

ISSUE BRIEF

No. 4871 | JUNE 25, 2018

Stopping Family Separation Requires Closing Loopholes and Strengthening Immigration and Asylum Systems

David Inserra

The issue of alien children being divided from their parents at the U.S. southern border is one of strong emotion and concern for innocent children. Beyond the emotion, a complex set of factors and immigration restrictions and loopholes are at work that deserve careful analysis in order to solve this genuinely distressing situation. Congress should enact reforms that will allow family units to remain together, while closing immigration and asylum loopholes and maintaining robust enforcement of the country's immigration law.

Indeed, several bills have already been proposed to quickly stop family separation and enforce U.S. immigration laws. Bills by Senator Ted Cruz (R-TX), Senator Thom Tillis (R-NC), and Representative Mark Meadows (R-NC) each accomplish these objectives and provide a platform for even stronger reforms. Rather than letting the asylum and detention issues get bogged down by debates over amnesty, Congress should tackle these issues on their own.

Asylum and Immigration Enforcement

Asylum seekers who are already in the U.S., or at a U.S. port of entry, must meet the same standard as a refugee in order to receive asylum. A refugee or asylum seeker must be "a person who is unable or

unwilling to return to his or her country of nationality because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion."¹

Asylum seekers can claim affirmative asylum (when an immigrant or visitor in the U.S. requests asylum from the Department of Homeland Security (DHS) proactively) or defensive asylum (when an individual claims asylum in the process of deportation proceedings before an immigration judge to prevent removal from the U.S.). It is defensive asylum that is currently at issue regarding family separation.

Rather than show up at a legal port of entry and affirmatively claim asylum, some try to sneak into the U.S. illegally—and after being caught, placed in removal proceedings, and charged with illegal entry, they claim asylum defensively. The Trump Administration's policy of zero tolerance means that everyone who crosses the border illegally is charged with the crime of illegal entry.² Generally, these cases are decided quickly and the illegal immigrants are often sentenced to time served before being removed from the U.S.³ Prosecuting aliens for illegal entry acts as a deterrent, since while the first conviction may only be a misdemeanor, a subsequent conviction is a felony that may result in significant jail time.⁴

Since the prosecution is generally quick, families are separated only for the brief trial. But if an illegal border crosser claims asylum, the asylum claim must be adjudicated first, which is a process that can take months. According to the Ninth Circuit Court of Appeals' interpretation⁵ of a settlement agreement entered into by the Clinton Administration in 1997 in *Flores v. Reno*, however, the government is not allowed

This paper, in its entirety, can be found at <http://report.heritage.org/ib4871>

The Heritage Foundation
214 Massachusetts Avenue, NE
Washington, DC 20002
(202) 546-4400 | heritage.org

Nothing written here is to be construed as necessarily reflecting the views of The Heritage Foundation or as an attempt to aid or hinder the passage of any bill before Congress.

to detain an illegal juvenile, even if with the parents, for more than 20 days. So, while waiting for this asylum process to finish, the government is required to release the child. Such minors are placed with other family members or sponsors, or are placed in foster care.

The alternative is to “catch and release” the entire family into the U.S. But, as experience has shown, many families released into the U.S. will not show up at their immigration court hearings and this process only encourages more illegal immigration with children. Thus the decision is between releasing anyone at the border who claims asylum with a child, knowing that many will simply become illegal immigrants, or hold the parents to ensure that their case is adjudicated while releasing the child as required by the settlement agreement and the Ninth Circuit.⁶

Fixing a Broken System

A better third option is to fix this situation by closing and fixing various loopholes and weaknesses in the current system that inhibit the proper enforcement of U.S. immigration laws while also ensuring that families remain together.

Senator Cruz has proposed a bill, the Protect Kids and Parents Act (PKPA), which would do just that. The PKPA starts by overriding the Ninth Circuit and *Flores* settlement loophole and explicitly allows children to stay with their parents in detention centers designed for family units. The bill would also increase

the number of asylum officers, immigration judges, and support staff significantly so that, in the long run, these cases and other immigration cases can be more quickly adjudicated. With the average wait time in the immigration court increasing from 438 days to 718 days in 2018, these resources are desperately needed. The bill by Senator Tillis, which is co-sponsored by dozens of other Senators and has a companion bill in the House of Representatives, includes similar provisions, although it hires fewer judges and no additional support staff or asylum officers.⁷

Beyond just more money for immigration courts and detention, the PKPA would also establish a prioritized schedule for asylum claims of family units. The bill would set forth a 14-day schedule for hearing and adjudicating asylum claims. Two extensions of up to 30 days are possible if good cause is given. On a purely logistical level, it is unclear that this timeline will be possible but prioritizing these cases and adding more judges will assist in moving toward this faster timeline.

There are improvements that could be made to the Cruz or Tillis bills. The bill by Representative Meadows for example, would also close the related loophole⁸ in the 2008 William Wilberforce Trafficking Victims Protection Reauthorization Act (TVPRA) by allowing unaccompanied minors from countries other than Mexico to be quickly returned to family or social services agencies in their home countries.⁹

-
1. Nadwa Mossaad and Ryan Baugh, “Refugees and Asylees: 2016,” U.S. Department of Homeland Security, Office of Immigration Statistics, January 2018, https://www.dhs.gov/sites/default/files/publications/Refugees_Asylees_2016_0.pdf (accessed May 3, 2018).
 2. 8 U. S. Code § 1325 (1965), <https://www.uscis.gov/ilink/docView/SLB/HTML/SLB/0-0-0-1/0-0-0-29/0-0-0-9025.html> (accessed June 22, 2018).
 3. Miriam Jordan, “Swift Frontier Justice for Migrants Brought to Federal Courts,” *The New York Times*, June 19, 2018, <https://www.nytimes.com/2018/06/19/us/border-immigration-courts.html> (accessed June 22, 2018).
 4. 8 U. S. Code § 1326 (1965), <https://www.uscis.gov/ilink/docView/SLB/HTML/SLB/0-0-0-1/0-0-0-29/0-0-0-9047.html> (accessed June 22, 2018).
 5. *Flores v. Lynch*, 828 F.3d 898 (9th Cir. 2016), <https://cdn.ca9.uscourts.gov/datastore/opinions/2016/07/06/15-56434.pdf> (accessed June 22, 2018).
 6. In an executive order signed by President Donald Trump on June 20, 2018, the President directs the Attorney General to file a request with the court in the *Flores* case to modify the settlement agreement to permit the government “to detain alien families together throughout the pendency of criminal proceedings for improper entry or any removal or other immigration proceedings.” Donald J. Trump, “Affording Congress an Opportunity to Address Family Separation,” Executive Order 13841, The White House, June 20, 2018, <https://www.whitehouse.gov/presidential-actions/affording-congress-opportunity-address-family-separation/> (accessed June 22, 2018).
 7. News release, “Senators Introduce Legislation to Keep Families Together and Ensure the Integrity of Immigration Laws,” June 20, 2018, <https://www.tillis.senate.gov/public/index.cfm/press-releases?ID=75F05F81-1793-4770-AEA6-1013CE8DE50F> (accessed June 22, 2018).
 8. News release, “Rep. Meadows Introduces the Equal Protection of Unaccompanied Minors Act,” June 19, 2018, <https://meadows.house.gov/news/documentsingle.aspx?DocumentID=919> (accessed June 22, 2018).
 9. David Inserra and Paul Fredrick, “Fixing This Immigration Loophole Would Help Address Child Migrants,” *The Daily Signal*, April 04, 2018, <https://www.dailysignal.com/2018/04/04/fixing-immigration-loophole-help-address-child-migrants/>.
-

Congress could also adjust the asylum-claim process to require that the “credible fear” claim be made, and interview occur, at a consulate in Mexico.¹⁰ This would allow the government to weed out non-credible cases before asylum seekers even arrive at the U.S. border without having to detain anyone.

A Better Way Forward

The current problems at the U.S. border are largely caused by loopholes and mistakes in existing law that need to be rectified to both protect the vulnerable and persecuted and prevent illegal immigration. Congress should:

- **Increase funding for immigration court judges, prosecutors, and associated staff.** The U.S. immigration adjudication and court system is falling further and further behind. More immigration judges, prosecutors, and staff to assist in immigration proceedings as well as more U.S. Citizenship and Immigration Services (USCIS) asylum officers are essential to enforcing U.S. immigration laws in a timely and effective manner.
- **Expand alternatives to detention.** Many asylum seekers or other immigrants in deportation proceedings cannot be detained because of resource constraints. A cost-effective way to ensure that individuals appear at their court hearings is through the use of various alternatives to detention programs, the most effective of which involve GPS tracking anklets. Congress should require and fund the expansion of such alternatives to detention in addition to existing and new family detention requirements.
- **Adjust the asylum claim process.** Rather than applying for asylum at U.S. borders, asylum seekers travelling to the U.S. southern border should be required to first have their asylum claims heard by a USCIS asylum officer at a U.S. consulate in Mexico in a credible fear interview.

Credible fear interviewers should also ask the asylum seeker why he or she did not assert asylum in other countries, such as Mexico. Failure to adequately explain the refusal to pursue asylum in other countries should be considered in the decisions of immigration officials. The Administration should also pursue safe-third-country agreements with countries in Latin America requiring asylum seekers to first pursue asylum in those closer countries before making a claim in the U.S. Other changes to strengthen the asylum system can similarly improve the enforcement of immigration law.

- **Close loopholes.** Congress should reject the *Flores* settlement in order to allow accompanied children to remain with their parents while awaiting asylum adjudication or prosecution of misdemeanor violations of immigration law. The TVPRA of 2008 should be reformed to allow unaccompanied children from countries that are non-contiguous with the U.S. to be quickly repatriated to their home country.

Enforcing the Law and Keeping Families Together

Due to loopholes in existing law, the Administration has little choice but to release an entire illegal-immigrant family that claims asylum, or to detain the parents and release the child. Indeed, the President’s executive order on this matter notes this roadblock and pursues a judicial solution. Even better would be a legislative solution that would reform this system more permanently and fully than a judicial or executive decision and should be done separately from other immigration issues.

—*David Inserra is a Policy Analyst for Homeland Security and Cyber Security in the Douglas and Sarah Allison Center for Foreign Policy, of the Kathryn and Shelby Cullom Davis Institute for National Security and Foreign Policy, at The Heritage Foundation.*

10. David Inserra, “Seeking Asylum: Congress Should Fix Critical Loopholes to Secure the Southern Border and Help the Persecuted,” Heritage Foundation *Issue Brief* No. 4851, May 7, 2018, <https://www.heritage.org/immigration/report/seeking-asylum-congress-should-fix-critical-loopholes-secure-the-southern-border>.