



The Truth About Zero-Tolerance and Family Separation, What Americans Need to Know

By Matt O'Brien | June 2018

The Trump administration recently announced that it would begin charging all aliens caught illegally crossing the U.S.-Mexico border with the criminal offense of Improper Entry by an Alien, or other applicable criminal offenses.¹ That announcement immediately touched off a firestorm of critical media coverage with most outlets accusing the Department of Homeland Security of launching a policy deliberately aimed at “separating immigrant families” and discouraging legitimate asylum applications.² It also provoked a baseless class action lawsuit filed in the radically left-leaning Ninth Judicial Circuit by the American Civil Liberties Union, an organization that doesn’t believe the U.S. should have any borders at all.³

However, the vast majority of the commentary consists of hyperbole and baseless speculation fueled by a profound ignorance of criminal law and immigration procedures. In order to clarify the situation FAIR has prepared this issue brief, discussing both the operational and legal realities of the Trump administration’s policy.

What the Law Actually Says

- Pursuant to federal law, any alien who enters, or attempts to enter, the United States at any place other than a designated port-of-entry is guilty of the crime of Improper Entry by an Alien.⁴
- Because they are considered a significant flight risk, federal law permits the Department of Homeland Security (DHS) to keep illegal aliens charged with criminal offenses in custody, without bail.⁵
- A person is considered a flight risk if there is a serious risk that he/she will flee prior to appearing before the federal court to answer the charges brought against him/her.⁶

- Federal law specifically prohibits the detention or confinement of juveniles in any institution in which the juvenile would have “regular contact with adult persons convicted of a crime or awaiting trial on criminal charges.”⁷
- As a result, illegal alien adults who are arrested and charged with crimes are separated from any children with whom they have been traveling.
- The adults are placed in DHS custody; the children are placed in the custody of the U.S. Department of Health and Human Services (HHS).⁸
- Children in HHS custody are provided with an extensive array of services including routine medical and dental care, chaplain visits, mental health screening and anti-trafficking programs.⁹

No Cages, No Concentration Camps

Although the mainstream media has attempted to spin the Trump administration’s zero-tolerance policy as “immoral”¹⁰ and the HHS child and family detention centers as “concentration camps,”¹¹ those characterizations do not comport with reality:

Not only is the Trump policy not immoral, it’s a common occurrence when U.S. citizens’ parents have been charged with a crime – anything from tax evasion to drunk driving. As Sheriff Andy Louderback of Jackson County, Texas has observed, “We separate families when someone is charged with a crime. If both parents are sent to prison, we have to use social services while things are taken care of or restored.”¹² For some reason, otherwise reasonable people seem to apply a different moral framework when the law is applied to illegal aliens.

The United States Holocaust Memorial Museum defines a “concentration camp” as a facility, “in which people are detained or confined, usually under harsh conditions and without regard to legal norms of arrest and imprisonment that are acceptable in a constitutional democracy.”¹³ But that definition isn’t remotely applicable to HHS child detention facilities. The conditions are anything but harsh. *Breitbart News* journalist Joel B. Pollak toured the El Cajon, CA center and noted that, “It is a comfortable facility providing lodging, meals, clothing, medical care, education, recreation, counseling, and other services.”¹⁴

And no one in HHS custody is being detained without regard to acceptable legal norms that are acceptable in a constitutional democracy. In fact, the detention of minors by immigration authorities is governed largely by the terms of the settlement agreement in *Reno v. Flores*,¹⁵ under which DHS voluntarily observes the same restrictions applicable to minors detained in U.S. Department of Justice custody¹⁶, which include:

- Whenever the INS takes a minor into custody, it shall expeditiously process the minor and shall provide the minor with a notice of rights, including the right to a bond redetermination hearing if applicable.
- Every juvenile in custody shall be provided with adequate food, heat, light, sanitary facilities, bedding, clothing, recreation, education, and medical care, including necessary psychiatric, psychological, or other care and treatment.

According to the *Washington Times*, the federal government spends about \$670 per day, per child – in taxpayer funds – providing illegal alien children with education, recreation (that may include soccer tournaments, Spanish-language yoga and video games), as well as three meals

a day and two snacks.¹⁷ That sounds about as immoral as an elite boarding school. And, frankly, it's beyond offensive comparing HHS child detention centers to concentration camps like Auschwitz, where prisoners were forced perform back-breaking, hard labor on a diet of 800 to 1,500 calories per day.¹⁸

Despite Claims to the Contrary, this Policy Doesn't Apply to Everyone Seeking Asylum

Regardless of mainstream media assertions to the contrary, DHS is not separating every family that requests asylum in, or some other form of entry to, the United States. It applies only to those individuals encountered by Customs and Border Protection while attempting to enter the United States illegally.

As Secretary of Homeland Security Kirstjen Nielsen explained to *Fox News* recently¹⁹:

- It is lawful to travel to a port-of-entry and request asylum.
- Therefore, only illegal alien children whose parents are being charged with the crime of Improper Entry by an Alien are being routinely separated from their parents.
- Other children may be separated from their alleged parents if the child appears to be in danger or if DHS is unable to establish the existence of family ties, or cannot confirm that an established family member has a custodial relationship with the child traveling with him/her.

Therefore, it is important to remember that the illegal aliens complaining about being separated from the children who were traveling with them could easily have avoided the temporary disjunction by appearing at a port-of-entry and *lawfully* requesting admission to the United States, as asylees, or in whatever other admission category for which they might have been eligible.

Protecting Alien Children from Exploitation

It's also important to note that much of the media commentary on the "separation of families" presumes that illegal aliens presenting themselves as a family unit are related to each other. In fact, many of the purported parents are actually trafficking unrelated children.

To those unfamiliar with the rough-and-tumble conditions along the southern border of the United States, that may seem to be an extraordinary claim. However, the International Labour Organization estimates that human trafficking and the forced labor that goes along with it (everything from modern slavery to sexual peonage) generates approximately \$12 billion in profits in Latin America and the Caribbean alone.²⁰ And, according to an exposé by *Al Jazeera*, Latin American drug cartels are deriving an ever-increasing share of their profits through human trafficking activities.²¹

Because there are significant profits to be derived from trading in human beings, and because most U.S. immigration benefits permit the primary applicant to request the same status for family members, it has become common for alien smugglers and sex traffickers to pose as family units in order to gain easier access the United States.²² In fact, human traffickers regularly game the immigration system by forcing trafficking victims to pose as family members of gang members, who then force them into prostitution or unpaid labor in sweat shops, once they are admitted to the U.S.²³

According to a 2016 Senate report, the Obama administration inadvertently released an unknown number of unaccompanied alien minors to human traffickers after it failed to run the

most basic checks on individuals who claimed to be related to the children.²⁴ So it is clear that criminals are aware that there are flaws in our immigration system that can be manipulated to their benefit.

As such, keeping children with their alleged “parents” can often mean leaving them with criminals who wish to exploit them. Separating the adults from the children provides DHS with an opportunity to verify claims of parentage and enables law enforcement authorities to remove child victims from the clutches of smugglers and traffickers. As the United Nations *Anti-Human Trafficking Manual for Criminal Justice Practitioners* advises, “It may not be clear who is a suspect or victim on first encounter. Indeed, in many trafficking in persons cases this may not become apparent for some time.”²⁵ Therefore, any policy that allows law enforcement additional time to verify claims about family relationships makes migrant children safer.

Asylum Abuse

The other pre-conception upon which the mainstream media has based its condemnation of the President’s zero-tolerance policy is that all of the individuals currently attempting to enter the United States illegally have a legitimate claim to political asylum.

Political asylum is available to foreign nationals with a credible fear that they will be persecuted by their own government on account of race, religion, nationality, political opinion or membership in a particular social group.²⁶ It does not mean everyone who is dissatisfied with the political or economic situation in his or her home country can simply relocate to the United States. However, due to Immigration Court backlogs and irresponsible “catch-and-release” policies, merely applying for asylum often constitutes a “get out of jail free card” for migrants who simply want to work in the United States.²⁷

For years, DHS, the Department of State and the Immigration Court have known that the asylum system is plagued with fraud.²⁸ The Trump Administration’s current attempt to gain control of an asylum system run amok is long overdue.

Conclusion

When the citizens of the United States elected Donald Trump, they sent a clear message to Washington that they no longer want criminals and illegal aliens running America’s borders. President Trump paid attention. And, thus far, his immigration policies have been firmly focused on improving national security and public safety. Slowly but surely, we are regaining control of our borders.

But any attempts to pass legislation requiring DHS to keep alleged “families” together will undermine border integrity. Such laws are sure to encourage all types of immigration violators – from alien smugglers to drug cartels – to begin using children as human shields. And it would be a shame to permit children to become a toll that immigration violators use to dictate where and how *they* want to be detained.

Far from being cruel, the current policy of separating illegal aliens and adults who claim to be families brings us one step closer to ensuring that alien criminals don’t permanently separate would-be immigrant families. And it does so by putting the safety and security needs of Americans first. The best move that President Trump can make is to disregard the nonsense being pushed by the mainstream media and continue implementing no-nonsense border control policies.

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- ⁵ 18 U.S. Code §§ 3142(d)(1)(B) and (d)(2) <https://www.law.cornell.edu/uscode/text/18/3142>
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- ⁷ 18 U.S. Code § 5035 <https://www.law.cornell.edu/uscode/text/18/5035> (Made applicable to DHS detention of alien children via the Stipulated Settlement Agreement in *Jenny Lisette Flores, et al. v. Janet Reno, et al.*, Case No. CV 85-4544-RJK(Px))
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