



STATEMENT OF THE AMERICAN IMMIGRATION COUNCIL

SUBMITTED TO THE SENATE COMMITTEE ON THE JUDICIARY

HEARING ON “OVERSIGHT OF IMMIGRATION ENFORCEMENT AND FAMILY REUNIFICATION EFFORTS”

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The American Immigration Council (“Council”) is a non-profit organization which for over 30 years has been dedicated to increasing public understanding of immigration law and policy and the role of immigration in American society. We write to share our analysis and research regarding the nation’s asylum system and the obligations of the U.S. government to asylum seekers, as well as our deep concern around the administration’s family separation policies and increased prosecution of migrants for entry-related offenses.

With high levels of violence in parts of Central America, migration patterns have shifted in recent years, with more migrants seeking protection in the United States. Despite domestic and international legal obligations to protect migrants fleeing persecution and torture, the U.S. government nonetheless subjects individuals fleeing such harm to criminal proceedings; this violates international law.¹

In April, the Department of Justice (DOJ) and Department of Homeland Security (DHS) implemented a “zero tolerance” policy for those who cross the Southern border without authorization.² Under this policy DHS refers for criminal prosecution all migrants who crossed the border without authorization, and DOJ is directed to accept as many of these referrals as practicable.³ If these migrants arrived with children, the families were separated when the parents were referred for prosecution, and the children were designated “unaccompanied alien children” and placed in the custody of the

¹ American Immigration Council, *Prosecuting Migrants for Coming to the United States* (Washington, DC: May 1, 2018), <https://www.americanimmigrationcouncil.org/research/immigration-prosecutions>.

² Department of Justice, Office of Public Affairs, “Attorney General Announces Zero-Tolerance Policy for Criminal Illegal Entry,” April 6, 2018, <https://www.justice.gov/opa/pr/attorney-general-announces-zero-tolerance-policy-criminal-illegal-entry>; Department of Homeland Security, “Secretary Nielsen Statement on Arrival of Central American ‘Caravan,’” April 25, 2018, <https://www.dhs.gov/news/2018/04/25/secretary-nielsen-statement-arrival-central-american-caravan>.

³ Ibid.

Department of Health and Human Services (HHS) Office of Refugee Resettlement. The result was a de facto policy of family separation.

After more than 2,000 families were separated, and amid a growing outcry against the impact of these policies on children and their parents, President Trump issued an executive order on June 20, 2018, which ostensibly limited family separation.⁴ On June 26, a federal judge held that family separation violated the U.S. Constitution and ordered the administration to reunite all families that were pulled apart.⁵

Family Separation Causes Extreme Harm to Children and the Parents from whom They Are Separated

In December 2017, the Council, in collaboration with other organizations, [filed an administrative complaint with the DHS Office for Civil Rights and Civil Liberties \(CRCL\) and the Office of the Inspector General \(OIG\)](#) on behalf of numerous asylum-seeking families who were separated at the U.S.-Mexico border. The complaint included the cases of 15 individuals—including toddlers—who were separated from their family members shortly after their arrival at the U.S. border. These cases served to illustrate an increasing trend of family separation at our southern border.⁶

With the exponential increase in family separations since that time, it became increasingly apparent that forcibly separating families at the U.S.-Mexico border is an illegal and amoral practice. Judge Dana Sabraw, who ordered that families be reunified, described the policy as leaving children “essentially orphaned as a result of family separation.”⁷ When the Council and its volunteer attorneys spoke directly to detained parents who were separated from their children, all of them expressed how much being away from their children made them suffer. Many parents broke into tears describing the moment their children were taken away and described a sense of fear and loss at the idea that they may never see their children again. Even after families were reunified, staff from the Council’s Dilley Pro Bono Project served families detained together at the South Texas Family Residential Center and observed first-hand how families, especially young children, were severely traumatized by their separation.⁸

⁴ President Donald J. Trump, *Affording Congress an Opportunity to Address Family Separation*, The White House, June 20, 2018, <https://www.whitehouse.gov/presidential-actions/affording-congress-opportunity-address-family-separation/>.

⁵ Jonathan Stempel & Doina Chiacu, “U.S. judge orders migrant families to be reunited,” Reuters, June 26, 2018, <https://www.reuters.com/article/us-usa-immigration-aclu/judge-bars-separation-of-immigrants-from-children-orders-families-reunited-idUSKBN1JM2JA>.

⁶ American Immigration Council, et al., “Complaint Documents 15 Cases of Family Separation at the Border,” (Washington, DC: December 11, 2017), <https://www.americanimmigrationcouncil.org/advocacy/family-separation-at-the-border>.

⁷ *Ms. L., et. al. v. U.S. Imm. and Customs Enf.*, ___ F. Supp. 2d ___, 2018 WL 3129486, at *4 (June 26, 2018).

⁸ See *Ms. L., et. al. v. U.S. Imm. and Customs Enf.*, Declaration of Shaylyn Fluharty, Plaintiff’s Reply in Support of Stay of Removal (July 25, 2018), Exhibit 51, available at https://www.aclu.org/sites/default/files/field_document/mslviceplaintiffsreplyinsupportofmotionforstayofremoval.pdf; Lydia Wheeler, “ACLU: Separated parents were forced to sign paperwork they can’t read,” *The Hill*, July 25, 2018, <http://thehill.com/homenews/news/398873-aclu-separated-parents-were-forced-to-sign-paperwork-they-cant-read>.

Separated Parents Have Been Coerced and Misled into Waiving their Rights

The ability to seek asylum—as discussed in the Council’s factsheet, [Asylum in the United States](#)—is a right enshrined in both international and domestic laws.⁹ The majority of the migrants currently presenting themselves to the Border Patrol between the ports of entry and to Customs and Border Protection (CBP) at the ports along the Southern border are seeking humanitarian relief after fleeing persecution, grave violence, and even death.

Many parents who arrived at the U.S.-Mexico border seeking asylum have been coerced into abandoning their claims after having been separated from their families.¹⁰ One parent who spoke to Human Rights Watch described how he abandoned his right to appeal his case because an Immigration and Customs Enforcement (ICE) official told him that doing so was the only way to reunite with his child.¹¹ Families also report having been coerced into signing forms renouncing their rights to reunify with their child.¹² Another father, who had only talked to his 14-year old son once since being separated since May 28, 2018, repeatedly burst into tears when asked by a Council attorney whether he wanted to reunify with his son. He said that when ICE officers asked him if he wanted to be reunited with his son and deported together or allow his son to remain in the United States with family, he was not given any opportunity to call his son to discuss what his son wanted.¹³

Many parents, especially those who speak indigenous languages or are not literate, had no idea of what they were signing. Parents also were not provided with copies of the documents they signed. Indeed, multiple parents were shocked when an attorney informed them that they were not going to be reunified with their children because they had agreed to deportation. Some insisted repeatedly that when ICE had asked them about reunification, that they had chosen to be reunified.

Given the chaotic and unplanned rollout of family separation, it is no surprise that the reunification process has been equally problematic. The allegations of coercion also emphasize the need for access to counsel for immigrants in detention. Because deportation is classified as a civil rather than a criminal sanction, immigrants facing removal are not afforded the constitutional protections under the Sixth Amendment that are provided to criminal defendants.¹⁴ As noted in the Council’s special report, [Access to Counsel in Immigration Court](#), the lack of appointed counsel has a profound impact on immigrants’ ability to receive a fair hearing or understand the legal options before them. Given the remoteness of detention facilities and the limited availability of free and low-cost legal services, only 14 percent of detained immigrants acquire counsel.¹⁵ Detainees who had a custody hearing

⁹ American Immigration Council, *Asylum in the United States* (Washington, DC: May 14, 2018), <https://www.americanimmigrationcouncil.org/research/asylum-united-states>.

¹⁰ Human Rights Watch, *U.S.: Separated Families Report Trauma, Lies, Coercion*, July 26, 2018, <https://www.hrw.org/news/2018/07/26/us-separated-families-report-trauma-lies-coercion>.

¹¹ Ibid.

¹² Samantha Smith, “Migrant parents were misled into waiving rights to family reunification, ACLU tells court,” *Washington Post* (July 26, 2018), https://www.washingtonpost.com/news/morning-mix/wp/2018/07/26/migrant-parents-were-mislead-into-waiving-rights-to-family-reunification-aclu-tells-court/?noredirect=on&utm_term=.b5e43dcffdfd.

¹³ *Ms. L., et. al. v. U.S. Imm. and Customs Enf.*, See Declaration of Aaron Reichlin-Melnick, Plaintiff’s Reply in Support of Stay of Removal (July 25, 2018), Exhibit 43, available at https://www.aclu.org/sites/default/files/field_document/mslviceplaintiffsreplyinsupportofmotionforstayofremoval.pdf.

¹⁴ Ingrid Eagly, Esq. and Steven Shafer, Esq., *Access to Counsel in Immigration Court* (Washington, DC: American Immigration Council, September, 28, 2016), <https://www.americanimmigrationcouncil.org/research/access-counsel-immigration-court>.

¹⁵ Ibid.

were four times more likely to be released from detention if they had an attorney, and detained immigrants with counsel were nearly 11 times more likely to seek relief, such as asylum, than those without representation.¹⁶

Immigration Prosecutions

Over the last two decades, the federal government increasingly has utilized the federal criminal courts to punish people for immigration violations. Particularly on the southwest border, federal officials are vigorously prosecuting migrants either for entering the United States without permission or for reentering the country without permission after a prior deportation or removal order. Tens of thousands of migrants are subjected to criminal prosecution for these crimes every year.¹⁷

As the past three months have shown, a zero-tolerance approach to charging these entry-related offenses imposes heavy costs on migrants and the federal government alike. With high conviction rates for these federal offenses, many migrants are subjected to mandatory incarceration in federal prison for months or longer. For the federal government, such prosecutions are an extremely costly use of finite law-enforcement resources and have no demonstrated deterrent effect on future migration.¹⁸ In fact, despite the Trump administration's claim that harsh measures at the border will deter asylum-seekers, recent analysis has shown that prosecuting asylum-seekers and separating families does not deter families from fleeing harm in their home countries and seeking safety in the United States.¹⁹

The Council's factsheet, [Prosecuting Migrants for Coming to the United States](#), provides an overview of entry-related offenses, the significant costs incurred by the government for conducting these prosecutions, and how the government's rationale for carrying them out is not supported by the data.

When family separation began, the Council warned that separating families, criminally prosecuting migrants, and obstructing their ability to apply for asylum was cruel and un-American. Now that we have seen first-hand the trauma that family separation causes vulnerable parents and children, the message is clearer than ever that the United States can and must do better. This Committee should reign in punitive and costly immigration policies that run counter to American ideals.

¹⁶ Ibid.

¹⁷ Transactional Records Access Clearinghouse, "Immigration Prosecutions for May 2018," July 12, 2018, <http://trac.syr.edu/tracreports/bulletins/immigration/monthlymay18/fil/>.

¹⁸ Rebecca Gambler, *Border Patrol: Actions Needed to Improve Oversight of Post-Apprehension Consequences*, U.S. Government Accountability Office, January 2017, 36, <https://www.gao.gov/assets/690/682074.pdf>; Department of Homeland Security, Office of Inspector General, *Streamline: Measuring Its Effect on Illegal Border Crossing*, OIG-15-95, May 15, 2015, https://www.oig.dhs.gov/assets/Mgmt/2015/OIG_15-95_May15.pdf.

¹⁹ Tom K. Wong, *Do Family Separation and Detention Deter Immigration?* (Washington, DC: Center for American Progress, July 24, 2018), <https://www.americanprogress.org/issues/immigration/reports/2018/07/24/453660/family-separation-detention-deter-immigration/>.