



## ***Executive Order on Family Detention: What You Need to Know***

*Updated June 20, 2018*

### **1. What does the Executive Order Say?**

Titled "[Affording Congress the Opportunity Address Family Separation](#)" President Trump signed a new executive order (EO) June 20, 2018. Section 1 of the EO continues to mandate prosecution against individuals who cross the border irregularly and to also to "maintain family unity, including by detaining families together." The EO also states that the administration's position separating families is due to "Congress's failure to act." Importantly, there is no congressional order requiring families to be detained at all- separately or together.

### **2. What is the Relationship Between this Executive Order and the Trump Administration's "Zero Tolerance" Policy?**

The EO maintains the administration's "zero tolerance" policy to the extent that parents who cross the border with children will continue to be prosecuted. By issuing the EO the administration seems to have retracted from its position that parents must be separated from children during their criminal proceedings. Importantly, the EO does not end the policy of family separation.

### **3. Is Family Detention or Family Separation Required by Law?**

No. The Department of Homeland Security has [prosecutorial discretion](#) to detain or release children, parents and families from immigration detention. Such discretion is necessary because the federal government has limited resources and many noncitizens have compelling circumstances that make detention unsuitable. There is no statute or regulation that requires the Department to detain families. Rather, detaining parents and children is a policy choice.

### **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 discretionary, and can in most cases be made or [changed at any time](#).

### **5. Are Attorneys General required by law to prosecute every parent who crosses the border, 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 context of criminal law has been recognized by the Supreme Court in [U.S. v. Armstrong, 517 U.S. 456, 464 \(1996\)](#). Importantly, [Article 31](#) of the 1951 Refugee Convention also prohibits states from prosecuting asylum seekers for irregular entry.

*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.*

## **6. How and why did the administration start to separate children from families in the first place?**

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. With this new EO the administration has modified its position by stating that it will continue to prosecute parents, but at the same time “maintain family unity.” Importantly, the EO does not end the policy of family separation.

## **7. Is it lawful to hold families in detention?**

There are legal concerns with detaining children with families for prolonged periods. According to Section 3 of the EO, the President has directed the Attorney General to litigate a settlement known as *Flores v. Sessions* in a way that would enable families to be detained together when a parent is in criminal proceedings for irregular entry. [Flores is a historic settlement](#) that sets national standards for the detention, release and treatment of all children in immigration detention.

## **8. What are the alternatives to detaining families and prosecuting parents?**

On the criminal side, Attorney Generals 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.

## **9. Where can I find more resources?**

[Penn State’s Center for Immigrants’ Rights Clinic](#) (including our [Fact Sheet on Family Separation](#))  
[American Immigration Council](#)  
[Women’s Refugee Commission](#)