U.S. Department of Homeland Security
Washington, DC 20528

Homeland Security

February 1, 2022

Austin Evers
American Oversight
1030 15th Street, NW
Suite B255
Washington, DC 20005

Re: **2022-HQFO-00035**
ICE FOIA Case # 2020-ICFO-29489

Dear Mr. Evers:

This is the electronic final response to your March 24, 2020, Freedom of Information Act (FOIA) request to Immigration and Customs Enforcement (ICE), dated March 24, 2020 for any final memorandum signed on or around April 24, 2018 by John Mitnick entitled "Criminal Prosecution of Aliens Who Entered Unlawfully: Legal Guidance on Potential Separation of Family Members" as mentioned in a record released to American Oversight and attached hereto as Exhibit A. This office received your request and a referral of 4 pages of responsive records on September 27, 2021.

We are granting your request under FOIA, 5 U.S.C. § 552, and DHS FOIA regulations at 6 C.F.R. Part 5. After carefully reviewing the responsive document, I determined that it is appropriate for public release. The documents are enclosed in their entirety; DHS has claimed no deletions or exemptions.

Provisions of FOIA allow DHS to charge for processing fees, up to $25, unless you seek a waiver of fees. In this instance, because the cost is below the $25 minimum, there is no charge.

If you need any further assistance or would like to discuss any aspect of your request, you may send an e-mail to foia@hq.dhs.gov, call 202-343-1743 or toll free 1-866-431-0486, or you may contact our FOIA Public Liaison in the same manner and refer to **2022-HQFO-00035**.

Sincerely,

Jimmy Wolfrey
Senior Director, FOIA Operations and Management
(Acting)

Enclosure(s): 4 pages

Office of the General Counsel
U.S. Department of Homeland Security
Washington, DC 20528

Homeland Security

April 24, 2018

MEMORANDUM FOR THE SECRETARY

CC: CHIEF OF STAFF

FROM: John M. Mitnick
General Counsel

SUBJECT: Criminal Prosecution of Aliens Who Entered Unlawfully: Legal Guidance on Potential Separation of Family Members

The Immigration and Nationality Act ("INA") authorizes the detention of aliens who have entered the United States unlawfully until they can be removed from the United States.[1] Inadmissible aliens, including those who illegally enter the United States, are subject to removal and may also be subject to criminal penalties.[2] The Secretary of Homeland Security has broad legal authorities to carry out her responsibility to enforce the immigration laws.[3] DHS could permissibly direct the separation of parents or legal guardians and minors so that the parent or legal guardian can be prosecuted pursuant to those authorities.

Generally, individuals who have crossed the border illegally are subject to criminal penalties.[4] Under the INA, 8 U.S.C. § 1325, any alien who "enters or attempts to enter the United States at any time or place other than as designated by immigration officers" is subject to potential criminal penalties.[5] A second provision, 8 U.S.C. § 1324, establishes more significant criminal penalties against any person who knowingly "brings to or attempts to bring to the United States" another alien

[1] *See, e.g.*, 8 U.S.C. § 1225(b)(1)(B)(iii)(IV) (providing that certain aliens subject to "expedited removal" under Section 1225 "shall be detained pending a final determination of credible fear of persecution and, if found not to have such a fear, until removed"); 8 U.S.C. § 1225(b)(2)(A) (providing that aliens who have not been determined to be clearly and beyond a doubt entitled to admission shall be detained for 8 U.S.C. 1229a proceedings); 8 U.S.C. § 1226(a) (authorizing detention of removable aliens pending a decision on whether the alien is to be removed from the United States"); 8 U.S.C. § 1226(c) (mandating the detention of certain criminal aliens during removal proceedings); 8 U.S.C. § 1231(a)(2) (authorizing detention of aliens subject to a final order of removal).

[2] *See, e.g.*, 8 U.S.C. §§ 1325, 1326.

[3] *See* 6 U.S.C. § 202 (conveying broad authority to the Secretary of Homeland Security to secure the borders and carry out immigration enforcement functions); 8 U.S.C. § 1103(a)(3) (laying out broad regulatory authority for the Secretary of Homeland Security under the INA).

[4] The Attorney General has recently announced a "zero tolerance" poicy that directs prosecutors to prioritize prosecutions for illegally crossing the border, specifically prosecutions under 8 U.S.C. § 1325(a). *See* https://www.justice.gov/opa/press-release/file/1049751/download.

[5] 8 U.S.C. § 1325(a).

unlawfully.[6] A conviction under section 1324 does not constitute an "aggravated felony" under the immigration law if the offense is a first-time offense "for which the alien has affirmatively shown that the alien committed the offense for the purpose of assisting, abetting, or aiding only the alien's spouse, child, or parent (and no other individual)."[7] Nonetheless, prosecution under section 1324 may be applicable to and appropriate for first-time violators. Moreover, convictions for repeat smugglers or smugglers of extended family could constitute an "aggravated felony,"[8] depending on the facts and circumstances of a particular case.

We understand that you are presently considering three proposals that, in coordination with the Department of Justice ("DOJ"), would increase prosecutions against aliens who cross the border illegally.[9] One proposal would establish a scalable approach for increased prosecutions consistent with DHS and DOJ operations. A second proposal would seek to refer all single adults who commit criminal immigration violations for prosecution. We see little additional litigation risk to DHS with respect to those proposals, because individuals are afforded all process to which they have rights through the criminal justice system and the removal system. The third proposal would seek to refer all adults who commit immigration violations for prosecution, including adults who are apprehended as part of a family unit. In referring all adults for such criminal prosecutions, it would be legally permissible to separate minors from adult family members or other unrelated accompanying adults. In light of the more pronounced litigation risk associated with such separations, we address that option more fully here.

Although there might be some instances in which aliens, even those who enter unlawfully, have certain due process rights, we are not aware of any constitutional or statutory right to immigration detention as a family.[10] Courts have repeatedly emphasized that an individual's right to familial association does not apply with equal force in the lawful detention context.[11] Whether courts address such matters as claims of cruel or unusual punishment under the Eighth Amendment or as a claim of unconstitutional deprivation of a liberty interest under the Fifth Amendment Due Process clause, the Government has broad authority to detain children and adults separately or otherwise restrict adults from visiting with their children when a crime has been committed and the individuals have entered the United States illegally.[12] Courts evaluating detention and confinement policies have traditionally recognized that Government officials have broad discretion to develop policies that separate minors and other family members from adults who are detained while facing criminal charges.[13] As a general matter, an adult does not have any right to be held with his or her minor

[6] 8 U.S.C. § 1324(a)(1)(A)(i).

[7] 8 U.S.C. § 1101(a)(43)(N).

[8] *Id.*

[9] Any such prosecution policy should take into account U.S. obligations under the 1967 Protocol Relating to the Status of Refugees, which incorporates Article 31(1) of the 1951 Convention Relating to the Status of Refugees. Article 31(1) provides, "The Contracting States shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened in the sense of Article 1, enter or are present in their territory without authorization, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence."

[10] This issue is being litigated in *Ms. L v. ICE*, No. 18-cv-428 (S.D. Cal. filed Feb. 26, 2018) (motion to dismiss pending), *see infra*.

[11] *See, e.g., Overton v. Bazzetta*, 539 U.S. 126, 131 (2003) (recognizing that rights of familial association apply differently when an individual is imprisoned).

[12] *Overton*, 539 U.S. at 136; *Bell v. Wolfish*, 441 U.S. 520, 537 (1979).

[13] *See Block v. Rutherford*, 468 U.S. 576, 584-88 (1984); *Aguilar v. ICE*, 510 F.3d 1, 22 (1st Cir. 2007); *Pasco v. Saba*, No. 1:04-CV-97 (WLS), 2006 WL 2793156, at **4-5 (M.D. Ga. Sept. 26, 2006); *N.E.W. & C.M.W. v. Kennard*, 952 F. Supp. 714 (D. Utah 1997).

children while detained facing criminal charges. Whatever rights of association an alien might have if the alien is *not* detained but is still subject to criminal prosecution (and removal), it is reasonable to assert that aliens cannot exercise those rights while they are in detention. Moreover, to the extent that there is any consideration of separating adults and children through the immigration process, our legal position is likely strongest in those cases in which separation occurs in connection with a referral of an adult family member for criminal prosecution.

Legal Risks: The three proposals currently before you present different legal risks. The first option, a phased approach, could lead to increased prosecutions of adults apprehended as part of a family unit over time, but any impact would likely be gradual. The second option, which would focus on prosecution referrals of single adults, would not directly impact family units. As noted above, these two options likely have less direct litigation risk to DHS. The third option, which prioritizes prosecution referrals for *all* adults who commit criminal immigration violations could lead to a significant increase in the prosecutions of adults who are part of family units. Although it would be legally permissible to separate adults and minors as outlined above, any such decisions will face multiple legal challenges.

a. *Flores* Litigation

The plaintiffs in *Flores v. Sessions*, No. 85-4544 (C.D. Cal.), would likely challenge a determination to separate family units. The plaintiffs in *Flores*, however, have implicitly recognized in previous filings that familial separation could be both necessary and appropriate to fulfill the terms of the settlement. In fact, the July 24, 2015 decision of the U.S. District Court for the Central District of California appears to recognize the authority of DHS to separate family units.[14] Additionally, the Ninth Circuit recognized that the settlement terms do not provide any rights to adults, while extending them to all minors. *Flores v. Lynch*, 828 F.3d 898, 908-09 (9th Cir. 2016). The U.S. District Court for the Central District of California, however, has traditionally reacted with skepticism to the Government's position in *Flores*, and a challenge in this venue could yield an initial unfavorable result such as a finding that the settlement agreement contemplates some right for children to remain with their parent, including when in immigration detention. While we do not believe the Ninth Circuit's most recent decision or the settlement agreement would support such a finding, that forum has been unfavorable in the past.

[14] *Flores v. Johnson*, 212 F. Supp. 3d 864, 877 n.8 (C.D. Cal. 2015) ("Defendants concede that the logical outcome of applying the licensing provision to family residential centers . . . would have to mean separating accompanied children from their parents or legal guardians. Although the Agreement does not mandate that Defendants must release parents or legal guardians in all circumstances, Defendants certainly can and must make individualized determinations about whether releasing the parent is appropriate in a given situation.").

b. *Ms. L.* Litigation and Other Cases

Two plaintiffs, one in California and one in Texas, filed suit this year in the U.S. District Court for the Southern District of California, alleging that they were impermissibly separated from their minor children while in immigration detention, and requesting class certification. *See Ms. L* v. *ICE*, No. 18-cv-428 (S.D. Cal.). The Texas plaintiff's case arose out of an El Paso prosecution pursuant to 8 U.S.C. § 1325 and thus is similar to the proposal here. The Government argued that the California plaintiff's challenge is now moot, because the mother and child have been reunified and are not detained, and any challenge by the remaining plaintiff should be heard in Texas or dismissed based on similar arguments to those referenced above. If this case is not dismissed, or the Court grants class action certification, it will continue through the district court in California or Texas, and likely to the relevant circuit court of appeals. Plaintiffs would almost certainly bring a constitutional challenge, along the lines of their existing claims, in this forum if it is still a live action. Moreover, if the district court does not dismiss the single action arising out of El Paso, it is likely to examine family separation claims in greater depth if they become more consistent across the Southwest Border.

Of course, either this case could go forward, or other similar cases would likely be brought in the district courts. If you authorize referral for prosecution of all adults who appear to have violated the law and are subject to prosecution under 8 U.S.C. § 1325, with the result of separation of family units, a substantial increase in prosecutions of such adults would likely correspond with a rise in lawsuits challenging the Government's detention policies and practices.

Whether this issue is addressed in the *Ms. L.* litigation or in another case, a court could conclude that the separations are violative of the INA, Administrative Procedure Act, or the Fifth Amendment Due Process clause. It is possible, for instance, that the district court will not examine this question in the context of a criminal proceeding, but instead look to the immigration detention provisions. The district court could, for instance, determine that the individuals can be detained under either the criminal or immigration provisions and, thus, the Government must demonstrate a substantial need to detain consistent with normal criminal process (that is, not detaining the family under the immigration detention authority in a family residential center). The courts could reach this conclusion either relying on the Due Process clause, or, with respect to the authorities under 8 U.S.C. § 1225, potentially determining that the statute on its face does not require or permit family separation. We cannot provide an accurate risk analysis on this particular concern at this time because there is little law on the topic. Although existing case law appears to favor the Government, a precedential decision holding, for instance, that immigration detainees have certain rights that pretrial criminal detainees lack, likely would have adverse impacts on other cases such as *Doe v. Nielsen*, No. 4:15-cv-00250-DCB (D. Ariz.), in which the Government has argued that immigration detainees have equal or *fewer* rights than those who are in pretrial detention.

To summarize, it is legally permissible to adopt a policy that all adults who appear to have violated 8 U.S.C. § 1325 be referred to DOJ for prosecution. It is also legally permissible for minors to be separated from accompanying adults as a result of such a referral. That is, the minors would not be prosecuted for illegal entry under section 1325, but most likely treated as unaccompanied alien children and referred to the Department of Health and Human Services Office of Refugee Resettlement under applicable statutes. However, such a policy would likely be the subject of litigation, whether through the existing litigation in *Flores* and *Ms. L*, through new litigation, or both.