



Family Separation Policy: What You Need to Know

Updated June 20, 2018

1. What is the family separation policy?

The Trump Administration has implemented a “zero tolerance” policy against those who irregularly cross the border which has the result of separating families at the border. On April 6, 2018 Attorney General Sessions issued a memorandum from Attorney General Jeff Sessions entitled [Memorandum for Federal Prosecutors Along the Southwest Border](#) calling for a “zero tolerance policy,” and instructing United States Attorney’s Offices along the border to criminally prosecute anyone who enters unlawfully. On May 7, [Attorney General Sessions confirmed](#) that the Department of Homeland Security is referring everyone who crosses the Southwest border unlawfully to the Department of Justice for prosecution.

2. Is the family separation policy new?

Yes. Some have suggested that this policy is no different from policies previously implemented by the Obama and Bush administrations. However, this family separation policy is not a carryover from any prior administration. While [family separations did occur](#) under the Obama and Bush administrations, those separations were uncommon because the policies did not systematically target first time offenders for prosecution and made exceptions for adults migrating with children. [When Congress became aware in 2005](#) that enforcement practices resulted in family separation, [it instructed DHS](#) to adopt policies to release families or use alternatives to detention wherever possible.

3. Is family separation required by law?

No. Speaking about family separation, [President Trump said](#), “I hate the children being taken away. The Democrats have to change their law—that’s their law.” There is, however, no law by Congress or any other body which requires family separation. The systematic separation of children from their parents is a policy choice by the administration.

4. What is the difference between law and policy?

Laws can be passed by Congress in the form of a statute or created by formal regulation by an administrative agency. The process for passing statutes is found in the [Constitution](#), and the process for creating regulations is found in the [Administrative Procedure Act](#) (APA). In contrast, a [policy](#) is a statement of intent or method of action. Policies do not adhere to strict rulemaking requirements of the Constitution or the APA, and so they are not binding. Policies are discretionary, and can in most cases be made or [changed at any time](#).

5. Are Attorneys General required by law to prosecute every person who crosses the border with children, including asylum seekers?

No. In American criminal law, prosecutors have broad [prosecutorial discretion](#), which means they can choose whether to bring charges against a person. The choice by the Trump administration to prosecute and charge anyone who crosses the border irregularly (including those who present themselves at the border seeking asylum) is a choice, not a mandate. Prosecutorial discretion in

The goal of this document is to provide general information regarding family separation and is not meant to act as a substitute to legal advice from an attorney.

the context of criminal law has been recognized by the Supreme Court in [U.S. v. Armstrong, 517 U.S. 456, 464 \(1996\)](#), and in the context of civil immigration law in [Arizona v. U.S., 567 U.S. 387 \(2012\)](#). The [Department of Justice U.S. Attorney's Manual](#) also includes guidelines intended to promote the use of prosecutorial discretion. On June 18, 2018, a bipartisan group of former U.S. attorneys [have written to Attorney General Sessions](#) criticizing his “zero tolerance” policy. Their letter states in part: “The law does not require the systematic separation of families under these circumstances. Collectively, as former United States Attorneys, we have prosecuted tens of thousands of cases involving far more serious crimes than misdemeanor illegal entry offenses. And even in those far more serious cases, decisions involving the separation of children from their parents were made with extraordinary caution, and only after an evaluation of the specific circumstances of a particular case.”

6. How and why did the administration start to separate children from families?

On April 6, 2018, Attorney General Sessions [explained that the “zero tolerance” policy is a response](#) to a “crisis” of illegal immigration at the Southwest Border. The memorandum itself suggests that increased levels of prosecution are an effective means of deterring illegal immigration. The “zero tolerance” policy triggered family separation based on the administration’s position that children cannot stay with adults who are currently in criminal detention.

7. Has the issue of family separation been litigated?

Yes. On April 20, 2018, the American Civil Liberties Union (ACLU) [filed a federal lawsuit against the immigration agencies](#) enforcing the policy of family separation. The lawsuit was brought on behalf of Ms. L, an asylum-seeking mother from the Democratic Republic of Congo, who was traveling with her 7-year-old daughter when they were forcibly separated and detained in facilities 2,000 miles apart. On June 6, 2018, U.S. District Judge Dana Sabraw [issued a decision](#) to let the lawsuit go forward. Said Judge Sabraw, “At a minimum, the facts alleged are sufficient to show the government conduct at issue “shocks the conscience” and violates Plaintiffs’ constitutional right to family integrity. Accordingly, Defendants’ motion to dismiss Plaintiffs’ due process claim is denied.”

8. How many people are impacted?

DHS has reported that in a six week period from April 19 through May 31, 2018, [1,995 minors were separated from 1,940 adults](#).

9. Are there any cases in Pennsylvania?

Yes. One report from June 17, 2018 suggests that the government is [housing 50 child migrants in Pittsburgh](#) who were separated from their parents.

10. What is asylum?

[Asylum](#) is a legal protection available to any noncitizen on U.S. soil. Immigration and Nationality Act (INA) § 208(a)(1) states: “any alien who is physically present in the United States or who arrives in the United States (whether or not at a designated port of arrival) . . . irrespective of such alien's status, may apply for asylum.” Those seeking asylum must show they have suffered past persecution or have a well-founded fear of persecution on account of a protected ground if they are returned to their home country. [Protected grounds for asylum](#) include race, religion, nationality, membership in a particular social group, or political opinion.

The goal of this document is to provide general information regarding family separation and is not meant to act as a substitute to legal advice from an attorney.

When a noncitizen arrives at, or is apprehended between, a port of arrival without documents, or with false documents, § INA 235(b) instructs the immigration officer to order the noncitizen removed *unless* they express a fear of returning to their home country or an intention to apply for asylum. If the noncitizen expresses fear or an intention to apply for asylum, they [may be referred to an asylum officer](#) and the application for asylum begins. Criminally prosecuting asylum seekers for unlawful entry before they have had an opportunity to apply for asylum [dramatically slows down the process for seeking asylum](#) and also raises a number of legal and policy concerns.

11. Has the administration made any other changes to asylum?

Yes. The Attorney General has the power to certify to himself pending immigration cases. In one case, [Matter of A-B-](#) Attorney General Sessions overruled [Matter of A-R-C-G-](#), a landmark asylum case which recognized “married women in Guatemala who are unable to leave their relationship” as a particular social group for asylum purposes. [Matter of A-R-C-G-](#) was a step forward for asylum seekers hoping to build a claim on the basis of domestic abuse for which the state is unable or unwilling to intervene. Law professor and gender expert Karen Musalo [remarked](#) how [Matter of A-B-](#) “basically throws us back to the Dark Ages, when we didn’t recognize that women’s rights were human rights.”

12. What are the alternatives to separating parents and children?

On the criminal side, Attorneys General should be allowed to use their discretion in deciding whether an irregular border crosser should be charged criminally and detained pending trial. In the civil immigration side, the administration should consider alternatives to detention. The United States government [spends over \\$2 billion each year](#) detaining immigrants. However, there are alternatives to detention and family separation that result in a net financial and humanitarian gain for the country implementing them. For example, the [Community Assessment and Placement \(CAP\) model](#) prioritizes presumption against detention, procedural minimum standards, identification and decision-making, and case management as tools to build a system that ensures that detention is only used as a last resort instead of a first option.

13. What can I do to help families separated at the border?

There are [several organizations](#) you can donate to that provide legal services to families impacted by family separation, or that advocate for changes to law and policy that will protect children at the border.

14. Where can I find more resources?

[Penn State’s Center for Immigrants’ Rights Clinic](#)

[American Immigration Council](#)

[Women’s Refugee Commission](#) (including: [know your parental rights](#))

[Human Rights First](#)

[Department of Homeland Security Fact Sheet: Zero Tolerance Policy](#) (June 15, 2018)

[Department of Homeland Security Myth v. Fact: Zero Tolerance Policy](#) (June 18, 2018)

The goal of this document is to provide general information regarding family separation and is not meant to act as a substitute to legal advice from an attorney.