

AMERICAN BAR ASSOCIATION
MINNESOTA STATE BAR ASSOCIATION
CRIMINAL JUSTICE SECTION
SECTION OF INTERNATIONAL LAW
CENTER FOR HUMAN RIGHTS
CONNECTICUT BAR ASSOCIATION
MASSACHUSETTS BAR ASSOCIATION

REPORT TO THE HOUSE OF DELEGATES

RESOLUTION

1 RESOLVED, That the American Bar Association urges Executive-agency and
2 Congressional action to ensure that:

3
4 (i) the federal immigration policies and practices of separating minor children
5 from their parents at the border immediately cease and not be reinstated; any
6 separation of a child and a parent shall occur only upon a determination of child
7 endangerment, applying well defined criteria with due process protections for
8 parent and child, and
9

10 (ii) children who have already been separated from their parents under such
11 policies have a safe and expedited procedure for being reunited with their
12 parents consistent with ensuring that parents and children's individual and
13 independent legal claims are protected.

REPORT

“We recognize that these are challenging issues and that immigration involving children is, in general, a complicated matter with no easy solutions. We confidently believe, however, that the present approach will create greater problems than it alleviates. ... *The systemic practice of separating parents and children is antithetical to our values as a country, appears to violate longstanding precedent protecting rights to family integrity, burdens the federal criminal justice and immigration adjudication systems, and increases costs to the government.*”

-- American Bar Association President Hilarie Bass in a letter dated June 12, 2018 to U.S. Attorney General Jeff Sessions and U.S. Secretary of Homeland Security Kirstjen Nielson.

American law gives special recognition to “the constitutional liberty interest of parents in the care, custody, and control of their children,” a core human right that is “perhaps the oldest of the fundamental liberty interests recognized by” the United States Supreme Court. *Troxel v. Granville*, 530 U.S. 57, 65 (2000). The Supreme Court in *Troxel* held as a general matter that governmental action may only intentionally infringe upon this liberty interest when it is necessary for the child’s welfare and safety. *Id.* It may well be true that every lawful arrest of a parent “runs the risk of interfering in some way with the parent’s ability to care for his or her children,” *Aguilar v. U.S. Immigration and Customs Enforcement*, 510 F.3d 1, 22 (1st Cir. 2007), but a policy of intentionally separating children from their parents as a reported “deterrent”¹ against migrants committing the misdemeanor of improper entry into the United States under 8 U.S.C. 1325(a), or lawfully seeking asylum, without any mechanism to prevent this intentional separation of child from parent becoming permanent, surely shocks the conscience.²

¹ *The Washington Post*, June 19, 2018, “Here Are the Administration Officials Who Have Said that Family Separation is Meant as a Deterrent,” available at https://www.washingtonpost.com/news/politics/wp/2018/06/19/here-are-the-administration-officials-who-have-said-that-family-separation-is-meant-as-a-deterrent/?noredirect=on&utm_term=.f7d428091723.

² See, e.g., *Ms. L. et al. v. U.S. Immigration and Customs Enforcement*, No.18cv428 (S.D. Cal.), June 26, 2018, Order Granting Plaintiffs Motion for Classwide Preliminary Injunction, slip op. at 17 (“This practice of separating class members from their minor children, and failing to reunify class members with those children, without any showing the parent is unfit or presents a danger to the child is sufficient to find Plaintiffs have a likelihood of success on their due process claim. When combined with the manner in which that practice is being implemented, e.g., the lack of any effective procedures or protocols for notifying the parents about their childrens’ whereabouts or ensuring communication between the parents and children, and the use of the children as tools in the parents’ criminal and immigration proceedings, a finding of likelihood of success is assured. A practice of this sort implemented in this way is likely to be “so egregious, so outrageous, that it may fairly be said to shock the contemporary conscience”), citations omitted, available at https://www.courtlistener.com/recap/gov.uscourts.casd.564097/gov.uscourts.casd.564097.83.0_2.pdf

On May 7, 2018, the Attorney General of the United States adopted a zero-tolerance prosecution policy, which mandates the prosecution for illegal entry of everyone apprehended between ports of entry, including asylum seekers.³ U.S. Customs and Border Protection began implementation of this policy, resulting in the transfer of most adults who had entered illegally to U.S. Marshals Service custody pending prosecution.⁴ When adults are prosecuted, the Department of Homeland Security (DHS) treats their children as “unaccompanied alien children” as defined in section 279(g)(2) of Title 6 of the U.S. Code and the Trafficking Victims Protection Reauthorization Act of 2008. DHS generally must transfer any such “unaccompanied” children in its custody to the Department of Health and Human Services (DHHS) for care and custody within 72 hours, absent exceptional circumstances.⁵ The children are commonly placed in shelters under the custody of the DHHS’s Office of Refugee Resettlement (ORR) and may eventually be released to a family member, guardian, or foster family. But the unaccompanied minors process is problematic, because the unaccompanied minors process was established to address a different problem, namely minor children who were apprehended at the border without their parents, *i.e.*, true “unaccompanied alien children,” not the problem of migrant children, detained with their parents at the border, who are thereafter *separated* from their parents.⁶

Implementation of this zero-tolerance prosecution policy caused a spike in family separations at the U.S. - Mexico border. On June 15, 2018, a DHS official told reporters that 1,995 children had been separated from 1,940 adults in only six weeks – between April 19 and May 31, 2018, alone.⁷ Despite the recent Executive Order⁸ of June 20, 2018 intended to end the separation of minor children from their parents, and the federal government's subsequent stated plan to preserve family units, there is no comprehensive plan in place expeditiously to

³ <https://www.justice.gov/opa/press-release/file/1049751/download>.

⁴ July 31, 2018, Testimony of Matthew T. Albence, Executive Associate Director, Enforcement and Removal Operations, U.S. Immigration and Customs Enforcement, Department of Homeland Security, before U.S. Senate Commission on the Judiciary, available at <https://www.judiciary.senate.gov/imo/media/doc/07-31-18%20Albence%20Testimony.pdf>, at p.3.

⁵ *Id.* See also *Ms. L. et al. v. U.S. Immigration and Customs Enforcement*, No.18cv428 (S.D. Cal.), June 26, 2018, Order Granting Plaintiffs Motion for Classwide Preliminary Injunction (“*Ms. L. v. ICE*, 6/26/18 Order”), slip op. at 6-8, available at https://www.courtlistener.com/recap/gov.uscourts.casd.564097/gov.uscourts.casd.564097.83.0_2.pdf

⁶ *Ms. L. v. ICE*, 6/26/18 Order, slip op. at 7, available at https://www.courtlistener.com/recap/gov.uscourts.casd.564097/gov.uscourts.casd.564097.83.0_2.pdf

⁷ <https://abcnews.go.com/Politics/justify-separating-kids-parents-border-tolerance-bannon/story?id=55946718>.

⁸ https://www.whitehouse.gov/presidential-actions/affording-congress-opportunity-address-family-separation/?utm_source=twitter&utm_medium=social&utm_campaign=wh

reunite currently-detained children with their parents, some of whom have been separated from each other for months.⁹

On June 26, 2018, United States District Judge Dana M. Sabraw, in the key case of *Ms. L., et al. v. ICE*, ordered that all separated children, with limited exceptions, be reunified with their parents within 30 days (and within 14 days for children under age 5).¹⁰ The government has been unable to comply. On July 26, 2018, the government reported reuniting 1,442 children between the ages of 5 and 17, while deeming the parents of 711 children “ineligible” to receive children (although plaintiffs’ counsel assert that no information has been provided to verify this data or locate the reportedly reunited families).¹¹ The plaintiffs contend that “close to” 1,000 parents remain separated from their children, a number that includes “nearly 500 parents”¹² who were removed from the country without their children, a number that includes some parents who the government reports “waived reunification.”¹³ After reviewing the status report, Judge Sabraw said the administration’s plan for reunifying separated migrant families is “disappointing” and that it is “just unacceptable” that only 12 or 13 parents out of close to 500 parents who have been deported from the U.S. have been located thus far, observing, “The reality is that for every parent who is not located there will be a permanently orphaned child and that is 100 percent the responsibility of the administration.”¹⁴

Medical professionals agree that the practice of separating children from their families in this way can result in grave trauma with lifelong negative consequences for the children. The American Psychological Association warns, and common sense dictates, that separating children from their parents causes serious harm to children already suffering trauma from fleeing their countries of origin.¹⁵ The American Academy of Pediatrics has condemned the practice of family separation, explaining that “[f]ear and stress, particularly prolonged exposure to serious stress without the buffering protection afforded by stable, responsible relationship.....can harm the developing brain and harm short-and long-term health.”¹⁶

⁹ It should be noted that the ABA provides resources on the ground in the immigration removal field, including the Commission on Immigration off-site projects, ProBAR in Harlingen, Texas, The Immigration Project in San Diego, California, and the Children’s Immigration Law Academy in Houston, Texas.

¹⁰ *Ms. L. v. ICE*, 6/26/18 Order, available at https://www.courtlistener.com/recap/gov.uscourts.casd.564097/gov.uscourts.casd.564097.83.0_2.pdf.

¹¹ Joint Status Report, July 26, 2018, *Ms. L. v. ICE*, at pp. 2 & 4, available at https://www.courtlistener.com/recap/gov.uscourts.casd.564097/gov.uscourts.casd.564097.159.0_4.pdf.

¹² This number includes parents who *declined* to waive the child’s legal right to seek asylum as a condition of the parent’s reunification with the child.

¹³ See *id.*, at p.4.

¹⁴ “Federal Judge Calls Government Plan to Reunify Migrant Families ‘Disappointing’,” *NPR*, August 3, 2018, available at <https://www.npr.org/2018/08/03/635502588/federal-judge-calls-government-plan-to-reunify-migrant-families-disappointing>.

¹⁵ <http://www.apa.org/advocacy/immigration/separating-families-letter.pdf>.

¹⁶ <https://www.aap.org/en-us/about-the-aap/aap-press-room/Pages/StatementOpposingSeparationofChildrenandParents.aspx>.

The separation of families exacerbates the immigration court backlog. The immigration court system already has a backlog of over 700,000 cases.¹⁷ Another approximately 350,000 administratively closed cases may soon be placed back on the active docket.¹⁸ Children who are rendered “unaccompanied” are placed in individual removal proceedings before an immigration judge separately from their parent, transforming a single case into multiple immigration court cases and creating additional inefficiencies in the already backlogged immigration court system. Children proceeding alone often will not be competent to present their claims for relief or have access to vital evidence held by their parents, necessitating additional time and attention by the immigration judge, causing increased inefficiencies in the already significantly backlogged immigration courts.¹⁹

Detention of children with their parents is not the solution to the crisis created through the intentional separation to families. To extend the detention of children in custody indefinitely would run afoul of the consent decree agreed to by the government in *Flores v. Reno*, No. CV-85-4544, (C.D. Cal., January 17, 1997),²⁰ under which the government is required to release children from immigration detention “without unnecessary delay.” This period of time, as clarified on August 21, 2015, “likely” allows holding parents and children for up to 20 days, the time frame reported to the Court as required to screen family members for credible fear (for purposes of access to asylum), preliminary to placing families into expedited removal proceedings.²¹ Indeed Congress wisely declined to abrogate the *Flores* doctrine on June 27, 2018, when the House of Representatives rejected passage of H.R. 6136, the Border Security and Immigration Reform Act, a bill that would have superceded *Flores* by eliminating the separation of families and authorizing indefinite detention of parents and children pending immigration court proceedings.²² Indefinite detention of families in custody is problematic for other reasons as well. Many organizations, including the American Bar Association, oppose simply exchanging the family separation policy for a systematic policy of family detention.²³ The policy that

¹⁷ “Commentary: America’s Immigration Court System is in Trouble,” *Fortune*, April 11, 2018, available at: <http://fortune.com/2018/04/11/immigration-court-judge-quotas/>.

¹⁸ The Attorney General’s May 17, 2018, decision in *Matter of Castro-Tum* revokes immigration judges’ and the Board of Immigration Appeals’ general authority to administratively close cases, opening the door to potentially reopening 350,000 deportation cases the government previously agreed to close. See <https://www.justice.gov/opa/pr/attorney-general-jeff-sessions-opinion-matter-castro-tum>.

¹⁹ ABA President Hilarie Bass letter to Attorney General Jeff Sessions and U.S. Department of Homeland Security Kirstjen Nielson (June 12, 2018)

²⁰ The January 17, 1997, *Flores* consent decree is available at https://www.aclu.org/sites/default/files/assets/flores_settlement_final_plus_extension_of_settlement011797.pdf.

²¹ *Flores v. Lynch*, 212 F. Supp. 3d 907, 914 (C.D. Cal. 2015).

²² <https://www.congress.gov/bill/115th-congress/house-bill/6136?q=%7B%22search%22%3A%5B%22h.r.+6136%22%5D%7D&r=1>.

²³ American Bar Association Commission on Immigration, *Family Immigration Detention: Why the Past Cannot be a Prologue*, July 31, 2015, pp. 42-43, available at

would appear more consonant with justice and substantive due process would seem to be to encourage the government to manage this population through established release mechanisms and by employing alternatives to pre-adjudication detention, such as community supervision and GPS monitoring.²⁴

To conclude, the arrival of families at our southern border is a complex circumstance that cries out for thoughtful policy choices in order to uphold our national values, to respect substantive due process rights by keeping migrant families together and to maintain the security of our borders.

Respectfully submitted,

Paul Godfrey
President, Minnesota State Bar
Association
July 2018

https://www.americanbar.org/content/dam/aba/publications/commission_on_immigration/FINAL%20ABA%20Family%20Detention%20Report%208-19-15.authcheckdam.pdf.

²⁴ See, e.g., <https://www.vox.com/2018/6/22/17483230/family-separation-immigration-alternatives-immigrant-detention-centers>.

GENERAL INFORMATION FORM

Submitting Entity: Minnesota State Bar Association

Submitted By: Paul Godfrey, President

1. Summary of Resolution(s).

This resolution urges Congress to enact immigration reform addressing children separated from their parents at the United States border.

2. Approval by Submitting Entity.

Approved by the Minnesota State Bar Association Assembly on June 29, 2018.

3. Has this or a similar resolution been submitted to the House or Board previously?

No.

4. What existing Association policies are relevant to this Resolution and how would they be affected by its adoption?

The following policies are relevant to this Resolution but none would be affected by its adoption:

ABA Goal IV.3 – Work for just laws, human rights and fair legal process.

ABA Goal IV.4 – Assure meaningful access to justice for all persons.

Resolution 04M105 - Opposing legislation creating a crime based merely on an alien's undocumented presence.

Resolution 06M107E – Opposing the detention of non-citizens in immigration removal proceedings except in extraordinary circumstances which would include a determination, following a hearing and subject to judicial review, that a person presents a threat to national security or public safety, or presents a substantial flight risk. Supports the use of alternatives to detention, including supervised pre-hearing release and bond. Supports prompt hearings, meaningful administrative review, and judicial oversight for detainees who are denied release. For persons detained during immigration proceedings or under a final order of removal, supports the establishment of mechanisms to ensure full compliance with Supreme Court case law.

Resolution 12A102 -- Adopting the ABA *Civil Immigration Detention Standards*, dated August 2012, which govern the treatment of persons in the U.S. immigration detention system.

Resolution 04A117 -- Adopting *ABA Standards for the Custody, Placement and Care; Legal Representation; and Adjudication of Unaccompanied Alien Children in the United States*, which contain a provision that immigration enforcement agencies should keep children and family members together as a unit and place them in the least restrictive setting appropriate to families.

Resolution 17M10B -- affirming support for the establishment of laws, policies, and practices that ensure access to legal protection for refugees, asylum seekers, torture victims, and others deserving of humanitarian refuge.

Resolution 11A103B -- Urging Congress to enact legislation, and the Department of Homeland Security to adopt policies, that: (1) assure information pertaining to location and transfer either of immigrant detainees who are parents, legal guardians or primary caregivers of minor children, or of the minor children themselves, or of changes of placement of those minor children, is shared among immigration authorities, state and local child welfare agencies, and state courts; (2) assure the length of one's status as an immigration detainee, or one's removal or pending removal from the country, cannot be the sole basis for a state not to provide legally mandated reasonable efforts to reunify children with their primary caretaker.

Resolution 18M108E – Urging the Executive Branch to rescind its decision to end the Deferred Action for Childhood arrivals (DACA) program and urging Congress to enact legislation protecting DACA recipients and other undocumented immigrants who were brought to the United States as children and who meet age, residency, educational and other qualifications as set forth by the U.S. Citizenship and Immigration Service (“DREAMers”).

5. If this is a late report, what urgency exists which requires action at this meeting of the House?

This resolution concerns a government policy that has only recently been put into effect.

6. Status of Legislation. (If applicable)

Multiple bills have been introduced in Congress addressing family separation.

7. Brief explanation regarding plans for implementation of the policy, if adopted by the House of Delegates.

A letter from the ABA President should be sent to all members of Congress, informing them of the policy and urging their immediate action.

8. Cost to the Association. (Both direct and indirect costs)

None, other than the cost of transmitting the resolution.

9. Disclosure of Interest. (If applicable)

N/A

10. Referrals.

Center on Human Rights
Commission on Immigration
Commission on Youth at Risk
Connecticut Bar Association
Criminal Justice Section
Massachusetts Bar Association
Solo, Small Firm and General Practice Division
Section of Civil Rights and Social Justice
Section of Family Law
Section of International Law
Section of International Law, International Human Rights Committee
Standing Committee on Pro Bono and Public Service

11. Contact Name and Address Information. (Prior to the meeting. Please include name, address, telephone number and e-mail address)

Michael Miller
SiebenCarey, P.A.
901 Marquette Avenue, Ste 500
Minneapolis, MN 55402
Michael.miller@knowyourrights.com
Phone: 612-978-4818

12. Contact Name and Address Information. (Who will present the Resolution with Report to the House? Please include best contact information to use when on-site at the meeting. *Be aware that this information will be available to anyone who views the House of Delegates agenda online.*)

Cara Lee T. Neville
(612) 251-3007
Neville@benchmarknationaladr.com

EXECUTIVE SUMMARY

1. Summary of the Resolution

The resolution recommends Congress take immediate action to permanently cease family separations at the border, and to pass legislation ensuring children separated at the border from their parents are quickly and safely reunified.

2. Summary of the Issue that the Resolution Addresses

The resolution addresses an immigration policy that is inhumane and harmful to families, particularly children.

3. Please Explain How the Proposed Policy Position Will Address the Issue

This policy is needed for the ABA to urge Congress and the President to act quickly to address the issue of family separations at the United States border in a comprehensive way.

4. Summary of Minority Views or Opposition Internal and/or External to the ABA Which Have Been Identified

None have been identified.