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Legal Sidebar

Family Separation at the Border and the *Ms. L.* Litigation

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The separation of families of non-U.S. nationals (aliens) apprehended by immigration authorities near the border has prompted contentious debate among policymakers as well as legal challenge to immigration detention policies. Trump Administration officials have called for legislation addressing family separation, while some lawmakers have urged the executive branch to modify current separation policies to ensure that families detained by immigration authorities are held or released from custody together. On June 20, 2018, President Trump issued an executive order announcing that it is "the policy of this Administration to maintain family unity, including by detaining families together where appropriate and consistent with law and available resources."

At the time the executive order was issued, there was a pending lawsuit, *Ms. L. v. U.S. Immigration and Customs Enforcement*, challenging on substantive due process grounds the practice of separating alien families at the border. And notwithstanding the June 20 executive order, on June 26, 2018, the presiding district judge considering the challenge ordered the Trump Administration, subject to exception, to (1) stop the practice of separately detaining alien parents and minor children who had lacked authorization for admission to the United States and who were apprehended by immigration authorities at or between designated ports of entry along the border, and (2) reunite within weeks all separated alien parents and their minor children. Additionally, the court later issued a temporary restraining order blocking the government from deporting alien parents until they have been reunified with their children for at least one week so that parents can make "an informed, non-coerced decision if they are going to leave their children behind" pending the child's separate immigration proceedings. Though at least some policies that resulted in family separation reportedly have been modified or ended, litigation relating to these policies remains ongoing. This Legal Sidebar explores the underlying policies resulting in family separation, the due process issues arguably implicated by these policies, and the political and judicial processes invoked to tackle the issue of family separation.

Executive Action: The separation of families in immigration authorities' custody is often (though not always) the result of the interplay of immigration enforcement policies of two agencies – the Department of Homeland Security (DHS) and the Department of Justice (DOJ). Under the Immigration and Nationality Act (INA), aliens who attempt to enter the United States without valid entry documents are generally subject to removal, and DHS is primarily responsible for the apprehension and detention of those aliens pending removal proceedings. DOJ, in turn, is the lead agency responsible for pursuing

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criminal violations of the INA that may subject an alien to criminal prosecution and punishment. The initiation of removal proceedings against an alien by DHS and the pursuit of criminal charges by DOJ are not mutually exclusive; in some instances, the government may charge an alien with a crime and, following the conclusion of criminal proceedings, seek to remove the alien from the United States.

Earlier this year the Trump administration initiated a "zero-tolerance" policy for illegal entry into the United States, instructing federal prosecutors to bring criminal charges for unlawful entry against adult aliens caught attempting to enter the United States illegally between official ports of entry. The criminal prosecution of an alien parent, and the resulting transfer of that parent from DHS to criminal law enforcement custody, appears to have consequences for the status of the alien child. When an alien parent is arrested and placed in criminal detention, immigration authorities have considered an accompanying child younger than eighteen to be an "unaccompanied alien child" (UAC)—likely because a parent is no longer "available to provide care and physical custody" of the child. Federal statute generally requires that a UAC (other than a national of a contiguous country who consents to voluntary return) is transferred from DHS custody into the custody of the Department of Health and Human Services' Office of Refugee Resettlement (ORR), and may, in turn, be transferred to the custody of a sponsor in the United States. Accordingly, when an alien parent is transferred to DOJ custody for criminal prosecution, the parent's children in DHS custody may be transferred to ORR.

Separation may also occur in situations other than because of criminal prosecution. Reportedly, in some instances DHS has questioned whether an apprehended alien adult and child are actually related. In such situations, if DHS believes the adult is not the "parent or legal guardian" of the child, the child may be deemed a UAC and transferred to ORR. In still other cases, alien children reportedly have been separated from their parents because of medical concerns or because the parents' criminal history led authorities to believe they posed a danger to their children.

Reportedly, some alien parents—after being released from criminal custody and placed in civil immigration detention—have had trouble locating and reuniting with their children. There have been additional reports that some alien families have also been separated when lawfully seeking asylum at official U.S. ports of entry, although the Attorney General has stated that the zero-tolerance policy does not apply in those circumstances. (Unlike with criminal detention, families generally may, but are not required to, be detained together in immigration detention facilities.) And in some cases, parents have been removed from the United States before they have been reunited with a child in ORR custody.

The executive order targets, but does not definitely end, family separation at the border. The order declares that it is "the policy of this Administration to maintain family unity, including by detaining families together *where appropriate and consistent with law and available resources*." It also directs the DHS Secretary to detain alien families together throughout the duration of criminal or immigration proceedings "to the extent permitted by law and subject to the availability of appropriations." Also, the order does not specifically mention the zero-tolerance policy, but it does state that the Administration would "initiate proceedings to enforce [the unlawful entry statute] and other criminal provisions of the INA until and unless Congress directs otherwise," raising questions about whether the order maintains or in any way alters the Justice Department's zero-tolerance policy. Finally, reuniting alien families that have already been separated is not mentioned. Taken together, these qualifications in the executive order do not clearly guarantee an end to family separation.

In practice, the government appeared unable to pursue simultaneously zero tolerance policies and ensure that alien families in DHS custody were not separated. The day after President Trump issued the executive order, DHS's Customs and Border Protection (the lead component responsible for immigration enforcement at the border) announced that it planned to implement the order by transferring to Immigration and Customs Enforcement (the DHS component primarily responsible for detaining aliens pending removal proceedings), together, families apprehended while unlawfully crossing into the United States, but would still refer the adult parents for prosecution. However, within days of that announcement,

CBP stated that it would no longer refer those alien parents for prosecution and, because ICE has insufficient space in family detention centers, would release the families during the pendency of immigration proceedings. For its part, HHS reportedly communicated in early July that it was no longer "receiving anymore referrals as a result of the zero tolerance policy."

***Ms. L.* Litigation**: Before the executive order, asylum seekers identified as "Ms. L." and "Ms. C." filed a class action lawsuit against the government, claiming, among other things, that their substantive due process rights have been violated by the government's practice of separating families entering the United States at the border—both when seeking admission at a port of entry and when illegally crossing into the United States between ports of entry. Ms. L., a citizen of the Democratic Republic of the Congo, alleges that she and her seven-year-old daughter sought asylum at the San Ysidro Port of Entry at the border of Tijuana, Mexico and San Diego, California. They were initially detained in civil immigration custody by DHS, but, Ms. L. says, within a few days, the child was transferred to an ORR facility in Chicago, Illinois because immigration officials averred that Ms. L. may not actually be the mother "despite Ms. L's protestations to the contrary and [the daughter's] behavior." Ms. C., a citizen of Brazil, fled with her fourteen-year-old son to the United States, entered between official entry points, and was apprehended by immigration authorities. She was arrested and taken into custody for unlawfully entering the United States, and her son was sent to an ORR facility in Chicago. Ms. C. was convicted and was incarcerated for twenty-five days. Afterwards, she was transferred to an immigration detention center for removal proceedings and later released on bail. She had been detained for a total of five months, but the separation from her son lasted eight.

The plaintiffs have principally asserted that the government has no legitimate interest in separating them, and those similarly situated, from their children and that doing so violates their substantive due process rights to family integrity. (Claims brought under the Administrative Procedure Act and the Immigration and Nationality Act were dismissed.) While the procedural due process rights of aliens who have not been admitted to the United States may be limited in the context of immigration matters, the *substantive* component of the Due Process Clause, has generally been interpreted to protect the rights—at least to some extent—of all persons physically present in the United States, including aliens who have entered unlawfully. The Supreme Court also has recognized "the interest of parents in the *care*, *custody*, and *control* of their children" as a constitutionally recognized liberty interest. For its part, the government did not contest that the substantive component of the Due Process Clause protects the plaintiffs, but argued that there is no constitutional right for aliens in immigration authorities custody to be detained together, and even if such a right exists, family separations have resulted from the existing legal framework governing the "lawful immigration enforcement and detention decisions made by the Government," and thus the government has not acted in a manner that shocks the conscience.

The district court certified the class in the *Ms. L.* litigation and granted a preliminary injunction against the government on June 26, 2018. The class is defined as:

> [a]ll adult parents who enter the United States at or between designated ports of entry who (1) have been, are, or will be detained in immigration custody by the DHS, and (2) have a minor child who is or will be separated from them by DHS and detained in ORR custody, ORR foster care, or DHS custody, absent a determination that the parent is unfit or presents a danger to the child.

The class excludes alien parents with criminal history or a contagious disease, those apprehended within the interior of the United States, and those who have been detained with their minor child as a result of the executive order. The preliminary injunction orders the government to take the following actions with respect to class members who have neither been deemed unfit or a danger to the child, nor have affirmatively, knowingly, and voluntarily declined to be reunited with a child in DHS custody:

1. refrain from detaining in DHS custody class members without their minor children;

2. release detained minor children to the custody of parent class members who have been discharged from DHS custody;
3. reunite all class members with their minor children within fourteen days for children under age five, and within thirty days for older children; and
4. take all necessary steps to facilitate regular communication between class members and their children in ORR custody, ORR foster care, or DHS custody but, at a minimum, arrange a telephone call within ten days.

In issuing the preliminary injunction, the district court first rejected the government's argument that an injunction is unnecessary given the recent executive order. The court recognized that the executive order "attempts . . . to address some of the issues in this case," but asserted that it does not "obviate[] the need for injunctive relief." The court reasoned that the executive order contains several subjective qualifications that limit its ability to provide relief to separated families, such as whether there is a "concern"—as opposed to an objective finding—"that detention of an alien child with the child's alien parent would pose a risk to the child's welfare." Next, the court concluded that the class was likely to succeed on its substantive due process claims. First, the court opined that just because the government "is acting within its powers to detain individuals lawfully entering the United States and to apprehend individuals illegally entering the country," the right to family integrity does not disappear, nor are the government's actions shielded from judicial review. Further, in the court's view, the government's practice of separating families—allegedly without determining that any parent is unfit or presents a danger to the child, without tracking the children after separation, without enabling communication between the parents and their children, and without reuniting the families once the parents have been released from criminal or immigration custody—is "so egregious, so outrageous, that it may fairly be said to shock the contemporary conscious," and thus would not pass constitutional muster. Since the order, the government has been working toward reunifying the separated families, substantially pursuant to the timeline provided by the court. By the time the deadline expired for reuniting all separated families, on July 26, 2018, the government reported that 711 children (of the 2,551 previously identified as separated) remained in ORR custody because "the adult associated with the child is either not eligible for reunification or not available for discharge at this time." In response, the district judge ordered the government to provide a list of (1) parents that were excluded from the class and the reasons for their exclusion; (2) class parents that were removed from the country before the court issued the preliminary injunction; (3) class parents that were released into the U.S. interior and not yet located; and (4) parents in criminal custody.

Considerations for Congress: Several Members have introduced measures purporting to address family separation at the border. These proposals generally fall into two camps: one favoring keeping families together *without being detained*, and one favoring keeping families together *while in detention*. For example, in the Senate, the Keep Families Together Act (S. 3036) would create a "strong presumption in favor of family unity" and "that detention is not in the best interests of families and children." Accordingly, the bill would prohibit the government from removing a child from a parent or legal guardian at or near a port of entry or within 100 miles of the U.S. border *unless* designated authorities have terminated the rights, or believe that it would be in the best interest of the child to be removed from, a parent or legal guardian, or have found that the child is a victim of, or at risk of becoming a victim of, human trafficking. The bill also would instruct the DHS Secretary to publish guidance describing the process for a parent or legal guardian to locate a child who has been separated subject to the limitations described above. To address families already separated, the House and Senate have introduced versions of the REUNITE Act, which directs the Secretaries of DHS and HHS to promulgate a rule that would provide aid to an alien parent or legal guardian trying to locate and reunite with a separated child.

Other introduced proposals tend to focus on family unity while in detention. For example, the House and Senate versions of the Protect Kids and Parents Act would, among other things, require alien parents and their children to be detained together during immigration proceedings if the family is seeking asylum. The bills also set forth specific procedures for the removal of an alien child from the alien parent's custody without the parent's consent.

Author Information

Sarah Herman Peck
Legislative Attorney

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