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STOP THE HORRIFIC PRACTICE OF SEPARATING CHILDREN FROM PARENTS

Posted on June 19, 2018 by Cyrus Mehta & Sophia Genovese

The desperate sobbing of children who have been separated from their parents is horrific and shocking. As the children scream "Mami" and "Papa" over and over again, a Border Patrol agent booms above the crying: "Well, we have an orchestra here," he jokes. "What's missing is a conductor."

The practice of separating families at the border is not only cruel and unconscionable, but it is in direct violation of the United States' obligations under international and US law. As has been argued by the American Civil Liberties Union (ACLU) in its most recent lawsuit against the government, *Ms. L v. ICE*, this practice of forcibly separating families violates "the Constitution's due process clause, federal law protecting asylum seekers, and of the government's own directive to keep families intact." The Texas Civil Rights Project, the Women's Refugee Commission, the University of Texas School of Law Immigration Clinic, and Garcia & Garcia Attorneys at Law, P.L.L.C., have filed an Emergency Request for Precautionary Measures with the Inter-American Commission on Human Rights ("IACHR"), arguing that the United States is "violating internationally-recognized human rights and well-established Inter-American standards, including the rights to family, to seek asylum and protection, to minimum due process, among others."

For those parents seeking asylum in particular, it is permissible under the Immigration and Nationality Act to apply for asylum even if you entered the US without inspection. Supporters of the zero-tolerance policy have decried that these asylum-seekers and migrants should "get in line" or "do it the right way" by applying at Ports of Entry (POEs). However, even when asylum-seekers present themselves at POEs, they are often prevented from making an asylum claim and are turned away. This is in direct violation of International Refugee

law, where countries are required to refrain from "expel or return ('refouler') a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion." Others 'lucky' enough to get through to credible fear interviews are systemically found to not possess such a fear and are swiftly removed from the United States despite being eligible for asylum. Attorney General Sessions has now made this even more difficult after he overturned *Matter of A-R-C-G-,* 26 I&N Dec. 338 (BIA 2014) in *Matter of A-B-*, 27 I&N Dec. 316 (A.G. 2018), and in a footnote gratuitously asserts that few claims based on domestic violence or gang based persecution would satisfy the legal standard to determine whether a foreign national has a credible fear of persecution. And now these individuals seeking asylum, both at the POEs and who have entered without inspection, are being violent separated from their families before they can even attempt to adjudicate their claims.

The Trump Administration understands that what they are doing is shameful, and has deployed every public relations stunt in the book to try and distract the public from what is really going on. From blaming Democrats and the Obama Administration for the existence of a supposed law that mandates this violent separation, to claiming that a separation policy does not exist, to then defending such a policy – it is difficult to keep up. No matter which way you paint it, though, the policy is disgraceful and unlawful, and the Trump Administration has the power to stop its enforcement.

There is no law that requires the separation of immigrant families. The Administration has made the explicit decision to prosecute parents who enter the United States without inspection and to separate them from their children in the process. The government has appeared to bunker down on INA § 275 and 8 USC § 1325, which allow for the prosecution of the misdemeanor violation of illegal entry. Under Session's so-called zero-tolerance policy, every person who crosses the border illegally is now being prosecuted under INA § 275. The rationale is that those being prosecuted must be separated from their children during the pendency of the trial. Despite supposedly only separating those families who enter without inspection, there are also a number of cases where immigrant families are being separated after lawfully presenting themselves at POEs. Indeed, in *Ms. L v. ICE, supra*, the federal judge presiding over the case determined that the plaintiff-parents had asserted sufficient facts and legal basis to establish 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 under the Fifth Amendment.

This Administration has made the choice to immediately subject asylum-seekers to prosecution prior to adjudicating their asylum eligibility. The UN and human rights advocates have rightfully called this practice unlawful. But more than that, the combination of being punished for fleeing violence and being violently separated from one's children takes an ineffable mental toll and prevents them from effectively adjudicating their asylum claims, with one recent story of a father taking his own life under the stress of this policy and others discussing the developmental consequences of this separation to children. Once an asylum-seeker finally gets to adjudicate their asylum claim, after weeks or months of separation from their children, they are often so broken down that they cannot effectively argue their claims. If they do not have access to counsel, their chances of obtaining relief – despite clear eligibility – are next to none. What also makes this practice so egregious is that the underlying motive of the Trump administration is to use the children as political fodder so that Trump can get what he desires in an immigration bill, including his wall and a reduction in legal immigration. The whole crisis has been manufactured by Trump himself and he has the power to stop it right now. Indeed, the separation of children as young as eight months old is so horrific that it is important to start viewing them as crimes against humanity, punishable under an international tribunal, rather than a shift in policy.

If you're like us, and believe that this separation is wrong, we urge you to put pressure on your Congressperson to propose/support emergency legislation to stop the Trump Administration from cruelly separating children from the parents. Call the congressional switchboard at (202) 224-3121. There's a Senate bill (S. 3036 - Keep Families Together Act) and a House bill (H.R. 5950 - the HELP Separated Children Act), which you can ask your Senators and Representatives to support. If your member is conservative and not likely to support any of these bills, then at least have the member speak out in order to urge the President to reverse the policy. This violent policy of separating families at the border is not in line with the law and is not in line with American values. The United States has historically taken in hundreds of thousands of refugees from Eastern Europe, the Soviet Union, Haiti, Cuba and Vietnam, among many other countries. We can easily take in people fleeing persecution and violence in Central America once they qualify for asylum under our laws. The Trump

Administration and its supporters ought to take a good, long look in the mirror and ask themselves whether they in good conscience believe that separating children from their families is in-line with those values.

Update: The solution to family separation is not family incarceration.

On June 20, 2018, President Trump issued an Executive Order misleadingly entitled "Affording Congress an Opportunity to Address Family Separation," purportedly resolving the issue of the separation of immigrant families. The EO maintains support for the zero-tolerance policy at the border and mandates family detention during the pendency of proceedings for unlawful entry, as well as for the immigration proceedings themselves. This EO is in contravention of international norms and standards in regards to the detention of refugees and children. The EO is also in violation of the Flores settlement, which requires that the government not detain children for more than 20 days. Although the Flores settlement only applies to children, past practice (admittedly, inconsistent practice) has been to release the whole family after 20 days to ensure family unity. The EO directs the Attorney General to file suit in the Central District of California to modify the Flores settlement to allow for indefinite detention of children.

The struggle to end mass incarceration of families is not over, and the new EO should not be seen as a victory. Practitioners should continue to litigate these detention practices in the courts and allies should continue to advocate for the eradication of this egregious practice. Nor should President Trump gloat and claim victory. He along with his cabinet members and advisors who masterminded a gulag for children, toddlers and infants – with the goal of using them as political fodder - have inflicted irreparable damage on them and should ultimately pay the price.