Background on Separation of Families and Prosecution of Migrants  

at the Southwest Border¹

July 31, 2018

1. **DOJ has taken a punitive approach to immigration violations, mandating criminal prosecution of low-level, entry-related immigration violations:** In April, Attorney General Sessions announced a “zero tolerance” policy under which the Department of Homeland Security (DHS) vowed to refer all migrants who entered the United States without authorization to the Department of Justice (DOJ) for prosecution. This policy expanded “Operation Streamline,” a program which began in 2005 to add criminal penalties to entry-related immigration violations for adult border-crossers (generally those crossing without children). The Attorney General has expressed his desire to use the full force of the law to punish and deter those who cross illegally into the United States and at least initially, to separate parents from their children. Through these actions, the Attorney General’s goal, as stated in an April 6 memorandum to federal prosecutors, is to end “illegality” in the immigration system and to deter migrants from entering the United States without authorization.

2. **The administration has intentionally separated nearly 2,700 children from their parents:** Under the “zero tolerance” policy, the practice of separating children from their parents drastically escalated. Based on the government’s representations in litigation² challenging the family separation policy, as of July 23, 2018, a total of 2,551 children aged 5-17 were separated from their parents as a result of this policy. On July 31, in testimony given before the Senate Judiciary Committee, a DHS official stated that, of the 103 separated children under age five, 57 have been reunified and the parents of the remaining 46 children were ineligible for reunification. He further stated that 1,820 of the 2,551 children age five and above have been reunified with their parent(s) or an eligible sponsor. This policy of separation applied to children of all ages, including toddlers and infants. These separations were not only cruel, but also violated 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.³

3. **After a sustained, bi-partisan outcry, the President ended the family separation policy through an Executive Order dated June 20, 2018:** In an Executive Order titled “Affording Congress an Opportunity to Address Family Separation,” the President reiterated his commitment to “rigorously enforce

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¹ ABA Commission on Immigration, [www.americanbar.org/immigration](http://www.americanbar.org/immigration).
³ [Troxel v. Granville](http://www.supremecourt.gov), 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](http://www.supremecourt.gov), 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 letter from ABA President Hilarie Bass to the Attorney General and DHS Secretary dated June 12, 2018.
immigration laws” and “to maintain family unity...by detaining families together where appropriate and consistent with law and available resources.” Many organizations including the American Bar Association oppose simply exchanging the family separation policy for a systematic policy of family detention and encourage the government to manage this population through established release mechanisms and by employing alternatives to detention.4

4. The government has been unable to reunite hundreds of children with their parents, despite a federal court order issued through a class-wide preliminary injunction: The government is currently prohibited from separating children from their parents under a preliminary injunction order entered in Ms. L v. ICE on June 26, 2018. The injunction also ordered all children (with limited exceptions) to be reunified with their parents within 30 days (and within 14 days for children under five). The court-imposed deadline to reunify children between the ages of 5 and 17 was July 26, 2018. On that date the government reported reuniting 1,442 children between the ages of 5 and 17, while claiming that 711 parents were deemed ineligible to receive children over the age of five as well as 46 parents of children under age five.5 Finally, the parents of about 431 children appear to have already been deported without their children.6

5. 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 currently at war.

6. Although U.S. law enshrines the right to seek asylum, the Administration has recently 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. 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 or parole. Another significant obstacle to gaining asylum protection is the Attorney General’s decision in Matter of A-B-, as well as USCIS’s accompanying July 11, 2018 policy memorandum, making it more difficult to obtain protection based on fear of domestic violence or gang violence in the home countries.7

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6 Id. at A18
7. The Obama Administration also tried to deter families from coming to the United States through the use of family detention policies: 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.\(^8\) 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.\(^9\) The court held that the government could not hold children in detention for more than 20 days. Subsequently, the duration of family detention decreased, and many families were released using detention alternatives, usually involving electronic monitoring of the parent. The Justice Department, under an Executive Order by the president, recently sought a court order narrowing the scope of the Flores Agreement’s release provisions to exclude children who entered the United States with their families. Judge Dolly M. Gee denied this request, holding that it was both “procedurally improper and wholly without merit.”\(^10\)

8. Separation of families due to the prosecution of parents has artificially rendered hundreds of children “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 children under the age of 18 with no lawful immigration status and no parent or legal guardian present or available to provide care and custody.\(^11\) The government’s decision to criminally prosecute parents for low level entry-related crimes rendered 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 were detained in ORR shelters and appeared before an immigration judge on their own. Though the family separation policy is enjoined, the government’s aggressive prosecution policy is still in effect. Under the terms of an agreement reached by the parties in Ms. L regarding the scope of the injunction, migrants in detention with their children must choose between either (1) remaining in detention with their children and waiving the children’s rights under the Flores Agreement including the right to be released, or (2) waive any rights not to be separated from the children under the injunction and consent to the children’s release and transfer to a licensed program in accordance with Flores.

9. Family separation causes both short and long-term harm 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 protection afforded by stable, responsible relationship…..can harm the developing brain and harm short-and long-term health.”

10. Separation of families further exacerbates the immigration court backlog: The immigration court system currently has a backlog of over 700,000 cases with another 355,000 administratively closed cases that may soon be placed back on the active docket after the Attorney General’s decision in Matter of

\(^8\) Flores v. Lynch, 212 F. Supp. 3d 907 (C.D. Cal. 2015).
\(^9\) Flores v. Lynch, 828 F.3d 898, 901 (9th Cir. 2016).
\(^11\) 6 U.S.C. §279(g).
Castro-Tum.\textsuperscript{12} Children who are rendered “unaccompanied” are placed in individual removal proceedings before an immigration judge.\textsuperscript{13} Family separation transforms a single case into multiple immigration court cases. This causes additional inefficiencies in the already backlogged immigration court system.

11. \textbf{Asylum-seekers fleeing persecution will not be deterred by detention policies and criminal prosecution:} After President Trump took office in January 2017, there was an initial decline in the numbers of unaccompanied children and families entering the U.S. without authorization. However, by May 2017, the numbers began to increase again 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. Indeed the number of families apprehended at the southwest border has remained approximately static from April (9,652) to May (9,485) to June (9,449). The number of unaccompanied children dropped somewhat from May (6,388) to June (5,115), though that number is still higher than the number of unaccompanied children apprehended in April (4,292).

12. \textbf{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. Those with prior removal orders are prosecuted for “illegal re-entry” (second time or more), a felony under 8 U.S.C. § 1326 with a maximum sentence of two years, or for those with certain criminal convictions, up to 20 years. The “zero tolerance” policy has overwhelmed the federal criminal system, diverting resources from prosecuting serious crimes and diminishing the use of prosecutorial discretion, an essential law enforcement function. These often 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). Moreover, the Administration was using these criminal proceedings to justify the separation of parents and children. Federal defenders and U.S. Magistrate judges expressed concerns about this policy and its impact on parents and children, as well as the court system. While the Attorney General’s stated intention was to prosecute all unlawful border crossers, a recent report by TRAC Immigration found that in May 2018, the government prosecuted only 32% of the total border crossers and appears to have prioritized prosecuting parents over adults who entered the country without children.

13. \textbf{The number of migrants entering the United States is at an all-time low.} In FY 17, Customs and Border Protection (CBP) reported the lowest level of unauthorized cross-border migration on record. According to CBP’s own report, U.S. Border Patrol apprehensions averaged over 1 million per year between 1980 and 2016, but in FY17 CBP recorded 310,531 apprehensions by U.S. Border Patrol and found 216,370 individuals inadmissible at authorized ports of entry.

14. For more information or to help, see the following link:
https://www.americanbar.org/advocacy/other_abu_initiatives/family-separation-and-detention.html

\textsuperscript{13} 8 U.S.C. §1229a.