



## Background on Separation of Families and Prosecution of Migrants at the Southwest Border<sup>1</sup>

June 8, 2018

- 1. The criminalization of immigration is cruel and excessively punitive:** In April, Attorney General Sessions announced a “zero tolerance” [policy](#) under which the Department of Homeland Security (DHS) will refer all migrants who enter the U.S. without authorization to the Department of Justice (DOJ) for prosecution. This policy expands “[Operation Streamline](#),” a program which began in 2005 to add criminal penalties to entry-related immigration violations. The Attorney General has expressed his intention to use the full force of the law to punish and deter those who cross illegally into the United States and, as an additional deterrent, to separate parents from their children. The Attorney General’s goal, stated in an April 6 [memorandum](#) to federal prosecutors, is to end “illegality” in the immigration system. The memorandum does not recognize that asylum-seekers should be exempted from this policy as mandated by U.S. treaty obligations and discussed in this [report](#) by Human Rights First. The Trump administration considers protection for asylum-seekers and unaccompanied children as “loopholes” in the immigration law and thus advocates for termination of these minimal protections.
- 2. The systematic prosecution of migrants impedes due process, is costly to U.S. taxpayers, and overburdens the federal court system and the immigration court system:** In May, the prosecutions began in full force, most for “illegal entry” (first time), a misdemeanor under 8 U.S.C. § 1325(a) which carries a maximum sentence of six months and “illegal re-entry” (second time or more), a felony under 8 U.S.C. § 1326 with a maximum sentence of two years or up to 20 years for those with prior criminal convictions. The Administration is using these criminal proceedings to justify the separation of parents and children. These rushed group prosecutions of migrants on low-level entry-related charges violate due process protections as well as Article 31 of the Refugee Convention (relating to asylum-seekers) and overwhelm the federal criminal system. Federal defenders and U.S. Magistrate judges are increasingly concerned about this policy and its impact on parents and children. Parents are being deported before being reunified with their minor children. Lawyers are obliged to represent detained children whose parents are held in criminal or immigration custody or rapidly deported.
- 3. In only two weeks, the administration separated over 650 children from their parents:** the New York Times [reported](#) in April that over 700 children, including 100 children under the age of four, were separated from adults claiming to be their parents between October 2017 and April

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<sup>1</sup> ABA Commission on Immigration, [www.americanbar.org/immigration](http://www.americanbar.org/immigration).

2018. On May 23, 2018, Richard Hudson, a DHS official testified in a [Senate Judiciary Hearing](#) that between May 6 and May 19, 638 parents were separated from 658 children to allow for the parents' prosecution. This [policy of separation](#) applies to children of all ages, including toddlers and infants, and causes great anguish and concern to all those directly and indirectly impacted. These separations are not only cruel, but also violate basic child welfare principles and legal precedent that require children to remain with their parents unless there has been an allegation of abuse or neglect.<sup>2</sup>

4. **Many of the migrants targeted for prosecution come from some of the most violent countries in the world:** Most of the migrants impacted by this policy come from the Northern Triangle of Central America (Honduras, El Salvador and Guatemala). Many are fleeing [extreme violence](#) in their countries of origin. El Salvador and Honduras are two of the most violent nations in the world with some of the highest homicide rates for countries not at war.
5. **Although U.S. law enshrines the right to seek asylum, the Administration has imposed significant obstacles to making an asylum claim:** Over the past year, advocates have reported increasing barriers to seeking asylum in the United States as detailed in this [report](#) from the American Immigration Lawyers Association. These obstacles include frequent “turnbacks” of asylum seekers at the U.S. ports of entry. Advocacy groups report hostile encounters with Customs and Border Protection officers who claim they cannot process requests for asylum or instruct applicants to return at another time. Those who enter unlawfully are referred for prosecution and after serving their sentence, transferred to Immigration and Customs Enforcement (ICE) custody and placed in “expedited removal” proceedings pursuant to 8 U.S.C. § 1225(b)(1). If an individual placed in “expedited removal” proceedings expresses a fear of persecution, he or she should be referred to the Asylum Office within U.S. Citizenship and Immigration Services for a “credible fear” interview. 8 U.S.C. § 1225(b)(1)(B). Only after passing a “credible fear” interview, will the individual even be considered for release on bond.
6. **Family separation is harmful to children:** Medical professionals, including the [American Academy of Pediatrics](#), have condemned the practice of family separation, explaining that “[f]ear and stress, particularly prolonged exposure to serious stress without the buffering

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<sup>2</sup> [Troxel v. Granville, 530 U.S. 57, 66, 120 S.Ct. 2054, 147 L.Ed.2d 49 \(2000\)](#) (noting the “extensive precedent” establishing that the Due Process Clause of the Fourteenth Amendment “protects the fundamental right of parents to make decisions concerning the care, custody, and control of their children”); [Zadvydas v. Davis, 533 U.S. 678, 693, 121 S.Ct. 2491, 150 L.Ed.2d 653 \(2001\)](#) (observing that “the Due Process Clause applies to all ‘persons’ within the United States, including aliens, whether their presence here is lawful, unlawful, temporary, or permanent”); see also *In re Doe*, 281 P.3d 95 (Idaho 2012); *In re E.N.C., et al*, 384 S.W.3d 796 (Tex. 2010); and *In re Interest of Angelica L.*, 767 N.W.2d 74 (Neb. 2009) (extending parental rights under *Troxel* to immigrant parents who lack lawful status in the United States); *Ms. L v. U.S. Immigration and Customs Enforcement*, 2018 WL 2725736 (S.D. Cal. 2018) (finding in the context of a motion to dismiss, that plaintiffs set forth a claim that separation from their children while they are contesting their removal and without a determination they are unfit or present a danger to their children violates due process).

protection afforded by stable, responsible relationship.....can harm the developing brain and harm short-and long-term health.”

7. **The number of migrants entering the United States is at an all-time low.** In FY 17, Customs and Border Protection [reported](#) the lowest level of unauthorized cross-border migration on record.
8. **Asylum-seekers fleeing persecution will not be deterred by detention policies and criminal prosecution:** After an initial decline in the numbers of unaccompanied children and families entering the U.S. after President Trump took office in January 2017, the [numbers](#) began to increase in mid-2017 and have continued to climb. A recent [report](#) analyzing “Operation Streamline” by the Vera Institute of Justice finds that prosecution of migrants entering the country without authorization is not an effective way to deter migration.
9. **The Obama Administration also tried to deter families from coming to the United States through the use of family detention facilities:** The Obama administration attempted to deter families from entering the United States by constructing large family detention centers and detaining families together to undergo proceedings, but a federal judge found this policy violated the [Flores Agreement](#) (minimum standards established for the detention, release and treatment of children in immigration detention) relating to the minors.<sup>3</sup> When the defendants appealed to the Ninth Circuit, the appellate court affirmed in part and reversed in part, holding that the *Flores Agreement* applied to both unaccompanied and accompanied children but did not provide rights for the release of parents.<sup>4</sup> Subsequently, the duration of family detention decreased and many families were released using detention alternatives, usually in the form of a parental ankle monitor.
10. **Separation of families has unnecessarily rendered hundreds of additional children as unaccompanied each week.** In the immigration system, the Office of Refugee Resettlement (ORR), an agency within the U.S. Department of Health and Human Services, Administration of Children and Families, is responsible for the care and custody of unaccompanied immigrant children— defined as under the age of 18 with no lawful immigration status and no parent or legal guardian present or available to provide care and custody.<sup>5</sup> By selecting to criminally prosecute these parents for low level entry-related crimes, the government renders hundreds of additional children “unaccompanied” each week. As a result, children who would have previously been held with their parents or released with a parent are now detained in an ORR shelter and appear before an immigration judge on their own. Children typically remain in ORR custody for 30 to 60 days and are usually reunified with a family member or family friend to complete their removal proceedings in immigration court.
11. **Separation of families further exacerbates the immigration court backlog:** The immigration court system has a [backlog of nearly 700,000 cases](#) with another 300,000 administratively closed

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<sup>3</sup> *Flores v. Lynch*, 212 F. Supp. 3d 907 (C.D. Cal. 2015).

<sup>4</sup> *Flores v. Lynch*, 828 F.3d 898, 901 (9<sup>th</sup> Cir. 2016).

<sup>5</sup> 6 U.S.C. §279(g).

cases that may soon be placed on the active docket. When children remain with their parents, both generations are subject to “expedited removal” proceedings.<sup>6</sup> Children who are rendered “unaccompanied” are placed in separate removal proceedings before an immigration judge.<sup>7</sup> Family separation transforms a single case into multiple immigration court cases. This causes tremendous inefficiencies in the already backlogged immigration courts. Advocates report that it is virtually impossible to coordinate the representation of separated children and their parents since they are often detained in different parts of the country and brought before different judges and administrative agencies. Meanwhile, children, like adults, have no right to appointed counsel in immigration court proceedings. Separated children may have little or no knowledge of the dangers that threaten them in the home country or be too young to communicate such dangers.

12. **The Office of Refugee Resettlement (ORR) has eliminated funding for the representation of unaccompanied children who have been reunified with sponsors throughout the United States:** In May 2018, the Vera Institute of Justice informed a national network of legal service providers that ORR will no longer fund direct legal representation for prospective cases of children reunited with sponsors. This will affect thousands of children who will be unable to obtain legal representation through this national network of experienced legal service providers.
  
13. **Reports of missing children are misleading and focus attention away from the most deleterious policies:** On April 26, 2018, the Acting Assistant Secretary for U.S. Department of Health and Human Services [testified](#) before the Senate Committee on Homeland Security and Governmental Affairs that between October and December 2017, ORR attempted to reach 7,635 previously unaccompanied children now reunified with sponsors. The agency confirmed that 6,075 children remained with their sponsors and was unable to determine the whereabouts of 1,475 children. While instances of trafficking have been previously [reported](#), ORR has improved the sponsor vetting system since 2015. There is no reason to assume that the children the agency failed to contact are in dangerous situations. ORR generally has very little contact with either children or their sponsors after reunification and is not funded to provide comprehensive follow-up services. The welfare of all children in the immigration system is paramount, but these reports must not be used to justify further restricting legal and other protections for children and families.

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<sup>6</sup> 8 U.S.C. § 1225(b)(1).

<sup>7</sup> 8 U.S.C. §1229a.