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

Updated July 20, 2018

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

**CRS REPORT**
Prepared for Members and
Committees of Congress

# Summary

For the last several years, 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 Administration officials contend are often fraudulent.

Under the zero tolerance policy, DOJ prosecutes all adult aliens apprehended crossing the border illegally, with no exception for asylum seekers or those with minor children. DOJ's policy represents a change in the level of enforcement for an existing statute rather than a change in statute or regulation. Prior Administrations prosecuted illegal border crossings relatively infrequently.

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 remain in family immigration detention for no more than 20 days. If parents cannot be released with them, children are 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 are a consequence of the Trump Administration's 100% prosecution policy, not the result of any family separation policy. Since that policy was implemented, up to 3,000 children may have been separated from their parents.

Following mostly critical public reaction, President Trump ordered DHS to 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.

Family unit apprehensions, which increased from just over 11,000 in FY2012 to 68,560 in the first nine months of FY2018, are occurring within relatively low historical levels of total alien apprehensions. The national origin of recently apprehended aliens and families has shifted from mostly Mexican to mostly Central American.

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

Immigrant advocates contend that migrant families are fleeing legitimate threats from countries with exceptionally high rates of gang violence, and that family separations resulting from the zero tolerance policy are cruel and violate fundamental human rights—such as the ability to request

asylum. They maintain that the zero tolerance policy was hastily implemented and lacked planning for family reunification following criminal prosecutions. Some observers question the Trump Administration's capacity to marshal sufficient resources to prosecute all illegal border crossers without additional resources. Others criticize the family separation policy in light of less expensive alternatives to detention.

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# Introduction

In recent years, Central American migrant families have been arriving at the U.S.-Mexico border in relatively large numbers, many seeking asylum.[1] 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.[2] On May 7, 2018, 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 Administration officials contend are often fraudulent.[3]

Under the zero tolerance policy, DOJ is prosecuting 100% of adult aliens[4] apprehended crossing the border illegally, making no exceptions for whether they are asylum seekers or accompanied by minor children.[5] 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 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" policy represents a change in the level of enforcement of an existing statute rather than a change in statute or regulation.[9] The recent Bush and Obama Administrations 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

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[1] 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.

[2] 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*.

[3] 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.

[4] *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.

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

[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.

[8] 8 U.S.C. §1326

[9] 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.

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)[10] 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 are therefore a *consequence* of the Administration's new policy of 100% prosecution of illegal border crossing, and not the result of a direct policy or law mandating family separation. Since the policy was implemented, "under 3,000" children may have been separated from their parents, including at least 100 under age 5.[11]

The family separations have garnered extensive public attention. The Trump Administration and immigration enforcement advocates maintain that the zero tolerance policy is necessary to disincentivize migrants from coming to the United States and clogging immigration courts with fraudulent requests for asylum.[12] Immigrant advocates contend that migrant families are fleeing legitimate threats of violence and that family separations resulting from the zero tolerance policy are cruel and violate fundamental human rights.[13]

This report briefly reviews the statutory authority for prosecuting persons who enter the United States illegally between U.S. ports of entry, 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. An appendix examines recent trends in the apprehension of family units at the U.S. southern border.

This report describes policies and circumstances that are changing rapidly. Information presented in it is current as of the publication date but may become outdated quickly.

[10] 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*.

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

[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/.

# Enforcement and Asylum Policy for Illegal Border Crossers

Aliens who wish to enter the United States may request admission legally[14] 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.[15]

## 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 streamlined 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.[16] In addition, the INA provides criminal penalties for persons who unlawfully reenter the United States after they were previously removed from the country.[17] 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

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

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

[16] 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.

[17] 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.

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.[18] 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.[19]

## Asylum

Many 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.[20]

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").[21] 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).[22] 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

[18] 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.

[19] For more information on formal and streamlined removal processes, see CRS Report R43892, *Alien Removals and Returns: Overview and Trends*.

[20] For more information on the two ways of obtaining asylum, see U.S. Citizenship and Immigration Services, "Obtaining Asylum in the United States," updated October 19, 2015, accessed by CRS on July 15, 2018 at https://www.uscis.gov/humanitarian/refugees-asylum/asylum/obtaining-asylum-united-states.

[21] 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 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 has not yet occurred.

[22] 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).

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.[23] However, child detention operates under different policies than that of adults. All 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 all 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.[24] 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.[25] 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."[26] 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 family immigration detention with their parents for more than 20 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. Under expedited removal (INA §235(b)), an alien who lacks proper documentation or has committed fraud or willful misrepresentation to gain

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

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

[25] P.L. 110-457, §235.

[26] For unaccompanied alien children 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*.

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.[27]

If apprehended foreign nationals are found to be removable, ICE and CBP share the responsibility for repatriating them.[28] 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.[29]

# 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, 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.[30]

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. 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.[31]

DHS officials justified the "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.[32] Immigration enforcement advocates criticized the catch and release policy because of the failure of many apprehended individuals to appear subsequently for their immigration hearings.[33]

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[27] 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*.

[28] Ibid.

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

[30] CRS consultation with ICE Legislative Affairs, June 8, 2018.

[31] 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).

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

[33] For more information, see Mark Metcalf, "Absent attendance and absent enforcement in America's immigration courts," Center for Immigration Studies, March 19, 2017.

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.[34] Such practices are needed to monitor the roughly 2 million aliens in removal proceedings given that ICE's current budget funds less than 50,000 beds, which are prioritized for aliens who pose public safety or absconder risks.[35]

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.[36]

DHS states that the agency referred an average of 21% of all illegal border crossing "amenable adults" for prosecution from FY2010 through FY2016.[37] DHS maintains that it has an established policy of separating children from adults when it

- 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.[38]

# Prosecution of Aliens Charged with Illegal Border Crossing in the Trump Administration

On April 6, 2018, 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.[39] This "100% prosecution" policy makes no

[34] 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.

[35] 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 FY2019, ICE is requesting funding for 47,000 detention beds (44,500 for adults, 2,500 for families); see U.S. Immigration and Customs Enforcement, FY2109 Congressional Budget Justification, Operations and Support, pp. 13-14.

[36] As of this writing, CRS has open requests with DHS for data on family separations under the Obama Administration. Other observers have similar pending requests. See, for example, Lori Robertson, "Did the Obama Administration Separate Families," *FactCheck.org*, June 20, 2018.

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

[38] Ibid.

[39] 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.

exceptions for asylum seekers and/or family units.[40] 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.[41]

Consequently, if a family unit is apprehended crossing illegally between ports of entry, the zero tolerance policy mandates 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, are to be processed as unaccompanied alien children in accordance with the TVPRA. They are transferred to the custody of ORR, which houses them in agency-supervised, state-licensed shelters. If feasible given the circumstances, ORR attempts to place them with relatives or legal guardian sponsors or place them in temporary foster care.[42]

ORR has over 100 shelters in 17 states,[43] and they are reportedly at close to full capacity.[44] Consequently, the agency is currently 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.[45]

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. It is expected that parents can then be 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.

## Statistics on Family Separation

In FY2017, CBP apprehended 75,622 alien family units and separated 1,065 (1.4%) of them. 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

[40] Immigration and human rights advocates caution 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. See, for example, Jonathan Blitzer, "The Trump Administration Is Completely Unravelling the U.S. Asylum System," *The New Yorker*, June 11, 2018.

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

[42] 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 57 days. U.S. Department of Health and Human Services, Administration for Children and Families, Office of Refugee Resettlement, *Fact Sheet*, "Unaccompanied Alien Children Program," June 15, 2018.

[43] 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 July 11, 2018.

[44] One 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. CRS was unable to obtain a figure for current ORR shelter capacity as of this writing.

[45] 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.

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.[46]

Under the Administration's zero tolerance policy, 658 children were separated from 638 adults who were referred for prosecution between May 7 and May 21, 2018, according to CBP testimony.[47] DHS subsequently reported that 1,995 children had been separated from their parents between April 19 and May 31.[48] DHS updated these figures in June 2018, reporting that 2,342 children were separated from their parents between May 5 and June 9.[49] DHS subsequently reported that CBP had since reunited with their parents 538 children who were never sent to ORR shelters.[50] HHS Secretary Alex Azar then reported that "under 3,000" minor children (under age 18) had been separated from their families in total, including roughly 100 under age 5.[51] As of July 13, 2018, HHS reported that 2,551 children ages 5 to 17 remained separated (see "Recent Developments" below).[52]

## Recent Developments

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.[53] The EO instructs DOD to provide and/or construct additional shelter facilities, upon request by ORR, and it instructs other executive branch agencies to assist with housing as appropriate to implement the EO.[54] The EO mandates that the Attorney General prioritize the adjudication of detained family cases, and it requires 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

[46] 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.

[47] 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.

[48] 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.

[49] 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.

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

[51] 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," *New York Times*, July 5, 2018.

[52] Dan Diamond, "Trump administration expedites reunifications for 2551 migrant children," *Politico*, July 13, 2018.

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

[54] Thus far, only DOD has made arrangements with ORR to provide housing for alien families and children.

to DOJ for criminal prosecution.[55] According to a White House announcement, the zero tolerance policy is expected to be reinstituted once additional family detention bed space becomes available.[56] 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.[57] DOD subsequently announced that 12,000 persons would be housed on its facilities,[58] before another report appeared suggesting the number was 32,000 UAC and family units.[59]

In addition to leasing facilities to DHS or HHS when those agencies' detention or shelter facilities are insufficient to meet surges of border crossers,[60] DOD is deploying National Guard personnel under "Operation Guardian Support."[61] DOD reportedly is also sending active duty military officers to serve as Special Assistant U.S. Attorneys (also known as judge advocate generals or JAGs) to assist in U.S. Attorney offices along the border for six-month tours of duty.[62]

On June 26, 2018, as the result of a class action lawsuit filed by the American Civil Liberties Union,[63] Judge Dana Sabraw of the U.S. District Court for the Southern District of California issued an injunction against the Administration's practice of separating families and ordered that all separated families be reunited within 30 days.[64] The judge ruled that children under age 5 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 danger to them, and parents were not to be removed unless they had been reunited with their separated children.[65]

In response, the Trump Administration has reportedly instructed DHS to provide all parents who have final orders of removal and whose children have been separated from them with two options.[66] The first is to return to their countries of origin with their children. This option fulfills

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

[56] Ibid.

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

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

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

[60] Secretary of Health and Human Services, letter to the Honorable Jim Mattis, Secretary of Defense, March 8, 2018.

[61] For more information, see U.S. Customs and Border Protection, "Operation Guardian Support Begins for Del Rio Border Patrol Sector," press release, April 13, 2018. According to CBP, support includes "logistical and administrative support, aerial support, surveillance efforts, border-related intelligence analysis efforts, and mechanical support."

[62] Alex Johnson and Courtney Kube, "Pentagon sending military lawyers to border to help prosecute immigration cases," *nbcnews.com*, June 20, 2018.

[63] The ACLU case was filed on behalf of two families separated at the southwest border: a woman from the Democratic Republic of the Congo who, at a port of entry, was separated from her 6-year-old daughter for five months; and a woman from Brazil who, crossing into the United States illegally between ports of entry, was separated from her 14-year-old son for eight months.

[64] Ms. L. v. U.S Immigration and Customs Enforcement, __ F. Supp. 3d __, 2018 WL 3129486 (S.D. Cal. 2018).

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

[66] Immigration advocates contend that the new form being used misleads parents who have outstanding asylum claims into thinking that they must leave the United States without their children, despite the fact that the forms indicate that they apply only to parents with final orders of removal. DHS responds 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." Nick Valencia and Tal

the mandate from the June 26 court order to reunite families but also forces parents and children to abandon any claims for asylum. The second option is 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 are to be recorded on a new ICE form.[67]

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 DOJ's request to modify the agreement. 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.[68]

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 policy that has been labeled by some as "catch and release." DOJ maintains that its zero tolerance policy remains in effect.[69]

DHS and HHS have publicized their efforts to reunify families.[70] News reports indicate that Judge Sabraw's June 26 order mandating the reunion of all children under age 5 with their parents within two weeks will not be met.[71] On July 12, 2018, the Trump Administration reported that 57 of 103 children under the age of 5 who had been separated from their parents had been reunited, while the other 46 had been deemed ineligible for reunification for reasons including parental deportation and criminal histories of some of the adults.[72]

On July 16, 2018, in response to concerns expressed by the American Civil Liberties Union about potential abrupt deportations following family reunification, Judge Sabraw stated that he will temporarily halt deportations, for one week, of parents who have been reunited with their children.[73] 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, 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

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Kopan, "The options parents facing deportation have after they've been separated from their kids," *CNN*, July 3, 2018; and 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.

[67] U.S. Immigration and Customs Enforcement, Enforcement and Removal Operations, Separated Parent's Removal Form, July 2018. CRS could not locate the form or accompanying instructions on the ICE or DHS websites.

[68] Miriam Jordan and Manny Fernandez, "Federal Judge Rules that Trump Administration Cannot Hold Migrant Families in Long-Term Detention," *New York Times*, July 9, 2018.

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

[70] U.S. Department of Homeland Security, "Fact Sheet: Zero-Tolerance Prosecution and Family Reunification," press release, June 23, 2018; U.S. Department of Health and Human Services, "HHS Is Executing On Its Mission With Care And Compassion," press release, July 6, 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.

[71] Tal Kopan, "Trump administration falls short on first family reunification deadline," *CNN*, July 10, 2018.

[72] Brittny Mejia, "Trump administration reunites just over half of migrant children under 5 with parents, says others are 'ineligible'," *Los Angeles Times*, July 12, 2018.

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

children in its custody ages 5 to 17 and had matched 2,480 to their parents, while 71 children's parents remain unidentified.[74] ORR is undertaking intensive background checks to ensure that separated children are reunited with their actual parents and do not face personal security risks such as child abuse.[75] According to White, 1,609 parents of separated children remain in ICE custody. White noted that ICE is also conducting its own security checks and thus far 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.[76]

As of July 19, 2018, the 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 have final orders of deportation. Another 908 parents are reportedly not expected to be eligible for reunification because they possessed criminal backgrounds or required "further evaluation."[77]

# 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 decry the Administration's treatment of migrants as unnecessarily harsh and counterproductive.

## Enforcement Perspectives

DHS and DOJ contend that the policy enforces existing law and is needed to reduce illegal immigration.[78] DHS notes that foreign nationals attempting to enter the United States between ports of entry or "without inspection" are committing a crime punishable under the INA as a misdemeanor on the first occasion and a felony for every attempt thereafter.

DHS maintains that it has 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 maintains that it does not have a formal policy of separating parents from children for deterrence purposes, and it follows a standard policy of keeping families together "as long as operationally possible."[79] According to DHS, the agency has "a legal obligation to protect

[74] Ibid.

[75] 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.

[76] Ibid.

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

[78] 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.

[79] 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 contend 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

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."[80] Accordingly, DHS considers it appropriate to treat children of apprehended parents as UAC.[81]

DHS posits that while family separation is an unfortunate outcome of stricter enforcement of immigration laws and criminal prosecution of illegal entry and reentry, it is no different than the family separation that occurs in the U.S. criminal justice system when parents of minor children commit a crime and are taken into criminal custody.[82] Attorney General Sessions has stated that parents who do not want to be separated from their children should simply not attempt to cross the U.S. border illegally.[83]

DHS Secretary Nielsen justified the zero tolerance policy with statistics showing a 223% increase in illegal border crossings and inadmissible cases along the southwest border between April 2017 and April 2018.[84] Similar increases in monthly apprehensions between years were cited for family units and unaccompanied alien children. 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 either way.[85] DHS officials cite results of policies 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%.[86]

DHS notes that its policy reflects President Trump's January 2017 Executive Order 13767[87] on border security directing executive branch departments and agencies to "deploy all lawful means to secure the Nation's Southern border, to prevent further illegal immigration into the United States, and to repatriate illegal aliens swiftly, consistently, and humanely."[88] 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. DHS argues that some parents, aware of the limited amount of family

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Remarks Discussing the Immigration Enforcement Actions of the Trump Administration," May 7, 2018.

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

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

[82] Nielsen testimony, April 11, 2018.

[83] 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.

[84] Nielsen testimony, April 11, 2018. CBP apprehended 15,766 unauthorized migrants at the Southern border in April 2017 and 50,923 in April 2018. See U.S. Customs and Border Protection, "Southwest Border Migration FY2018," website, updated July 5, 2018.

[85] 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 the first eight months of FY2018 were 46,934, 34,599, and 42,503, respectively. See U.S. Customs and Border Protection, "Southwest Border Migration FY2018," website updated July 5, 2018.

[86] Maria Sacchetti, "Top Homeland Security officials urge criminal prosecution of parents crossing border with children," *Washington Post*, April 26, 2018. That statistic has been 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 suggest 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.

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

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

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 risks.[89] DHS points to unpublished intelligence reports describing cases where unrelated adults have used or trafficked children in order to avoid immigration detention.[90] DHS and other observers also note that asylum requests have increased considerably, a trend that raises concerns about possible fraudulent asylum claims and the misuse of asylum claims to enter and remain in the United States.[91]

DHS notes that ICE and ORR both play a role in family reunification and characterizes the process as "well-coordinated."[92] 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.[93] DHS and ORR are using DNA testing to confirm familial ties between parents and children.[94]

## Immigrant Advocacy Perspectives

Immigrant advocacy organizations argue that migrant families are fleeing a well-documented epidemic of gang violence from the Northern Triangle countries of El Salvador, Guatemala, and Honduras.[95] They have criticized the practice of family separation because it seemingly punishes people for fleeing dangerous circumstances and seeking asylum in the United States. They posit that requesting asylum is not an illegal act,[96] Congress created laws that require DHS to process and evaluate claims for humanitarian protection, DHS must honor congressional intent by humanely processing and evaluating such claims, and many who request asylum have valid claims and compelling circumstances that merit consideration.[97]

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[89] Ibid.

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

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

[92] 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.

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

[94] 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.

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

[96] 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/.

[97] 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*.

Immigrant advocates have also criticized the Administration for creating what they consider to be a debacle of its own making, characterized by frequently changing policies and justifications,[98] what some describe as an uncoordinated implementation process, and the absence of an effective plan to reunify separated families.[99] In some cases, records linking parents to children reportedly may have disappeared or been destroyed, hampering efforts to establish relationships between family members.[100] Media reports have 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.[101] In addition, while DOJ typically detains and prosecutes parents for illegal entry at federal detention centers and courthouses near the U.S.-Mexico border, ORR houses their children at shelters geographically dispersed in 17 states, in some cases thousands of miles away from the parents.

Child welfare professionals assert that family separation has the potential to cause lasting psychological harm for adults[102] and especially for children.[103] Some point to the findings of a DHS advisory panel as well as those of other organizations that discourage family detention as neither appropriate nor necessary for families and as not being in children's best interests.[104]

Some immigration observers question the Administration's ability to marshal resources required to prosecute all illegal border crossers given that Congress has 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

[98] 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.

[99] See, for example, 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; and Jonathan Blitzer, "The Government has no plan for reuniting the immigrant families it is tearing apart," *The New Yorker*, June 18, 2018.

[100] Caitlin Dickerson, "Trump Administration in Chaotic Scramble to Reunify Migrant Families," *New York Times*, July 5, 2018.

[101] 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," *New York Times*, July 5, 2018.

[102] 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.

[103] 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.

[104] 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.

which 37,383 foreign nationals were apprehended for illegal entry.[105] Given the relative size of the task they face, observers question how DOJ and DHS can channel fiscal resources to meet this objective without compromising their other missions. They contend that the policy is counterproductive because it prevents CBP from using risk-based strategies to pursue the most egregious crimes, thereby making the southern border region less safe and more prone to criminal activity.[106] Some have suggested that the zero tolerance policy is diverting resources from, and thereby hindering, other DHS operations.[107]

Some in Congress have criticized the family separation policy because of its cost in light of alternative options, such as community-based detention programs. They cite, for example, the Family Case Management Program (FCMP), which monitored families seeking asylum and demonstrated a reportedly high compliance rate with immigration requirements such as court hearings and immigration appointments.[108] The FCMP, which began in January 2016,[109] was terminated by the Trump Administration in April 2017.[110] According to DHS, the FCMP average daily cost of $36 reportedly exceeded that of "intensive supervision" programs ($5-$7 daily),[111] although both programs are considerably lower than the average daily cost of family detention ($319).[112]

More broadly, immigration advocates contend that the Administration is engaged in a concerted effort to restrict access to asylum and reduce the number of asylum claims.[113] They caution 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 human rights- and refugee-related international protocols.[114] They note a considerable current 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.[115] They also cite Attorney General Sessions's recent decision to substantially limit the extent to which immigration judges can consider gang or domestic violence as sufficient grounds for asylum.[116] Such efforts could

[105] 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.

[106] Ibid.

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

[108] 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.

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

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

[111] 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.

[112] DHS currently oversees three family detention facilities. Berks Family Residential Center in Berks County, PA; Karnes Residential Center in Karnes City, TX; and South Texas Family Residential Center in Dilley, TX.

[113] Simon Romero and Miriam Jordan, "On the Border, a Discouraging New Message for Asylum Seekers: Wait," *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.

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

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

[116] 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

have the unintended effect of sustaining illegal immigration flows of desperate foreign nationals fleeing violent circumstances, particularly from Northern Triangle countries.

# Congressional Activity

A number of bills have been introduced in the 115th Congress in response to family separation resulting from the Administration's zero tolerance policy regarding the prosecution of illegal border crossing. With the exception of H.R. 6136, which failed to pass in the House by a vote of 121-301, none of the bills introduced have seen congressional action as of this writing.

Given that this topic is developing rapidly, bills discussed below do not reflect all legislation or amendments introduced to date, or more recent developments. Instead, the bills presented here are intended to illustrate the range of legislative proposals to address family separation in the current context.

Bills that emphasize immigration enforcement include H.R. 6182, the Codifying President Trump's Affording Congress an Opportunity to Address Family Separation Executive Order Act, which provides statutory authority for President Trump's executive order within the INA; H.R. 6173;[117] and Section 3102 of H.R. 6136, the Border Security and Immigration Reform Act of 2018, which would permit 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. On July 11, 2018, similar amendment language was included in an appropriations bill to fund the Departments of Labor, Health and Human Services, and Education, that was approved by the House Appropriations Committee.[118] H.R. 6204, the Families First Act of 2018, includes similar provisions and would also implement asylum reforms and provide increased funding for family unit facilities, personnel, and judges, among other provisions.

Bills that intend to prevent or limit family separation include H.R. 6135/S. 3036, the Keep Families Together Act, and H.R. 6236, the Family Unity Rights and Protection Act, both of which contain provisions to keep families together during all stages of processing following apprehension at a U.S. border; H.R. 6232, the Preventing Family Separation for Immigrants with Disabilities Act, which would prohibit family separation for individuals with developmental disabilities; and H.R. 6172, the Reunite Children with Their Parents Act, which would require DHS and DOJ to reunite minor children already separated from their parents.

Other bills, such as H.R. 6181/H.R. 6190 /S. 3093, the Keep Families Together and Enforce the Law Act, would maintain family unity by making the Flores Settlement Agreement and related laws and regulations inapplicable to children who are accompanied by adults when they are apprehended at a U.S. border. H.R. 6195/S. 3091, the Protect Kids and Parents Act, would limit the separation of families seeking asylum by mandating that they be housed together, and facilitate asylum processing (e.g., by adding additional immigration judges and DHS personnel and establishing asylum processing deadlines), among other provisions.

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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," *New York Times*, June 11, 2018.

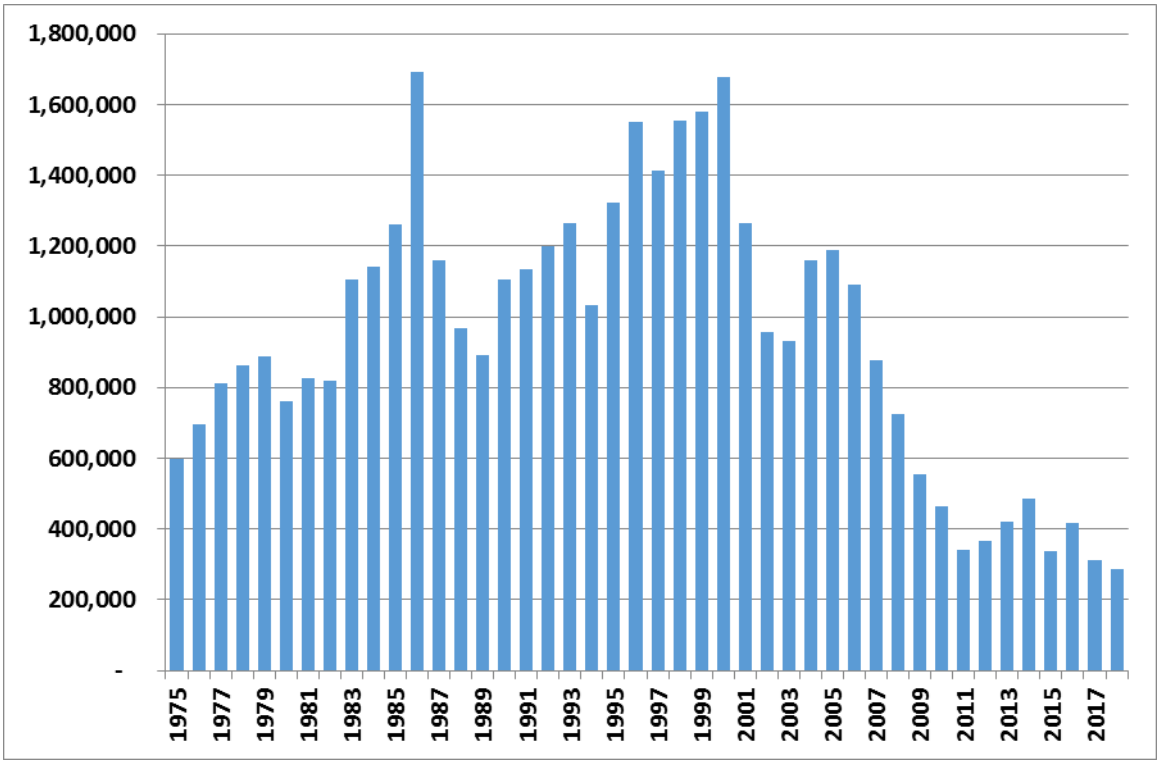
[117] The title of H.R. 6173 is "To amend section 235 of the William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008 to clarify the standards for family detention, and for other purposes."

[118] A number has not yet been assigned to this bill. See Andrew Siddons and Kellie Mejdrich, "Labor-HHS-Education Bill OK'd; Family Separation Changes Added," *CQ News*, July 11, 2018.

# Appendix. Trends in Alien Apprehensions

Increasing numbers of apprehensions of Central American family units are occurring within the context of relatively low historical levels of total alien apprehensions (**Figure A-1**).

**Figure A-1. Total CBP Alien Apprehensions at the Southwest Border, FY1975-FY2018***




**Source:** U.S. Department of Homeland Security, United States Border Patrol, "Stats and Summaries," https://www.cbp.gov/newsroom/media-resources/stats.

**Notes:** *FY2018 includes October 2017 through June 2018, or three-fourths of the fiscal year.

Apprehensions had peaked at 1.7 million in 1986, the year Congress enacted the Immigration Reform and Control Act (IRCA), which gave legal status to roughly 2.7 million unauthorized aliens residing in the United States.[119] After dropping for multiple years, apprehensions increased again, climbing from 1.13 million in FY1991 to 1.68 million in FY2000. Apprehensions generally fell after that (with the exception of FY2004-FY2005), reaching a 40-year low of 327,577 in FY2011. They have fluctuated since that point. For the first nine months of FY2018, apprehensions reached 286,290.[120]

The national origins of apprehended aliens have shifted considerably during the past two decades (**Figure A-2**). In FY2000, for example, almost all aliens apprehended at the southwest border (98%) were Mexican nationals. As recently as FY2011, Mexican nationals made up 84% of all apprehensions. However, beginning in FY2012 foreign nationals from countries other than Mexico began to comprise a growing percentage of total apprehensions, even as total

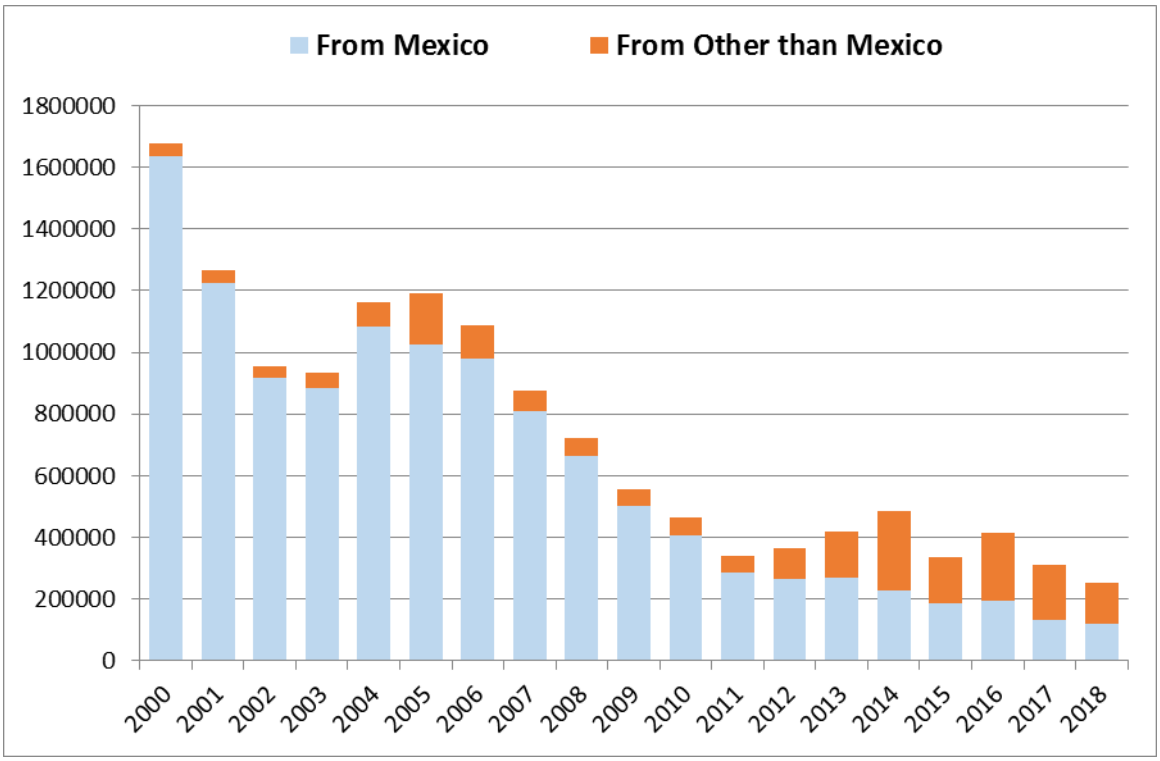
[119] For more information, see CRS Report R42138, *Border Security: Immigration Enforcement Between Ports of Entry*.

[120] Border patrol apprehensions data count events rather than people. Thus, an unauthorized alien who is caught trying to enter the country three times in one year counts as three apprehensions.

apprehensions declined since FY2005.[121] Most recently, in the first eight months of FY2018, "other-than-Mexicans" comprised the majority (52%) of total alien apprehensions on the southwest border.

**Figure A-2. Total CBP Alien Apprehensions at the Southwest Border by Country of Origin, FY2000-FY2018***

(Country of origin is either Mexico or other-than-Mexico)




**Source:** U.S. Department of Homeland Security, United States Border Patrol, "Stats and Summaries," https://www.cbp.gov/newsroom/media-resources/stats.

**Notes:** *FY2018 includes October 2017 through May 2018, or two-thirds of the fiscal year. CRS was unable to locate these data through June 2018, in contrast with data presented in **Figure A-1** and **Figure A-3**.

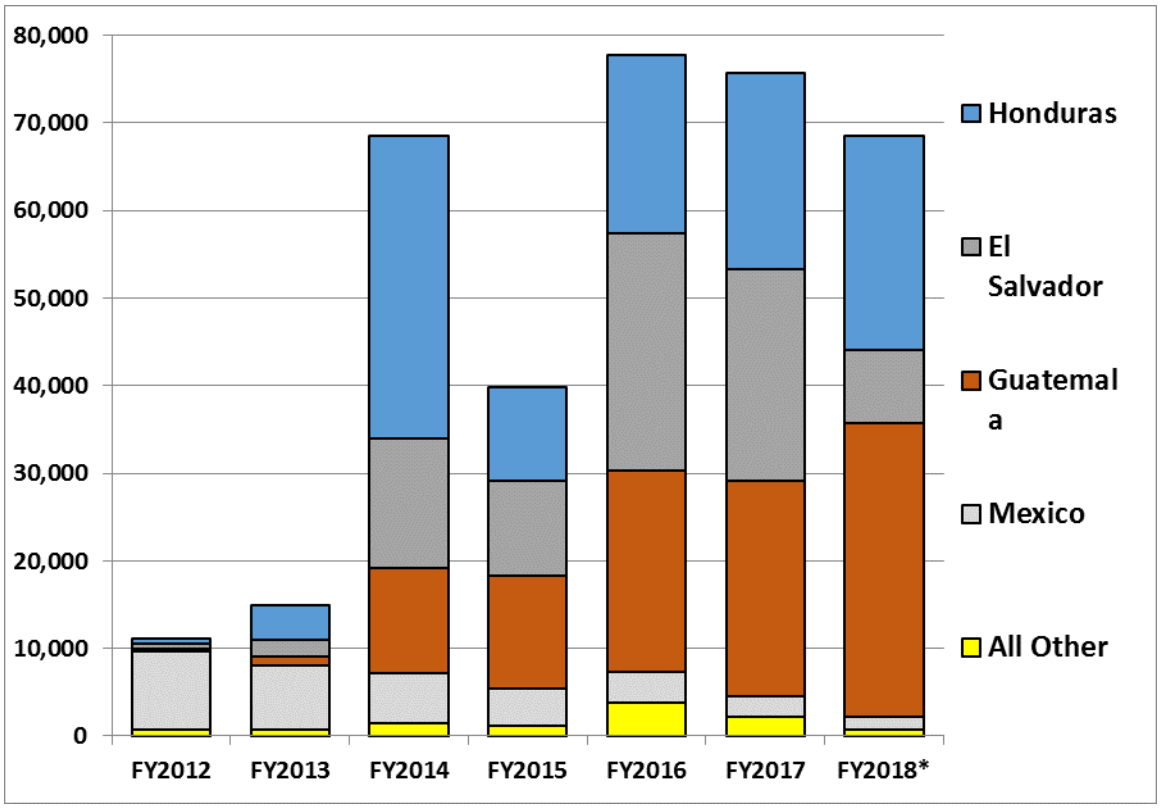
Family units are making up a growing share of total alien apprehensions at the southern border. According to CBP Commissioner Kevin McAleenan, single adult males made up over 90% of arriving aliens in the past; however, families and children make up roughly 40% of all arriving aliens currently.[122] CBP data on family unit apprehensions at the southern border are publicly available starting in FY2012, when they numbered just over 11,000 (**Figure A-3**). Since then, family unit apprehensions have increased considerably, reaching a peak of 77,674 in FY2016. In the first nine months of FY2018, CBP apprehended 68,560 family units, which, if the monthly average is extrapolated to the remainder of FY2018, would yield a total (91,400) exceeding those of all prior fiscal years.

[121] The rise in both total apprehensions and family unit apprehensions of other-than Mexicans mirrors that of unaccompanied alien children over this recent period. See CRS Report R43599, *Unaccompanied Alien Children: An Overview*, Figure 1.

[122] Testimony of Kevin McAleenan, Commissioner, U.S. Customs and Border Patrol, in U.S. Congress, House Committee on Homeland Security, Subcommittee on Border and Maritime Security, *Border Security, Commerce and Travel: Commissioner McAleenan's Vision for the Future of CBP*, 115th Cong., 2nd sess., April 25, 2016.

Since FY2012, the composition of family unit apprehensions by origin country has shifted from mostly Mexican (80%) to mostly El Salvadoran, Guatemalan, and Honduran (97%). Among these Northern Triangle countries, the proportion of apprehensions from El Salvador has recently declined, from 35% of all family unit apprehensions in FY2016 to 12% in FY2018.

**Figure A-3. Total CBP Alien Family Unit Apprehensions at the Southwest Border, FY2012-FY2018***




**Source:** For FY2013: U.S. Department of Homeland Security, United States Border Patrol, "Juvenile and Adult Apprehensions—Fiscal Year 2013." For FY2014-FY2016, "Customs and Border Protection, Southwest Border Unaccompanied Alien Children." For FY2017-FY2018, "U.S. Border Patrol Southwest Border Apprehensions by Sector FY2018," https://www.cbp.gov/newsroom/stats/usbp-sw-border-apprehensions.

**Notes:** *FY2018 includes October 2017 through June 2018, or three-fourths of the fiscal year.

## Author Information

William A. Kandel
Analyst in Immigration Policy

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