

## Separation of Immigrant Families in U.S. Immigration Custody

Family unity is a natural and fundamental human right that is a cornerstone of U.S. policy and international law.<sup>1</sup> Family unity must also be a respected principle in enforcement and removal operations by the Department of Homeland Security (DHS). As the numbers of family units migrating together rises, so have the instances of arbitrary and harmful family separation, both before and upon reaching the U.S. border. Many of these families face arbitrary separation due to administrative failures to appropriately identify and track familial relationships or respect the principle of family unity during immigration enforcement actions.

Separation from family members can cause undue trauma to children and may violate the Victims of Child Abuse Act of 1990.<sup>2</sup> In addition, family separation can impede the ability of families to access asylum and other protection mechanisms because individual family members may be unable to apply for the same benefit they are legally entitled to apply for as a family unit. Separation of adult family members during the deportation process has also shown to expose deported individuals to serious harm, rendering them more vulnerable to abuse, assaults, kidnapping, and trafficking.

Through research, analysis, interviews, and representation of thousands of families in family detention centers, we have identified the following types of family separation fact patterns that fail to uphold family unity while families are in DHS custody.

- 1. Separation of families prior to Customs and Border Protection (CBP) apprehension without mechanisms to reunite.** Family members may be separated from each other by smugglers or for other reasons during the journey to the United States, possibly resulting in apprehension by CBP in different locations or on different dates and possibly leading to different custody determinations (e.g. release or detention), or procedural tracks to seek asylum. Separated family members who are detained in separate locations may have different credible fear findings despite having the same claim, may be missing key evidence that another family member possesses, or may be in different procedural postures (such as expedited removal instead of removal proceedings) through no fault of their own. While CBP did not cause the separation, DHS components such as CBP, Immigration and Customs Enforcement (ICE), and U.S. Citizenship and Immigration Services (USCIS) should have mechanisms to identify family members separated prior to arrival, reunite them, and ensure they are able to fairly pursue immigration relief.
- 2. Separation of immediate family members during CBP removal, transfer, or custody.** Individuals may be separated from a parent, spouse, sibling, child, or other family member during the apprehension, detention and removal process for a number of reasons, including: an unverified biological relationship, inadequate screening, arbitrary and inadequate custody determinations, or even as a punitive or deliberate measure. Family separation also occurs as a result of implementation of the Consequence Delivery System (CDS), which may result in different family members being processed differently or ending up in different legal proceedings. Since September 2015, there has been a significant increase in prosecutions for reentry of individuals apprehended in the Yuma sector, including parents entering the United States with young children. This has resulted in a significant increase of children being classified

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<sup>1</sup> Family unity as a protected right can be found in: Final Act of the 1951 U. N. Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, Recommendation B.; U.N. International Covenant on Civil and Political Rights, art. 23, (March 23, 1976); U.N. Convention on the Rights of the Child, art. 9, (September 2, 1990); General Comment 6 to the Convention, “Treatment of Unaccompanied and Separated Children Outside their Country of Origin” (CRC 2005).

<sup>2</sup> See 42 U.S.C. §13031(c)(1) defines “child abuse” as “the physical or mental injury, sexual abuse or exploitation, or negligent treatment of a child.” See generally, 42 U.S.C. §13031 and 28 C.F.R. § 81.

as unaccompanied and placed in Office of Refugee Resettlement (ORR) custody, despite having entered the United States with a parent. Studies show this can place separated family members at extreme risk.<sup>3</sup> Moreover, separation of extended family members is especially problematic in situations in which children at a vulnerable age have travelled with a grandparent, aunt/uncle, or adult sibling who is their primary caregiver back home. These children, once in ORR custody, should have an opportunity to be reunified with primary caregivers, following their release.

3. **Separation of parents or non-parental relatives and children in ICE and/or ORR custody.** This separation, which often begins in CBP custody or during the journey, continues when family members and children are transferred to various ICE detention facilities or to ORR custody. As a result a parent or a potential ORR sponsor may be in ICE custody, or family members could be separated into several ICE detention facilities across the country. When families are detained in different federal facilities, there is no way to regularly monitor this or inform the detainee where their family member is located, making it nearly impossible to reunite or pursue a joint asylum claim without counsel. In the case of children separated from parents and placed in ORR custody, the child may have no information about potential eligibility for asylum based on the parent's claim.
4. **Separation of families impedes due process and impacts compliance with conditions of release.** Family separation routinely occurs as a result of ICE custody determinations, in which family members may be detained in separate facilities—including family detention facilities—or some family members may be released while others are detained. This has widespread negative consequences: loss in immigration relief determinations (e.g. asylum) because of separated claims, non-compliance with conditions of release as separated family members attempt to locate family, or result in removal of some family members while others continue to pursue relief.
5. **Separation of children from parents or caregivers leads to children facing repatriation alone, separate from parent or caregiver who may also be repatriated.** The repatriation process is especially emotionally difficult for children. Lack of information regarding the whereabouts, cases status, and potential repatriation of parents or caregivers, and the absence of systematic attempts by ICE to reunite caregivers with children, results in children being repatriated separately from returning parents or caregivers, causing children and caregivers unnecessary, additional trauma in the repatriation process.

## Recommendations

### DHS and the Department of Health and Human Services (HHS):

- **ICE should issue a Notice to Appear (NTA) to families and primary caregivers upon apprehension** whenever possible and pursuant to the *Flores* settlement agreement<sup>4</sup> and the Parental Interests Directive, instead of placing individuals into expedited or reinstatement of removal. Where there is a flight risk or other public safety concern, DHS should utilize conditions of release proportionate to the concern.

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<sup>3</sup> See *Our Values on the Line: Migrant Abuse and Family Separation at the Border*, released September 15, 2015, available at: <http://jesuits.org/ValuesontheLine>, page 19.

<sup>4</sup> The Flores Settlement Agreement, Case No. CV 85-4544-RJK(Px); Available at: <https://www.aclu.org/legal-document/flores-v-meese-stipulated-settlement-agreement-plus-extension-settlement>. Some of the agreement's terms have been codified at 8 CFR §§236.3, 1236.3.

- **If DHS components learn of family members who have been separated, family members should be released and reunited as quickly as possible unless DHS can demonstrate significant security risks that cannot be mitigated by alternatives to detention.**
- **ICE, CBP, USCIS and ORR should have mechanisms to track family relationships and to share information and facilitate reunification by dedicating points of contact across components and agencies to streamline communication on these issues.** This should include affirmative processes for flagging familial relationships during intake and dedicated fields in DHS databases to link cases and enable family searches.
- **DHS should create and ensure access to tools for family members and advocates to report family separation incidents and to verify the status, location, and disposition of their family members, regardless of whether they are in custody or released.** This could be done through a hotline that would be available in CBP, ICE, and ORR facilities, and CBP, ICE, and ORR officials should be thoroughly trained on the appropriate processes to receive and respond to complaints. If significant security risks prevent reunification, separated families should have a means of communicating during their separation. ICE, CBP, and ORR facilities should have telephones available for communication of separated families and should ensure that separated family members have regular access to these telephones.
- **DHS should affirmatively ask individuals if they were separated from a family member with whom they were traveling** upon apprehension and release from DHS custody, as part of a routine administrative entrance/exit interview process. If an individual has been separated from family members while in custody, DHS should inform the individual of the whereabouts of family members and how to get in touch with the family member.
- **In cases of children who have been separated from a parent or caregiver and placed in ORR custody and who are being repatriated, ICE should coordinate their travel with returning parents or caregivers, unless doing so requires a child to remain in ORR custody significantly longer than necessary (i.e. because parent is facing criminal charges).**

**DHS Office of the Inspector General (OIG)/Office of Civil Rights and Civil Liberties (CRCL)/CBP Office of Internal Affairs (IA):**

- DHS OIG, CRCL, and CBP IA should investigate complaints involving family separation and track complaints across DHS components.
- CRCL should recommend improvements in training and policies to address family separation across DHS.

**CBP**

- CBP should consult CRCL with regards to Transport, Escort, Detention, and Search (TEDS) training and the implementation of a Parental Interests Directive policy to protect family unity during apprehension, short-term custody, the imposition of a Consequence Delivery System (CDS) consequence and risk assessment, and during removal. The training and implementation of TEDS, any component-specific policies to supplement the TEDS, and other CBP policies should prevent family separation and facilitate family reunification.
- In certain sectors CBP routinely fails to provide deported persons with their removal paperwork including their “Alien” number (A-number), making it all the more difficult to track individuals in the system, investigate complaints, and understand system breakdowns leading to family separation. Every person removed should be provided with removal paperwork indicating their A-number, location of apprehension, and facility in which they were processed to help facilitate reunification with family members.

## **ICE**

- ICE Headquarters should ensure field officers have adequate and regular guidance and training on the Parental Interests Directive and conduct regular check-ins to monitor implementation and compliance.
- ICE detention and deportation staff should increase visibility and access to information on the directive and procedural mechanisms to rectify family separation for all detained individuals.
- ICE should provide training to ORR service providers on the Parental Interests Directive.

## **USCIS**

- USCIS should strengthen mechanisms to better identify and consolidate Credible Fear Interview (CFI)/Reasonable Fear Interview (RFI) cases where they may exist; however, it should be acknowledged in certain cases that individuals may wish to pursue separate claims.

## **Department of Justice, Executive Office for Immigration Review (EOIR)**

- EOIR should develop a mechanism that allows children's asylum claims to be consolidated with those of their parents, even when appearing before different judges, although a child's right to pursue claims for relief separate from a parent must be preserved, as must the mechanism for a child to do so. Legal Orientation Program (LOP) providers should also include information on rectifying family separation and the Parental Interests Directive

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