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The Trump Administration's "Zero Tolerance" Immigration Enforcement Policy

Updated February 2, 2021

Congressional Research Service
https://crsreports.congress.gov
R45266

CRS REPORT
Prepared for Members and
Committees of Congress

Summary

For the last decade, Central American migrant families have arrived at the U.S.-Mexico border in relatively large numbers, many seeking asylum. While some request asylum at U.S. ports of entry, others do so after entering the United States "without inspection" (i.e., illegally) between U.S. ports of entry. On May 7, 2018, the Department of Justice (DOJ) implemented a "zero tolerance" policy toward illegal border crossing both to discourage illegal migration into the United States and to reduce the burden of processing asylum claims that Trump Administration officials contended are often fraudulent.

Under the zero tolerance policy, DOJ prosecuted all adult aliens apprehended crossing the border illegally, with no exception for asylum seekers or those with minor children. DOJ's policy represented a change in the enforcement of an existing statute rather than a change in statute or regulation. Prior administrations had prosecuted illegal border crossings relatively infrequently. Data are not available on the rate and/or absolute number of family separations resulting from illegal border crossing prosecutions under prior administrations, limiting the degree to which comparisons can be made with the Trump Administration's zero tolerance policy

Criminally prosecuting adults for illegal border crossing requires detaining them in federal criminal facilities where children are not permitted. While DOJ and the Department of Homeland Security (DHS) have broad statutory authority to detain adult aliens, children must be detained according to guidelines established in the *Flores Settlement Agreement* (FSA), the Homeland Security Act of 2002, and the Trafficking Victims Protection Reauthorization Act of 2008. A 2015 judicial ruling held that children can remain in family immigration detention for no more than 20 days. If parents cannot be released with them, children must be treated as unaccompanied alien children and transferred to the Department of Health and Human Services' (HHS's) Office of Refugee Resettlement (ORR) for care and custody.

The widely publicized family separations were a consequence of the Trump Administration's zero tolerance policy, not the result of an explicit family separation policy. Following mostly critical public reaction, President Trump issued an executive order on June 20, 2018, mandating that DHS maintain custody of alien families during the pendency of any criminal trial or immigration proceedings. DHS Customs and Border Protection (CBP) subsequently stopped referring most illegal border crossers to DOJ for criminal prosecution. A federal judge then mandated that all separated children be promptly reunited with their families. Another rejected DOJ's request to modify the FSA to extend the 20-day child detention guideline. DHS has since reverted to some prior immigration enforcement policies, and family separations continue to occur based upon DHS enforcement protocols in place prior to the 2018 zero tolerance policy. On January 26, 2021, during the first month of the Biden Administration, the Department of Justice formally rescinded the zero tolerance policy.

During the six weeks the policy was active, DHS separated 2,816 children—subsequently included in a class action lawsuit—from their parents or guardians. Almost all have since been reunited with their parents or placed in alternative custodial arrangements. In 2019, DOJ disclosed the separations of an additional 1,556 children prior to the zero tolerance policy but also during the Trump Administration who were included in the lawsuit class. As of December 2020, a steering committee assembled to locate separated children in this second group had not yet established contact with the parents of 628 children. In the period since the zero tolerance policy was effectively paused in June 2018, at least 1,000 additional children were separated, bringing the total reported number of separated children to between 5,300 and 5,500.

Trump Administration officials and immigration enforcement advocates argued that measures like the zero tolerance policy were necessary to discourage migrants from coming to the United States and submitting fraudulent asylum requests. They maintained that alien family separation resulting from the prosecution of illegal border crossers mirrored that which occurs regularly under the U.S. criminal justice system policy where adults with custody of minor children are charged with a crime and may be held in jail, effectively separating them from their children.

Immigrant advocates contended that migrant families were fleeing legitimate threats from countries with exceptionally high rates of gang violence, and that family separations resulting from the zero tolerance policy were cruel, unconstitutional, and violated international human rights law. They maintained that the zero tolerance policy was hastily implemented and lacked planning for family reunification following criminal prosecutions. Some observers questioned the Trump Administration's capacity to marshal sufficient resources to prosecute all illegal border crossers without additional resources. Others criticized the family separation policy in light of less expensive alternatives to detention.

Family separation-related legislation introduced during the 116th and 115th Congresses focused primarily on preventing or limiting the practice. Few of the bills saw congressional action.

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The Zero Tolerance Policy Under the Biden Administration

This report is a historical document about the zero tolerance immigration enforcement policy and the resulting practice of separating children from parents and legal guardians under the Trump Administration. On January 26, 2021, Acting Attorney General Monty Wilkinson, during the first month of the Biden Administration, issued a DOJ memorandum formally rescinding the zero tolerance policy.[1] This report will not be updated.

Introduction

In recent years, Central American migrant families have been arriving at the U.S.-Mexico border in relatively large numbers, many seeking asylum.[2] While some request asylum at U.S. ports of entry, others do so after attempting to enter the United States illegally between U.S. ports of entry.[3] On May 7, 2018, then-Attorney General Jeff Sessions announced that the Department of Justice (DOJ) implemented a "zero tolerance" policy toward illegal border crossing, both to discourage illegal migration into the United States and to reduce the burden of processing asylum claims that Trump Administration officials contended are often fraudulent.[4]

Under the zero tolerance policy, DOJ prosecuted 100% of adult aliens[5] apprehended crossing the border illegally, making no exceptions for whether they were asylum seekers or accompanied by minor children. Illegal border crossing is a *misdemeanor*[6] for a first time offender and a *felony*[7] for anyone who has previously been "denied admission, excluded, deported, or removed, or has departed the United States while an order of exclusion, deportation or removal is outstanding and

[1] U.S. Department of Justice, Office of the Attorney General, *Memorandum for all Federal Prosecutors*, "Rescinding the Zero-Tolerance Policy for Offenses Under 8 U.S.C. §1325(a)," January 26, 2021.

[2] Asylum is a protection granted to a foreign national physically present within the United States or at the U.S. border who meets the definition of a refugee. A refugee is a person who is outside his or her home country (a second country that is not the United States) and is unable or unwilling to return because of persecution, or a well-founded fear of persecution, on account of five possible criteria: (1) race, (2) religion, (3) nationality, (4) membership in a particular social group, or (5) political opinion. INA 1101(a)(42)(A). In recent years, particularly following the surge of unaccompanied children at the Southwest border in 2014, courts have grappled with whether the statutory definition of asylum can encompass threats like gang violence. In some cases, asylum has been granted on such grounds. For more information, see CRS Report R45539, *Immigration: U.S. Asylum Policy*.

[3] A port of entry is a harbor, border town, or airport through which people and goods may enter a country. The United States currently has 328 ports of entry. For background information related to ports of entry and border security, see CRS Report R43356, *Border Security: Immigration Inspections at Ports of Entry*; and CRS Report R42138, *Border Security: Immigration Enforcement Between Ports of Entry*.

[4] U.S. Department of Justice, Office of Public Affairs, "Attorney General Sessions Delivers Remarks Discussing the Immigration Enforcement Actions of the Trump Administration," May 7, 2018.

[5] *Alien* refers to anyone who is not a citizen or a national of the United States; INA §101(a)(3), 8 U.S.C. §1101(a)(3). In this report, alien is synonymous with *foreign national*. *Unauthorized alien* refers to a foreign national who is unlawfully present in the United States and who either entered the United States illegally ("without inspection") or entered lawfully and temporarily ("with inspection") but subsequently violated the terms of his/her admission, typically by "overstaying" a visa duration.

[6] A misdemeanor, under federal law, is a criminal offense that is generally regarded as less serious than a felony and punishable by a fine and/or imprisonment for a period of one year or less. See 18 U.S.C. §3559; see also Black's Law Dictionary, 10th ed., 2014.

[7] A felony is a criminal offense punishable by a term of imprisonment for more than one year or by death. See 18 U.S.C. §3559; see also Black's Law Dictionary, 10th ed., 2014.

thereafter enters, attempts to enter or is found in the U.S."[8] Both such criminal offenses can be prosecuted by DOJ in federal criminal courts.

DOJ's "100% prosecution"[9] policy represented a change in the level of enforcement of an existing statute rather than a change in statute or regulation.[10] The George W. Bush Administration and Barack Obama Administration prosecuted illegal border crossings relatively infrequently, in part to avoid having DOJ resources committed to prosecuting sizeable numbers of misdemeanors. At different times during those administrations, illegal entrants would be criminally prosecuted in an attempt to reduce illegal migration, but exceptions were generally made for families and asylum seekers.

Illegal border crossers who are prosecuted by DOJ are detained in federal criminal facilities. Because children are not permitted in criminal detention facilities with adults, detaining adults who crossed illegally requires that any minor children under age 18 accompanying them be treated as *unaccompanied alien children* (UAC)[11] and transferred to the care and custody of the Department of Health and Human Services' (HHS's) Office of Refugee Resettlement (ORR).

The widely publicized family separations were therefore a *consequence* of the Trump Administration's policy of 100% prosecution of illegal border crossings, and not the result of a direct policy or law mandating family separation.

The family separations garnered extensive public attention. The Trump Administration and immigration enforcement advocates maintained that the zero tolerance policy was necessary to dis-incentivize migrants from coming to the United States and clogging immigration courts with fraudulent requests for asylum.[12] Immigrant advocates contended that migrant families were fleeing legitimate threats of violence and that family separations resulting from the zero tolerance policy were cruel and violated international human rights law.[13]

Following mostly critical public reaction, President Trump issued an executive order that effectively terminated the zero tolerance policy.[14] During the six weeks that the policy was in place, "under 3,000" children were estimated to have been separated from their parents, including at least 100 under age five.[15] A subsequent class action lawsuit was filed by the American Civil

[8] 8 U.S.C. §1326.

[9] DHS's Immigration and Customs Enforcement (ICE) referred to the "zero tolerance" policy as the "100% prosecution" policy. CRS consultation with ICE Legislative Affairs, June 8, 2018.

[10] See Tim O'Shea, Theresa Cardinal Brown, "Why Are Families Being Separated at the Border? An Explainer," Bipartisan Policy Center, June 13, 2018; and Weekend Edition Saturday, "Jeh Johnson On Immigration And Trump," *National Public Radio*, June 9, 2018.

[11] Unaccompanied alien children (UAC) are defined in statute as children who lack lawful immigration status in the United States, who are under the age of 18, and who either are without a parent or legal guardian in the United States or without a parent or legal guardian in the United States who is available to provide care and physical custody; 6 U.S.C. §279(g)(2). In this report, children refers to minors under age 18 unless otherwise indicated. For more information, see CRS Report R43599, *Unaccompanied Alien Children: An Overview*.

[12] U.S. Department of Justice, Office of Public Affairs, "Attorney General Sessions Delivers Remarks Discussing the Immigration Enforcement Actions of the Trump Administration," May 7, 2018.

[13] See for example, American Immigration Council, "Asylum in the United States, Fact Sheet," May 14, 2018; and International Justice Resource Center, Asylum and the Rights of Refugees, accessed by CRS on July 12, 2018, at https://ijrcenter.org/refugee-law/.

[14] The White House, Affording Congress an Opportunity to Address Family Separation, Executive Order 13841, June 20, 2018.

[15] U.S. Department of Health and Human Services, "HHS Issues Statement on Ms. L, et al., Status Report Regarding Plan for Compliance for Remaining Class Members," press release, July 13, 2018. This figure was also reported in several news reports, including Dan Diamond, "HHS says hundreds more migrant kids may have been separated than

Liberties Union (ACLU) on behalf of 2,816 children that ORR ultimately identified as having been separated as of June 26, 2018. More children were separated prior to and subsequent to the six-week period.

This report briefly reviews the statutory authority for prosecuting persons who enter the United States illegally and the policies and procedures for processing apprehended illegal border entrants and any accompanying children. It explains enforcement policies under past administrations and then discusses the Trump Administration's zero tolerance policy on illegal border crossers and the attendant family separations. The report concludes by presenting varied policy perspectives on the zero tolerance policy and briefly reviews recent related congressional activity.

Enforcement and Asylum Policy for Illegal Border Crossers

Aliens who wish to enter the United States may request admission[16] at a U.S. port of entry or may attempt to enter illegally by crossing the border surreptitiously between U.S. ports of entry. Aliens who wish to request asylum may do so at a U.S. port of entry before an officer with the Department of Homeland Security (DHS) Customs and Border Protection (CBP) Office of Field Operations or upon apprehension between U.S. ports of entry before an agent with CBP's U.S. Border Patrol. DHS has broad statutory authority both to detain aliens not legally admitted, including asylum seekers, and to remove aliens who are found to be either inadmissible at ports of entry or removable once in the United States. Aliens requesting asylum at the border are entitled to an interview assessing the credibility of their asylum claims.[17]

Illegal U.S. Entry

Aliens who enter the United States illegally between ports of entry face two types of penalties. They face civil penalties for illegal presence in the United States, and they face criminal penalties for having entered the country illegally. Both types of penalties are explained below.

The Immigration and Nationality Act (INA) establishes *civil* penalties for persons who are in the United States unlawfully (i.e., without legal status). These penalties apply to foreign nationals who entered the United States illegally as well as those who entered legally but subsequently violated the terms of their admission, typically by "overstaying" their visa duration. Foreign nationals who are apprehended for such civil immigration violations are generally subject to removal (deportation) and are placed in formal or expedited removal proceedings (described below in "Removal").

The INA also establishes *criminal* penalties for (1) persons who enter or attempt to enter the United States illegally between ports of entry, (2) persons who elude examination or inspection by immigration officers, or (3) persons who attempt to enter or obtain entry to the United States through fraud or willful misrepresentation.[18] In addition, the INA provides criminal penalties for

earlier count," *Politico*, July 5, 2018; and Caitlin Dickerson, "Trump Administration in Chaotic Scramble to Reunify Migrant Families," *The New York Times*, July 5, 2018.

[16] For more information on legal admissions, see CRS Legal Sidebar LSB10150, *Immigration Laws Regulating the Admission and Exclusion of Aliens at the Border*; and CRS Report R45020, *A Primer on U.S. Immigration Policy*.

[17] INA §235(b)(1), 8 U.S.C. §1225(b)(1).

[18] INA §275, 8 U.S.C. §1325 treats *improper entry* by aliens (first-time illegal entry) as a federal misdemeanor, punishable by fines and/or up to six months in prison.

persons who unlawfully reenter the United States after they were previously removed from the country.[19] Foreign nationals apprehended for criminal immigration violations are subject to prosecution by DOJ in federal criminal courts. This report only addresses criminal penalties for illegal entry and reentry between ports of entry.

Foreign nationals who attempt to enter the United States without authorization often do so between U.S. ports of entry on the U.S. border. If apprehended, they are processed by CBP. They are typically housed briefly in CBP detention facilities before being transferred to the custody of another federal agency or returned to their home country through streamlined removal procedures (discussed below). All apprehended aliens, including children, are placed into removal proceedings that occur procedurally after any criminal prosecution for illegal entry. Removal proceedings generally involve formal hearings in an immigration court before an immigration judge, or expedited removal without such hearings (see "Removal" below).

In general, CBP refers apprehended aliens for criminal prosecution if they meet criminal enforcement priorities (e.g., child trafficking, prior felony convictions, multiple illegal entries). Such individuals are placed in the custody of the U.S. Marshals Service (DOJ's enforcement arm) and transported to DOJ criminal detention facilities for pretrial detention. After individuals have been tried—and if convicted, have served any applicable criminal sentence—they are transferred to DHS Immigration and Customs Enforcement (ICE) custody and placed in immigration detention.[20] ICE, which represents the government in removal hearings, commences removal proceedings.

If CBP does not refer apprehended aliens to DOJ for criminal prosecution, CBP may either return them to their home countries using streamlined removal processes or transfer them to ICE custody for immigration detention while they are in formal removal proceedings.[21]

Asylum

Some aliens at the U.S.-Mexico border seek asylum in the United States. Asylum is not numerically limited and is granted on a case-by-case basis. Asylum can be requested by foreign nationals who have already entered the United States and are not in removal proceedings ("affirmative" asylum) or those who are in removal proceedings and claim asylum as a defense to being removed ("defensive" asylum). The process in each case is different.[22]

Arriving aliens who are inadmissible, either because they lack proper entry documents or because they attempt U.S. entry through misrepresentation or false claims to U.S. citizenship, are put into a streamlined removal process known as *expedited removal* (described below in "Removal").[23]

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[19] INA §276, 8 U.S. C. §1326 treats *illegal reentry* as a felony, punishable by fines and/or up to two years in prison. Higher penalties apply for migrants with criminal records.

[20] Sentences for first-time illegal entry under INA §275 are typically a matter of days or weeks, with pretrial detention usually counted as part of the sentence; Tim O'Shea, Theresa Cardinal Brown, "Why Are Families Being Separated at the Border? An Explainer," Bipartisan Policy Center, June 13, 2018.

[21] For more information on formal and streamlined removal processes, see CRS Legal Sidebar LSB10150, *Immigration Laws Regulating the Admission and Exclusion of Aliens at the Border*.

[22] For more information on the two ways of obtaining asylum, see U.S. Citizenship and Immigration Services, "Obtaining Asylum in the United States," https://www.uscis.gov/humanitarian/refugees-asylum/asylum/obtaining-asylum-united-states, updated September 22, 2020.

[23] INA §212(a)(7) and §212(a)(6)(C) are inadmissibility sections that apply to expedited removal. Expedited removal was introduced as part of the Illegal Immigration and Immigrant Responsibility Act of 1996. According to the statute (INA §235(b)(1)(A)(iii)), expedited removal can be applied to an alien who meets the expedited removal inadmissibility criteria described above, has not been admitted or paroled, and cannot affirmatively show continuous

Aliens in expedited removal who express a fear of persecution are detained by ICE and given a *credible fear* interview with an asylum officer from DHS's U.S. Citizenship and Immigration Services (USCIS).[24] The purpose of the interview is to determine if the asylum claim has sufficient validity to merit an asylum hearing before an immigration judge. Those who receive a favorable credible fear determination are taken out of expedited removal, placed into formal removal proceedings, and given a hearing before an immigration judge, thereby placing the asylum seeker on the defensive path to asylum. Those who receive an unfavorable determination may request that an immigration judge review the case. Aliens in expedited removal who cannot demonstrate a credible fear are promptly deported.

Detention

The INA provides DHS with broad authority to detain adult aliens who are in removal proceedings.[25] However, child detention operates under different policies than that of adults. Children are detained according to broad guidelines established through a court settlement agreement (applicable to all alien children) and two statutes (applicable only to unaccompanied alien children).

The 1997 Flores Settlement Agreement (FSA) established a nationwide policy for the detention, treatment, and release of alien children, both accompanied and unaccompanied. The Homeland Security Act of 2002 charged ORR with providing temporary care and ensuring custodial placement of UAC with suitable and vetted sponsors.[26] Finally, the William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008 (TVPRA) directed DHS to ensure that all UAC be screened by DHS for possible human trafficking.[27] The TVPRA mandated that UAC from countries other than Mexico or Canada—along with all UAC apprehended in the U.S. interior—be transferred to the care and custody of ORR, and then be "promptly placed in the least restrictive setting that is in the best interest of the child."[28] In the course of being referred to ORR, UAC are also put into formal removal proceedings, ensuring they can request asylum or other types of immigration relief before an immigration judge.

As a result of a 2015 judicial interpretation of the Flores Settlement Agreement, children accompanying apprehended adults cannot be held in immigration detention for more than 20

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physical presence for the prior two years. As a matter of policy, however, expedited removal to date has been limited to persons apprehended within 100 miles of the U.S. border and who have been present in the United States for less than 14 days. Executive Order 13767 issued on January 25, 2017, instructs the DHS Secretary to implement the expansion of expedited removal to the full extent of the statute. That implementation was recently halted by a federal judge. For more information, see CRS Legal Sidebar LSB10336, *The Department of Homeland Security's Nationwide Expansion of Expedited Removal*.

[24] *Credible fear* means that there is "a significant possibility," taking into account the credibility of the statements made by the alien in support of the alien's claim and such other facts as are known to the officer, that the alien could establish eligibility for asylum. INA §235(b)(1)(B)(v); 8 U.S.C. §1225(b)(1)(B)(v).

[25] For background information, see archived CRS Report RL32369, *Immigration-Related Detention*.

[26] P.L. 107-296, §462, codified, as amended, at 6 U.S.C. §279(g)(2).

[27] P.L. 110-457, §235.

[28] For UAC from Mexico or Canada, CBP personnel must screen each child within 48 hours of apprehension to determine if he or she (1) is at risk of becoming a trafficking victim, (2) has a possible asylum claim, and (3) is unable to make an independent decision to voluntarily return to his/her country of nationality or last habitual residence. If any response is affirmative, CBP must refer the child to ORR within 72 hours of this determination. If CBP personnel determine the minor to be inadmissible under the INA (i.e., if responses are not affirmative), they can permit the minor to voluntarily return to his/her country of nationality or last habitual residence. For more information, see CRS Report R43599, *Unaccompanied Alien Children: An Overview*.

days, on average. If the parents cannot be released with them, such children are typically treated as UAC and referred to ORR.

Removal

Under the formal removal process, an immigration judge from DOJ's Executive Office for Immigration Review (EOIR) determines whether an alien is removable. The immigration judge may grant certain forms of relief (e.g., asylum, cancellation of removal), and removal decisions are subject to administrative and judicial review.

Under streamlined removal procedures, which include *expedited removal* and *reinstatement of removal* (i.e., when DHS reinstates a removal order for a previously removed alien), opportunities for relief and review are generally limited.[29] Under expedited removal (INA §235(b)), an alien who lacks proper documentation or has committed fraud or willful misrepresentation to gain admission into the United States may be removed without any further hearings or review, unless he or she indicates a fear of persecution in their home country or an intention to apply for asylum.[30]

If apprehended foreign nationals are found to be removable, ICE and CBP share the responsibility for repatriating them.[31] CBP handles removals at the border for unauthorized aliens from the contiguous countries of Mexico and Canada, and ICE handles all removals from the U.S. interior and removals for all unauthorized aliens from noncontiguous countries.[32]

Prosecution of Aliens Charged with Illegal Border Crossing in Prior Administrations

Prior to the Trump Administration, aliens apprehended between ports of entry who were not considered enforcement priorities (e.g., a public safety threat, repeat illegal border crosser, convicted felon, or suspected child trafficker) were typically not criminally prosecuted for illegal entry but would be placed directly into civil removal proceedings for unauthorized U.S. presence.[33]

In addition, aliens apprehended at and between ports of entry who sought asylum and were found to have credible fear generally were not held in immigration detention if DHS did not assess them as public safety risks. Rather, they were administratively placed into removal proceedings, instructed by DHS to appear at their immigration hearings, and then released into the U.S.

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[29] For more information, see CRS Report R45314, *Expedited Removal of Aliens: Legal Framework*.

[30] Two other removal options, often referred to as "returns"—*voluntary departure* and *withdrawal of petition for admission*—require aliens to leave the United States promptly but exempt them from certain penalties associated with other types of removal. For background information, see CRS Report R43892, *Alien Removals and Returns: Overview and Trends*.

[31] Ibid.

[32] For more detail on laws governing border enforcement, see CRS Legal Sidebar LSB10150, *Immigration Laws Regulating the Admission and Exclusion of Aliens at the Border*.

[33] CRS consultation with ICE Legislative Affairs, June 8, 2018. For one historical perspective on the policy of family separation as a migration deterrent, see Noah Lanard, "An Explosive Government Report Exposed Family Separations and Other Immigration Horrors—in 1931," *Mother Jones*, October 27, 2020.

interior. This policy became more prevalent after 2015 when a federal judge ruled that children could not be kept in immigration detention for more than 20 days.[34]

DHS officials justified this "catch and release" approach in the past because of the lack of detention bed space and the considerable cost of detaining large numbers of unauthorized aliens and family units for the lengthy periods, often stretching to years, between apprehension by CBP and removal hearings before an EOIR judge.[35] Immigration enforcement advocates criticized the "catch and release" policy because they contended that many apprehended individuals fail to appear subsequently for their immigration hearings, an argument that others have refuted.[36]

According to some observers, prior administrations made more use of alternatives to detention that permitted DHS to monitor families who were released into the U.S. interior.[37] Such practices are needed to monitor the roughly 2 million aliens in removal proceedings given that ICE's current budget funds about 45,000 beds, which are prioritized for aliens who pose public safety or absconder risks.[38]

Data are not available on the rate and/or absolute number of family separations resulting from illegal border crossing prosecutions under prior administrations, limiting the degree to which comparisons can be made with the Trump Administration's zero tolerance policy.[39]

DHS states that the agency referred an average of 21% of all illegal border crossing "amenable adults" for prosecution from FY2010 through FY2016.[40] DHS maintains that it has an established policy of separating children from adults when it

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[34] The federal judge ruled that under the Flores Settlement Agreement, minors detained as part of a family unit cannot be detained in unlicensed facilities for longer than "a presumptively reasonable period of 20 days," at which point, such minors must be released or transferred to a licensed facility. Since most jurisdictions do not offer licensure for family residential centers, and because none of ICE's family detention centers is licensed, DHS rarely detains families for more than 20 days. See Flores v. Lynch, 212 F. Supp. 3d 907 (C.D. Cal. 2015).

[35] Lori Robertson, "Did the Obama Administration Separate Families?," *FactCheck.org*, June 20, 2018.

[36] The issue of whether immigrants show up for their court hearings is debated. For example, see Mark Metcalf, U.S. *Immigration Courts & Aliens Who Disappear Before Trial*, Center for Immigration Studies, January 24, 2019; and Mark Metcalf, *Absent attendance and absent enforcement in America's immigration courts*, Center for Immigration Studies, March 19, 2017. For opposing views, see Ingrid Eagly and Steven Shafter, *Measuring In Absentia Removal in Immigration Court*, American Immigration Council, January 28, 2021; American Immigration Council, *Immigrants and Families Appear in Court: Setting the Record Straight*, July 30, 2019; and Transactional Records Access Clearinghouse (TRAC), *Most Released Families Attend Immigration Court Hearings*, June 18, 2019.

[37] See for example, Ana Campoy, "The $36-a-day alternative to jailing immigrant families favored by Obama," Quartz, June 23, 2018; Alex Nowrasteh, "Alternatives to Detention Are Cheaper than Universal Detention," Cato Institute, June 20, 2018; and Alexia Fernández Campbell, "Trump doesn't need to put families in detention centers to enforce his immigration policy. There are better options," *Vox*, June 22, 2018. For more information on alternatives to detention, see United Nations High Commission for Refugees, "Guiding Questions for the assessment of Alternatives to Detention," *UNHCR Beyond Detention Toolkit*, May 2018; and American Immigration Lawyers Association, *The Real Alternatives to Detention*, Document 17071103, July 11, 2017. For a critical perspective on alternatives to detention, see Dan Cadman, *Are 'Alternative to Detention' Programs the Answer to Family Detention?*, Center for Immigration Studies, June 28, 2018. For background information, see CRS Report R45804, *Immigration: Alternatives to Detention (ATD) Programs*.

[38] U.S. Department of Homeland Security, Office of the Inspector General, "U.S. Immigration and Customs Enforcement's Alternatives to Detention (Revised)," OIG-15-22, February 4, 2015. For FY2021, ICE requested funding for 60,000 detention beds (55,000 for adults, 5,000 for families; an increase of 12,226 and 2,500 beds, respectively, from current levels); see U.S. Immigration and Customs Enforcement, *FY2021 Congressional Budget Justification, Operations and Support*, pp. 14-15.

[39] See Lori Robertson, "Did the Obama Administration Separate Families?," *FactCheck.org*, June 20, 2018.

[40] U.S. Department of Homeland Security, "Myth vs. Fact: DHS Zero-Tolerance Policy," press release, June 18, 2018. However, as some observers note, this percentage does not reveal how many children were separated from the adults

- cannot determine the family relationship or otherwise verify identity,
- determines that the child is being smuggled or trafficked or is otherwise at risk with the parent or legal guardian, or
- determines that the parent or legal guardian may have engaged in criminal conduct and refers them for criminal prosecution.[41]

Prosecution of Aliens Charged with Illegal Border Crossing during the Trump Administration

During 2017, prior to the zero tolerance policy, news outlets had reported on pilot programs that separated family units that were apprehended at certain locations along the Southwest border.[42] One migrant advocacy organization issued a report documenting a range of DHS policies and practices that led to family separations, including the criminal prosecution of illegal entry.[43]

On April 6, 2018, then-Attorney General Jeff Sessions announced a "zero tolerance" policy under which *all* illegal border crossers apprehended between U.S. ports of entry would be criminally prosecuted for illegal entry or illegal reentry.[44] This policy made no exceptions for asylum seekers and/or family units.[45] To facilitate this policy, the Attorney General announced that he would send 35 additional prosecutors to U.S. Attorney's Offices along the Southwest border and 18 additional immigration judges to adjudicate cases in immigration courts near the Southwest border.[46] According to a subsequent DHS Office of Inspector General (OIG) report, DHS had expected to separate at least 26,000 children when it began the policy.[47]

Consequently, if a family unit was apprehended crossing illegally between ports of entry, the zero tolerance policy mandated that CBP refer all illegal adult entrants to DOJ for criminal prosecution. Accompanying children, who are not permitted to be housed in adult criminal detention settings with their parents, were to be processed as unaccompanied alien children in

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who were referred for prosecution. See Lori Robertson, "Did the Obama Administration Separate Families?," *FactCheck.org*, June 20, 2018.

[41] U.S. Department of Homeland Security, "Myth vs. Fact: DHS Zero-Tolerance Policy," press release, June 18, 2018.

[42] See Julia Edwards Ainsley, "Exclusive: Trump administration considering separating women, children at Mexico border," *Reuters*, March 3, 2017; and Lomi Kriel, "Trump moves to end 'catch and release', prosecuting parents and removing children who cross border," *Houston Chronicle*, November 25, 2017.

[43] Kids in Need of Defense (KIND), Women's Refugee Commission, and Lutheran Immigration and Refugee Service, *Betraying Family Values: How Immigration Policy at the United States Border is Separating Families*, January 10, 2017.

[44] U.S. Department of Justice, Office of the Attorney General, *Memorandum for Federal Prosecutors Along the Southwest Border*, "Zero-Tolerance for Offenses Under 8 U.S.C. §1325(a)," April 6, 2018. The policy was implemented on May 7, 2018; U.S. Department of Justice, Office of Public Affairs, "Attorney General Sessions Delivers Remarks Discussing the Immigration Enforcement Actions of the Trump Administration," May 7, 2018.

[45] Immigration and human rights advocates cautioned that prosecuting persons who cross into the United States in order to present themselves before a CBP officer and request asylum raises concerns about whether the United States is abiding by a number of human rights and refugee-related international protocols. For background information, see Jonathan Blitzer, "The Trump Administration Is Completely Unravelling the U.S. Asylum System," *The New Yorker*, June 11, 2018.

[46] U.S. Department of Justice, Office of Public Affairs, "Justice Department Announces Additional Prosecutors and Immigration Judges For Southwest Border Crisis," May 2, 2018.

[47] U.S. Department of Homeland Security, Office of the Inspector General, *DHS Lacked Technology Needed to Successfully Account for Separated Migrant Families*, OIG-20-06, November 25, 2019, pp. 17-18.

accordance with the TVPRA. They were transferred to the custody of ORR, which houses them in agency-supervised, state-licensed shelters. If feasible given the circumstances, ORR attempted to place them with relatives or legal guardian sponsors or place them in temporary foster care.[48]

At the time the zero tolerance policy was in effect, ORR had over 100 shelters in 17 states[49] that were reportedly at close to full capacity.[50] Consequently, at one point, the agency was evaluating options for housing children on Department of Defense (DOD) installations to handle the surge of separated children resulting from increased prosecution of parents crossing between ports of entry.[51]

As noted earlier, after adults have been tried in federal courts for illegal entry—and if convicted, have served their criminal sentences—they are transferred to ICE custody and placed in immigration detention. Typically, parents are then reunited in ICE family detention facilities with their children who have either remained in ORR custody or have been placed with a sponsor. Requests for asylum can also be pursued at this point.

Timeline on Family Separation

The following section provides a timeline of events directly related to the separation of families at the Southwest border in conjunction with the zero tolerance policy as well as prior and subsequent to that policy.[52]

2017

Between March 2017 and November 2017, CBP's U.S. Border Patrol (USBP) conducted a pilot program to increase prosecutions for illegal entry and allow for the prosecution of adults within family units. According to DOJ, this initiative resulted in the separation of about 280 families. It also reportedly reduced family unit apprehensions by 64% in El Paso TX, one of the primary locations where it was initiated.[53] According to a subsequent DOJ internal review of the zero

[48] Most unaccompanied alien children who arrive at the Southwest border alone are placed with sponsors or in ORR-arranged foster care; for more information, see CRS Report R43599, *Unaccompanied Alien Children: An Overview*. It is not clear whether such placements are as likely for UAC who arrive with parents. During the peak of the UAC apprehension surge in 2014, UAC spent an average of 35 days in ORR shelters. Most recently, ORR reported that the average length of stay in its shelters was 50 days. U.S. Department of Health and Human Services, Administration for Children and Families, Office of Refugee Resettlement, *Fact Sheet*, "Unaccompanied Alien Children Program," October 2, 2019.

[49] U.S. Department of Health and Human Services, Office of Refugee Resettlement, "Unaccompanied Alien Children Frequently Asked Questions," website, July 9, 2018, accessed by CRS on February 20, 2019.

[50] One news article at the end of May 2018 reported ORR shelter capacity at 95%; see Nick Miroff, "Trump's 'zero tolerance' at the border is causing child shelters to fill up fast," *Washington Post*, May 29, 2018.

[51] Letter from Alex M. Azar II, Secretary, U.S. Department of Health and Human Services, to The Honorable Jim Mattis, Secretary of Defense, March 8, 2018. Similar arrangements were made in June 2014, when apprehensions of UAC reached an all-time high. ORR coordinated with DOD to temporarily allow UAC to be housed at Lackland Air Force Base in San Antonio, TX, and at Naval Base Ventura County in Oxnard, CA. Arrangements at both sites ended August 2014.

[52] See also Southern Poverty Law Center, "Family separation under the Trump administration – a timeline," June 17, 2020, https://www.splcenter.org/news/2020/06/17/family-separation-under-trump-administration-timeline; and U.S. House of Representatives, Committee on the Judiciary, Majority Staff Report, *The Trump Administration's Family Separation Policy: Trauma, Destruction, and Chaos*, October 2020.

[53] U.S. Department of Justice, Office of the Inspector General, *Review of the Department of Justice's Planning and Implementation of Its Zero Tolerance Policy and Its Coordination with the Departments of Homeland Security and Health and Human Services*, 21-028, January 2021, p. 32.

tolerance policy, the separations and federal agencies' inability to reunite the families caused concern among prosecutors and other stakeholders, but did not prompt the DOJ to seek additional information to identify the deleterious consequences that resulted from this pilot program.[54]

In FY2017, CBP apprehended 75,622 alien family units and separated 1,065 (1.4%) of them.[55] Of those separations, 46 were due to fraud and 1,019 were due to medical and/or security concerns. In the first five months of FY2018, prior to enactment of the zero tolerance policy, CBP apprehended 31,102 alien family units and separated 703 (2.2%), of which 191 resulted from fraud and 512 from medical and/or security concerns.[56]

2018

Prior to Attorney General Sessions's announcement of the zero tolerance policy, the American Civil Liberties Union (ACLU) filed a lawsuit against ICE (referred to as "Ms. L. v. ICE") on behalf of two families separated at the Southwest border: a woman from the Democratic Republic of the Congo who was separated from her 6-year-old daughter at a port of entry for five months; and a woman from Brazil who had crossed into the United States illegally between ports of entry and was separated from her 14-year-old son for eight months.[57] The lawsuit, filed in February, was subsequently expanded in March 2018 to a class-action lawsuit filed by the ACLU against ICE on behalf of all parents who were separated from their children by DHS.

In the early months of the policy, the Trump Administration repeatedly updated the number of children separated from their families. According to CBP testimony in May 2018, 658 children were separated from 638 adults who were referred for prosecution between May 7 and May 21.[58] DHS subsequently reported that 1,995 children had been separated from their parents between April 19 and May 31.[59] DHS updated these figures in June 2018, reporting that 2,342 children were separated from their parents between May 5 and June 9.[60] DHS then reported that CBP had since reunited with their parents 538 children who were never sent to ORR shelters.[61] HHS Secretary Alex Azar then reported that "under 3,000" minor children (under age 18) had been

[54] Ibid. See also Lisa Riordan Seville and Hannah Rappleye, "Trump admin ran 'pilot program' for separating migrant families in 2017," *NBC News*, June 29, 2018.

[55] Because FY2017 began on October 1, 2016, some of these separations—unspecified in CBP's correspondence to CRS—occurred during the last four months of the Obama Administration.

[56] Email correspondence from CBP Legislative Affairs to CRS, June 8, 2018. Figures represent separated family units, not the number of separated children; the latter is likely higher given that some family units consist of more than one child.

[57] See *Ms. L v. ICE*, No. 18-cv-00428-DMS-MDD (S.D. Cal. Feb. 18, 2018).

[58] Testimony of Richard Hudson, Deputy Chief of the Operations Program, Law Enforcement Operations Directorate, U.S. Customs and Border Protection, in U.S. Congress, Senate Committee on the Judiciary, Subcommittee on Border Security and Immigration, *TVPRA and Exploited Loopholes Affecting Unaccompanied Alien Children*, 115th Cong., 2nd sess., May 23, 2018.

[59] These figures were obtained from DHS by the Associated Press on June 15, 2018. See Colleen Long, "DHS reports about 2,000 minors separated from families," Associated Press, June 16, 2018.

[60] On June 18, Senator Dianne Feinstein reportedly released DHS statistics showing that 2,342 children were separated from their parents between May 5 and June 9. See Arit John and Jennifer Epstein, "All About the U.S. Separating Families at Its Border," Bloomberg, June 18, 2018.

[61] U.S. Department of Homeland Security, "Fact Sheet: Zero-Tolerance Prosecution and Family Reunification," June 23, 2018.

separated from their families in total, including roughly 100 under age 5.[62] As of July 13, 2018, HHS reported that 2,551 children ages 5 to 17 remained separated.[63]

On June 20, 2018, following considerable and largely negative public attention to family separations stemming from the zero tolerance policy, President Trump issued an executive order (EO) mandating that DHS maintain custody of alien families "during the pendency of any criminal improper entry or immigration proceedings involving their member," to the extent permitted by law and appropriations.[64] The EO instructed DOD to provide and/or construct additional shelter facilities, upon request by ORR, and it instructed other executive branch agencies to assist with housing as appropriate to implement the EO.[65] The EO mandated that the Attorney General prioritize the adjudication of detained family cases, and it required the Attorney General to ask the U.S. District Court for the Central District of California, which oversees the Flores Settlement Agreement, to modify the agreement to permit detained families to remain together.

On June 25, 2018, CBP announced that, because of ICE's lack of family detention bed space, it had temporarily halted the policy of referring adults who cross the border illegally with children to DOJ for criminal prosecution.[66] According to a White House announcement, the zero tolerance policy could be reinstituted once additional family detention bed space became available.[67] Also on June 25, 2018, DOD announced plans to permit four of its military bases to be used by other federal agencies to shelter up to 20,000 UAC and family units.[68] DOD subsequently announced that 12,000 persons would be housed on its facilities,[69] before another report appeared suggesting the number was 32,000 UAC and family units.[70] Despite these announcements, apprehended UAC or family units were not subsequently housed on military installations.[71]

On June 26, 2018, in response to the ACLU class action lawsuit, Judge Dana Sabraw of the U.S. District Court for the Southern District of California issued an injunction against the Trump Administration's practice of separating families and ordered that all separated families be reunited within 30 days.[72] The judge ruled that children under age five must be reunited with their parents within 14 days, all children must have phone contact with their parents within 10 days, children could be separated at the border only if accompanying adults presented an immediate

[62] Dan Diamond, "HHS says hundreds more migrant kids may have been separated than earlier count," *Politico*, July 5, 2018; and Caitlin Dickerson, "Trump Administration in Chaotic Scramble to Reunify Migrant Families," *The New York Times*, July 5, 2018.

[63] Dan Diamond, "Trump administration expedites reunifications for 2,551 migrant children," *Politico*, July 13, 2018.

[64] The White House, *Affording Congress an Opportunity to Address Family Separation*, Executive Order, June 20, 2018.

[65] Up to that date, only DOD had made arrangements with ORR to provide housing for alien families and children.

[66] Ron Nixon, Erica L. Green and Michael D. Shear, "Border Officials Suspend Handing Over Migrant Families to Prosecutors," *The New York Times*, June 25, 2018.

[67] Ibid.

[68] Michael D. Shear, Helene Cooper and Katie Benner, "U.S. Prepares to House Up to 20,000 Migrants on Military Bases," *The New York Times*, June 21, 2018. It was unclear what proportion of the DOD facilities would have been used for UAC shelters versus immigration detention for families.

[69] U.S. Department of Defense, "DHS Requests DoD House Up to 12,000 Migrants," *Defense.gov*, June 28, 2018.

[70] Lara Seligman, "Pentagon Says It Won't Pay for Housing of Immigrants," *Foreign Policy*, July 9, 2018.

[71] U.S. Department of Defense, Office of Legislative Affairs, email to CRS, January 29, 2021.

[72] Order Granting Plaintiffs' Motion for Classwide Preliminary Injunction, Ms. L. v. U.S. Immigration and Customs Enforcement, Case 3:18-cv-428, Document 83 (S.D. Cal. June 26, 2018).

danger to them, and parents who were removable were not to be removed unless they had been reunited with their separated children.[73]

In response to the June 26 injunction, the Trump Administration reportedly instructed DHS to provide all parents with final orders of removal and whose children were separated from them with two options.[74] The first was to return to their countries of origin with their children. This option fulfilled the mandate from the June 26 court order to reunite families, but also forced parents and children to abandon any claims for asylum. The second option was for parents to return alone to their country of origin. This option would leave the children in the United States to apply for asylum on their own. Parental decisions were to be recorded on a new ICE form.[75]

On June 27, 2018, CBP issued guidance to its immigration officers on compliance with Judge Sabraw's injunction against family separation. The guidance indicated that children could be separated from their parents only for the following reasons:

1. referral of a parent/legal guardian for prosecution for a felony;
2. the parent/legal guardian presents a danger to the child;
3. the parent/legal guardian has a criminal conviction(s) for violent misdemeanors or felonies; or
4. the parent/legal guardian has a communicable disease.[76]

On July 9, 2018, Judge Dolly Gee of the U.S. District Court for the Central District of California, which oversees the Flores Settlement Agreement, ruled against a DOJ request to modify the agreement to permit children to remain with their parents in family detention. Judge Gee held that no basis existed for amending the court's original decision requiring the federal government to release alien minors in immigration detention after 20 days, regardless of any unlawful entry prosecution of the parents.[77]

On July 10, ICE officials reportedly indicated that parents reunited with their children would be enrolled in an alternative detention program, such as the use of ankle bracelets that permit electronic monitoring, and then released into the U.S. interior, essentially reverting to the prior

[73] Michael D. Shear, Julie Hirschfeld Davis, Thomas Kaplan, and Robert Pear, "Federal Judge in California Halts Splitting of Migrant Families at Border," *The New York Times*, June 26, 2018.

[74] Nick Valencia and Tal Kopan, "The options parents facing deportation have after they've been separated from their kids," *CNN*, July 3, 2018; Julia Ainsley and Jacob Soboroff, "New Trump admin order for separated parents: Leave U.S. with kids or without them," *nbcnews.com*, July 3, 2018; and Jeremy Raff, "ICE Is Pressuring Separated Parents to Choose Deportation," *The Atlantic*, July 6, 2018. Immigration advocates contended that the new form misled parents who had outstanding asylum claims into thinking that they had to leave the United States without their children, despite the fact that the forms indicated that they applied only to parents with final orders of removal. DHS responded that " it is 'long-standing policy' to offer parents facing deportation the option of leaving their [children] behind, noting it is 'not uncommon' for parents to elect to do so, historically. Any child who remains in the United States in the custody of the government or with a family member is allowed to pursue their own right to stay, and ICE 'does not interfere' in that decision."

[75] U.S. Immigration and Customs Enforcement, Enforcement and Removal Operations, Separated Parent's Removal Form, July 2018.

[76] Kevin K. McAleenan, Commissioner, *Interim Guidance on Preliminary Injunction in Ms. L. v. ICE, No. 18-428 (C.D. Cal. June 26, 2018)*, U.S. Customs and Border Protection, Memorandum for Carla L. Provost, Chief, U.S. Border Patrol, and Todd C. Owen, Executive Assistant Commissioner, Office of Field Operations, June 27, 2018.

[77] Order Denying Defendants "Ex Parte Application for Limited Relief from Settlement Agreement," Flores v. Sessions, Case 2:85-cv-4544, Document 455 (C.D. Cal. July 9, 2018). See also Miriam Jordan and Manny Fernandez, "Judge Rejects Long Detentions of Migrant Families, Dealing Trump Another Setback," *The New York Times*, July 9, 2018.

policy that has been labeled by some as "catch and release."[78] DOJ continued to maintain that its zero tolerance policy was in effect.[79]

On July 11, 2018, in response to the requirements of the ACLU lawsuit, ORR certified a list of 2,654 children that the agency stated were in its custody at the time of the June 26 injunction that it believed had been separated from their parents and whose parents met the lawsuit's class definition.[80] According to a subsequent HHS Office of Inspector General (OIG) report, one or more data sources showed that an additional 946 children may have been separated from family members at the time of apprehension, but their family members did not meet the criteria needed for inclusion in the lawsuit.[81]

On July 16, 2018, in response to concerns expressed by the ACLU about potential abrupt deportations following family reunification, Judge Sabraw temporarily halted, for one week, the deportations of parents who had been reunited with their children.[82] The judge issued the stay of deportations to provide parents slated for removal with a week's time to better understand their legal rights regarding asylum or other forms of immigration relief for themselves and their children.

On July 16, 2018, Commander Jonathan White, Deputy Director for Children's Programs at the Office of Refugee Resettlement, testified before Judge Sabraw that ORR had identified 2,551 separated children in its custody ages 5 to 17 and had matched 2,480 to their parents, while 71 children's parents remained unidentified.[83] ORR was undertaking intensive background checks to ensure that separated children were reunited with their actual parents and did not face personal security risks such as child abuse.[84] According to White, 1,609 parents of separated children remained in ICE custody. White noted that ICE was also conducting its own security checks and at that point had cleared 918 parents, failed 51 parents, and had 348 parents with pending clearances. As of July 16, 2018, ICE had approved about 300 children for release to be reunited with their parents.[85]

On July 18, 2018, HHS submitted a "Tri-Department Plan" in coordination with DHS and DOJ explaining actions the agencies were taking to reunify Ms. L v. ICE class members with their

[78] In summer 2018, the sizable influx of migrants was reportedly overwhelming the capacity of some ICE facilities, leading to the release of family units. See Nick Miroff, "Migrant families overwhelm detention capacity in Arizona, prompting mass releases," *Washington Post*, October 9, 2018.

[79] Miriam Jordan, Katie Benner, Ron Nixon, and Caitlin Dickerson, "As Migrant Families Are Reunited, Some Children Don't Recognize Their Mothers," *The New York Times*, July 10, 2018.

[80] The class was defined as "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 absent a determination that the parent is unfit or presents a danger to the child." Parents were excluded from the class if they had a criminal history or communicable disease See *Ms. L v. ICE*, No. 18-cv-00428-DMS-MDD (S.D. Cal. June 26, 2018).

[81] U.S. Department of Health and Human Services, Office of Inspector General, "Separated Children Placed in Office of Refugee Resettlement Care," *HHS-OIG Issue Brief*, January 2019. OEI-BL-18-00511.

[82] Caitlin Dickerson, "Court Orders Temporary Halt to Migrant Family Deportations," *The New York Times*, July 16, 2018 and Ted Hesson, "Judge will temporarily halt deportations of reunited families," *Politico*, July 16, 2018.

[83] Ibid.

[84] Nick Miroff, Maria Sacchetti and Amy Goldstein, "In D.C. command center, officials work to reunite migrant children by court deadline," *Washington Post*, July 19, 2018.

[85] Ibid.

children. These steps included conducting and reviewing background checks of parents, confirming parentage, assessing child safety, interviewing parents, and reuniting families.[86]

As of July 19, 2018, the Trump Administration had reportedly reunified 364 of the 2,551 children ages 5 to 17. Apart from the parents of those children, 1,607 parents were eligible to be reunited with their children, 719 of whom had final orders of deportation. Another 908 parents were not expected to be eligible for reunification because they possessed criminal backgrounds or required "further evaluation."[87]

On September 6, 2018, DHS and HHS proposed new regulations that would effectively terminate the Flores Settlement Agreement and replace it with formal regulations governing the "apprehension, processing, care, custody, and release" of minor children.[88] The primary provision in these proposed regulations would be the authority to hold migrant children and their parents until their cases have been adjudicated.

In October 2018, it was widely reported that the Trump Administration was considering alternative immigration enforcement policies involving family separation to reduce the persistent and relatively high level of unauthorized migrants seeking asylum at the Southwest border. One of these approaches, a "binary choice" policy, would give detained parents the option of keeping their children with them in immigration detention during the pendency of their immigration cases or being separated from their children, who would be referred to ORR shelters, including possible foster care.[89] This option gained traction as a large and expanding migrant group originating from Honduras, referred to as a migrant "caravan," garnered extensive media attention as it made its way northward through Central America and Mexico. Subsequent news reports indicated that this policy was being used in ICE detention centers.[90]

Apart from the number of separated children who have been included in the Ms. L. v. ICE lawsuit, other figures emerged on the total number of family separations that have occurred more generally. For example, on October 12, 2018, Amnesty International (AI) published a report citing statistics provided to the organization by CBP indicating that the agency had separated 6,022 "family units" between April 19, 2018, and August 15, 2018.[91] These cases, combined with

[86] U.S. Department of Health and Human Services, U.S. Department of Homeland Security, and U.S. Department of Justice, The Tri-Department Plan for Stage II of Family Reunification, July 18, 2018. Accessed at https://www.hhs.gov/sites/default/files/UAC-Tri-Department-Process.pdf on November 18, 2018.

[87] Julia Ainsley and Jacob Soboroff, "Facing deadline, government reunified 364 of 2,500-plus migrant children," *nbcnews.com*, July 19, 2018.

[88] U.S. Department of Homeland Security and U.S. Department of Health and Human Services, "Apprehension, Processing, Care, and Custody of Alien Minors and Unaccompanied Alien Children," 83 *Federal Register* 45486-45534, September 7, 2018.

[89] See, for example, Nick Miroff, Josh Dawsey and Maria Sacchetti, "Trump administration weighs new family-separation effort at border," *Washington Post*, October 12, 2018; and Miriam Jordan, Caitlin Dickerson and Michael D. Shear, "Trump's Plans to Deter Migrants Could Mean New 'Voluntary' Family Separations," *The New York Times*, October 22, 2018.

[90] See, for example, Julia Ainsley, "Family separation is back for migrants at the U.S./Mexican border, say advocates," *NBC News*, May 15, 2020; and Amanda Holpuch, "Indefinite detention or family separation? US forced immigrants to choose, lawyers say," *The Guardian*, May 15, 2020.

[91] Amnesty International, *USA: 'You Don't Have Any Rights Here': Illegal Pushbacks, Arbitrary Detention, and Ill-Treatment of Asylum-Seekers in the United States*, October 2018. It is not clear from this report (see Footnote 144) whether "family unit" refers to family or to individuals who arrive at the Southwest border as part of a family. The report authors suggest that in the context of family separations, "family unit" refers to a family, while in the context of alien apprehensions reported monthly by CBP, the term refers to individuals who arrive at the Southwest border as part of a family.

the 1,768 family separations reported by DHS between October 1, 2016, and February 28, 2018 (the 1,065 in FY2017 plus the 703 in the first five months of FY2018 noted separately above) indicate that CBP has reported a total of 7,790 family separations to either the Congressional Research Service (CRS) or AI. This total excludes an unknown number of family separations occurring between March 1 and April 18, 2018. According to AI, it also may exclude an unknown number of families that were separated after requesting asylum at U.S. ports of entry.

2019

On January 17, 2019, HHS's OIG issued a report describing ORR's challenges identifying all separated children.[92] The report cited limitations with both its information technology system for tracking such children as well as the complexity of determining which children should be classified as separated. According to this report, ORR's review of new information acquired between July and December 2018 indicated that an additional 162 children had met the criteria to be included in the Ms. L. v. ICE lawsuit, and that 79 previously included children had not actually been separated from a parent, changing the total from 2,654 to 2,737 children in the lawsuit.[93] In addition to the children included in the lawsuit who ORR identified were in its custody as of June 2018, ORR noted that thousands of additional children, who were not included in the accounting required by the lawsuit, may have been separated during an influx that began in 2017. The OIG concluded that "the total number of children separated from a parent or guardian by immigration authorities is unknown."

On February 7, 2019, a representative from HHS's OIG testified before Congress that DHS was continuing to separate children from their parents, although at a lower rate than during the zero tolerance policy of May-June 2018.[94] The testimony noted that while DHS routinely separates families if parents have a criminal history, DHS had not provided HHS with sufficient information to facilitate appropriate placement within the ORR shelter system. The testimony also noted that thousands more children were likely separated prior to June 26, 2018, but, lacking any formal system for tracking such separations, the witness could not provide more precise figures.

On February 14, 2019, Texas Civil Rights Project released a report describing the findings from interviews with 272 adults who had experienced family separation after President Trump's June 2018 EO.[95] The interviewees had indicated to screeners that they had been separated from their children.[96] The data, the first on family separation collected on a large scale by an organization outside the federal government, indicated that since the zero tolerance policy ended, a considerable number of family separations had occurred between minor children and relatives

[92] U.S. Department of Health and Human Services, Office of Inspector General, "Separated Children Placed in Office of Refugee Resettlement Care," HHS OIG Issue Brief, OEI-BL-18-00511, January 17, 2019.

[93] Problems described in this HHS-OIG report had been reported earlier by DHS's OIG in September 2018, although DHS did not quantify children who may have been separated or incorrectly classified. See DHS Office of Inspector General, "Special Review - Initial Observations Regarding Family Separation Issues Under the Zero Tolerance Policy," OIG-18-84, September 27, 2018.

[94] U.S. Congress, House Committee on Energy and Commerce, Subcommittee on Oversight and Investigations, *Examining the Failures of the Trump Administration's Inhumane Family Separation Policy*, Testimony of Ann Maxwell, Office of Inspector General, HHS Office of Refugee Resettlement, 116th Cong., 1st sess., February 7.

[95] Laura Peña and Efrén C. Olivares, *The Real National Emergency: Zero Tolerance & the Continuing Horrors of Family Separation at the Border*, Texas Civil Rights Project, February 14, 2019. Report initially reported by Dara Lind, "Hundreds of families are still being separated at the border," *Vox*, February 21, 2019.

[96] The 272 interviewees were a subset of almost 10,000 screened migrants who were prosecuted for immigration violations at the Southwest border.

other than parents and legal guardians. As noted above, the INA defines an unaccompanied alien child (UAC) as one under age 18 who lacks lawful immigration status in the United States and who is not in the care and custody of a parent or legal guardian.[97] According to DHS, minor children apprehended at the border who are accompanied by older siblings, cousins, aunts, uncles, grandparents, and other relatives who are not parents or legal guardians must be treated as UAC separated from their accompanying relatives, and turned over to the custody of ORR.[98] DHS reportedly does not count such related pairs of individuals as family units in its statistics, raising concerns among advocates that current CBP statistics may not fully capture the extent of family separation among apprehended migrants.

On February 21, 2019, the Joint Status Report filed on the status of a revised total of 2,816 children (2,709 ages five and above and 107 under age five)[99] included in the Ms. L. v. ICE lawsuit indicated that 2,735 had been reunited with their parents.[100] The report classified the statuses of the remaining children as follows: being determined upon further review to have not been separated from their parents, not reunited because of potential safety issues with the parent, and not being reunited because deported parents confirmed they wanted to allow the child to remain in the United States.[101] In addition, the report also indicated that up to 249 additional children not part of the Ms. L. v. ICE lawsuit had been separated between June 27, 2018 (the day after the lawsuit was filed), and January 31, 2019. According to ICE, the basis for separation was largely "parent criminality, prosecution, gang affiliation, or other law enforcement purpose."

On March 8, 2019, Judge Sabraw expanded the certified class of parents whose children were separated from them at the border to include those separated prior to the zero tolerance policy.[102] The expansion occurred after the HHS-OIG reported in January 2019 that potentially thousands of children may have been separated as early as July 2017.[103]

In the year following the enactment and pause of the zero tolerance policy, reports emerged on the detrimental treatment of children in CBP and ORR custody.[104] Some agency officials attributed

[97] 6 U.S.C. §279(g)(2).

[98] Ibid. See Dara Lind, "Hundreds of families are still being separated at the border," *Vox*, February 21, 2019.

[99] HHS's Office of Inspector General testified that ORR has repeatedly revised the number of children determined to be eligible for inclusion in the Ms. L. v. ICE case. See U.S. Congress, House Committee on Energy and Commerce, Subcommittee on Oversight and Investigations, *Examining the Failures of the Trump Administration's Inhumane Family Separation Policy*, Testimony of Ann Maxwell, Office of Inspector General, HHS Office of Refugee Resettlement, 116th Cong., 1st sess., February 7.

[100] Joint Status Report, Ms. L. v. U.S. Immigration and Customs Enforcement, Case 3:18-cv-428, Document 360 (S.D. Cal. February 20, 2019).

[101] Ibid.

[102] Order Granting Plaintiffs' Motion to Modify Class Definition, Ms. L. v. U.S. Immigration and Customs Enforcement, Case 3:18-cv-428, (S.D. Cal. March 8, 2019).

[103] Suzanne Monyak, "Families Separated At Border In 2017 Added To Class Action," *Law360*, March 11, 2019.

[104] See for example, Nomaan Merchant, "Hundreds of children wait in Border Patrol facility in Texas," *AP News*, June 18, 2018; Ginger Thompson, "Listen to Children Who've Just Been Separated From Their Parents at the Border," *ProPublica*, June 18, 2018; Sarah Stillman, "The Five-Year-Old Who Was Detained at the Border and Persuaded to Sign Away Her Rights," *New Yorker*, October 11, 2018; Caitlin Owens, Stef W. Kight, and Harry Stevens, Thousands of migrant youth allegedly suffered sexual abuse in U.S. custody," *Axios*, February 26, 2019; Jacob Soboroff and Julia Ainsley, "Botched family reunifications left migrant children waiting in vans overnight," *NBC News*, June 3, 2019; and Caitlin Dickerson, "'There Is a Stench': Soiled Clothes and No Baths for Migrant Children at a Texas Center," *The New York Times*, June 21, 2019.

such treatment to CBP's inability to transfer custody of children to ORR because the latter agency lacked sufficient shelter capacity.[105]

On July 30, 2019, the ACLU submitted a memorandum to the court indicating that child migrants had been separated from their parents after the zero tolerance policy was terminated.[106] Of these cases, the ACLU indicated that 678 occurred because parents had a criminal history for offenses that included drunken driving, assault, and gang affiliation, as well as theft, disorderly conduct, and minor property damage. The ACLU filed a request with Judge Sabraw to take action to prevent parents from losing custody of their children for minor violations, including traffic offenses. The ACLU subsequently requested that Judge Sabraw enforce a preliminary injunction that would limit family separation only to cases where the parent is deemed unfit or a danger to his or her child.[107]

On August 21, 2019, DHS and HHS finalized the regulations that would terminate the Flores Settlement Agreement.[108] As noted above, federal courts have since blocked key aspects of the regulations as inconsistent with the Flores Settlement Agreement. The rule would have permitted DHS to detain children with their parents for more than 20 days. Federal courts have since ruled against this and other key aspects of the regulations based on their inconsistency with the Flores Settlement Agreement.[109]

On October 24, 2019, DOJ disclosed to Judge Sabraw that an additional 1,556 migrant children had been separated from their parents during the Trump Administration but prior to the zero tolerance policy, in addition to the 2,816 separated children ultimately tallied for the Ms. L v. ICE lawsuit.[110] According to the ACLU, which reported the figure, most of the additional children were under age 13, including 204 under age 5.

On November 25, 2019, the DHS Office of the Inspector General issued a report describing the lack of CBP's information technology (IT) functionality that hampered the agency's ability to track separated migrant families during the enactment period of the zero tolerance policy.[111] According to the report, CBP officials had known about the deficiencies for several years, having conducted a pilot program imitating the zero tolerance policy in El Paso, TX, in November 2017.

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[105] Cedar Attanasio, Garance Burke, and Martha Mendoza, "Lawyers: 250 children held in bad conditions at Texas border," *AP News*, June 20, 2019.

[106] Maria Sacchetti, "ACLU: U.S. has taken nearly 1,000 child migrants from their parents since judge ordered stop to border separations," *Washington Post*, July 30, 2019. See also, Memorandum in Support of Motion to Enforce Preliminary Injunction, Ms. L. v. U.S. Immigration and Customs Enforcement, Case 3:18-cv-428, Document 439-1 (S.D. Cal. July 30, 2019).

[107] Hannah Albarazi, "Family Separation At Border Is 'Child Abuse' ACLU Tells Court," *Law360*, September 21, 2019.

[108] U.S. Department of Homeland Security, "DHS and HHS Announce New Rule to Implement the Flores Settlement Agreement; Final Rule Published to Fulfill Obligations under Flores Settlement Agreement," press release, August 21, 2019.

[109] Maria Sacchetti, "Federal judge blocks Trump administration from detaining migrant children for indefinite periods," *Washington Post*, September 27, 2019. See also Asher Stockler, "9th Circ. Rejects Trump Admin. Move To Overhaul Flores," *Law360*, January 4, 2021.

[110] Maria Sacchetti, "ACLU says 1,500 more migrant children were taken from parents by the Trump administration," *Washington Post*, October 24, 2019. See also, Joint Status Report, Ms. L. v. U.S. Immigration and Customs Enforcement, Case 3:18-cv-428, Document 495 (S.D. Cal. November 6, 2019).

[111] U.S. Department of Homeland Security, Office of the Inspector General, *DHS Lacked Technology Needed to Successfully Account for Separated Migrant Families*, OIG-20-06, November 25, 2019.

These IT deficiencies left the OIG's office unable to confirm the total number of family separations during the zero tolerance policy or subsequently.

2020

On January 13, 2020, Judge Sabraw issued a ruling reaffirming DHS's discretionary power to separate migrant families based on most criminal history (except a first offense of illegal entry) in the parent's background.[112] The ruling was in response to an ACLU filing that contended that the Trump Administration was systematically separating migrant families in cases where the parent was not a danger to the child.

On May 29, 2020, the DHS OIG's office issued a report indicating that far more families (60 families) than previously reported (7 families) were separated between May 6 and July 9 of 2018 solely because the parents had incurred prior immigration violations.[113] Such circumstances, according to the report, were "inconsistent with official DHS public messages about the limited circumstances warranting family separation at ports of entry."

On June 26, 2020, Judge Dolly Gee ordered ICE to release migrant children detained longer than 20 days within three weeks.[114] The order was in response to advocates' assertions that ICE was detaining the children unnecessarily.

On October 20, 2020, parties in the Ms. L v. ICE lawsuit filed a Joint Status Report to establish the disposition and circumstances of members of the expanded class of the lawsuit (parents of children separated during the Trump Administration but prior to the zero tolerance policy).[115] According to the report, ICE identified 1,556 children of potential expanded class members, 1,134 of which were confirmed by ICE as being members of the class. Parents of the other 422 children were categorized as "exclusions" who ICE identifies as not being potential expanded class members.[116]

Of the 1,134 children ICE confirmed as expanded class members, ICE had not provided a phone number in its court documents to allow contact with the parents of 104 of those children.[117] Of the remaining 1,030 children, a Steering Committee (comprised of ACLU attorneys, members of several immigrant advocacy organizations, and attorneys from private law firms) had successfully reached 485 of them. As such, the parents of 545 children (1,030 for which contact information

[112] Craig Clough, "Ruling Lets Feds Separate Families At Border For Any Crime," *Law360*, January 13, 2020. See also, Order Granting in Part and Denying in Part Plaintiffs' Motion to Enforce Preliminary Injunction, Ms. L. v. U.S. Immigration and Customs Enforcement, Case 3:18-cv-428, (S.D. Cal. January 13, 2020).

[113] U.S. Department of Homeland Security, Office of the Inspector General, *CBP Separated More Asylum-Seeking Families at Ports of Entry Than Reported and for Reasons Other Than Those Outlined in Public Statements*, OIG-20-35, May 29, 2020.

[114] Vanessa Romo, "Judge Orders ICE To Free Detained Immigrant Children Because Of COVID-19," *NPR*, June 26, 2020. See also, In Chambers-Order Re Updated Juvenile Coordinator Reports, Jenny L. Flores, et al. v. William P. Barr, et al., Case 2:85-cv-4544, (C.D. Cal. June 26, 2020).

[115] Caitlin Dickerson, "Parents of 545 Children Separated at the Border Cannot Be Found," *The New York Times*, October 21, 2020. See also Joint Status Report, Ms. L. v. U.S. Immigration and Customs Enforcement, Case 3:18-cv-428, Document 556 (S.D. Cal. October 20, 2020).

[116] DHS reportedly maintained that it would not disclose information about the parents of the 422 excluded children because those individuals had criminal records that prevented DHS from reuniting them with their children under DHS policy. ACLU indicated that it plans to contact those individuals and "reserves the right to contest these exclusions."

[117] The October 20, 2020, Joint Status Report cited above did not explain why ICE lacked a phone number for the 104 children.

exists minus those successfully contacted) were considered to remain out of contact.[118] The Steering Committee estimated that about two-thirds of these uncontacted parents (representing about 360 children) were residing in their countries of origin and required alternative on-the-ground methods to establish contact. These efforts have been hampered by the COVID-19 pandemic.[119] Of the parents that the Steering Committee had contacted, none sought to have their children returned to their countries of origin.[120]

In some cases, members of the Steering Committee have had only names and countries of origin to go on in trying to locate separated parents. Even after conducting public record searches to identify the cities where the families were from, they faced additional hurdles. Many of the families had fled their homes because they were escaping violence or extortion, and intentionally withheld information from friends and neighbors about where they were going.[121] The ACLU, which is leading the court challenge to the family separation policy, said it had also been unable to find 362 of the children, many of whom are likely living in the United States, whose parents were deemed unreachable. Reportedly, 60 of the 545 children were under age five when they were separated.

On December 2, 2020, a Joint Status Report in the ongoing ACLU lawsuit described efforts to locate the parents of 1,198 separated children. This figure included the 1,134 children described above, and an additional 64 "Recategorized Original Class" children who were not identified as part of original class in June 2018 but whose existence DHS subsequently disclosed.[122] The Steering Committee, having contacted the parents or attorneys of 570 children, still needed to contact those of the remaining 628 children.[123] This latter group consisted of 295 children whose parents were likely deported and 333 children whose parents were likely still in the United States. Of the 628, the Steering Committee contacted at least one other family member for 168 children. On-the-ground searches for parents were hampered by the COVID-19 pandemic.[124]

2021

To compute the total number of children who were ever separated from their parents or legal guardians as the result of the zero tolerance policy and its prototype requires counting those separated over three periods: 1) during the 2017 pilot program; 2) during the six-week period in 2018 when the policy was enacted; and 3) during the period after the policy's pause on June 20, 2018. As noted above, the ACLU's lawsuit includes a class of 1,556 children separated during the

[118] A subset of these parents representing 470 children are considered "unreachable" because the Steering Committee has neither been able to successfully contact them nor expects telephonic outreach to be successful.

[119] Methods to establish contact with parents include conducting on-the-ground searches; establishing toll-free telephone numbers in the United States, Guatemala, Honduras, Mexico, and El Salvador; sending letters to addresses provided by ICE; using broad-based media outreach; and working with a U.S. nonprofit organization to locate parents residing in the United States.

[120] Joint Status Report, Ms. L. v. U.S. Immigration and Customs Enforcement, Case 3:18-cv-428, Document 556 (S.D. Cal. October 20, 2020).

[121] Caitlin Dickerson, "Parents of 545 Children Separated at the Border Cannot Be Found," *The New York Times*, October 21, 2020.

[122] See Joint Status Report, Ms. L. v. U.S. Immigration and Customs Enforcement, Case 3:18-cv-428, Document 360 (S.D. Cal. February 20, 2019).

[123] The number of related parents is 1,082 because some entered with more than one child.

[124] Priscilla Alvarez, "Parents of 628 migrant children separated at border still have not been found, court filing says," CNN, December 2, 2020. See also, Joint Status Report, Ms. L. v. U.S. Immigration and Customs Enforcement, Case 3:18-cv-428, Document 560 (S.D. Cal. December 2, 2020).

first period. It also includes a class of 2,816 children separated during the six-week policy. Regarding the third period, according to HHS, 3,793 children were separated from their parents or legal guardians between April 1, 2018, and November 30, 2020, with 2,826 occurring in the later 9 months of 2018, 927 occurring in all of 2019, and 40 occurring in the first 11 months of 2020.[125] Combining the HHS figure with the 1,556 children included in the expanded class of the ACLU lawsuit that were separated prior to the zero tolerance policy yields a total of 5,349 recorded children separated between March 2017, at the start of the DHS pilot program, and November 30, 2020.

Policy Perspectives

Perspectives on the zero tolerance policy generally divide into two groups. Those who support greater immigration enforcement point to recent surges in family unit migration and a substantial backlog of asylum cases that are straining DHS and DOJ resources, potentially compromising the agencies' abilities to meet their outlined missions. Those who advocate on behalf of immigrants criticize the Trump Administration's treatment of migrants as unnecessarily harsh and counterproductive.

Enforcement Perspectives

DHS and DOJ contended that the zero tolerance policy enforced existing law and was needed to reduce illegal immigration.[126] DHS noted that foreign nationals attempting to enter the United States between ports of entry or "without inspection" were committing a crime punishable under the INA as a misdemeanor on the first occasion and a felony for every attempt thereafter.

DHS maintained that it had a long-standing policy of separating children from adults when children are at risk because of threats from human trafficking or because the familial relationship is suspect. DHS also maintained that it did not have a formal policy of separating parents from children for deterrence purposes, and it followed a standard policy of keeping families together "as long as operationally possible."[127] According to DHS, the agency had "a legal obligation to protect the best interests of the child whether that is from human smugglings, drug traffickers, or nefarious actors who knowingly break [U.S.] immigration laws and put minor children at risk."[128] Accordingly, DHS considered it appropriate to treat children of apprehended parents as UAC.[129]

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[125] U.S. Department of Health and Human Services, Administration for Children and Families, *Monthly Report to Congress on Separated Children, November 2020*. Of this number, 316 (8%) were under five years old.

[126] Sari Horwitz and Maria Sacchetti, "Sessions vows to prosecute all illegal border crossers and separate children from their parents," *Washington Post*, May 7, 2018. Senior immigration and border officials had reportedly issued a confidential memo to DHS Secretary Nielsen supporting the policy as the "most effective" way to reduce illegal entry.

[127] Testimony of the Honorable Kirstjen Nielsen, Secretary of Homeland Security, in U.S. Congress, House Committee on Appropriations, Subcommittee on Homeland Security, *FY 2019 Budget Hearing - Department of Homeland Security*, , 115th Cong., 2nd sess., April 11, 2018 (hereinafter, "Nielsen testimony, April 11, 2018"). Other observers contended that Attorney General Sessions explicitly justified the zero tolerance policy on the basis of deterring migrants from coming to the United States. See, for example, Christopher Ingraham, "Sessions says family separation is 'necessary' to keep the country from being 'overwhelmed.' Federal immigration data says otherwise," *Washington Post*, June 18, 2017; and U.S. Department of Justice, Office of Public Affairs, "Attorney General Sessions Delivers Remarks Discussing the Immigration Enforcement Actions of the Trump Administration," May 7, 2018.

[128] Maria Sacchetti, "Top Homeland Security officials urge criminal prosecution of parents crossing border with children," *Washington Post*, April 26, 2018.

[129] For more information on ORR processing of UAC, see CRS Report R43599, *Unaccompanied Alien Children: An Overview*.

DHS posited that while family separation was an unfortunate outcome of stricter enforcement of immigration laws and criminal prosecution of illegal entry and reentry, it was no different than the family separation that occurs regularly in the U.S. criminal justice system when parents of minor children commit a crime and are taken into criminal custody.[130] Then Attorney General Sessions stated that parents who did not want to be separated from their children should not attempt to cross the U.S. border illegally.[131]

Then DHS Secretary Nielsen justified the zero tolerance policy with statistics showing an increase of over 200% in illegal border crossings and inadmissible cases along the Southwest border between April 2017 and April 2018.[132] She also cited similar substantial increases in monthly apprehensions of family units and unaccompanied alien children during this period. Secretary Nielsen also stated that while the apprehension figures "are at times higher or lower than in years past, it makes little difference," characterizing them as unacceptable.[133] DHS officials cited results of the pilot program imposed at the Border Patrol's El Paso sector (covering West Texas and New Mexico) for part of 2017, where a similar family separation policy reduced the number of illegal family border crossings by 64%.[134]

DHS noted[135] that its zero tolerance policy reflected President Trump's January 2017 Executive Order 13767[136] on border security, which directed executive branch departments and agencies to "deploy all lawful means to secure the Nation's Southwest border, to prevent further illegal immigration into the United States, and to repatriate illegal aliens swiftly, consistently, and humanely." DHS further contends that parents who attempt to cross illegally into the United States with their children not only put their children at grave risk but also enrich transnational criminal organizations to whom they pay smuggling fees.[137] DHS argues that some parents, aware of the limited amount of family detention space, intentionally use their children as shields from detention and anticipate that they will be viewed, as they had been in prior years, as low security

[130] Nielsen testimony, April 11, 2018.

[131] U.S. Department of Justice, Office of Public Affairs, "Attorney General Sessions Delivers Remarks Discussing the Immigration Enforcement Actions of the Trump Administration," May 7, 2018.

[132] Nielsen testimony, April 11, 2018. CBP apprehended 15,798 unauthorized migrants at the southern border in April 2017 and 51,168 in April 2018. See U.S. Customs and Border Protection, "Southwest Border Migration FY2018," https://www.cbp.gov/newsroom/stats/sw-border-migration/fy-2018, updated November 9, 2018. CBP defines *inadmissibles* as "individuals encountered at ports of entry who are seeking lawful admission into the United States but are determined to be inadmissible, individuals presenting themselves to seek humanitarian protection under our laws, and individuals who withdraw an application for admission and return to their countries of origin within a short timeframe." U.S. Customs and Border Protection, "Nationwide Enforcement Encounters: Title 8 Enforcement Actions and Title 42 Expulsions," https://www.cbp.gov/newsroom/stats/cbp-enforcement-statistics/title-8-and-title-42-statistics.

[133] Because monthly apprehensions can fluctuate substantially between years, average monthly apprehensions may provide a more accurate measure of illegal border crossing activity. Average monthly apprehensions of all border crossers in FY2016, FY2017, and FY2018 were 46,114, 34,626, and 43,424, respectively. Ibid.

[134] Maria Sacchetti, "Top Homeland Security officials urge criminal prosecution of parents crossing border with children," *Washington Post*, April 26, 2018. The 64% statistic was criticized as inaccurate and misleading by at least one news report; see Dara Lind, "Trump's DHS is using an extremely dubious statistic to justify splitting up families at the border," *Vox*, May 8, 2018. In addition, other reports suggested that family separation was occurring because of increased prosecution of illegal border crossing since the summer of 2017; see Jonathan Blitzer, "How the Trump Administration Got Comfortable Separating Immigrant Kids from Their Parents," *The New Yorker*, May 30, 2018.

[135] Email communication to CRS from CBP Legislative Affairs, June 4, 2018.

[136] Executive Order 13767, "Border Security and Immigration Enforcement Improvements," 82 *Federal Register* 8793-8797, January 25, 2017.

[137] Victoria A. Greenfield, Blas Nuñez-Neto, Ian Mitch, Joseph C. Chang, and Etienne Rosas, *Human Smuggling and Associated Revenues: What Do or Can We Know About Routes from Central America to the United States?*, Homeland Security Operational Analysis Center, Rand Corporation, 2019.

risks.[138] DHS points to unpublished intelligence reports describing cases where unrelated adults have used or trafficked children in order to avoid immigration detention.[139] DHS and other observers also note that asylum requests have increased considerably, a trend that raises concerns about possible fraud and the misuse of asylum claims to enter and remain in the United States.[140]

DHS notes that ICE and ORR both play a role in family reunification and characterizes the process as "well-coordinated."[141] DHS maintains that it has procedures in place to connect separated family members and ensure that parents know the location of minors and can regularly communicate with them. Mechanisms to facilitate such communication include posted information notices in ICE detention facilities, an HHS Adult Hotline and email inquiry address, and an ICE call center and email inquiry address.[142] DHS and ORR are using DNA testing to confirm familial ties between parents and children.[143]

Immigrant Advocacy Perspectives

Immigrant advocacy organizations argued that migrant families were fleeing a well-documented epidemic of gang violence from the Northern Triangle countries of El Salvador, Guatemala, and Honduras.[144] They criticized the practice of family separation because it seemingly punished people for fleeing dangerous circumstances and seeking asylum in the United States. They posited that requesting asylum was not an illegal act,[145] that Congress created laws that require DHS to process and evaluate claims for humanitarian protection, that DHS must honor congressional intent by humanely processing and evaluating such claims, and that many who requested asylum had valid claims and compelling circumstances that merited consideration.[146]

Immigrant advocates also criticized the Trump Administration for creating what they consider to be a debacle of its own making, characterized by frequently changing policies and

[138] Ibid.

[139] Ariane de Vogue and Tal Kopa, "ACLU class action lawsuit seeks to block immigrant family separations," *CNN*, March 9, 2018.

[140] See, for example, U.S. Citizenship and Immigration Services, "USCIS to Take Action to Address Asylum Backlog," press release, January 31, 2018.

[141] U.S. Department of Homeland Security, "Fact Sheet: Zero-Tolerance Prosecution and Family Reunification," press release, June 23, 2018. In some cases, expedited DOJ hearings resulted in family reunification occurring in CBP holding facilities because children had not yet been transported to ORR custody. In such cases, family reunification occurs in CBP custody before the family unit is transported to an ICE immigration detention facility for family units.

[142] U.S. Department of Homeland Security, "Myth vs. Fact: DHS Zero-Tolerance Policy," press release, June 18, 2018.

[143] Email correspondence from ORR Legislative Affairs, July 11, 2018; and U.S. Department of Health and Human Services, "Unaccompanied Alien Children Frequently Asked Questions," website, July 9, 2018, accessed by CRS on July 12, 2018.

[144] See CRS Report RL34112, *Gangs in Central America*.

[145] See, for example, American Immigration Council, "Asylum in the United States, Fact Sheet," May 14, 2018; and International Justice Resource Center, Asylum and the Rights of Refugees, accessed by CRS on July 12, 2018, at https://ijrcenter.org/refugee-law/.

[146] According to the 1951 Convention on the Status of Refugees, countries should not punish asylum-seekers who violate immigration laws if they present themselves to authorities. Although not a party to this convention, the United States is a party to a 1967 Protocol to the Convention, provisions of which are found in the 1980 Refugee Act. Under current U.S. policy, most aliens arriving in the United States without proper documentation who claim asylum are held until their "credible fear" hearing, but some asylum seekers are held until their asylum claims have been adjudicated. For background information, see archived CRS Report RL32369, *Immigration-Related Detention*.

justifications,[147] what some describe as an uncoordinated implementation process, and the absence of an effective plan to reunify separated families.[148]

News reports and OIG investigations about the decisionmaking process leading up to the zero tolerance policy indicate that while senior officials in the Trump Administration were aware of the link between the zero tolerance policy and the family separations that would result from enforcing it, they lacked a coordinated plan to reunite the separated families.[149]

In some cases, records linking parents to children reportedly may have disappeared or been destroyed, hampering efforts to establish relationships between family members.[150] Media reports described obstacles to reuniting families after separation, including a lack of communication between federal agencies, the absence of information about accompanying children collected by CBP at the time of apprehension, the inability of ICE detainees to receive phone calls without special arrangements, and a cumbersome vetting process to ensure children's safe placement with parents.[151] Similar observations were made subsequently by government agencies.[152] In addition, while DOJ typically detained and prosecuted parents for illegal entry at federal detention centers

[147] Maria Sacchetti, "DHS proposal would change rules for minors in immigration detention," *Washington Post*, May 9, 2018. This proposal was first publicly suggested by then DHS Secretary John Kelly in March, 2017. See Daniella Diaz, "Kelly: DHS is considering separating undocumented children from their parents at the border," *CNN*, March 7, 2017. Following the ensuing controversy over his interview, he subsequently stated that DHS would not implement such policies. See Tal Kopan, "Kelly says DHS won't separate families at the border," *CNN*, March 29, 2017.

[148] See, for example, U.S. Department of Justice, Office of the Inspector General, *Review of the Department of Justice's Planning and Implementation of Its Zero Tolerance Policy and Its Coordination with the Departments of Homeland Security and Health and Human Services*, 21-028, January 2021; Neena Satija, Karoun Demirjian, Abigail Hauslohner and Josh Dawsey, "A Trump administration strategy led to the child migrant backup crisis at the border," *Washington Post*, November 12, 2019; Kevin Sieff, "The chaotic effort to reunite immigrant parents with their separated kids," *Washington Post*, June 21, 2018; Erik Hanshew, "Families will no longer be separated at the border. But where are my clients' kids?," *Washington Post*, June 20, 2018; Jonathan Blitzer, "The Government has no plan for reuniting the immigrant families it is tearing apart," *The New Yorker*, June 18, 2018.

[149] See, for example, U.S. Department of Justice, Office of the Inspector General, *Review of the Department of Justice's Planning and Implementation of Its Zero Tolerance Policy and Its Coordination with the Departments of Homeland Security and Health and Human Services*, 21-028, January 2021; and Michael D. Shear, Katie Benner and Michael S. Schmidt, "'We Need to Take Away Children,' No Matter How Young, Justice Dept. Officials Said," *The New York Times*, updated October 21, 2020.

[150] See, for example, U.S. Department of Homeland Security, Office of Inspector General, *DHS Lacked Technology Needed to Successfully Account for Separated Migrant Families*, OIG-20-06, November 25, 2019; Julia Ainsley and Jacob Soboroff, "Officials said in 2017 that separated migrants under 12 couldn't find parents again on their own," *NBC News*, October 9, 2020; and Caitlin Dickerson, "Trump Administration in Chaotic Scramble to Reunify Migrant Families," *The New York Times*, July 5, 2018. In response to the challenges with reuniting families that occurred during and following the zero tolerance policy, DHS initiated the Unified Immigration Portal (UIP), a technological platform where users from multiple federal agencies with immigration-related missions can access and share immigration data through a single interface. According to the CBP, "the federated nature of the solution will allow agencies to manage their unique domains of the immigration mission, while also accessing complete, real-time information on a common platform." U.S. Department of Homeland Security, *U.S. Customs and Border Protection, Budget Overview, Fiscal Year 2021, Congressional Justification*, CBP-PC&I-40 (pdf p. 281).

[151] See, for example, Ian Lovett and Louise Radnofsky, "Amid Chaos at Border, Some Immigrant Families Reunite," *Wall Street Journal*, June 24, 2018; Jonathan Blitzer, "The Government has no plan for reuniting the immigrant families it is tearing apart," *The New Yorker*, June 18, 2018; Ted Hesson and Dan Diamond, "As deadline looms, Trump officials struggle to reunite migrant families," *Politico*, July 2, 2018; Ritu Prasad, "Undocumented migrant families embark on chaotic reunion process," *BBC*, June 25, 2018; and Caitlin Dickerson, "Trump Administration in Chaotic Scramble to Reunify Migrant Families," *The New York Times*, July 5, 2018.

[152] DHS Office of Inspector General, "Special Review - Initial Observations Regarding Family Separation Issues Under the Zero Tolerance Policy," OIG-18-84, September 27, 2018; and U.S. Department of Health and Human Services, Office of Inspector General, "Separated Children Placed in Office of Refugee Resettlement Care," *HHS-OIG Issue Brief*, January 2019. OEI-BL-18-00511.

and courthouses near the U.S.-Mexico border, ORR housed their children at shelters geographically dispersed in 17 states, in some cases thousands of miles away from the parents.

Child welfare professionals asserted that family separation has the potential to cause lasting psychological harm for adults[153] and especially for children.[154] Some pointed to findings of a DHS advisory panel as well as of other organizations that viewed family detention as neither appropriate nor necessary for families and as not being in children's best interests.[155]

Some immigration observers questioned the Trump Administration's ability to marshal resources required to prosecute all illegal border crossers given that Congress had not appropriated additional funding to support the zero tolerance policy. One news report, for example, noted that 3,769 foreign nationals were convicted of illegal entry in criminal courts during March 2018, a month in which 37,383 foreign nationals were apprehended for illegal entry.[156] Given the relative size of the task they face, observers questioned how DOJ and DHS could channel fiscal resources to meet this objective without compromising their other missions.[157] They contended that the policy was counterproductive because it prevented CBP from using risk-based strategies to pursue the most egregious crimes, thereby making the Southwest border region less safe and more prone to criminal activity.[158] Some suggested that the zero tolerance policy was diverting resources from, and thereby hindering, other DHS operations.[159]

Some in Congress criticized the family separation policy because of its cost in light of alternative options, such as community-based detention programs. They cited, for example, the Family Case Management Program (FCMP), which monitored families seeking asylum and demonstrated reportedly high compliance rate with immigration requirements such as court hearings and immigration appointments.[160] The FCMP, which began in January 2016,[161] was terminated by the Trump Administration in April 2017.[162] According to DHS, the FCMP average daily cost of $36

[153] See, for example, DHS Advisory Committee on Family Residential Centers, "Report of the DHS Advisory Committee on Family Residential Centers," September 30, 2016; and Alexander Miller, Julia Meredith Hess, Deborah Bybee, and Jessica R. Goodkind, "Understanding the mental health consequences of family separation for refugees: Implications for policy and practice," *American Journal of Orthopsychiatry*, vol. 88 (2018), pp. 26-37.

[154] See, for example, American Academy of Pediatrics, Letter from Colleen A. Kraft, President, to The Honorable Kirstjen M. Nielsen, U.S. Secretary of Homeland Security, March 1, 2018; Julie M. Linton, Marsha Griffin, Alan J. Shapiro, and Council on Community Pediatrics, "Detention of Immigrant Children," *Pediatrics*, vol. 139 (April 2017), pp. 1-13; and Kimberly Howard, Anne Martin, Lisa J. Berlin, and Jean Brooks-Gunn, "Early Mother-Child Separation, Parenting, and Child Well-Being in Early Head Start Families," *Attachment & Human Development*, vol. 13 (2011), pp. 5-26.

[155] DHS Advisory Committee on Family Residential Centers, "Report of the DHS Advisory Committee on Family Residential Centers," September 30, 2016. This report cites similar findings by Government Accountability Office, the United Nations High Commissioner for Refugees, and the American Bar Association, among others.

[156] Alan Bersin, Nate Bruggeman and Ben Rohrbaugh, "Trump's 'zero tolerance' bluff on the border will hurt security, not help," *Washington Post*, May 31, 2018.

[157] CBP, for example, describes its mission priorities as countering terrorism, combatting transnational crime, securing the border, facilitating lawful trade and protecting revenue, and facilitating lawful travel. See U.S. Customs and Border Protection, "About CBP," https://www.cbp.gov/about, updated December 18, 2020.

[158] Ibid.

[159] Nick Mirnoff, "Seeking a split from ICE, some agents say Trump's immigration crackdown hurts investigations and morale," *Washington Post*, June 28, 2018.

[160] DHS Office of Inspector General, "U.S. Immigration and Customs Enforcement's Award of the Family Case Management Program Contract (Redacted)," OIG-18-22, November 30, 2017.

[161] U.S. Immigration and Customs Enforcement, "Fact Sheet, Stakeholder Referrals to the ICE/ERO Family Case Management Program," January 6, 2016.

[162] Frank Bajak, "ICE Shutters Detention Alternative for Asylum-Seekers," *U.S. News and World Report*, June 9, 2017.

reportedly exceeded that of "intensive supervision" programs ($5-$7 daily),[163] although both programs were considerably lower than the average daily cost of family detention ($319).[164]

More broadly, immigration advocates contended that the Trump Administration was engaged in a concerted effort to restrict access to asylum and reduce the number of asylum claims.[165] They cautioned that prosecuting persons who cross into the United States in order to present themselves before a CBP officer and request asylum raised concerns about whether the United States was abiding by human rights and refugee-related international protocols.[166] They noted a considerable backlog of pending defensive asylum cases, which numbered almost 325,000 (45%) of the roughly 720,000 total pending immigration cases in EOIR's docket as of June 11, 2018.[167] They also cited Attorney General Sessions's decision to limit the extent to which immigration judges could consider gang or domestic violence as sufficient grounds for asylum.[168]

Congressional Activity

This section in intended to illustrate the range of legislative proposals to address family separation rather than provide a complete list of all such related proposals. Few of the bills saw legislative action and none were enacted.

116th Congress

Family separation-related legislation introduced during the 116th Congress contained provisions largely intended to prevent or limit the practice. Some bills, for example, would have granted humanitarian parole and/or LPR status to separated parents and children upon request. Others contained provisions to keep families together during all processing stages following apprehension at a U.S. border, or contained protections against prosecution for illegal border crossing of asylum seekers and grantees. Some contained provisions that would have facilitated communication among family members and the expeditious reunification of separated families. Legislative proposals also included funding increases for participation in Alternatives to Detention programs and Family Case Management Program, both alternatives to family detention.

[163] Ibid. Intensive supervision programs monitor aliens in deportation proceedings who have been released from detention. They often involve electronic monitoring devices such as GPS ankle bracelets or voice recognition software for telephone-based reporting, and intensive case management.

[164] DHS was overseeing three family detention facilities in 2018: Berks Family Residential Center in Berks County, PA; Karnes Residential Center in Karnes City, TX; and South Texas Family Residential Center in Dilley, TX.

[165] Simon Romero and Miriam Jordan, "On the Border, a Discouraging New Message for Asylum Seekers: Wait," *The New York Times*, June 12, 2018; and Jonathan Blitzer, "The Trump Administration Is Completely Unravelling the U.S. Asylum System," *The New Yorker*, June 11, 2018. For a contrary view on the weakening of the asylum system, see Dan Cadman, "Asylum in the United States," Center for Immigration Studies, March 26, 2014.

[166] Jonathan Blitzer, "The Trump Administration Is Completely Unravelling the U.S. Asylum System," *The New Yorker*, June 11, 2018.

[167] Email correspondence to CRS from DOJ Legislative Affairs, June 28, 2018.

[168] Matter of A-B-, Respondent, 27 I&N Dec. 316 (A.G. 2018), Interim Decisions #3929. The ruling vacated a 2016 decision by DOJ's Board of Immigration Appeals, the immigration appeals court for EOIR, granting asylum to a woman who experienced sexual, emotional, and physical abuse. See Ted Hesson and Josh Gerstein, "Sessions moves to block asylum for most victims of domestic, gang violence," *Politico*, June 11, 2018; and Katie Benner and Caitlin Dickerson, "Sessions Says Domestic and Gang Violence Are Not Grounds for Asylum," *The New York Times*, June 11, 2018.

115th Congress

Relevant legislation introduced in the 115th Congress included bills that would have increased immigration enforcement as well as bills that would have prevent family separation. Bills that emphasized immigration enforcement included provisions, for example, that would have provided statutory authority for President Trump's executive order within the INA; clarified standards for family detention; permitted children accompanied by parents to remain in DHS custody during the pendency of a parent's criminal prosecution, rather than being referred to ORR and treated as UAC; and/or increased funding for family unit facilities, personnel, and judges.

Some legislative proposals intended to prevent or limit family separation contained provisions that would have kept families together during all stages of processing following apprehension at a U.S. border, prohibited family separation for individuals with developmental disabilities, and required federal agencies to reunite minor children already separated from their parents. Others would have maintained family unity by making the Flores Settlement Agreement and related laws and regulations inapplicable to apprehended accompanied children, limited the separation of families seeking asylum by mandating that they be housed together, and facilitated asylum processing by providing additional resources and establishing asylum processing deadlines.

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