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# Child Separation in the Courts

by [Deborah Pearlstein](#)

*June 29, 2018*

Developments in the ongoing child separation crisis have come so quickly in the past week it is nearly impossible even for experts to keep track. Donald Trump's [executive order](#) requiring an end to the child separation policy, his administration's subsequent [announcement](#) that it would halt its "zero-tolerance" policy of prosecuting the misdemeanor offense of illegal entry, the California federal court's [Tuesday decision](#) halting further separation and requiring currently separated families be reunified — all of these are positive developments for those concerned about the catastrophic effects of the policy on children and families. But the legal battle here is far from over.

Among other things, the Trump administration has asked another federal court to amend a longstanding court-approved settlement agreement (known as the [Flores Agreement](#)) in order to allow the government to confine parents and children together in immigration detention not just for the 20 days current law permits, but indefinitely. Understanding why the administration's argument here should fail — and why its argument is otherwise so fundamentally at odds with the basic norms of constitutional democracy — requires some explanation.

As the child separation crisis came into public view, the Trump Administration [insisted](#) for weeks that it could not detain whole migrant families together because a court order prevented it. The ruling the administration had in mind was the [Flores Agreement](#), a court-ordered settlement that does not bar the government from detaining families together, but rather (as [subsequent courts](#) interpreting the Agreement have held) bars children from being detained for more than 20 days while the government tries to determine whether or not the law entitles them to asylum in the United States. If their case is not resolved after 20 days, the children are entitled to be released (or, if they migrated without parents, to the least restrictive form of care available). The Agreement affords accompanying parents no such right to release after 20 days.

The Trump administration's argument that the Flores Agreement requires family separation has always been spurious. Family immigration detention centers exist – and are, [unfortunately](#), actively used – for exactly that purpose. What the administration objects to is the law's requirement that the children may only be detained in such facilities for 20 days pending a determination of their asylum status. For once that detention clock runs out, the only way to keep families together is to release the parents as well. Neither the Flores Agreement, nor anything else in law, categorically prohibits such release. On the contrary, for example, once an immigration official has found that a family has a “credible fear” of persecution or torture in their home country, the law provides for parole into this country while the family's final status is settled. (Current Department of Homeland Security policy – not law – has broadly denied all such immigrants any access to parole, a policy that is also currently the subject of separate [legal challenges](#) in court.) Even before there has been a chance to decide whether or not a family has a “credible fear,” the attorney general has discretion under [existing law](#) to grant temporary parole to families on a case-by-case basis for “urgent humanitarian reasons or significant public benefit” – an exception that one might imagine has some relevance in light of the humanitarian crisis the American Academy of Pediatrics now [describes](#) facing thousands of children stripped from their parents. In short, the Trump administration could release the parents pending their asylum determination. It just doesn't want to.

It is in this context that the administration last week [asked](#) the Flores court to amend the existing Agreement to allow the detention of families – including children – indefinitely. The administration's argument that it is entitled to this modification is based on an [established exception](#) in law, empowering courts to modify the terms of settlement agreements if the Court concludes that “a significant change either in factual conditions or in law” makes the original terms of the settlement no longer equitable. Here, the administration now says, the facts have changed dramatically. As the Trump administration argues: “[T]he number of persons illegally crossing the border in family units has dramatically increased and has materially changed from what the parties or Court could reasonably have contemplated.” Put simply: Today, there are just too many cases, and not enough resources – agents, lawyers, judges or detention beds – to process them in time. It is thus, in the Administration's view, “not possible” to resolve families' status in 20 days or less, and “not possible” to comply with the Flores Agreement as it is.

The argument that this “increase” amounts to a “factual” change is wrong, and profoundly so. For the government’s brief defines its vast increase in numbers based on the increase in government apprehensions of migrants, not actual migration. The government’s brief offers no statistics at all on actual migration. The change the government points to is not about factual conditions in the world, beyond the parties’ control. It is a change in how the government has decided to handle the world as it is.

And while there is no question that the Justice Department has vast discretion to decide how to handle cases within its jurisdiction – to adopt, for example, a “zero tolerance”/no-parole policy toward immigration misdemeanors (or tax felonies or campaign finance violations or whatever it chooses) – the law affords prosecutors such discretion because it assumes prosecutors and immigration officials are bound by the basic reality of our constitutional democracy: (1) that they will pursue those enforcement actions in compliance with existing laws protecting individual rights (including affording people basic hearings before judges), and (2) that they will pursue these cases within the limits of what funding resources our elected representatives in Congress are willing to provide.

While the importance of the former requirement should be self-evident, the latter requirement is likewise no mere practical limit. It is a fundamental check on the government’s most profound power to deprive people of liberty within the limits of what a democracy will support. The “impossibility” the administration finds here is not one of circumstances altered by some independent, factual reality, but rather one in which the administration has adopted a “zero tolerance”/no-parole policy without allocating adequate resources to ensure it could do so without violating legal rights (like a child’s right to be released in 20 days), or without first seeking an appropriation from Congress adequate to make up whatever gap in funding currently exists.

At best, this is a catastrophic failure of bureaucratic decision-making. At worst, it is an attempt to avoid paying the price our Constitution demands the Executive pay as the cost of doing its policy business. It is a core principle of democratic governance. Not a basis for rolling back rights the law otherwise provides.

*Image: A boy and father from Honduras are taken into custody by U.S. Border Patrol agents near the U.S.-Mexico Border on June 12, 2018 near Mission, Texas. The asylum seekers were then sent to a U.S. Customs and Border Protection (CBP) processing center for possible separation. Photo by John Moore/Getty Images*

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