



December 11, 2017

VIA ELECTRONIC MAIL

Cameron Quinn
Officer for Civil Rights and Civil Liberties
Department of Homeland Security
Washington, DC 20528

John V. Kelly
Acting Inspector General
Department of Homeland Security
Washington, DC 20528

Re: **The Separation of Family Members Apprehended by or Found Inadmissible while in U.S. Customs and Border Protection (CBP) Custody at the U.S.-Mexico Border**

Dear Ms. Quinn and Mr. Kelly:

The undersigned organizations jointly file this complaint on behalf of numerous family members who have been separated while in federal custody at the U.S. border, including instances in which one family member has been referred for criminal prosecution by the Department of Justice (DOJ). The alarming increase in family units being forcibly divided is consistent with the current

Administration's unabated series of attacks on the most vulnerable individuals in today's immigration system: protection-seeking children and their family members.¹

Our organizations have for years and in great detail documented the immense trauma created by the separation of family members and the impact of separation on their ability to pursue legal immigration relief.² The separation of parents from their children at the U.S.-Mexico border and within the United States, absent a justifiable child protection grounds, is so fundamentally unconscionable it defies countless international and domestic laws on child welfare, human rights and refugees. In addition to this it violates CBP's own standards on family unity and subverts the mission of the Office of Refugee Resettlement (ORR) to vouchsafe the interests of unaccompanied children as mandated by Congress. It is cruel and unlawful to separate family members for the sole purpose of deterring migration; such separation deprives family members the ability, given their detention, to locate each other and be reunited.

As such, we urge your offices to continue to investigate current Department of Homeland Security (DHS) practices in order to stop the practice of separating families for purposes of punishment and deterrence, to ensure compliance with international and domestic standards and already articulated DHS policies on family separation, to identify and expand humane alternatives to detention and separation, to better track family separation incidents, and to implement meaningful mechanisms so that separated family members can locate, contact, and reunite with one another.

BACKGROUND

Family unity is recognized as a fundamental human right, enshrined in both domestic and international law.³ The U.S. Supreme Court has held that the right to family unity is "perhaps the oldest of the fundamental liberty interests recognized by [the Supreme] Court."⁴ While some

¹ President Donald J. Trump's Letter to House and Senate Leaders & Immigration Principles and Policies, October 8, 2017, available at: <https://www.whitehouse.gov/the-press-office/2017/10/08/president-donald-j-trumps-letter-house-and-senate-leaders-immigration>.

² For extensive discussion on family separation at the border in the last three years, including recommendations on next steps, see: Women's Refugee Commission, Kids in Need of Defense, and Lutheran Immigration and Refugee Service, *Betraying Family Values: How Immigration Policy at the United States Border is Separating Families*. March 2017. <https://www.womensrefugeecommission.org/rights/gbv/resources/1450-betraying-family-values>. See also: American Immigration Council. *Divided by Detention: Asylum-Seeking Families Experiences of Separation*. August 2016. <https://www.americanimmigrationcouncil.org/research/divided-by-detention-asylum-seeking-families-experience-of-separation>. See also: Jesuit Conference of the United States and Canada & Kino Border Initiative. *Our Values on the Line: Migrant Abuse and Family Separation at the Border*. September 2015 Available at: http://jesuits.org/Assets/Publications/File/REPORT_2015_Our_Values_on_the_Line.pdf.

³ 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).

⁴ *Troxel v. Granville*, 530 U.S. 57, 65 (2000). Further, the Supreme Court has held that a parent's right to the care and custody of his or her child "has been deemed essential, [a] basic civil right of man, and rights far more precious than property rights." *Stanley v. Illinois*, 405 U.S. 645, 651, 92 S.Ct. 1208, 31 L.Ed.2d 551 (1972).

family members who seek protection at the U.S. border may have been separated during their journey prior to reaching the United States, or may be separated in isolated incidents by immigration officials due to valid concerns over the best interest of the child,⁵ our organizations have noticed an alarming increase in instances of family members who arrived together but were intentionally separated by U.S. immigration officials without a clear or reasonable justification, as a means of punishment and/or deterrence and with few to no mechanisms to locate, contact, or reunite with separated family members.

While our organizations are concerned about family separation and its consequences in all of these scenarios, this particular complaint focuses largely on the separation of children from their parents specifically in cases where those families traveled together to the United States for the purposes of seeking protection and found themselves instead separated.

While the TVPRA authorizes the separation of children from non-parents and legal guardians in order to prevent trafficking and comply with safe family reunification standards, several immigration laws demonstrate Congressional intent to keep children with their parents whenever feasible and to prioritize the reunification of separated children with parents whenever in the best interests of the child.⁶

CBP currently has insufficient guidance and policies relating to definitions of what constitutes family membership, when and how family members should be separated, if necessary, and mechanisms to help family members once they have been separated. However, CBP's National

⁵ For example, the passage of the Homeland Security Act of 2002 ("HSA") and the William Wilberforce Trafficking Victims Protection Reauthorization Act ("TVPRA") of 2008 and, provide for the separation of children from non-parents and legal guardians in order to prevent trafficking and comply with safe family reunification standards. *See* Section 462 of the HSA, Pub. L. No. 107-296, codified at: 6 U.S.C. § 279 and Section 235 of the TVPRA, Pub. L. No. 110-457, codified at: 8 U.S.C. § 1232.

⁶ *See e.g.*, The Homeland Security Act of 2002 clearly defines an unaccompanied alien child as a child with respect to whom "no parent or legal guardian in the United States is available to provide care and physical custody." 6 U.S.C. § 279(g)(2)(C)(ii); HSA defines ORR's role as "...ensuring that the interests of the child are considered in decisions and actions relating to the care and custody of an unaccompanied alien child" 6 U.S.C. § 279(b)(1)(B); The TVPRA states that "an unaccompanied alien child in the custody of the Secretary of Health and Human Services shall be promptly placed in the least restrictive setting that is in the best interest of the child" 8 U.S.C. § 1232(c)(2)(A); TVPRA further requires that "an unaccompanied alien child may not be placed with a person or entity unless the Secretary of Health and Human Services makes a determination that the proposed custodian is capable of providing for the child's physical and mental well-being" § 1232(c)(3)(A); regulations on the custody of children states that "Juveniles may be released to a relative (brother, sister, aunt, uncle, or grandparent) not in Service detention who is willing to sponsor a minor and the minor may be released to that relative notwithstanding that the juvenile has a relative who is in detention" 8 C.F.R. § 212.5(b)(3); Flores Settlement Agreement of 1997, Case No. CV 85-4544-RJK(Px) ¶ 14 establishes a policy favoring release of all children and prioritizing their reunification with parents, available at: <http://web.centerforhumanrights.net:8080/centerforhumanrights/children/Document.2004-06-18.8124043749>; Judge Gee upheld Plaintiffs' motion to enforce Paragraphs 14, 18, 19, and 23 of the Agreement on the issue of whether Defendants are making and recording continuous efforts to release class members or place them in nonsecure, licensed facilities in accordance with the Agreement, *Jenny L. Flores, et al. v. Jefferson B. Sessions, III, et al.*, CV 85-4544 DMG (AGRx)(C.D. C.A., June 27, 2017), available at: http://www.centerforhumanrights.org/PDFs/06-27-17_Flores_2016MTE_Order.pdf.

Standards on Transport, Escort, Detention, and Search (TEDS) do require that family units stay together “to the greatest extent operationally feasible” absent concerns for security and safety.⁷ TEDS also requires documentation if separation does occur.⁸

However, in early March 2017, then DHS Secretary Kelly stated that the department was formally considering a policy of separating children from their parents at the border in order to deter their migration to the United States.⁹ Among others, the American Academy of Pediatrics expressed serious concern over the proposal, stating that authorities should “exercise caution to ensure that the emotional and physical stress children experience as they seek refuge in the United States is not exacerbated by the additional trauma of being separated from their siblings, parents or other relatives and caregivers.”¹⁰ Multiple members of Congress and non-governmental organizations strongly opposed the idea.¹¹ We remain concerned that such a policy or practice would only drive vulnerable migrants further into the hands of unscrupulous smugglers or traffickers when fleeing violence for safety but fearing the prospect of family separation at the hands of U.S. immigration agents.

Moreover, other deterrence policies have already been found to violate U.S. law in the case of asylum-seekers.¹² Countless recent reports¹³ show that U.S. CBP has systematically violated U.S.

⁷ CBP, *National Standards on Transport, Escort, Detention, and Search (TEDS)*, available at: <https://www.cbp.gov/sites/default/files/assets/documents/2017-Sep/CBP%20TEDS%20Policy%20Oct2015.pdf>. For further discussion on the lack of clear mechanisms and policies to track and identify separated family members, see *Betraying Family Values*, p. 4.

⁸ *TEDS* at 4.3 and 5.6.

⁹ “Kelly: DHS is considering separating undocumented children from their parents at the border.” *CNN*. <http://www.cnn.com/2017/03/06/politics/john-kelly-separating-children-from-parents-immigration-border/index.html>.

¹⁰ See “AAP Statement Opposing Separation of Mothers and Children at the Border.” March 4, 2017. Available at: <https://www.aap.org/en-us/about-the-aap/aap-press-room/Pages/immigrantmotherschildrenseparation.aspx>. For further discussion and recommendations on the treatment of immigrant children, see also: Linton JM, Griffin M, Shapiro AJ, AAP Council on Community Pediatrics. Detention of Immigrant Children. *Pediatrics*. March 2017. Available at: <http://pediatrics.aappublications.org/content/pediatrics/early/2017/03/09/peds.2017-0483.full.pdf>

¹¹ See: “Letter to Secretary Kelly Opposing Plan to Separate Migrant Families at the Border.” March 22, 2017. Available at: <https://www.womensrefugeecommission.org/rights/gbv/resources/1460-family-separation-sign-on-letter>. See: House Committee on Homeland Security, March 8, 2017, available at: <https://democrats-homeland.house.gov/sites/democrats.homeland.house.gov/files/documents/children030817.pdf>; Letter to the Congressional Hispanic Caucus, March 8, 2017, available at: <https://congressionalhispaniccaucus-lujanrisham.house.gov/media-center/press-releases/congressional-hispanic-caucus-pens-letter-to-dhs-opposing-separation-of>; Letter to Democratic Members of Congress, March 9, 2017, available at: <https://bass.house.gov/media-center/press-releases/rep-bass-leads-house-democrats-letter-opposing-trump-administration-plan>.

¹² See *R.I.L.R. v Johnson*, finding that the Department of Homeland Security is prohibited from using detention (a “No Release Policy”) as deterrence to future migration, suggesting more broadly that the government cannot use *any* detention tactic—including a policy of family separation—as a deterrence for future migration because it violates the principle of individual decision-making in detention issues. Available at: <https://www.aclu.org/cases/rilr-v-johnson>.

¹³ See, e.g., Borderland Immigration Council, *Discretion to Deny: Family Separation, Prolonged Detention, and Deterrence of Asylum Seekers at the Hands of Immigration Authorities Along the U.S.-Mexico Border*, 12 (2017), https://media.wix.com/ugd/e07ba9_72743e60ea6d4c3aa796becc71c3b0fe.pdf (reporting that “it is commonplace for asylum seekers to be placed in expedited removal proceedings and summarily deported . . . , despite expressing

law and binding international human rights law by refusing to allow individuals access to the asylum process by utilizing various tactics including intimidation, inhumane treatment and threats of violence, criminal prosecution, and family separation. U.S. law mandates that asylum seekers be provided with due process of law and access to the asylum process.¹⁴ In addition to the trauma caused to separated family members, the practice of dividing family units at the border leads to the unlawful result of depriving asylum seekers of access to the asylum process – as a result of the deterrent effect of family separation and due to the unavailability of critical legal evidence and witnesses – and stripping them of their right to seek asylum under U.S. law.

Former Secretary Kelly subsequently stated on the record while testifying before the U.S. Senate that the DHS would not, in fact, “routinely” separate children from their families when arriving at the border except under extenuating circumstances, such as if “the mother is sick or addicted to drugs,” or if the life of the child was in imminent risk.¹⁵ He testified to the U.S. Senate that these were the only circumstances mothers and children would be separated and that he “[could not] imagine” doing so in other cases.¹⁶ Despite this, our organizations and the media are documenting cases of separation where, to our knowledge, families were not separated on account of a mother or father who fit this description.

Family separation incidents are continuing and appear to be increasing

Despite Constitutional protections guaranteeing parents fundamental due process rights in the care and custody of their children, controlling Supreme Court precedent, and the government’s commitment that children would not be separated from their family members at the border except under extenuating circumstances, our organizations have documented numerous instances of family separation in the last several months alone. The Florence Immigrant and Refugee Rights Project (FIRRP), a legal service provider in Arizona, has identified 155 cases of family separation at the border involving parents and children as of late October 2017; of these, 90 cases had occurred

fear”); U.S. Comm’n on Int’l Religious Freedom, *Barriers to Protection: The Treatment of Asylum Seekers in Expedited Removal*, 20 (2016) (reporting that despite findings and recommendations in a 2005 study relating to primary inspection, USCIRF observers in 2016 continued to find “several examples of non-compliance with required procedures” in CBP primary inspection interviews); see also 2005 USCIRF Report, *supra* note 25, at 54 (finding that, in approximately half of the inspections observed, inspectors failed to read the proper advisals regarding asylum to the non-citizen and that “in 15 percent of [the] cases [] where an arriving [non-citizen] expressed a fear of return to the inspector, that [non-citizen] was not referred” for a credible fear interview).

¹⁴ U.S. Const. Amend. V. See also, e.g., *Marincas v. Lewis*, 92 F.3d 195, 203 (3d Cir. 1996) (“The basic procedural rights Congress intended to provide asylum applicants . . . are particularly important because an applicant erroneously denied asylum could be subject to death or persecution if forced to return to his or her home country.”). 8 U.S.C. § 1158(a)(1) (The INA provides that any noncitizen “who is physically present in the United States or who arrives in the United States” has a statutory right to apply for asylum, irrespective of such individual’s status);

¹⁵ Testimony before Congress in the Senate Homeland Security and Governmental Affairs Committee hearing titled, “Improving Border Security and Public Safety” (April 5, 2017); see also “Kelly says DHS won’t separate families at the border.” *CNN*. <http://www.cnn.com/2017/03/29/politics/border-families-separation-kelly/index.html>. See Elise Foley and Roque Planas, “Trump Administration Won’t Routinely Separate Families At The Border After All,” (HuffPost April 5, 2017), available at: http://www.huffingtonpost.com/entry/dhs-separating-families-border_us_58e50d4fe4b0f4a923b448b7.

¹⁶ *Id.*

in the most recent quarter as of that time, indicating a significant spike in incidents of family separation.¹⁷

Lutheran Immigration and Refugee Service (LIRS), an organization that provides services to unaccompanied children in transitional foster care around the country, reports that until April 2017 it had seen no cases of children separated from parents, and in May and June 2017 encountered one each month. Beginning in July 2017, however, LIRS began to see a substantial increase, with four cases reported in July, five cases in August, and nine cases in September.¹⁸ Separated children can include very young children; LIRS's FY 2017 data revealed that children's ages ranged from two to 15, and were an average of eight years old. In the vast majority of these cases, LIRS social workers have not been made aware any imminent child abuse or neglect allegations that would warrant a child's separation from a parent consistent with child welfare standards.¹⁹ These incidents of family separation directly contradict then-Secretary Kelly's statements that DHS would not separate families unless a child was in danger.

DHS and its components have consistently demonstrated that they are unable to manage the separation of family members in a legal and ethical manner. Family members are given little to no information on what happens to those from whom they are separated, including how to locate, contact, or reunite with them. DHS and its components continue to lack the ability to track familial relationships of individuals who are transferred to Immigration and Customs Enforcement (ICE) custody or to coordinate mechanisms to work with ORR within the Department of Health and Human Services (HHS) or the Department of Justice (DOJ) to facilitate location of, contact with, or release and reunification with separated family members.

Criminal prosecution of asylum seekers impedes access to protection and increasingly separates families

The undersigned organizations have received an increase in reports of family units being broken up where a parent traveling with a child is referred by CBP officials for prosecution by DOJ under 8 U.S.C. §1325 for illegal entry or 8 U.S.C. §1326 for illegal re-entry; parents in these cases may have no prior criminal history or removal orders. Those who *do* have prior removal orders—and who are prosecuted for illegal re-entry under 8 U.S.C. §1326—are often seeking humanitarian relief in the United States.

A recent report in the Houston Chronicle, detailed further below, reported knowledge of 22 specific cases “in which parents [...] with no history of immigration violations were prosecuted for the misdemeanor crime of improper entry and had their children removed.” The article notes that “[f]ederal defense attorneys across the southern border say they are fielding unprecedented

¹⁷ Data on file with authors.

¹⁸ Affidavit of Jessica Jones, Policy Counsel at Lutheran Immigration and Refugee Service (LIRS). December 8, 2017. On file with authors.

¹⁹ DHS PREA Regulations also set out standards for the safety of juveniles and when a report should be made to mandated reporting agencies by CBP or ICE. See 6 CFR § 115.14, 115.114, 115.61, and 115.161.

requests from migrant clients to find their children.”²⁰ This reported trend is consistent with the cases that LIRS has documented, nearly all of which “occurred after the parent or legal guardian was criminally prosecuted for crossing the border illegally or for reentry following a prior order of removal.”²¹ Indeed, according to reports in the *Houston Chronicle*, Border Patrol (BP) officials affirmed at an October 2017 meeting that family separation was occurring. A subsequent email from CBP’s Office of Assistant Chief Counsel’s noted that “[a]ny increase in separated family units is due primarily to the increase in prosecutions of immigration-related crimes.”

These cases present not only additional hurdles to family reunification, but the DHS Office of Inspector General (OIG) has already identified the prosecution of asylum seekers as a practice that may violate U.S. obligations under international law.²² Prosecutions which take place before an asylum seeker is able to complete, or in many cases even begin, the process of applying for asylum will have the effect of denying asylum seekers access to the asylum process or dissuading them from even attempting to avail themselves of humanitarian protections in the United States.²³ Asylum law in the United States shields asylum seekers from punishment (including prosecution) for unauthorized entry.²⁴

The Impact of Family Separation

The long-term consequences of family separation have already been well documented.²⁵ The cases below illustrate the same trauma and the same profound impact on the ability to express or document a fear of return as the dozens that have previously been published and/or filed with your agency. Separated families are desperate to understand what happened to their loved ones and may be unable to fully articulate or provide evidence to support a claim when they have no information about and cannot locate those with whom they traveled. Many separated individuals receive no

²⁰ “Trump moves to end ‘catch and release’, prosecuting parents and removing children who cross border.” *Houston Chronicle*. November 25, 2017. Available at: <http://www.houstonchronicle.com/news/houston-texas/houston/article/Trump-moves-to-end-catch-and-release-12383666.php>.

²¹ Affidavit of Jessica Jones.

²² The 1951 Refugee Convention states: “The Contracting States shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened....” See: *Streamline: Measuring its Effect on Illegal Border Crossing*, DHS Office of the Inspector General, May 2015, pp. 16-17, available at: https://www.oig.dhs.gov/assets/Mgmt/2015/OIG_15-95_May15.pdf. See also: *The Rise in Criminal Prosecutions of Asylum Seekers*, Human Rights First, July 2017, pp. 6-7 Available at: <http://www.humanrightsfirst.org/sites/default/files/hrf-criminal-prosecution-of-asylum-seekers.pdf>.

²³ Sign-on Letter to Stop Streamline Prosecution of Asylum Seekers, July 10, 2015, AILA Doc. No. 15072304, available at: http://www.aila.org/advo-media/aila-correspondence/2015/sign-on-letter-end-prosecution-of-asylum-seekers?utm_source=aila.org&utm_medium=InfoNet%20Search.

²⁴ *Streamline: Measuring Its Effect on Illegal Border Crossing*, p. 2.; The United States is bound through its accession to the 1967 Protocol Relating to the Status of Refugees to Article 31(1) of the Refugee Convention, which prohibits states from penalizing refugees for illegal entry. Because refugee status is a matter of discovery and a refugee is, in fact, deserving of the protections of the Refugee Convention and Protocol prior to recognition of refugee status, the referral of asylum seekers for criminal prosecution in the manner described by the OIG report is incompatible with U.S. commitments under Article 31(1). Convention Relating to the Status of Refugees art. 31(1), July 28, 1951, 19 U.S.T. 6259, 189 U.N.T.S. 137, available at <http://www.refworld.org/docid/3be01b964.html>.

²⁵ See: *Betraying Family Values, Divided by Detention, Our Values on the Line*.

information on how to locate, contact, or reunite with a family member. We believe that referrals to DOJ for prosecution only further exacerbate these circumstances.

The practice of separating families at the border will cause family members—including parents with young children—to seek alternative ways of entering the United States, rather than presenting at a port of entry on the U.S.-Mexico border out of fear that they will be separated. As a result, vulnerable individuals desperate to avail themselves of humanitarian and legal protections may fall into the hands of unscrupulous smugglers. A systemic, wide-scale policy of family separation on the U.S.-Mexico border intended as deterrence will have dangerous repercussions for asylum seekers attempting to access the U.S. asylum system.²⁶ Indeed one study that conducted a statistical analysis of DHS data on the migration of unaccompanied children from Northern Triangle countries from 2011 through 2016, found that no U.S. policy—whether it be deterrence or not—has a statistical impact in the migration of a child.²⁷ Instead, the study found that the single biggest indicator of a child’s migration was the number of homicides in locality of where the child lived, finding that for every 10 homicides in a locality, 6 more additional children would migrate. So not only is the practice inhumane, the premise for the policy is unfounded.

Further, the separation of family members constitutes a significant impediment to due process. Separated family members whose cases would otherwise be linked may no longer have access to critical physical or testimonial evidence, or the trauma of separation may preclude sharing critical information. In one case of a separated child who had been rendered unaccompanied and was later encountered by LIRS it was “[o]nly after talking to the parent [that] LIRS learn[ed] of why the parent and child fled because the parent kept that information away from the child to protect the child.”²⁸ As families are separated at the border, an asylum-seeking individual’s spouse, parent, or sibling—who is being held in DOJ or ICE custody in a remote detention facility hundreds or thousands of miles away—may possess the very evidence that will enable the asylum seeker to prevail before an Immigration Judge or the Asylum Office. The cases below demonstrates the

²⁶ On July 12, 2017, the American Immigration Council, along with the Center for Constitutional Rights and a large law firm, filed a class action lawsuit challenging Customs and Border Protection’s (CBP) unlawful practice of turning away asylum seekers who present themselves at ports of entry along the U.S.-Mexico border. This litigation remains pending at the time of submission of this complaint.

<https://www.americanimmigrationcouncil.org/litigation/challenging-customs-and-border-protections-unlawful-practice-turning-away-asylum-seekers>. See also, “Rights groups sue U.S. government, alleging it is turning away asylum applicants at Mexico border,” *Washington Post*, July 12, 2017, available at: https://www.washingtonpost.com/world/the_americas/rights-groups-sue-us-government-alleging-it-is-turning-away-asylum-applicants/2017/07/12/35b95508-6650-11e7-94ab-5b1f0ff459df_story.html?utm_term=.ea50c1b28505.

²⁷ *Violence, Development, and Migration Waves: Evidence from Central American Child Migrant Apprehensions*, CGD Working Paper 459. Washington, DC: Center for Global Development, available at: <https://www.cgdev.org/publication/violence-development-and-migration-waves-evidence-central-american-child-migrant>.

²⁸ Affidavit of Jessica Jones. On file with authors.

negative effects family separation may have on an individual's legal case, which may lead to prolonged detention for some or even deportation.

The Particular Focus on Parents and Children at the Border

Current and previous practices separating families affect every possible configuration of family and have occurred in a variety of settings. Our organizations have received accounts of spouses or partners being separated from one another; one or both parents from children; non-parent caregivers from dependents; siblings or cousins (including where one or both are adult); or situations in which one parent and child are sent to family detention while another parent and/or child are detained in a different family detention facility. Members of the same family may be detained in separate ORR, ICE, CBP, and DOJ facilities.

Forcibly dividing families at the border can occur in the jurisdiction of either BP or Office of Field Operations (OFO) when someone has recently crossed, but family separation can also occur when ICE or CBP apprehend family members who have been in the United States for a long time, separating them from other relatives including U.S. citizen children or others. This complaint focuses on the separation of children from their parents at the border despite having traveled to the United States together as a unit and where, to our knowledge, there are no indications of child trafficking or danger to the child at the hands of the parent.

INDIVIDUAL COMPLAINTS & EXAMPLES OF TRENDS OF FAMILY SEPARATION

Many of our organizations have already filed complaints with your office on behalf of individual separated family members. The cases below represent a sample of recent cases of family members who have been separated, with a specific emphasis on parents and children. They underscore not only the significant emotional impact family separation can have on an adult or a child, which may in turn frustrate his or her ability to articulate a claim for relief, but also the due process implications of impeding access to a loved one who may possess critical legal evidence. Any policies or practices of intentionally separating immigrant children from their parents when there is not a specific and clear protection concern, and in particular in cases involving prosecution of the parent, also raise serious legal concerns.

Further, these cases demonstrate the difficulties that separated family members face in locating and reuniting with one another once separated due to insufficient policies and systems. In many cases, family members and the service providers assisting them are not able to locate and reach all of the different affected individuals; as a result, some of the stories are incomplete without this additional information. Therefore, we are also including cases that were observed by service providers but have been anonymized and should not be seen as individual complaints. These cases

are denoted as such below. While in some cases more detailed affidavits may be available, not all cases include full identifying information.²⁹

1. Case of Sofia, whose husband was separated from their five-year-old son Rodrigo at the U.S.-Mexico border

Sofia fled Guatemala with her husband and their two minor children. Her husband, Luis, entered the U.S. with their five-year-old son, Rodrigo on or around November 11, 2017. Luis was separated from his son at the border. Sofia entered the United States with their one-year-old child, Jaime, the following day and was subsequently transferred to the South Texas Family Residential Center (STFRC) in Dilley, Texas. Sofia learned that Rodrigo had been separated from her husband and transferred to the custody of ORR and that her husband had been transferred to the San Luis Regional Detention Center in Arizona. Through the assistance of her attorney, Sofia discovered that her husband was in the custody of the U.S. Marshals and that he had likely been charged criminally for illegal re-entry to the United States, even though he had traveled to the United States for the purpose of seeking asylum.

Sofia reports that her attorney attempted to coordinate a phone call between her and her husband on numerous occasions, but was informed that phone calls between detainees are not permitted when at least one of them is in the custody of the U.S. Marshals. Sofia describes the emotional impact of being separated from both her minor son, Rodrigo, and her husband and the negative impact this separation had on her legal case:

When I finally spoke to Rodrigo, [my older son], we both cried. He seemed very upset. He asked why his father had left him. I did not know what to tell him to make him feel better. I had to lie and tell him that his dad was working and that he was going to be brought to me very soon to try to calm him down, but it did not help much. He is far too young to be separated from his parents. He is in a foreign country where everything seems different and there is no one around him that he knows.

I had my credible fear interview on Monday, November 27. I know that I cannot return to Guatemala, and did my best to explain why to the asylum officer. However, I feel that I really needed to speak to my husband to understand exactly why we were in danger because he was the one who heard the threats against us directly. I could not describe exactly what words the gang used or how many times we were threatened. I think that my husband did not tell me the whole story because he was trying to protect me. I am waiting and hoping that what I knew was enough to pass the interview and that I will be called to sign a positive decision soon.

At the time of submission of this complaint, Sofia and their one-year-old child Jaime had been released and were permitted to pursue their immigration cases in a non-detained setting; it is

²⁹ Only pseudonyms are used in public versions of this complaint.

unclear whether or not Rodrigo remains in the custody of ORR or where exactly Luis remains in custody.

2. Aurelia, Honduras, formerly detained at Karnes County Residential Center with her 1.5-year-old daughter; separated from her husband who was transferred to U.S. Marshals custody

Aurelia, her husband, and their 1.5-year-old daughter fled gang violence in Honduras and entered the United States on October 22, 2017 around El Paso, Texas. Aurelia reports that after the family was apprehended by U.S. Border Patrol authorities (BP), officers indicated to the family that, “they were not accepting anymore [sic] families with kids.” Aurelia reports that although she requested to call her sponsor, officials told her that they “weren’t allowed to have a lawyer, or a judge, and that they were the judges.” She states, “[T]hey did not ask us if we feared returning to our country and they did not give us the chance to ask for asylum.”

Aurelia reports that her husband was subsequently transferred to another facility. Aurelia was given no information regarding his location, just that he had been transferred to a different facility and that he would be deported after her. Although she was told she would be deported, she was instead transferred to the Karnes County Residential Center with her 1.5-year-old daughter. She tried repeatedly to locate her husband. She was told that he was detained in the Otero County Processing Center, but even when Geo Group officials tried to connect her to the facility, she was told that the facility could not locate him. She finally learned that he’d been referred to U.S. Marshals custody, not ICE custody. Aurelia reports that her husband has no criminal history, and writes “I only want to communicate with him and to know how he is.” Her daughter also “asks for him every day.”

3. Maria, Guatemala, separated from her five- and 14-year-old children and her husband

Maria fled Guatemala with her husband, child, and her husband’s child to escape violence, including the murder of their 21-year-old child. They entered the United States on September 9, 2017, at the San Ysidro port of entry. Maria reports that on September 11, she was separated from her husband and children and subsequently transferred to the Otay Mesa Detention Center. For at least ten days, she notes that DHS officers failed to provide her with any information regarding the whereabouts of her children. At that point, she was told that her children had been separated from her husband and that they were sent to a shelter in New York while her husband was also detained at the Otay Mesa Detention Center.

Maria received a phone number to call her children, which she reports does not give her the opportunity to leave a message if no one answers. She writes that: “When I do talk to my kids, they tell me they don’t want to be there, they miss me, and they want to be with me.”

Maria and her husband agreed to have their children released to an uncle; however the uncle was not able to receive the children. She is concerned over what will happen with them, and they continue to be in ORR custody in New York.

4. Case of Valentina, detained with one-year-old child, after being separated from her husband at the U.S.-Mexico border

Valentina fled El Salvador with her husband and their one-year-old son and entered the U.S. on or around November 14, 2017. Following several days in a processing unit on the border near San Luis, Arizona, Valentina's husband was transferred to an adult immigrant detention center in Arizona, and Valentina and their child were transferred to a family detention center in Dilley, Texas.

Valentina reports that she attempted to speak with her husband on the phone on numerous occasions after they were separated. According to Valentina, the adult detention center in which her husband was detained required proof of her marriage to her husband in order to coordinate a phone call. She describes the emotional impact of the separation from her husband:

Hilario and I are legally married, but I do not have our marriage certificate easily accessible. I only traveled with my passport, which has my married name of "[last name]." [My pro bono attorney at] CARA requested if that was sufficient for the phone call, but it has not yet been accepted. My mom has been trying to send me my marriage certificate, but whenever she tries to fax or email it does not go through.

I received my positive credible fear determination today. Hilario and I fled El Salvador for exactly the same reason, so I believe that if I have a positive credible fear determination he should also have one. I am terrified of what will happen if he is deported. I fear he will be killed and I will have to raise [Juan] alone. I am worried about the developmental effects the psychologist talked about. I feel helpless because I am unable to talk to my husband and help him.

Valentina's pro bono attorney contacted USCIS and requested that her case be linked to that of her husband's. Valentina was given a phone call to her husband 13 days after her attorney requested it. Her case was eventually linked to that of her husband. Valentina and her minor son were released from custody on or around December 5, 2017 and allowed to pursue their immigration case in a non-detained setting. However, her husband remains detained at the time of submission of this complaint.

5. Case of Camila, Mexico, detained with 17-year-old daughter, separated from her husband and 16-year-old child at the U.S.-Mexico border

Camila fled Mexico with her husband and their two teenaged children, Rebeca (17 years old) and Xavier (16 years old). Xavier is a U.S. citizen. The family entered the United States on or around November 7, 2017, at the Hidalgo Port of Entry. Xavier was separated from his parents and older

sister shortly after they entered the United States, and transferred to the custody of Camila's sister-in-law, who lives in Texas. Camila and Rebeca were transferred to the South Texas Family Residential Center in Dilley, Texas, and her husband was transferred to the Port Isabel Detention Facility. Camila describes the emotional trauma associated with being separated from her husband and son:

It has been very traumatic for our family to be separated in this way. It is difficult for my daughter and I to discuss it without crying. It has been very difficult for my daughter to be separated from her father and brother. I have never been separated from my son and I worry about him every day. We fled Mexico as a family and I believe we should have been kept together as a family, especially because my children are still underage.

At the time of submission of this complaint, Camila and her daughter have been reunited with her son and permitted to pursue their immigration case in a non-detained setting, but her husband remains detained.

6. Case of Javier, El Salvador, separated from 12-year old son Rodrigo near San Ysidro Port of Entry

Javier and Rodrigo presented themselves at the San Ysidro port of entry on November 12, 2017, after having first tried to request asylum at the Otay pedestrian port of entry but being indicated they had to find the San Ysidro port to be process. Upon requesting asylum, Javier and Rodrigo were handcuffed and taken to a holding room (at some point during this time, the handcuffs were removed). Both were eventually transferred to another holding cell with other fathers and children. The cell contained a toilet and sink, meaning that any use of the toilet occurred with the other men and children around. Javier reports that he and the others spent some days being held in the cell or transported to another federal building during the day and being transported to a hotel in the evenings.

On November 16, 2017, the men were taken to a cell in the other building and held again with other men and their children. Officers repeatedly pressured the men to give up their children; eventually, when only four men and their children were left, someone who introduced himself as the "boss" explained again that the men would be separated from their children. As Javier was taken out of the cell to identify his and his child's belongings, officers took his and the children of the other fathers. Javier reports that he never signed anything relinquishing custody of his child. He reports that the officer also took his belongings. Javier reports that immigration officers gave him a phone number with which he could try to locate his son and speak to him; however, Javier states that he was unable to locate his son despite repeated attempts to do so. According to advocates working on his case, Rodrigo remains in ORR custody.

7. Case of Angelo, El Salvador, separated from his one-year-old son Tobias near San Ysidro Port of Entry

Angelo and his one-year-old son requested asylum from U.S. border authorities on November 12, 2017. They were held in custody at San Ysidro in a room they described as very cold. While at San Ysidro, an immigration officer (who Angelo reports was wearing a green uniform, though all other officers were wearing blue) took an inventory of Angelo's belongings, and kept one-year-old Tobias's birth certificate while returning the rest of the items. When Angelo asked why she kept it, he reports that she told him that it was important and needed to remain separate. Angelo and Tobias were, like others, transferred back and forth between a federal immigration building in San Diego during the day and a hotel at night. While en route to the building on November 16, 2017, Angelo reports that he asked to change Tobias's diaper, but officials refused the request.

Angelo reports that while at the building on November 16, immigration officials repeatedly approached Angelo and other fathers to pressure them into giving up their children. On one occasion, Angelo reports that an officer indicated that "letting go of their kids was what was good for them, because otherwise it would affect their whole process." According to Angelo, the officer also indicated he would "take action" if the fathers did not cooperate, and that "they should not make their children witness violence." Angelo reports that eventually an official arrived who indicated that he was the director, and that he said that he had orders from authorities above him to separate the fathers from their children.

Angelo and the three other dads insisted that they stay with their children, but eventually an officer took Tobias away. Angelo reports that the officers did not take Tobias's belongings, and that that evening he and the other fathers were transferred to the Otay Mesa Detention Center. Angelo eventually received a phone number that he was told to use to locate Tobias, but when he called it he was told that he could not receive any information about Tobias "for security reasons." According to advocates working on his case, Tobias remains in ORR custody at the time of submission of this complaint.

8. Case of Alejandro, El Salvador, separated from his five-year-old daughter Aria near San Ysidro Port of Entry

Alejandro and his five-year-old daughter, Aria, turned themselves in to seek asylum at the San Ysidro port of entry on Friday, November 10, 2017, fleeing death threats in El Salvador. Alejandro showed authorities his and his daughter's passports, which indicate that he is her father. He was not asked for any additional documents. Alejandro reports that he and his daughter were there for approximately five days, that it was cold, and that his daughter "would cry all the time because she was afraid that the men guarding us with guns were there to kill us. She knew that we had left El Salvador because someone wanted to kill us so she was very afraid."

Alejandro reports that he and other fathers and their children were transported subsequently to a hotel. The next day they were taken to a building where they were detained in two different holding cells until they returned to the hotel in the evening. The following morning, they returned to the

office. They were eventually told to separate their belongings from their children's and that they would be separated from them. Although they resisted, eventually an individual who Alejandro reports was a senior official with ICE (a "jefe") appeared who told them that the order to separate had come from higher levels and that they would have to be separated from their children. Alejandro interpreted the official's words as a threat that their cases would be negatively impacted. Alejandro reports that the children became extremely upset. He said that Aria said to him " 'I don't want to be separated, I'm going to hug you so hard that no one will be able to separate us [...] Who will protect me if I'm afraid that someone will kill me?'"

After they were separated, Alejandro reports that he and the others received a phone number for ORR to call his daughter, but that he could not do so from detention. Alejandro writes:

I am worried about [Aria's] mental health. I tried calling but I have no funds. She has a congenital condition that causes her to lose control of her bladder.

I do not understand why I was separated from my daughter. The officers never asked me for any other documents proving I was her father. It did not seem that there was ever any question that Aria is my daughter. I have never been arrested in any country. I had an *in absentia* removal order from many years ago, but I explained that to the officers and they never mentioned it as a reason for taking my child from me. It has been very difficult not knowing where she is.

According to advocates working on his case, Aria remains in ORR custody at the time of submission of this complaint.

9. Case of Federico, Honduras, separated from his three-year-old son Sami at the U.S.-Mexico Border

Federico and Sami crossed the U.S.-Mexico border on Monday, November 13, 2017, to seek humanitarian protection, after fleeing Honduras. Federico and Sami were apprehended by Border Patrol and transferred to a facility he believes was in Chula Vista. Federico reports that he and his son were badly treated while being held; Sami had to repeatedly use the bathroom and eventually the Border Patrol officer interacting with them got upset and screamed at them to shut up. Sami ultimately wet his pants. When Federico asked to call his sponsor, he reports he was told that he was not allowed to do so and that "it would not make any difference." On Tuesday, November 14, Federico and Sami were taken to a building he believes was in San Diego, and that night stayed in a hotel. He and his son were taken back to the building the next day and held in a room with other fathers and children until they returned to the hotel that night. On November 16, he reports they were again taken to the same building and that on this day they were told they would have to let go of their children so the children could go to a shelter.

Federico reports that they repeatedly resisted, until eventually an official arrived who announced that he was in charge. Federico reports that he and the other fathers still tried to refuse letting go of their children, but that eventually the officials returned and said they would “have to use force to take them away.” Federico writes that Sami “begged to not be taken away and put his arms around me. I grasped him firmly in my arms. I told the officials that I would not give him up, and that they would have to take him from me. Then, one of the officers came up to me and with both hands forcefully pulled [Sami] out of my arms. They didn’t give us any paperwork to sign or anything.”

Federico shared that he was only provided with a number for ORR, but told when he called that they could not give him any information about his son. He writes “I feel like I have no will to do anything without knowing where my son is or whether he is safe. The only thing I ask for right now is that [Sami] be by my side.” Advocates working on the case believe Sami remains in an ORR custody program.

10. “Andrea,” Honduras, older woman separated from husband, children, daughter-in-law, and grandchild, separated at the U.S.-Mexico border³⁰

Andrea is a Garifuna woman in her 60s who presented at the Nogales port of entry along the Arizona-Mexico border in June 2017. She has no criminal history and no past immigration history. Andrea and her family fled to the U.S. after violent gangs killed three of her sons because the family was unable to pay the monthly extortion payments the gang demanded. Andrea presented at the port of entry with her son, daughter, daughter-in-law, granddaughter and husband, who suffered from cancer and was seriously ill. Her daughter, granddaughter, daughter-in-law, and husband were paroled into the United States and allowed to go to Texas to complete their immigration case in a non-detained setting, while Andrea and her son were both detained in Eloy, Arizona. Despite Andrea’s husband being in critical condition as of late October 2017, ICE refused to release Andrea to be with him. It was only after her husband’s death and intensive efforts by Andrea’s attorneys that Andrea was paroled in order to attend her husband’s funeral.

11. “Fernando,” Honduras, disabled 18-year-old separated from mother and younger siblings at the U.S.-Mexico border

Fernando is an 18-year-old with developmental disabilities, who fled gang violence in Honduras with his mother and younger siblings following the murder of his half-brother. Fernando, his mother, and his younger brothers presented at a port of entry on the U.S.-Mexico border in September 2017. The family had never been in the United States before. Fernando was separated

³⁰ Cases #10-#13 are anonymized in order to protect identity and were reported through the Florence Project. Although we cannot share more specific information, they serve to illustrate a growing trend of family separation observed by service providers.

from his family members and detained alone in adult detention while his mother and siblings were sent to a family detention center. It has been difficult for attorneys working with Fernando to reach the rest of his family and for Fernando to provide information about his claim due to his developmental disability. Because of the separation, it has also been difficult for attorneys to obtain medical records documenting Fernando's medical history and disability and which would provide critical evidence in his asylum case. Fernando remained detained in Arizona as of December 6, 2017.

12. “Anna,” Guatemala, a two-year-old separated from her father at the U.S.-Mexico border and rendered unaccompanied and “Antony,” Guatemala, two-year-old separated from his father at the U.S.-Mexico border and rendered unaccompanied

Anna's and Antony's cases are completely unrelated, but both are examples of family separation involving young toddlers. Anna is a two-year-old Guatemalan girl who was separated from her father at the U.S.-Mexico border and transferred to ORR custody. Antony is a two-year-old Guatemalan boy who was also separated from his father at the U.S.-Mexico border and encountered by legal service providers in ORR custody. Both were too young to be able to communicate with legal service providers about their arrest, separation, or reasons why their families left Guatemala. In Antony's case, legal service providers were able to determine that his father had been prosecuted for illegal entry 8 U.S.C. §1325(a)(1) in the Western District of Texas. This separation occurred despite records indicating that the father had no prior immigration history or known criminal history.

13. “Carlos,” Guatemala, 16-year-old separated at U.S.-Mexico border from his mother, who was prosecuted for illegal entry under 8 USC §1325(a)(1)

“Carlos” is a 16-year-old boy from Guatemala who was separated from his mother after they were apprehended while crossing the U.S.-Mexico border. Together they were seeking asylum based on gang violence and threats they received after reporting violence to the police. Carlos was transferred to a shelter in Tucson as an unaccompanied child, while his mother was prosecuted and convicted for illegal entry pursuant to 8 U.S.C. §1325(a)(1) in the Western District of Texas. According to records, Carlos's mother had no immigration or criminal history.

14. “Alex,” who was separated from his toddler child, “Jesse,” and then subsequently deported³¹

Jesse, a toddler child and his parent Alex were detained in CBP custody, where a CBP agent mocked Alex and the circumstance of being in CBP custody. The agent asked Alex if Alex believed in God. Alex replied that he was Catholic. The agent then proceeded to say, "Where is your God now?!...Is your God going to save you from being deported?!...Your God must not care about you because he allowed you to be here!" Alex was subsequently deported to their country

³¹ Case information in #14-#15 are from the affidavit of Jessica Jones, LIRS. They have been anonymized and given gender neutral names to protect the identity of the family. Full information will be filed separately.

of origin without his child. The child was rendered unaccompanied and transferred to ORR and placed in an LIRS foster care program. Upon placement, ORR did not have any information on whether Alex had been criminally prosecuted, where he was, or whether the child had a fear of return, because the Form 93 or I-213 were not provided to ORR. LIRS has frequently called Alex to gather more case information and understand what Alex would like to happen; during these calls, “Alex frequently would sob uncontrollably about the experience in CBP custody and reported severe anxiety attacks. The foster parent caring for the toddler child has reported that the child has also had severe anxiety attacks for a toddler and has been unable to sleep at night due to the separation from the parent. This has required a high level of care by the foster parent and LIRS foster care agency due to the medical attention needed for the child.”

15. “Chris,” an asylum-seeking parent separated from “T.J.” a U.S. citizen child and “A.J” an undocumented child

TJ, a U.S. citizen child and AJ, an undocumented child arrived at the border with their parent Chris who was coming to the United States for the first time and seeking asylum. Border Patrol separated both children from Chris and LIRS believes Chris was transferred to ICE detention, but Chris may have been previously detained in United States Marshals custody. LIRS does not have these details because ORR was not provided the I-213 and other documentation. TJ was transferred to state child protective services and because AJ was rendered “unaccompanied” when CBP transferred AJ to ORR custody. ICE told Chris that if he decided to pursue an asylum case he would remain detained for over six months. Further, Chris has children in two different forms of custody and may face a child welfare proceeding for Chris’s U.S. citizen child. Forced to choose between months of separation from his children or pursuing asylum, Chris ultimately decided not to pursue an asylum claim and requested to be deported.

CONCLUSION

The above case examples demonstrate a disturbing, increasing trend of family separation at the hands of U.S. immigration officials at the U.S.-Mexico border despite former Secretary Kelly’s assurances to the contrary. The separation of family members, and specifically minor children from their parents, absent extraordinary circumstances, raises significant legal concerns and threatens the most fundamental interests of parents and their children.

We urge your office to investigate and clarify current DHS policy on family separation and ensure that former Secretary Kelly’s commitment to avoid family separation is implemented. Many of our organizations have also outlined recommendations designed to prevent family separation, ensure a fair process for those seeking protection, and help families stay connected and in communication if separation does occur. These include that:

1. DHS should consider family unity as a primary factor in all charging and detention decisions. DHS agents should receive training and clear guidance on the identification, documentation, processing, and placement decisions for families.

2. DHS and its component agencies should document and trace all family relationships to better understand when family separation occurs and inform strategies to address it.
3. DHS should consider the best interests of the child in all processing, custody, and removal and repatriation decisions.
4. DHS should mandate the hiring of child welfare professionals at the border to supervise the protection of children and families and, in rare instances in which it is warranted, oversee instances of family separation.
5. DHS should coordinate among its components and with HHS and DOJ to identify family separation and facilitate release and reunification. DHS and its components should work with HHS and DOJ to ensure an inter-agency process to help separated family members be released and/or reunited. This should include mechanisms to help detained family members locate and connect with loved ones, such as an inter-agency hotline.³²
6. DHS should prioritize humanitarian considerations and obligations to ensure access to protection for asylum seekers when considering referral for criminal prosecution. Those traveling together as a family and who are asylum seekers should not be referred for prosecution until a determination has been made about an individual's eligibility for relief.
7. For families who require additional support, DHS should explore alternatives to detention such as the Family Case Management Program (FCMP) that ICE terminated in June 2017 and that—rather than unnecessarily relying on detention or ankle monitors—facilitated access to case management to ensure compliance with immigration requirement.
8. The Office for Civil Rights and Civil Liberties and the Office of the Inspector General should continue to investigate the unscrupulous prosecution of asylum seekers for entry and reentry following a former attempt to avail themselves of humanitarian protection in the United States.

Thank you in advance for your time and consideration. If you have any questions or require additional information, please contact Katie Shepherd of the American Immigration Council at kshepherd@immcouncil.org or (202) 507-7511, or Katharina Obser of the Women's Refugee Commission at katharinao@wrcommission.org or (202) 750-8597.

Al Otro Lado

American Immigration Council (Council)

American Immigration Lawyers Association (AILA)

³² The undersigned organizations recommend the implementation of a coordinated, national phone system that will permit detained (and non-detained) individuals to locate and contact their family members. Individuals in ICE, CBP, and DOJ custody—who should already have access to telephones with which they may call their attorneys or non-detained individuals—should be able to call a free number and speak with an individual who can assist in coordinating a phone call in a timely manner. The agency has already had some success with the ICE ERO Detention Reporting and Information Line (DRIL), which may serve as a model, but is specific to ICE custody, rather than HHS and DOJ. The coordination of phone calls between family members could address several concerns raised in this complaint.

Florence Immigrant and Refugee Rights Project (FIRRP)

Kids in Need of Defense (KIND)

Lutheran Immigration and Refugee Service (LIRS)

Refugee and Immigrant Center for Education and Legal Services (RAICES)

Women's Refugee Commission (WRC)