199]

Members of the Committee also discussed the need for additional information regarding the amount of bed space that would be needed to detain more families if the *Flores* agreement was modified to allow for detention for some period beyond 20 days.[200] The *FAMILIES Act* and the *Keeping Families Together While Enforcing the Law Act* proposed 1,000 additional bed spaces, in part due to concern about potential costs. It is clear from the Committee's oversight, however, that this number is inadequate. CBP and ICE told Committee staff that the agencies would need an additional 15,000 beds to hold all family units for 30 days and 30,000 beds to hold all family units for 60 days.[201] DHS's own estimates appear to be conservative given the high volume of aliens crossing the border illegally. The Committee would benefit from additional information from DHS to address this information gap.

C. What would it cost to implement ATD in a manner that ensures that aliens would be returned to custody for removal, and how would that compare with detention costs?

Members of the Committee discussed the relative costs and effectiveness of detention versus ATD to encourage compliance with immigration court proceedings. ICE Executive Associate Director Albence testified at the hearing that "[a]lternatives to [d]etention are a fairly effective tool at getting people to appear at some or all of their immigration court proceedings. It is a woefully ineffective tool at actually allowing ICE to effectuate a removal order issued by an immigration judge."[202]

GAO and ICE provided data related to the cost of ATD compared to detention. GAO told Committee staff that it costs $158 per day to detain an adult alien versus $10.55 per day for ATD. According to DHS's FY2018 Budget Justification, "an average daily rate for family beds can be calculated by dividing the total funding requirement of $291.4 million by the projected ADP of 2,500 for a rate of $319.37."[203] The cost per bed per day fluctuates based on occupancy. According to GAO, ATD becomes more costly than detention over time, since adjudication times on the non-detained docket are longer than the detained docket.[204] GAO informed staff that

[198] *Id*.; Briefing with Dep't of Justice Official, Dep't of Justice Exec. Office for Immigration Review, in Wash. D.C. (Aug. 10, 2018).
[199] *See HSGAC Hearing on Flores Settlement, supra* note 21.
[200] *Id*.
[201] Briefing with Enforcement & Removal Operations Official, U.S. Immigration & Customs Enforcement (Aug. 7, 2018).
[202] *HSGAC Hearing on Flores Settlement* (statement of Matthew Albence, Exec. Assoc. Dir., Enforcement and Removal Operations, U.S. Immigration and Customs Enforcement), *supra* note 21.
[203] Dep't of Homeland Sec., U.S. Immigration & Customs: Budget Overview Fiscal Year 2018 Congressional Justification, *available at* https://www.dhs.gov/sites/default/files/publications/ICE%20FY18%20Budget.pdf.
[204] E-mail from Dir., Homeland Sec. & Justice, Government Accountability Office, to Comm. majority staff (Sept. 14, 2018) (on file with Comm. majority staff).

ATD becomes more costly than adult detention around 435 days.[205] ICE told the Committee that ATD becomes more costly around 743 days.[206]

In addition to providing per-day estimates for costs related to ATD, ICE provided a cost analysis of the number of removals effected with participants in the ATD program. ICE said it spent $183 million on ATD programs in FY2017, which, according to ICE, led to 2,430 removals.[207] This amounts to a cost of more than $75,000 per removal related to ATD.[208] Acting Associate Director Albence testified that the number of ATD participants removed in FY2017 amounted to only 1 percent of ICE's removals during FY2017.[209]

The Committee would benefit from additional data regarding ATD's effectiveness at ensuring that aliens are returned to custody for removal if their asylum claim is denied. Additionally, the Committee would benefit from cost-benefit estimates for the length of projected family detention if *Flores* was modified as compared to long-term use of ATD for family unit members from start to finish of the immigration adjudication process.

D. What are the long-term implications for children placed in detention: a) unaccompanied; or b) detained with at least one parent?

Several members of the Committee raised strong concerns about the quality of care in detention and the potential long-term implications of detention for children. For example, Senator Gary Peters explained that he thought the Committee's top priority should be "the welfare and care of children in the process," and pointed to "a host of medical organizations, including the American Academy of Pediatrics, the American College of Emergency Physicians, the American Medical Association, the American Psychological Association, 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."[210]

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[205] *Id.* ("We conducted our analysis using two scenarios. Under our first analysis, we considered the average costs of ATD and detention and the average length of time aliens in detention spent awaiting an immigration judge's final decision, and found that the ATD program would have surpassed the cost of detention after an alien was in the program for 1,229 days in fiscal year 2013—significantly longer than the average length of time aliens spent in the ATD program in this year (383 days). In our second analysis, we considered the average costs of ATD and detention and the average length of time aliens spent in detention—regardless of whether they had received a final decision from an immigration judge—since some aliens may not be in immigration proceedings or may not have reached their final hearing before ICE released them from detention. ICE reported that the average length of time that an alien was in detention in fiscal year 2013 was 29 days. Using this average, we calculated the average length of time aliens could have stayed in the ATD program before they surpassed the cost of detention would have been 435 days in fiscal year 2013.").

[206] Interview with Exec. Assoc. Dir., Enforcement & Removal Operations, Immigration & Customs Enforcement (Sept. 12, 2018) (notes on file with Comm. majority staff).

[207] *Oversight of Immigration Enforcement and Family Reunification Efforts Hearing before S. Comm. on Judiciary.* 115th Cong. (2018) (statement of Matthew Albence, Exec. Assoc. Dir., Enforcement & Removal Operations, U.S. Immigration & Customs Enforcement).

[208] *Id.*

[209] *HSGAC Hearing on Flores Settlement* (statement of Matthew Albence, Exec. Assoc. Dir., Enforcement & Removal Operations, U.S. Immigration & Customs Enforcement), *supra* note 21.

[210] *Id.* (statement of Sen. Gary Peters).

In 2016, the DHS Advisory Committee's Report on Family Residential Centers' first recommendation strongly warned against family detention:

> DHS's immigration enforcement practices should operationalize the presumption that detention is generally neither appropriate nor necessary for families – and that detention or the separation of families for purposes of immigration enforcement or management, or detention is never in the best interest of children. DHS should discontinue the general use of family detention, reserving it for rare cases when necessary following an individualized assessment of the need to detain because of danger or flight risk that cannot be mitigated by conditions of release.[211]

The Advisory Committee's members include organizations that have been vocal in opposition to family detention, including the aforementioned American Academy of Pediatrics.[212]

The Committee would benefit from additional information about the long-term implications for children placed in detention, including looking at the impact of children detained alone (unaccompanied alien children) as compared to those detained with at least one parent.

E. To what extent are smugglers and traffickers exploiting DHS's policy of "catch and release" for apprehended families to smuggle and/or traffic people, including unrelated minors, into the country?

The Committee would benefit from additional data and information regarding the extent to which human smugglers and traffickers are exploiting the "catch and release" policy for family units at the border. For example, Senator Kamala Harris stated at the hearing: "I have asked repeatedly for information on the number and status of any cases, if they exist, where your agency [Immigration and Customs Enforcement] has referred an adult who accompanied a child for prosecution for trafficking, and I have still not received that information."[213]Acting Associate Director Albence cited data about overall HSI human trafficking investigations and arrests, but did not provide specific data about the number of those cases that were directly related to adults and minors apprehended as family units.[214] ICE and the Department should provide the Committee with this information. In addition, the Department and its components should provide relevant intelligence and data related to the extent that human trafficking or smuggling is related to family apprehensions and the current policy of "catch and release."

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[211] Dep't of Homeland Sec., Report of the DHS Advisory Committee on Family Residential Centers (2016), *available at* https://www.ice.gov/sites/default/files/documents/Report/2016/ACFRC-sc-16093.pdf.
[212] *See* U.S. Immigration and Customs Enforcement, Advisory Committee on Family Residential Centers (last updated Jan. 3, 2018), *available at* https://www.ice.gov/acfrc.
[213] *HSGAC Hearing on Flores Settlement* (statement of Sen. Kamala Harris), *supra* note 21.
[214] *Id.* (statement of Matthew Albence, Exec. Assoc. Dir., Enforcement & Removal Operations, U.S. Immigration & Customs Enforcement).

IV. CONCLUSION

Both the Obama and Trump administrations have described the migration of families and children to the southern border as a humanitarian crisis that poses significant challenges for the Department and border security. When it petitioned the court for an expedited hearing on the reinterpretation of *Flores* in 2015, the Obama administration argued: "Past experience has shown the Government that it will be difficult to have and maintain a firm and humane response to the challenge of mass family migration, if we do not have the legal authority and nimbleness to strike the right balance in the face of a constantly changing landscape."[215] It further warned that the court's requirement "would almost certainly require the Department of Homeland Security (DHS) to divert substantial resources away from other critical immigration, humanitarian, national security, and border security-related operations."[216]

Years later, Department officials continue to stress the challenge that humanely processing arriving families and children place on its personnel and resources. Testifying before the Committee, Acting Deputy CBP Commissioner Perez stated, "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."[217]

Since court rulings ended the Obama administration's family detention policy in 2015, more than 260,000 people in family units have crossed the southern border and been apprehended by Border Patrol.[218] Recent trends—including data for the first three months of FY2019—show that the United States will continue to see increasing levels of people migrating to the southern border as families, and an increasing number of family units headed by men. The vast majority of the apprehended and released family members will likely join the millions of people living in the United States illegally.

Our Committee will continue to gather information about these important issues and work through legislation to fix the *Flores* agreement and other legal loopholes that contribute to our horribly broken immigration system.

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[215] Mot. Pursuant to Circuit Rules 27-12 and 34-3 to Expedite Briefing and Hr'g Schedule for Appeal at 6, *Flores v. Lynch*, 828 F.3d 898, 901 (9th Cir. 2016).
[216] *Id*. at 3.
[217] *HSGAC Hearing on Flores Settlement* (statement of Robert E. Perez, Acting Deputy Comm'r, U.S. Border Patrol), *supra* note 21.
[218] DHS Border Metrics Report, *supra* note 3; Southwest Border Apprehension Data FY2017-FY2018 (staff calculations based on data) *supra* note 4.