

ACLU

AMERICAN CIVIL LIBERTIES UNION FOUNDATION

San Diego and Imperial Counties



Family Separation and Immigration Law Update

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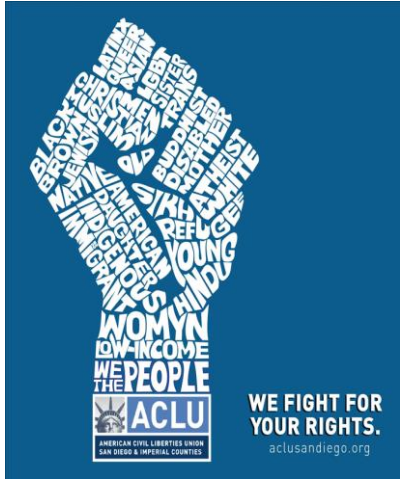
Who is the ACLU

1920: ACLU Established

ACLU is headquartered in New York City, with a federal legislative office in Washington, DC. Affiliates in every state, Puerto Rico, and the District of Columbia.

1933: ACLU of San Diego & Imperial Counties founded

ACLU-SDIC's mission is to protect and expand fairness, equity and freedom through community engagement and empowerment, policy advocacy, and impact litigation. We envision a just and fair society in which all can participate, prosper, and reach their full potential.





Family Separation





ICE Detention

Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRAIRA), Division C of Pub.L. 104–208, 110 Stat. 3009-546

Amended INA to require detention or eliminate eligibility for neutral custody review in most cases

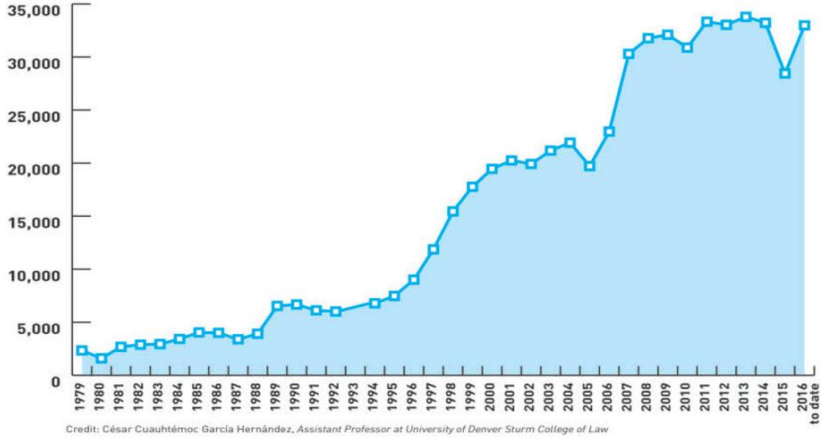
Immigration Detainees, including Unaccompanied Children, are not appointed counsel

- *Baltazar-Alcazar v. I.N.S.*, 386 F.3d 940, 948 (9th Cir. 2004) ("[T]he immigration laws have been termed second only to the Internal Revenue Code in complexity.")
- *Biwot v. Gonzales*, 403 F.3d 1094, 1098 (9th Cir. 2005) ("The proliferation of immigration laws and regulations has aptly been called a labyrinth that only a lawyer could navigate.")
- *Lok v. Immig. and Naturalization Serv.*, 548 F.2d 37, 38 (2d Cir. 1977) (noting "the striking resemblance between [the immigration code] and King Minos's labyrinth in ancient Crete")



ICE Detention

Growth of the Gulag



Source: ACLU "Shutting Down the Profiteers: Why and How the Department of Homeland Security Should Stop Using Private Prisons." 2016. https://www.aclu.org/sites/default/files/field_document/white_paper_09-30-16_released_for_web-v1-opt.pdf



ICE Detention

Costs: Financial and Human

Financial:

- **DHS Budget assumes avg $122/night per person**
  - DHS Office of Inspector General, *ICE's Release of Immigration Detainees, OIG-14-116 (Revised)*, at 7 (Aug. 2014), https://www.oig.dhs.gov/assets/Mgmt/2014/OIG_14-116_Aug14.pdf
- **Electronic Monitoring is effective and costs $13/day per person**
  - DHS Office of Inspector General, OIG-15-22 *U.S. Immigration and Customs Enforcement's Alternatives to Detention (Revised)* at 4 (Feb. 4, 2015), https://www.oig.dhs.gov/assets/Mgmt/2015/OIG_15-22_Feb15.pdf

Human:

- **Who is in ICE detention? Zero people serving time for a crime.**
  1. Longtime lawful residents who ICE alleges are deportable after serving criminal sentence
  2. Longtime US residents without immigration status
  3. Asylum seekers

- **Family Separation**



Ms. L v. ICE, 18-CV-00428-DMS-MDD (S.D. Cal)

Litigation Timeline

11/1/18	**Ms. L and 7-yr-old daughter present at SYS POE. Separated 4 days later. Ms. L detained in Otay.**
2/26/18	Complaint filed on behalf of Ms. L
3/6/18	DHS suddenly releases Ms. L from custody
3/9/18	Amended Complaint and Mtn for Class Cert
3/16/18	Ms. L and daughter reunified in Chicago
3/19/18	Mtn for Classwide Preliminary Injunction
4/6/18	Govt files Mtn to Dismiss
5/4/18	Oral Argument. Govt admits about 700 separated kids
5/7/18	**Sessions announces Zero Tolerance. Chaos Ensues**
6/6/18	Judge denies Mtn to Dismiss
6/20/18	Executive Order to "keep families together"
6/26/18	Court issues preliminary injunction requiring reunification



Executive Order

Affording Congress an Opportunity to Address Family Separation



- Will prosecute 8 U.S.C. 1325 violations (Zero Tolerance)
- DHS to maintain custody of “alien families” during 1325 prosecutions
- DoD to provide detention facility space to DHS
- DOJ to try to modify Flores settlement



Ms. L v. ICE, 18-CV-00428-DMS-MDD (S.D. Cal)

Preliminary Injunction Details

Class Definition: All 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

(3) separation occurred absent a determination that the parent is unfit or presents a danger to the child

- **Exceptions:** criminal history, communicable disease, already in interior of U.S., subject to EO

Deadlines

- **By July 10:** All children under 5 reunited
- **By July 26:** All class members reunited



Flores and *Ms. L*

On July 9, the Court denied the government's motion to modify the injunction. *Flores v. Sessions*, 2:85-cv-04544-DMG-AGR, ECF No. 455 (C.D. Cal, July 9, 2018) ("It is apparent that Defendants' Application is a cynical attempt, on an *ex parte* basis, to shift responsibility to the Judiciary for over 20 years of Congressional inaction and ill-considered Executive action that have led to the current stalemate.")

Where does that leave us?

- *Flores*: All children in ICE detention have a right to be transferred after 20 days to a more appropriate facility licensed for the care of children.
- *Ms. L.*: All children who arrived with their parents have a right to be together with their parents in DHS custody.

If the government insists on detaining family units, it will be up to the parent which choice is appropriate and in the best interests of their child. But the government cannot decide for them

But no law REQUIRES the government to detain family units. Discretion exists in detention decisions.



Family Separation

Government Failures

- **"There were three agencies, and each was like its own stovepipe. Each had its own boss, and they did not communicate… What was lost in the process was the family. The parents didn't know where the children were, and the children didn't know where the parents were. And the government didn't know either."** Judge Dana Sabraw, July 27, 2018 Hearing

- **"DHS also struggled to identify, track, and reunify families separated under Zero Tolerance due to limitations with its information technology systems, including a lack of integration between systems. Finally, DHS provided inconsistent information to aliens who arrived with children during Zero Tolerance, which resulted in some parents not understanding that they would be separated from their children, and being unable to communicate with their children after separation."** DHS Office of Inspector General, *Special Review - Initial Observations Regarding Family Separation Issues Under the Zero Tolerance Policy, OIG 18-84*, Sept 27, 2018. https://www.oig.dhs.gov/sites/default/files/assets/2018-10/OIG-18-84-Sep18.pdf



Ms. L v. ICE, 18-CV-00428-DMS-MDD (S.D. Cal)

Where We Are Now (as of 11/29/18)

2,667 separated children identified by the government, including 103 under age 5

- **2,125** reunified (1,959 in the U.S., 166 in home country)
- **369** discharged "under other appropriate circumstances"
- **173** still in custody, all but **8** will **not** be reunified
- **268** whose parents waived reunification (most already deported)

Issues with Reunification

- "Criminal History" (55 children whose parents were deemed "unfit" for crim history)
- Difficulty finding deported parents (Govt originally identified 414-420 deported parents, many came off list)



Ms. L v. ICE, 18-CV-00428-DMS-MDD (S.D. Cal)

Where We Are Now (as of 11/29/18)

Ongoing Issues

- **What to do about class members with final orders of removal?**
  - Settlement approved for this subclass on Nov. 15, 2018
- **Children released from ORR prior to 6/26/18 PI – are the class members?**
- **Are legal guardians class members?**



ZERO TOLERANCE: Operation Streamline

- Zero Tolerance means prosecutors must abandon their prosecutorial discretion and professional judgment, requiring criminal charges against every person apprehended entering the United States without documentation, no matter the circumstances

- Drastic increase in prosecutions can only be accommodated through "Operation Streamline" procedures. Defendants are dragged en masse into courtrooms where they are convicted and sentenced in group hearings in days

- **Since it took effect in San Diego in July 2018, Operation Streamline has led to a 1,200 percent increase in prosecutions without a corresponding increase in court resources, including judges and attorneys.**



Asylum Ban

On November 9, 2018:

1. Govt proposes new regulation to take immediate effect that those whose entry is suspended pursuant to Presidential Proclamation are ineligible for asylum

- *Aliens Subject to a Bar on Entry Under Certain Presidential Proclamations; Procedures for Protection Claims*, 83 Fed. Reg. 55,934 (Nov. 9, 2018)

2. President issues Proclamation suspending the "entry of any alien into the United States across the international boundary between the United States and Mexico."

- *Addressing Mass Migration Through the Southern Border of the United States*, 83 Fed. Reg. 57,661, 57,663 (Nov. 9, 2018)

3. ACLU and allies sue. *East Bay Sanctuary Covenant, et. al., v. Trump*, No. 3:18-cv-06810-JST

On November 19, 2018: N.D. Cal. Issues TRO until Dec. 19, 2018

On December 7, 2018: Ninth Circuit upholds TRO. (No. 18-17274) ("Just as we may not, as we are often reminded, 'legislate from the bench,' neither may the Executive legislate from the Oval Office.")


THANK YOU.
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QUESTIONS?
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