



# Who Is Really to Blame at the Border? Why Can't Border Crossers Be Deported?

In April, US Attorney General Jeff Sessions announced a “zero-tolerance” policy for illegal entry and all aliens caught entering the country illegally would be held for prosecution instead of “catch and release” that allows the aliens to stay in the US while awaiting a hearing that they often ignore.

Due to a long-running class-action lawsuit, alien minors cannot be confined by the government for longer than 20 days, forcing authorities to either detain the adult separately, until his claim is heard, and release the child after 20 days, or release both adult and child together into the US. The Obama administration chose the ‘catch and release’ option, resulting in a surge at the border of 70,000 adult-child units and 70,000 unaccompanied minors in 2014. Unless the ruling is overturned on appeal or Congress changes the relevant law, the administration will have two choices: try to get asylum hearings down to 20 days, or resume catch-and-release at the border for adults with children.

So it was a ruse. The hysteria over the separation of illegal-alien asylum-seekers from their children (or their purported children) was in large part pretextual. The real target of rage was the Trump administration’s policy of prosecuting all illegal border-crossers for the federal misdemeanor of illegal

entry.

In April, U.S. Attorney General Jeff Sessions announced a “zero-tolerance” policy for illegal entry. Henceforth, virtually all aliens caught entering the country illegally would be held for prosecution, rather than being released on their own recognizance for a later noncriminal deportation proceeding, to which few ever showed up. (This new enforcement policy would have come as a surprise to anyone who had fallen for the advocates’ decades-long lie that illegal entry is not a crime.) Under the new policy, even if the adult had brought a child with him across the border—the usual accoutrement of an asylum-seeker, for reasons explained below—the adult would still be prosecuted. The adult would be held in a U.S. marshal’s facility pending trial, while the child would be placed in a dormitory run by the U.S. Health and Human Services department, since children cannot be held in criminal lockups.

Images of child border-crossers, separated from their adult companion and crying or looking upset—and the experience would undoubtedly be traumatic for most young children—triggered nonstop coverage of Trump administration cruelty. MSNBC and CNN set up border encampments from which reporters and pundits pontificated on the child-separation crisis. Nazi and Holocaust analogies flew around the Internet; faculty petitions invoked the internment of Japanese-Americans during World War II. Mexico and four other Latin American countries filed a human rights complaint against the U.S. Politicians and religious leaders lined up to denounce White House racism and anti-immigrant hatred.

On Wednesday, Trump called their bluff. He signed an executive order that would house illegal-alien adults with minors in Department of Homeland Security or other government facilities. The zero-tolerance policy, however, would continue. Democratic politicians and illegal alien advocates immediately cried foul. “Make no mistake: the President is

doubling down on his 'zero tolerance' policy," Democratic U.S. Senator Dick Durbin, said in a statement Wednesday. "His new Executive Order criminalizes asylum-seekers . . . . Locking up whole families is no solution at all—the Trump Administration must reverse its policy of prosecuting vulnerable people fleeing three of the most dangerous countries on earth."

The Harvard Kennedy School's Juliette Kayyem told CNN's Don Lemon on Wednesday night: "The real problem is Sessions' decision to prosecute [illegal border crossers] 100 percent." A CNN anchor on Thursday morning asked U.S. Representative Adam Schiff, a California Democrat, if his position was: don't criminally charge each person who illegally crosses the border. Schiff responded: "We don't have to criminalize everyone that's coming here seeking asylum." NPR interviewed the director of Migrant Rights and Justice at the Women's Refugee Commission, Michelle Brané. "Families will be just as traumatized, children will be just as traumatized" under the executive order, she said on Thursday morning. "Exchanging one form of trauma for another is not the solution"; getting rid of the prosecutorial mandate is.

And the open-borders lobby possesses a powerful weapon for doing just that. The extraordinarily complex thicket of interpolated rules and rights that govern U.S. immigration policy (the result of decades of nonstop litigation by the immigration bar) contains a series of judicial mandates that defeated even the Obama administration's tepid efforts to bring some semblance of lawfulness to the border. A long-running class-action lawsuit in the U.S. Ninth Circuit Court of Appeals, originally styled *Flores v. Reno*, has held that alien minors cannot be confined by the government for longer than 20 days. This 20-day cap contributed to the flood of Central American child-toting asylum seekers that picked up steam during President Obama's second term. Asylum petitions typically take months, if not years, to adjudicate, given the long backlog of such cases in the immigration courts. If an

adult crosses the border alone and utters the magic asylum words—a fear of persecution in his home country—he could in theory be held in detention until his asylum claim was adjudicated. If, however, he brings a child with him and makes an asylum pitch, he puts the government to a choice: detain the adult separately until his claim is heard and release the child after 20 days, or release both adult and child together.

The Obama administration usually chose the second option. Word coursed through Mexico and Central America that taking a child across the border was a get-out-of-jail-free card that would exempt its holder from both criminal prosecution and detention. This child-release lever, coupled with Obama's announcement in 2012 that he would grant amnesty to the so-called Dreamers, meant that Obama soon had his own family border crisis on his hands. In 2014, 70,000 adult-child units and 70,000 unaccompanied minors were apprehended illegally crossing into the U.S. The administration tried building large family detention centers to hold the children and their accompanying adults, but the same *Flores* decree that has bedeviled the Trump White House stymied that effort. In 2015, a federal trial judge, Holly Gee, herself appointed by Obama and the very definition of an activist jurist, vastly expanded the scope of the original decree and ordered the administration to release the detained minors. The Department of Homeland Security warned that ending family detention would trigger another border surge. Judge Gee dismissed this concern as "fear-mongering," according to the Associated Press.

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