



PennState Law

Center for Immigrants' Rights Clinic

Biden Transition Team – Policy Recommendation on Family Detention

The “Biden Commitment to a Fair and Humane Immigration”¹ requires a policy that keeps families together and out of detention. Detention should never be a first resort where successful alternatives exist or where families have relatives, friends, and other members of the community willing to sponsor them. This policy brief centers on the harms and costs that flow from detaining families and recommends that the Biden administration issue a policy on family detention. Specifically, the Department of Homeland Security (DHS) must use its prosecutorial discretion to avoid detaining families in the absence of extraordinary circumstances. This solution is cost saving to the government, legally sound, and serves the best interest of families and the best interests of children.

The United States government currently confines immigrants in detention facilities or prisons operated or contracted by Customs and Border Protection (CBP) and Immigration and Customs Enforcement (ICE). Immigrants who travel to the United States as a family unit may be apprehended and detained together at the border, in the interior of the United States, or at an airport and, thereafter, placed into ICE custody at one of three family detention centers in the United States.² The three operational family detention centers include: South Texas Family Residential Center in Dilley, TX; Karnes County Residential Center in Karnes, TX; and Berks County Residential Center in Leesport, PA.

Tied to family detention is the Trump administration’s family separation policy. In Spring 2018, then-Attorney General Jeff Sessions announced the “zero-tolerance” policy directed towards immigrant families attempting to enter the country without authorization.³ The “zero-tolerance” policy included the separation of children from their families, as well as the arrest, holding, and prosecution of all unauthorized border crossers, including those without serious criminal histories.⁴ Under this policy, families were forcibly separated, which led to children being detained by the U.S. Department of Health and Human Services, while their parents were separately detained by the U.S. Bureau of Prisons and very shortly thereafter, ICE in adult detention centers. The “zero-tolerance” policy led to the prosecution of asylum-seekers in federal court for immigration violations, as well as the prolonged detention of persons in immigration proceedings.⁵

Due to public outcry, the Trump administration retracted its formal policy on family separation and replaced it with a practice of detaining parents and children. According to Human Rights First, more than 45,000 parents and children were held in family detention facilities in fiscal year 2019.⁶ In June 2019, the U.S. government reported that almost 5,000 members of “family units” were being detained by CBP in poor conditions.⁷ Several months into a global pandemic, families continue to be detained in the three family detention centers.⁸

Ending Family Detention: Why It Matters.

Family detention harms children. Family detention undermines the priority of ensuring children are healthy, safe, and placed where their best interests are served. For example, children in family detention fail to receive the necessary medical attention they need and parents are “turned away from onsite clinic staff when they try to seek medical care for their children.”⁹ According to Human Rights First, incarcerated children face multiple types of serious health concerns when in detention, including psychological trauma and long-term mental health risks.¹⁰ As articulated by Dr. Kyle Yasuda, MD, FAAP, President, American Academy of Pediatrics “No amount of time in detention is safe for a child. When children are detained, they experience physical and emotional stress, placing them at risk for serious short- and long-term health problems, such as developmental delays, poor psychological adjustment, anxiety, depression and suicidal ideation.”¹¹ When detention becomes prolonged, children face even greater mental and physical health risks including suicidality, withdrawal, and significant psychological distress.¹² While the Trump administration characterized family separation and family detention as an “either or” choice, a third option exists in reality: release family units to a sponsor or family member and where necessary, employ community based alternatives to detention.

Family detention is costly. Releasing families on their own recognizance, parole, or community-based alternatives programs such as holistic services in the form of robust case management and basic needs from non-profit organizations, will reduce costs for the federal government.¹³ According to the American Immigration Council, the per day cost for adult detention is \$139.07 and for family detention is \$319.37.¹⁴ To share the math of family detention in a different way, take the example of one facility. The South Texas Family Residential Center is owned and operated by the Corrections Corporation of America, a private corporation, and is estimated to cost \$260 million annually.¹⁵ By contrast, alternative programs are significantly cheaper. The federal government is incurring unnecessary expenses and liabilities through family detention and could realistically spend less by ending the practice or utilizing community-based alternatives. As described by President-Elect Biden’s platform “Evidence shows that these programs are highly effective and are far less expensive and punitive than detaining families.”¹⁶

Family detention does not advance the goal it purports to serve. The policy of family detention was deterrence—that is to stop the flow of unauthorized migration, including asylum-seeking families. However, the data on family apprehensions and social scientists cast doubt on the use of detention as a deterrence.¹⁷ One court has also found general deterrence to be an unlawful basis for detaining immigrants.¹⁸ Family detention also has no correlation with higher appearance for families or lower risk rates for the community. According to an empirical study by Ingrid Eagly, Esq., Steven Shafer, Esq. and Jana Whalley, Esq., 96 percent of asylum-seeking families who were released from immigration detention attended all immigration court hearings.¹⁹ Additionally,

nearly 100 percent of families in detention have sponsors waiting for them to provide housing, financial support and access to legal services and community organizations willing to receive them. Detention further limits access to community based legal services, which assist children and families in presenting their case, supported by evidence, in a removal proceeding. According to the Immigration and Customs Enforcement Advisory Committee on Family Residential Centers, “detention is generally neither appropriate nor necessary for families.”²⁰

Recommendation. The United States must end the practice of family detention. The position of the incoming administration should be the implementation of a humane immigration system that takes into account the best interests of children and the assurance of family unity and well-being. Families currently detained should be released to sponsors, and in the future, families should be allowed to immediately settle with sponsors while they await immigration proceedings. Only in exceptional and unusual cases—when there is evidence a family is a flight risk—community-based alternatives should be utilized rather than the use of detention. DHS should employ the assistance of child-welfare specialists and licensed social work professionals, rather than law enforcement personnel. The use of restrictive ankle monitoring devices with parents should be limited to the greatest extent possible so as not to interfere with their daily ability to provide care for their children.

To pivot away from family detention, the Secretary of Homeland Security should issue a policy memorandum that as a general policy discourages the detention of families and encourages release of families who are already detained. This DHS-wide guidance should apply to the activities of U.S. Immigration and Customs Enforcement, U.S. Customs and Border Protection, and U.S. Citizenship and Immigration Services. The policy should be grounded in the Department’s prosecutorial discretion.²¹ Pursuant to the Homeland Security Act and Immigration and Nationality Act, DHS sets immigration priorities and determines how to enforce and administer immigration laws.²² The decision not to detain families falls squarely within the scope of DHS’s prosecutorial discretion.²³

The following is draft language of the policy to be included in the memo:

Absent extraordinary circumstances, it is against DHS policy to detain families. DHS must exercise all appropriate discretion on a case-by-case basis when making detention and enforcement decisions for families. Families should normally be released from government custody to or placed with a sponsor. In special circumstances, community-based alternatives should be utilized. Detention is permissible only if extraordinary factors are present.

Conclusion

The very first step in establishing a more humane immigration system and demonstrating the government’s commitment to the safety of children and the value of reunification, is to adopt a policy that moves away from family detention. The way forward is to quickly and boldly end harmful government practices towards immigrant children and their families.

¹ <https://joebiden.com/immigration/>

² <https://www.detentionwatchnetwork.org/issues/family-detention>; <https://justiceforimmigrants.org/what-we-are-working-on/immigrant-detention/family-detention/>.

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- ³ <https://www.justice.gov/opa/press-release/file/1049751/download>.
- ⁴ <https://www.hrw.org/news/2018/08/16/qa-trump-administrations-zero-tolerance-immigration-policy#q1>.
- ⁵ <https://www.hrw.org/news/2018/08/16/qa-trump-administrations-zero-tolerance-immigration-policy#q1>.
- ⁶ https://www.humanrightsfirst.org/sites/default/files/Short_Detention_Report_March_2019.pdf
- ⁷ <https://www.vox.com/policy-and-politics/2019/6/25/18715725/children-border-detention-kids-cages-immigration>
- ⁸ <https://www.raicetexas.org/2020/09/03/families-remain-unjustifiably-detained-in-the-midst-of-a-pandemic/>
- ⁹ https://www.humanrightsfirst.org/sites/default/files/Short_Detention_Report_March_2019.pdf;
<https://pediatrics.aappublications.org/content/pediatrics/139/5/e20170483.full.pdf>.
- ¹⁰ https://www.humanrightsfirst.org/sites/default/files/Short_Detention_Report_March_2019.pdf
- ¹¹ <https://www.psychiatry.org/newsroom/news-releases/nation-s-top-child-focused-organizations-strongly-urge-california-federal-court-to-oppose-trump-administration-s-move-to-end-flores-settlement>
- ¹² https://www.humanrightsfirst.org/sites/default/files/Short_Detention_Report_March_2019.pdf
- ¹³ <https://immigrantjustice.org/interactive-timeline-resurgence-family-detention>
- ¹⁴ <https://www.aila.org/infonet/policy-brief-on-family-separation-and-detention>
- ¹⁵ <https://www.themarshallproject.org/2015/05/21/the-south-texas-family-residential-center-is-no-haven>
- ¹⁶ <https://joebiden.com/immigration/#>
- ¹⁷ <https://www.stanfordlawreview.org/online/detention-as-deterrence/>;
<https://www.migrationpolicy.org/article/trump-administration-new-indefinite-family-detention-policy>
- ¹⁸ R.I.L-R v. Johnson, 80 F. Supp. 3d 164 (D.D.C. 2015).
- ¹⁹ <https://www.americanimmigrationcouncil.org/research/detaining-families-a-study-of-asylum-adjudication-in-family-detention>
- ²⁰ <https://www.ice.gov/sites/default/files/documents/Report/2016/acfrc-report-final-102016.pdf>
- ²¹ See 8 U.S.C. § 1103 (2012) (INA § 103). See also, Wadhia, Beyond Deportation: The Role of Prosecutorial Discretion in Immigration Cases (NYU Press 2015)
- ²² See *id.*
- ²³ See e.g., https://www.dhs.gov/sites/default/files/publications/14_1120_memo_prosecutorial_discretion.pdf;
<https://www.ice.gov/doclib/secure-communities/pdf/prosecutorial-discretion-memo.pdf>;
https://www.ice.gov/doclib/detention-reform/pdf/civil_enforcement_priorities.pdf.