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U.S. Detention of Child Migrants

Tens of thousands of unaccompanied children have been arriving at the U.S.-Mexico border each year, sparking debate over how to respond. How is the Joe Biden administration handling it?

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UPDATED

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Summary

The United States continues to see a rise in apprehensions of unaccompanied migrant children, most from Central America, along its southern border.

Several laws and court cases guide how U.S. authorities treat migrant children while their asylum and immigration cases are under consideration.

U.S. detention of migrant children has long sparked controversy. The Trump and Biden administrations have faced criticism for violating legal protections.

Introduction

A spike in apprehensions of migrant children crossing the southern U.S. border without a parent or guardian has overwhelmed the systems set up to care for them and reinvigorated debate over the detention of minors. President Donald Trump framed the influx of asylum seekers—both adults and minors—as a national security threat, and his administration implemented a suite of policies to deter migrants. Critics argued that this response exacerba

Central America's humanitarian crisis, broke U.S. law, and violated international human rights norms.

President Joe Biden promised to overhaul Trump's immigration policy, but has struggled to address growing migrant flows as socioeconomic conditions worsen across Latin America. The end of some pandemic-related border measures has challenged the Biden administration to seek new ways of handling children and families arriving at the southern U.S. border, with some critics condemning his restrictive asylum proposals.

What's the current situation at the border?

Border encounters of unaccompanied minors plunged in early 2020 amid the COVID-19 pandemic but have since risen steadily. Immigration authorities encountered more than 152,000 unaccompanied minors at or near the U.S.-Mexico border in fiscal year 2022 (FY2022), an all-time high. About 72 percent of all unaccompanied children in federal care were fifteen years of age or older, though authorities have also detained infants and toddlers.

What is the definition of an unaccompanied minor?

Under U.S. law, unaccompanied alien children (UAC) are defined as migrants under eighteen years old with no lawful status in the United States and who have no parent or legal guardian available to care for them. Despite the term's connotation, these children do not necessarily enter the country alone. Some arrive with friends or family members and are separated at the border; others are brought by smugglers or fellow migrants on foot or by vehicle.

Why are children arriving on their own?

A lack of economic opportunity, environmental challenges, and chronic violence continue to drive people from Central America, with migrants from the so-called Northern Triangle countries of El Salvador, Guatemala, and Honduras accounting for three-quarters of unaccompanied children apprehended at the southern U.S. border in FY2022. Most others have historically come from Mexico, where the homicide rate is at near-record levels amid a long-standing war against drug cartels. Perceptions that Biden is more welcoming than his predecessor have also driven migration, some observers say.

Many children hope to reunite with relatives in the United States. Others have deliberately left their families behind, fleeing domestic abuse, poverty, criminal gangs, or corruption. Some migrant parents, often out of desperation, choose to send their children across the border alone to avail themselves of asylum protections for unaccompanied minors.

What happens to detained children?

Most unaccompanied children are detained at or near the southern U.S. border, often turning themselves in to authorities. Their entry into the immigration system triggers a multiagency response that is guided by several laws and a court settlement.

Under the Homeland Security Act of 2002, the Departments of Homeland Security (DHS) and Health and Human Services (HHS) share responsibility for unaccompanied children. These agencies must uphold the 1997 Flores Settlement, which was the result of a lawsuit against federal immigration authorities regarding the treatment of minors in detention. Flores outlines standards of care [PDF] for both accompanied and unaccompanied minors, including access to food and water, emergency medical services, bathroom facilities, and ventilated, temperature-controlled surroundings. Under a 2015 court decision related to Flores and the 2008 William Wilberforce Trafficking Victims Protection Reauthorization Act (TVPRA), which codified certain Flores protections, officials must aim to keep minors in detention for less than one month. Nonetheless, they can hold children longer than this during emergencies, including spikes in migrant arrivals.

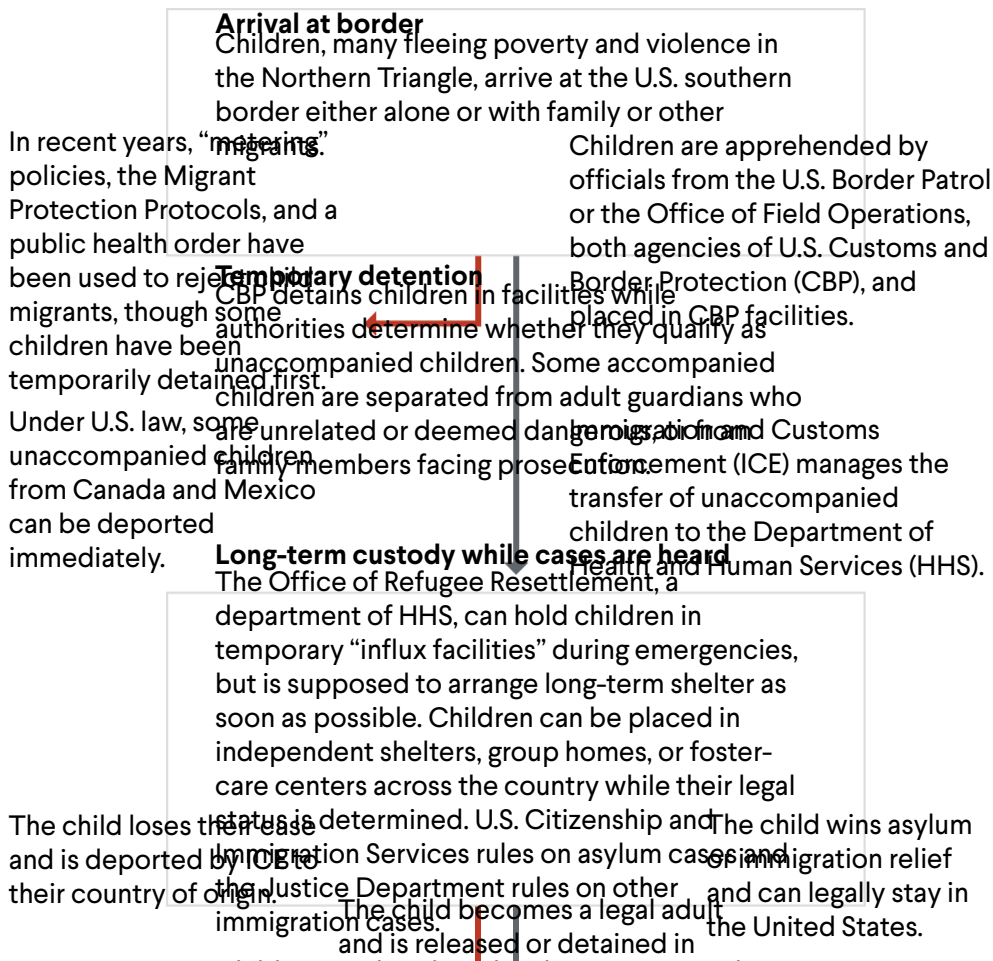
DHS is the first agency involved. Its responsibilities include apprehension, processing, and, if necessary, the return of children to their countries of origin. Customs and Border Protection (CBP), a DHS agency, initially detains child border crossers, whom it has historically identified as unaccompanied children through interviews, documents, and medical testing. CBP separates minors on an ad hoc basis from adults it deems unrelated, dangerous, or criminally prosecutable, which results in the recategorization of some accompanied children as unaccompanied. Another DHS agency, Immigration and Customs Enforcement (ICE), may apprehend minors already inside the United States.

At this point, DHS can repatriate Canadian and Mexican unaccompanied children who it determines are capable of making the decision to withdraw their request for entry, are not a

risk of trafficking, and can safely return home. For others, the TVPRA gives CBP and ICE three days to transfer custody to HHS officials after identifying the minors as unaccompanied.

HHS, which is responsible for unaccompanied children for the remainder of their time in federal custody, must place them in the “least restrictive setting” possible, which often means group homes, foster care, or other facilities equipped to provide long-term childcare. HHS’s Office of Refugee Resettlement (ORR) distributes many minors in its care [PDF] across a national network of more than two hundred state-licensed and federally-funded independent facilities, which typically provide educational, social, health, and legal services. During emergencies, ORR houses children in unlicensed, temporary influx shelters, though it aims to transfer them elsewhere within ninety days.

What Happens When a Child Arrives at the Border?



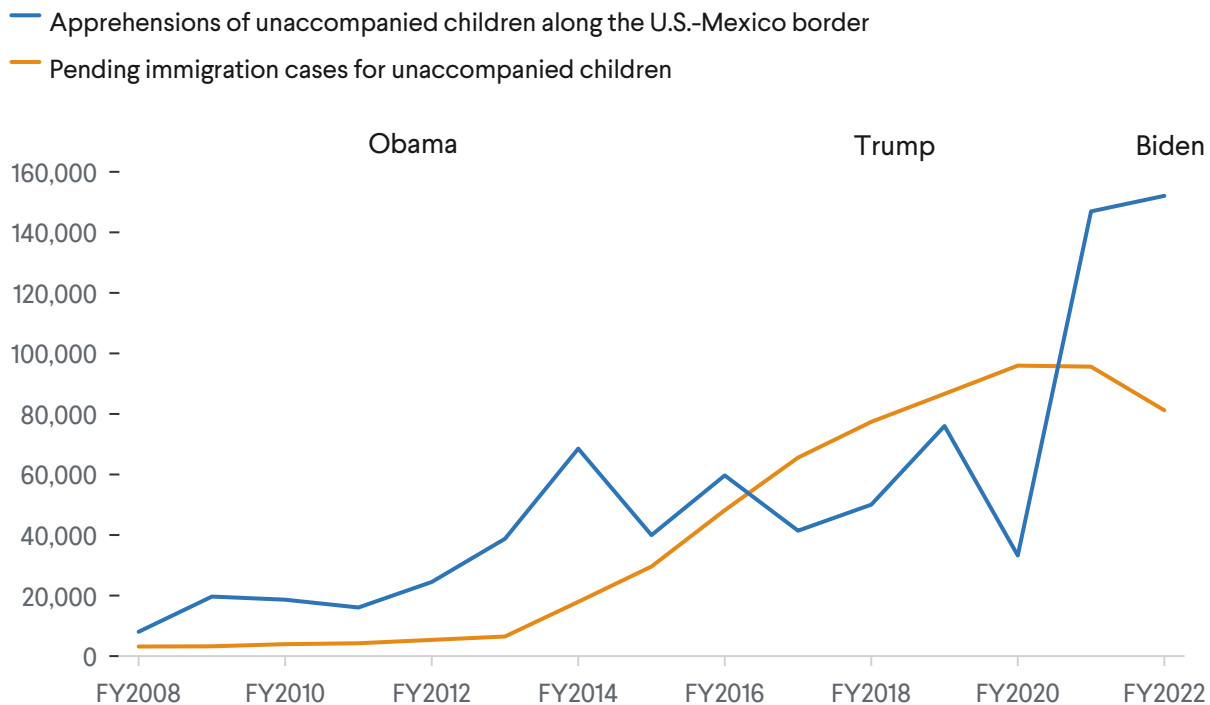
average of thirty days. However, HHS has faced criticism for not tracking children after releasing them to sponsors, which it has said it has no authority to do. Many children end up working grueling and dangerous jobs in violation of child labor laws.

How is their immigration status determined?

Regardless of whether children are released to sponsors, their asylum and immigration cases continue. Unaccompanied children are typically screened for asylum eligibility and, unlike adults, they can make a claim even after being in the United States for a year.

Children face formidable challenges to prove their cases, often without legal help. In the last quarter of 2018, U.S. Citizenship and Immigration Services (USCIS), part of DHS, granted asylum to just over 28 percent of child applicants, though the agency gives certain unaccompanied minors other forms of legal relief, including special visas for survivors of human trafficking and parental abuse. Though the overall denial rate for asylum and other forms of relief had steadily climbed in the past two decades, it dropped from about 70 percent in FY2020 down to 53 percent in FY2022. Analysts point to several possible reasons, including an increase in the number of asylum seekers receiving legal representation.

Child Migrant Crossings Continue Rising as Case Backlog Shrinks



Note: Data for part of fiscal year 2020 and for fiscal years 2021 and 2022 includes children expelled under Title 42.

Sources: U.S. Customs and Border Protection; Executive Office for Immigration Review, U.S. Department of Justice.

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While their asylum cases are pending, unaccompanied children must also navigate backlogs in immigration courts overseen by the Department of Justice's Executive Office for Immigration Review. The TVPRA urges the government to ensure legal support for child migrants, but because immigration cases are civil proceedings, they are not guaranteed attorneys. In FY2020, ICE deported 220 unaccompanied children [PDF], or just 13 percent of the previous year's total. Other children voluntarily leave the country, receive asylum or other legal relief, or have their cases thrown out due to insufficient evidence of their unlawful status. Under Biden, overall deportations have risen: in FY2022, there were more than 111,000 deportations, almost three times the amount from a year earlier.

How did the Trump administration respond?

Trump pursued hard-line measures to deter asylum seekers, including expanding the number of spaces available in immigration detention and increasing family separations. Critics said the:

actions created unsafe conditions for unaccompanied children, but the administration argue that the surge of arrivals at the border overwhelmed the immigration system, and it blamed Congress for failing to increase funding for border security.

Most notably, in April 2018, the Justice Department announced a new zero-tolerance policy, which directed authorities to detain and criminally prosecute all adults caught entering the United States without authorization, instead of releasing most of them to await an immigration court date. Minors by law cannot be held alongside guardians awaiting trial; as a result, officials separated more than 4,300 children from their families and recategorized them as unaccompanied between July 2017 and June 2018.

Following public outcry, Trump issued an executive order to halt family separations, and a federal judge ordered the families to be reunited. However, separations—which were carried out informally before the zero-tolerance policy—continued.

Critics decried the overcrowding of migrant detention facilities during the Trump administration, alleging abuse and linking poor conditions to child deaths. (At least seven children died in immigration custody during Trump’s presidency, following a decade without any such deaths.) The CBP reportedly held children for weeks, in violation of the TVPRA. Additionally, the administration tried to override Flores Settlement regulations and allow DHS to indefinitely detain families, which it argued would end the need to separate children from guardians. A federal judge blocked those efforts in 2019.

That same year, the Trump administration created the Migrant Protection Protocols (MPP), also known as the “Remain in Mexico” program, which forced asylum seekers to wait in Mexico as their cases were processed in U.S. immigration courts. Although MPP guidelines stipulate that unaccompanied minors should not be sent back, over sixteen thousand migrants under age of eighteen were returned to Mexico before the Biden administration halted the program in February 2021.

Trump’s approach to detention policies reflected a broader push to reshape U.S. asylum policy. His administration cut deals with regional partners to inhibit asylum seekers from entering the United States, made obtaining asylum more difficult for child migrants, and ended the prioritization of unaccompanied children’s cases in immigration courts, among other changes.

Officials characterized some of these changes as central to fighting human smuggling, since migrants are often forced to pay exorbitant sums to abusive smugglers, and the administration implemented measures [PDF] to prosecute anyone complicit in smuggling minors across the border. Critics countered that the policies unduly targeted parents who paid smugglers.

What impact did the pandemic's arrival have?

The Trump administration suspended asylum procedures for most border crossers, including unaccompanied children, and began swiftly removing them from the United States under Title 42, an emergency public health regulation that remains in effect. However, critics argue this gave rise to a so-called shadow immigration system.

Before their removals—which watchdog groups said violated the TVPRA—hundreds of most unaccompanied children were detained in hotels, sometimes for weeks. In September 2020, a federal judge ruled that this practice violated the Flores Settlement and ordered DHS to end it, at least in most cases, a decision that was upheld by an appeals court. The same judge had ordered the release of migrant children detained alongside their parents in ICE custody, citing the pandemic, but later declared that order unenforceable. In November 2020, another federal judge barred the administration from rejecting unaccompanied minors under the public health order, though the administration later admitted it continued expulsions in violation of the ruling.

What has been the Biden administration's approach?

Biden has taken several steps to roll back Trump-era policies. However, a growing influx of migrants crossing the border has challenged his administration and prompted criticism from Democrats and Republicans.

In January 2021, Biden created a task force to reunite hundreds of still-separated children with their parents, and his Justice Department officially rescinded the zero-tolerance policy. As of February 2023, some six hundred children have been reunited with their families, but about one thousand remain separated. Officials also reinstated the Central American Minors (CAM) program, which allows certain children from Northern Triangle countries to gain refugee status or temporary legal residence before making the dangerous journey to the U.S.-Mexico border.

(Trump had discontinued CAM in 2017.) In June 2022, more than a year after the administration first attempted to end the Remain in Mexico program, the Supreme Court ruled that U.S. officials had the authority to end the controversial policy. However, a Texas federal judge blocked the ruling in December, and administration efforts to end the program continued.

Though Biden has relied on Title 42, which has been responsible for more than 2.6 million deportations, to manage the growing crisis at the border, his administration has largely held on using it to resume expelling unaccompanied minors. The resulting influx of unaccompanied children has at times overwhelmed ORR, and caused many of these minors to be housed in overcrowded CBP facilities, sometimes for far longer than the three-day limit. With Title 42 set to end in May 2023, the administration's fears of an additional border surge have led to the announcement of a restrictive new asylum policy that will allow the government to deny asylum to migrants who did not previously apply in a third country. Some reporting also indicates the administration is considering reinstating a controversial practice that allows U.S. authorities to detain migrant families who cross the border illegally.

Meanwhile, officials have sought to speed up the releases of unaccompanied children to sponsors. Still, the number of children entering HHS custody far outpaces the number being released from its care.

What did earlier administrations do?

Detention has played a persistent role in U.S. immigration policy, dating back to legislation in the 1890s that standardized practices for detaining migrants for medical and admissibility screenings.

President Ronald Reagan reinvigorated the practice in the 1980s amid a surge in refugees from Central America and the Caribbean. Officials began detaining all migrants, many in private prisons, and opened the first facility for infants and children. Reagan's policies faced legal challenges, including the lawsuit that was ultimately resolved by the Flores Settlement.

In the early 1990s, under President George H.W. Bush, authorities intercepted thousands of Haitian refugees and indefinitely detained them in makeshift facilities at the U.S. naval base Guantánamo Bay, Cuba. Abuse and forced repatriation of unaccompanied Haitian minors at

facility became a political flash point under President Bill Clinton, who eventually allowed many of the children to enter the United States.

Clinton also fortified the U.S.-Mexico border, constructing a fence and equipping an expanded CBP force with surveillance technologies. President George W. Bush later vowed to prosecute anyone [PDF], including first-time offenders, caught crossing the border illegally. Unlike Trump's zero-tolerance approach, this policy did not result in the mass separation of children and parents. However, the Bush administration did separate some families and detain others pending resolution of their cases. Additionally, Bush signed legislation, including the TVPRA that defined protections for unaccompanied minors.

Until the Barack Obama administration, however, total numbers of unaccompanied children arriving at the southern border were relatively low. In 2014, Obama responded to a spike in unaccompanied minors by promising to send back the children and coordinating with Central American governments to deter would-be migrants. His administration also funded legal support for unaccompanied minors and established CAM. Officials did not routinely separate families, though they expanded detention of children and parents in prison-like, unsanitary facilities that critics say violated due process and Flores. Obama's ORR also came under fire for mistakenly releasing some unaccompanied children into the custody of human traffickers.

How do other countries deal with child migrants?

Though the pandemic temporarily stifled global movement, experts say it has also increased vulnerability of displaced and migrant children. Several UN agreements outline countries' responsibilities to child migrants, most notably the Convention on the Rights of the Child. The 1989 accord affirms that countries should not separate families and should detain children "as a measure of last resort and for the shortest appropriate period of time." The United States is a signatory, but it is the only country worldwide that has not ratified the convention, and is thus not legally bound by it.

The United Nations holds that asylum-seeking children should almost never be detained; however, some 330,000 migrant children across at least seventy-seven countries [PDF] were detained annually before the pandemic.

That includes arrivals to Europe, which has struggled with a wave of migration from the Middle East and North Africa that began in 2015. In 2022, more than twenty-one thousand [PDF] child migrants in Bosnia and Herzegovina, Bulgaria, Greece, Italy, and Serbia were unaccompanied or separated from guardians. The European Union's asylum law, known as the Dublin Regulation, requires member states to accept responsibility for unaccompanied children who have family members living or seeking asylum in those countries. However, detention of migrant families is rampant in the EU [PDF]. More than eighteen thousand unaccompanied child migrants vanished in Europe between January 2018 and December 2020, one investigation found.

Australia has likewise faced controversy over its mandatory, indefinite detention of unauthorized migrants. While there are now no children [PDF] being held in immigration detention facilities on the mainland, compared to a peak of about two thousand in 2013, some refugees and asylum seekers continue to be held offshore. Critics say Australia's lack of a legal limit on how long minors can be held has led some child refugees to languish in custody for years. Denmark created a similar policy for processing asylum seekers offshore in 2021, and the United Kingdom is considering such an approach.

Meanwhile, Canadian law allows the detention of migrant children only as a last resort. There were only two minors held through the Canada Border Services Agency during the first four months of 2022. Both were housed alongside a parent or guardian rather than detained independently. However, experts have previously raised concerns [PDF] about children held with their parents in prison-like facilities without legal recourse.

Under pressure from the United States, Mexico has escalated migrant apprehensions in recent years. In 2021, Mexican authorities apprehended nearly 308,000 migrants, the highest number ever recorded. That excludes child migrants after the government declared in 2020 that children would be prohibited from being placed in immigration detention. Today, unaccompanied minors apprehended in Mexico en route to the United States face almost-certain deportation.

Recommended Resources

The Congressional Research Service explains U.S. policies [PDF] toward unaccompanied children.

This Backgrounder details the debate over U.S. immigration policy.

A report by the UN Children's Fund and the Migration Policy Institute outlines four ways [PDF] that the U.S. government can improve services available for unaccompanied children after they leave federal custody.

The Guardian offers a multimedia deep dive into the evolution of U.S. migrant detention.

This Backgrounder examines the responsibilities of U.S. border patrol.

CFR's Carla Anne Robbins, KPBS's Gustavo Solis, and the Migration Policy Institute's Julia Gelatt discuss Biden's border policies at this 2023 meeting.

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