



How We Got to the Point of Separating Families Entering the U.S. Illegally

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The firestorm that erupted as a result of the Trump administration's efforts to curb a surge of illegal immigration was decades in the making. The fuse that ultimately led to Attorney General Jeff Sessions' announcement that, among other steps, children and adults illegally entering the United States would be detained separately, had been lit 25 years earlier. In the ensuing years, presidential administrations, Congress, and courts kept adding combustible material to the mix.

If there is one thing about what is currently going on along America's border that everyone can agree upon, it is that no one wants to see children separated from their parents. While it is true that law enforcement often results in families being separated, the crisis that raged in May and June could have been avoided. It was a direct consequence of laws and policies that could have been fixed, but were not because those who claim to advocate for migrants wanted them to remain broken, and still do.

While people were understandably saddened by recent events at the border, there is little understanding of the circumstances that led us to this point. The separation of children and adults at the border was not a deliberate act on the part of the Trump administration intended to inflict pain on migrants, but rather a policy choice necessitated by a lack of other choices and deliberate efforts to prevent other options from being available.

Understanding the chain of event and policies that got us here is important to ensuring that we do not wind up here again.

Reno v. Flores

In 1985, a 15-year-old unaccompanied minor (UAM) from El Salvador, Jenny Flores, was apprehended entering the United States illegally. The girl was held by the now defunct Immigration and Naturalization Service in a facility that also housed adults of both sexes. INS refused to release Jenny to any adult other than her parents, whom they suspected of being in the United States illegally.

Jenny Flores' case set off a chain of judicial rulings and policy decisions, many with unintended consequences, that have led us to where we are now. After making its way through a number of federal district courts and the Ninth Circuit Court of Appeals, her case ultimately made it to the U.S. Supreme Court. In a 7-2 ruling in March 1993, the Supreme Court largely sided with the government. *Reno v. Flores* ruled that UAMs do not have a constitutional right to be released to anyone other than a parent or close relative.¹ Moreover, the decision affirmed that UAMs do not have a right to automatic review of their cases by an immigration judge.

RENO V. FLORES SETTLEMENT AGREEMENT

Four years after the Supreme Court handed down its ruling, the Clinton administration agreed to a consent decree that set the standards for how UAMs should be treated under *Reno v. Flores*.²

Under the consent decree, the government would release UAMs, without unnecessary delay, to parents, other close relatives, or a suitable guardian, pending a determination of the UAM's claim to remain in the United States. The agreement also reasonably stipulated that if there was no suitable relative or guardian to take custody, UAMs would be held in the "least restrictive" setting possible in a facility provided certain basic comforts and amenities.

Trafficking Victims Protection Reauthorization Act (TVPRA) of 2008

The Flores Settlement worked reasonably well for the first decade after it was agreed to. The number of UAMs arriving at the border was relatively small and, whether the minor was released to a relative or held in an appropriate detention facility, the cases could be dealt with expeditiously without automatic judicial review of an unfavorable ruling.

Then came a well-intended, but disastrous piece of legislation with unforeseen consequences. The TVPRA signed by President George W. Bush on his way out the door in December 2008, was meant to curb the heinous sex trafficking of children.³ But in an effort to protect minors who were being trafficked, the TVPRA opened the door for large-scale abuse. The TVPRA requires that with exception of Canadian and Mexican

nationals, the Department of Health and Human Services (HHS) “shall ensure, to the greatest extent practicable...that all unaccompanied alien children who are or have been in the custody of [DHS]...have counsel to represent them in legal proceedings or matters.” HHS is also required “[t]o the greatest extent practicable” to make every effort to utilize the services of pro bono counsel “who agree to provide representation to such children without charge.”

In other words, under the TVPRA, most UAMs could not be turned back at the border. Rather, the law required that they be admitted and provided an often-lengthy legal procedure, with counsel, to press a claim to remain in the U.S. Guess what? There was an almost immediate increase in the number of UAMs from non-contiguous countries arriving at our borders.⁴

In an ironic twist, a law intended to protect victims of human traffickers, turned out to be a boon for another cohort of slightly less reprehensible criminals: human smugglers. Parents, like those of Jenny Flores who were in the country illegally, realized that the TVPRA provided them with an opportunity to have their children smuggled to the United States and almost certainly released to their custody. Still other parents, in places like El Salvador, decided that the TVPRA was an opportunity to send their kids to the U.S. where they might be placed in the care of relatives already here in the hope that someday the parents would be able to join them in the U.S.

The TVPRA was so poorly written that its protections for minors from non-contiguous countries could be applied to those who were illegally entering the United States with their parents. Children brought to the United States illegally by their parents are clearly not trafficking victims, yet they are afforded all the legal protections of trafficking victims – a paradox that would eventually lead to a surge of illegal aliens arriving in the company of children.

Deferred Action for Childhood Arrivals (DACA)

During his first two years in office, with control of both houses of Congress, President Obama decided to bet his political capital on passage of the Affordable Care Act (ACA). Obama’s bet paid off – after a long and bitter battle the ACA was enacted. But his victory on health care came at an enormous political price. The ACA turned out to be not that popular with voters and Democrats lost control of Congress in 2010.

While Democratic Party activists whose top priority was enactment of universal health coverage got what they wanted out of two years of complete Democratic control of the federal government, other activists who placed a premium on a total or partial amnesty

for illegal aliens were disappointed. A belated effort to pass a DREAM Act amnesty in a late-2010 lame duck session came up short.

Heading into his own 2012 re-election bid, President Obama was taking heat from his base for his failure to deliver an amnesty for at least those illegal aliens who arrived as minors. Realizing that this discontent could lead some of these voters staying home on Election Day, in June Obama announced the creation of DACA, despite his repeated assertions that he lacked the constitutional authority to exempt an entire class of illegal aliens from enforcement and grant them the right to work in the U.S.⁵

Although DACA did not bestow any benefits on minors who arrived subsequent to the creation of the program, it nonetheless signaled that the United States regarded minors who entered the country illegally as blameless. It created the expectation that if the United States had an ethical obligation to protect “blameless” illegal aliens who had entered in the past, eventually that same ethical obligation would apply to later arrivals.

Moreover, in addition to the expectation that they would eventually become eligible for amnesty or at least an expansion of DACA protections, the TVPRA provided UAMs with the opportunity to get through the door and start the clock. Predictably – or at least what should have been predictable – the number of UAMs arriving at the border began to spike further.

Bureau of Immigration Appeals (BIA) in the Matter of A-R-C-G et al.

For years, immigrants’ rights organizations had been pushing to have political asylum protections applied to victims of domestic violence whose own government could not or would not protect them from an abusive spouse. Political asylum, as the name suggests, was intended to protect people facing *political* persecution at the hands of their governments based on five criteria: race, religion, national origin, political opinion, or membership in a particular social group.

That last vague category, “membership in a particular social group,” was intended to provide protection to people who were singled out for persecution because of a characteristic that did not fit neatly into one of the other four. So, for example, someone who faced government persecution because of sexual orientation could be granted political asylum based on being a member of a social group.

The BIA, an arm of the Justice Department, in A-R-C-G, blew a gaping hole in U.S. asylum policy in 2014 at the direction of the Obama administration.⁶ Prior to the BIA’s decision, an asylum applicant had to demonstrate that what happened to them was the *result* of being a member of a “particular social group.” A-R-C-G said that membership

in a particular social group could be acquired as a *consequence* of what happened to them. Moreover, the fear being claimed did not need to be political in nature. It could be interpersonal, such as an abusive spouse or partner, or it could be the result of social breakdown in the home country resulting in generalized lawlessness.

Under A-R-C-G, an asylum policy that was meant to protect foreign nationals from acts of *commission* by their governments was extended to protect people from acts of *omission* by their governments. Your government did not necessarily need to persecute you; it merely had to fail to protect you from some sort of danger.

Again, the results were predictable. In addition to the surge of UAMs who were pouring across the border in 2014, A-R-C-G created a concurrent flow of families with children.⁷ In some cases, the family units consisted of one parent – almost always a mother – arriving at the border with young children claiming to be fleeing an abusive spouse. While in some cases these mothers and children were legitimately trying to escape domestic abuse, affirming or disproving such claims in poorly governed countries is virtually impossible. As such, A-R-C-G served as an engraved invitation to enter a credible fear claim based on domestic violence and virtually guaranteed entry to the United States.

And even though A-R-C-G did not specifically order that people claiming fear of rampant gang violence be treated as members of a social group, in practice many families (often with both parents) were able to gain initial entry to the United States under such claims.

In June 2018, U.S. Attorney General Jeff Sessions finally took steps to overturn A-R-C-G and narrow the universe of foreign nationals who could claim political asylum in the United States. While acknowledging the serious nature of domestic violence and the breakdown of social order in many failed or failing states, Sessions issued a precedent-setting ruling that those conditions could not be grounds for seeking protection in the U.S. *Political* asylum is meant to protect people from *political* persecution at the hands of governments that singled out individuals based on race, religion, national origin, political belief, or (pre-existing) membership in a social group.

The Flores Settlement Agreement 2016

The flood of new UAMs and families with children presented a huge new challenge: Where to detain them all? The answer, of course, is that many could not be detained resulting in most being released on a small bond in the hope that they would show up for a hearing that, due to the high volume of people attempting to enter the country, might be years in the future.

Attempts by the Obama administration to detain even a small number of families with children ran into another snag. Advocates for the illegal aliens went to court to argue that both the detention facilities that were being used to house family units, and the detention of the minors themselves, were

a violation of the 1997 Flores Settlement.

A federal district court judge in California, with a long history of judicial activism, agreed. Judge Dolly Gee ruled that the 1993 Flores decision, which dealt with the treatment of UAMs also applied to minors who arrived in the company of their parents and that the maximum the government could detain these family units is 20 days. The equally activist Ninth Circuit Court of Appeals upheld the ruling.⁸ The Obama administration, either because they didn't really want to detain family units, or because they were on their way out the door and figured that Hillary Clinton would find a way to let them all stay after she became president, decided not to pursue the case any further and agreed to the court's ruling.

Hillary Clinton did not become president. And after a short hiatus, until word filtered back to the sending countries that the Trump administration's hands were tied by the 2016 Flores Settlement, large-scale illegal immigration of UAMs and families with children came roaring back.

Given the magnitude of the crisis and the uproar over separating children and parents, the Trump administration returned to Judge Gee's courtroom requesting that, under the circumstances, she extend the timeframe under which children and parents could be detained together. In early July, Gee emphatically rejected that petition.⁹

Where things stand now

As a result of a series of ill-conceived policy decisions, badly written legislation, and politicized judicial rulings, the Trump administration was confronted with yet another chaotic surge of illegal aliens crossing our borders and only two possible ways of dealing with the crisis – both bad.

OPTION 1

Option 1 is to continue the policy inherited from the Obama administration and allow children to be used as “get out of jail free cards” by parents who show up with their kids. In effect, exercising this option means promoting even more chaos.

OPTION 2

Option 2, also a bad one, is to separate illegally arriving adults from the children accompanying them. To some extent, this would need to occur even if the intention of the government was to release them all expeditiously, if for no other reason than to verify that the children actually belonged to the adult or adults in whose company they arrived. Moreover, there was precedent for such actions. Previous administrations, including the Obama administration, had detained adults and children separately.¹⁰

The law allows the government to detain adults entering the country illegally for as long as necessary, so long as there is detention space available. And, since Congress has not seen fit to enact a legislative work-around of the 2016 Flores settlement, the children cannot be detained with their parents for more than 20 days.

Moreover, while the law allows for expedited removal of adults who have no legal claim to enter or remain the country, swift action cannot be taken in regard to the children, even if they are clearly part of a family that arrived as a unit.¹¹ Because they must be treated as presumptive trafficking victims (no matter how patently evident it might be that they are not), the kids will have to remain here for an extended period while their exercise their legal options.

OPTION 3

Option 3? It doesn't exist – unless Congress creates it legislatively. Congress could – assuming Congress is capable of doing anything these days – amend the TVPRA so that minors from non-contiguous countries are treated the same way that the law treats Canadian and Mexican minors. Minors who arrive with their parents are not trafficking victims and there is no rational reason why they should be given the protections of trafficking victims.

Congress could enact legislation allowing for the detention of family units, under conditions spelled out in the 1997 Flores Settlement, for as long as it reasonably takes to determine if the entire family has a legal claim to enter the United States. If the claim is legitimate, the entire family would be kept together and admitted as a unit. If their claim is without merit, the entire family would be kept together and repatriated as a unit.

Finally, Congress can update our asylum laws to reflect current realities, rather than the realities of the Cold War era, when the laws were last codified. People are no longer fleeing totalitarian regimes that threatened to sentence them to hard labor (or worse) for

expressions of dissent or demands for basic human rights and civil liberties. There is no longer an Iron Curtain that served to limit the number of people who could claim asylum to the occasional Soviet ballerina or Czech tennis star who slipped away from her hotel in the dead of night.

Migrants and asylum seekers today are largely the victims of weak, corrupt, incompetent, or malfeasant government – or some combination thereof. Far from trying to keep dissatisfied populations in, they are only too happy to see them go. As such, an asylum law that was enacted in 1980 is hopelessly and dangerously antiquated in 2018.¹²

If Congress and this or future administrations want to exercise some foresight, there is even a fourth option to consider. The United States is not alone in confronting the humanitarian fallout from a growing number of failed and failing states.

Similar crises are threatening to collapse the European Union – Mediterranean member states have begun turning away boats¹³ of migrants and Germany has decided to reinstate a hard border with neighboring Austria to prevent the entry of migrants to Europe's most prosperous member.¹⁴ On the other side of the world, Australia is preventing boats from landing and, instead, paying other South Pacific nations to detain migrants attempting to reach Australia's shores.¹⁵

Western democracies, which are bearing the brunt of the humanitarian crisis triggered by rogue regimes that loot their nations' treasuries and neglect the basic interests and security of their people can hold these governments accountable. The individual members of these countries' ruling elites can be targeted – denied visas to travel and have their ill-gotten personal assets, squirreled away in banks around the world, frozen or confiscated. Access to capital through international institutions like the International Monetary Fund or the World Bank can be conditioned on measurable social, economic, and political reform.

If governments cannot or will not make a reasonable effort to protect a woman who is being battered by her spouse, or to rein in criminal gangs (that flourish because the governments were neglecting the needs of the people in the first place), or tamp down corruption that leaves most of their populations destitute, they do not deserve the trappings and perks of governments. They are pariah regimes, and should be treated as such.

The Trump administration's ill-fated policy of separating children from their parents was a bad policy – *because there were only bad policy choices on the menu*. It should now be incumbent upon those who were the loudest critics of that policy – advocacy groups,

the media, the Democratic Party, and others – to make sure that there are better options (not necessarily ideal ones) available to this and future administrations.

Those who stand in the way of commonsense legislative and policy reforms will be making it clear that their real concerns are not about keeping families together, but about using families as a weapon in their assault on America’s sovereign right to enforce immigration laws.

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