

# Obstacles to Reforming Family Detention in the United States

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Dora Schriro  
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## About the Global Detention Project

The Global Detention Project (GDP) is a non-profit research centre based in Geneva, Switzerland, that investigates the use of detention in response to global migration. The GDP's aims include: (1) providing researchers, advocates, and journalists with a measurable and regularly updated baseline for analysing the growth and evolution of detention practices and policies; (2) facilitating accountability and transparency in the treatment of detainees; and (3) encouraging scholarship in this field of immigration and refugee studies.

## About the authors

Dora Schriro, currently Commissioner of the Connecticut Department of Emergency Services and Public Protection, served as Special Advisor to Secretary of Homeland Security Janet Napolitano on Immigration and Customs Enforcement and Detention and Removal. A version of this paper will appear in the forthcoming volume *Challenging Immigration Detention: Academics, Activists, and Policymakers* (Edward Elgar).

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By Dora Schriro

## INTRODUCTION

During the summer of 2014, thousands of families, mostly children and their mothers, traveled north from Central America, fleeing gang murders and pervasive violence, to the southwest border of the United States in search of protection.<sup>1</sup> In federal fiscal year (FFY) 2014, U.S. Customs and Border Patrol (CBP) apprehended 68,445 parents and children traveling together at the United States-Mexico border (U.S. Border Patrol, n.d.).

Characterizing this humanitarian situation as a threat to national security, the Obama administration responded with a statement from then-Secretary of Homeland Security Jeh Johnson, who emphasized the need for marked increases in detention and deportation in order to send a “message” to deter future migration (DHS, 2014).

This working paper provides an inside look at how policymakers early in the Obama administration sought to roll back family detention and the fate of those efforts. It examines ambitious early family detention reform efforts and subsequent challenges that spurred the administration to pursue more restrictive measures. The working paper concludes with a discussion of the reasons for the rapid reversal of previous reforms and provides recommendations on how to reverse current trends. The need for such an effort has become all the more acute under the Trump administration, which seeks to rapidly expand the country’s deportation system, which had already reached historic levels under Obama.

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<sup>1</sup> Under U.S. law, most families could apply for protection in the form of asylum while others would qualify only to apply for a related form of relief known as “withholding of removal.” *See* INA §§ 208, 241(b)(3)(B). In either case, the applicant for relief must meet the international law definition of “refugee” to receive legal recognition of their need for protection and the right to remain in the United States indefinitely. *See* INA §§ 101(a)(42)(A), 208(b)(1), 241(b)(3)(B). The international refugee definition is set forth in the U.N. Convention on the Status of Refugees, July 28, 1951, 189 U.N.T.S. 150, extended by the Protocol Relating to the Status of Refugees, Jan. 31, 1967, 19 U.S.T. 6223, 606 U.N.T.S. 267, and in effect for the United States on Nov. 1, 1968, through accession to the Refugee Protocol. “Refugee” status requires a showing of persecution on account of race, religion, nationality, political opinion or membership in a particular social group. Additionally, some of the children and/or their parents may also qualify for other forms of relief such as U visas for victims of certain crimes committed in the United States and Special Immigrant Juvenile Status for children who have been abandoned, abused or neglected by a parent. *See* INA §§ 101(a)(15)(U), 101(a)(27)(J).

## A BRIEF HISTORY OF U.S. FAMILY DETENTION

When the situation was manageable it was neglected, and now that it is thoroughly out of hand we apply too late the remedies which then might have affected a cure. —Winston Churchill<sup>2</sup>

### *The First Family Detention Facilities*

The U.S. government has long detained families outside the criminal process. This history includes the internment of Native American families,<sup>3</sup> the detention of immigrant families from Europe on Ellis and Angel Islands (See NPR, 2010; PBS, n.d.), internments of Asian and other families of U.S. citizens and immigrants during World Wars I and II (PBS, 2015; Gonzalez, 2015), and the detention of Cuban and Haitian families in Florida and at Guantánamo Bay (Dastyari and Effenev, 2012).

The most recent relevant family detention practices were in the 1980s when the numbers of refugees from Cuba, Haiti and Central America, among them unaccompanied and accompanied children, dramatically increased. Initially, the government responded by releasing children to a parent or legal guardian and then holding any remaining children in bare-boned border detention facilities and tent shelters (Olivas, 1990). For a time, entire families of Central American migrants were also housed in large American Red Cross camps along the Texas-Mexico border (Bolton, 1994; Lodi News-Sentinel, 1989).

In 1996, Congress passed the Antiterrorism and Effective Death Penalty Act and the Illegal Immigration Reform and Immigrant Responsibility Act,<sup>4</sup> markedly changing U.S. immigration law. Among the amendments adversely affecting families were the creation of an expedited removal process and the significant expansion of categories of persons subject to mandatory detention. In March 2001, Immigration and Naturalization Services (INS), the precursor to the U.S. Department of Homeland Security (DHS), converted a county nursing home in Berks County, Pennsylvania, into the Berks County Family Residential Center to temporarily detain migrant families undergoing administrative immigration proceedings or who were otherwise subject to mandatory detention (Berks, 2009). The 84-bed facility is owned by Berks County and was operated for the INS pursuant to a contract.

Berks was for a time the government's only detention center where families were kept intact.<sup>5</sup> The secure facility is smaller and the grounds greener than the "Family Residential Centers" (FRC) that followed and its programs more progressive than those at adult detention

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<sup>2</sup> Winston Churchill addressing the House of Commons, 2 May 1935, following the Stresa Conference, paraphrasing Santayana (1905).

<sup>3</sup> Native American families were interned in military forts during the Removal of 1838-39. Their experience is also relevant to the immigrant experience, because many Native Americans were not recognized by the U.S. as citizens until the 1924 Indian Citizenship Act. See Exploring the Trail of Tears, <http://pages.cs.wisc.edu/~fish/final115%28drip%29.swf>; Library of Congress, Indian Citizenship Act, <http://memory.loc.gov/ammem/today/jun02.html>.

<sup>4</sup> Anti-Terrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (1996); Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009-546 (1996).

<sup>5</sup> Berks confined both mother and fathers and their children from its opening through spring 2016. ICE has always restricted the use of Karnes and Dilley (as well as Artesia before it closed) to mothers and their children only. Fathers who are not confined with their children are separated from them and assigned instead to a detention facility for single, adult males, or are released.

centers. Until recently, it was the only licensed FRC; now there are none.<sup>6</sup> In early 2016, the Pennsylvania Department of Human Services Berks revoked Berks' license.

In 1997, the *Flores v. Meese* lawsuit, concerning the rights of unaccompanied children in immigration custody, resulted in an Agreement stipulating they be placed in the “least restrictive setting”<sup>7</sup> while waiting for a determination of removal or relief to protect their rights and ensure their well-being in immigration custody.<sup>8</sup> Under the Agreement, unaccompanied minors were to be released to the care of their parents or other family members whenever possible; otherwise, they were to be placed in foster homes or licensed facilities operated pursuant to age-appropriate policies and programs. In 2002, the care of unaccompanied minors as prescribed in the Agreement was transferred legislatively by Congress to the U.S. Department of Health and Human Services (DHHS), Office of Refugee Resettlement (ORR).<sup>9</sup> The custody of families with children (families) continues to be ICE's responsibility.

### *Detention Policy Changes After 9/11*

In the aftermath of the 11 September 2001 terrorist attacks, the government fortified immigration law enforcement, resulting in further changes to family detention policies. Congress passed the Homeland Security Act<sup>10</sup> in 2002, creating DHS, absorbing INS and subdividing it into three new agencies within DHS: the U.S. Immigration and Customs Enforcement (ICE), the U.S. Citizenship and Immigration Services (CIS), and the CBP.<sup>11</sup> Soon after, expedited removal proceedings were expanded to encompass some asylum-seekers and other migrants crossing U.S. land borders (HS, 2004), which resulted in detention, the preferred management strategy, disproportionately impacting families. The pre-9/11 policies—either releasing families or detaining them in family units—were largely abandoned. Instead, parents were separated from their children and one another and detained by ICE. The children, including infants and toddlers, were sent to facilities operated by ORR. The involuntary separation of parents from their children had the effect of rendering the children “unaccompanied” for legal purposes (See Women's Commission for Refugees & Lutheran Immigration and Refugee Service, 2007; 2014).

Congress took notice. In 2005, the House Appropriations Committee directed DHS to stop separating families: “The Committee expects DHS to release families or use alternatives to detention such as the Intensive Supervised Appearance Program whenever possible. When

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<sup>6</sup> The states, not the U.S. Government, licenses facilities operating within their jurisdictions. Licensing practices vary widely by state; there is no one set of minimum expectations to which all states adhere.

<sup>7</sup> Stipulated Settlement Agreement, *Flores v. Meese*, No. CV 85-4544-RJK (Px) (C.D. Cal. 17 January 1997). For cases culminating in the settlement agreement, *see Flores v. Meese*, No. 85-4544- RJK(Px)(CD Cal. 30 November 1987); *Flores v. Meese*, No. 85-4544-RJK(Px)(CD Cal. 25 May 1988); *Flores v. Meese*, 934 F.2d 991 (1990); *Flores v. Meese*, 942 F.2d 1352 (1992); and *Reno v. Flores*, 507 U.S. 292 (1993).

<sup>8</sup> See U.S. Dep't of Justice, Office of Inspector Gen (28 September 2001), *Unaccompanied Juveniles in INS Custody*, Report No I-2001-009, Exec. Summary available at <https://oig.justice.gov/reports/INS/e0109/exec.htm>.

<sup>9</sup> The Homeland Security Act (HSA) of 2002, § 462, Pub. L. 107–296, 116 Stat. 2135, was enacted on 25 November 2002 (codified as amended at 6 U.S.C. §§ 101-613 (2011)).

<sup>10</sup> Homeland Security Act, Pub. L. 107–296, 116 Stat. 2135 (2002).

<sup>11</sup> ICE is responsible for immigration enforcement. CIS handles all matters pertaining to immigration and the granting of citizenship to non-nationals. *See* <https://www.dhs.gov/>.

detention of family units is necessary, the Committee directs DHS to use appropriate detention space to house them together.”<sup>12</sup>

### *The Berks and Hutto Family Residential Centers*

DHS did not release more families or increase its use of alternatives to detention; instead, it expanded secure capacity to detain more families. In May 2006, ICE opened a second and larger facility, the 512-bed T. Don Hutto Family Residential Center (Hutto) in Taylor, Texas,<sup>13</sup> to detain mothers and their children. Neither its physical plant and programs nor policies and practices were age-appropriate or family-friendly. Movement within the facility and access to the grounds were restricted and age-appropriate programs negligible. There were reoccurring accounts of questionable medical and mental health care resulting in significant weight loss, depression and other documented conditions.<sup>14</sup>

Congress soon concluded that Hutto, a former medium security prison for adult male inmates, still operated as an adult correctional facility, and criticized both Berks and Hutto, noting that although Berks was more “homelike” than Hutto, it also failed to afford children the least restrictive setting, as required per the *Flores* settlement.<sup>15</sup>

In March 2007, the ACLU and others challenged ICE’s enforcement practices, arguing that using Hutto to detain families violated the rights of the detained minors. The lawsuit charged that children were separated impermissibly from their parents, detained illegally, and treated as prisoners, contrary to the settlement.<sup>16</sup> Plaintiffs also asserted ICE’s actions violated Congress’s repeated instructions to DHS to (1) keep families together whenever possible; (2) release families together whenever possible; (3) employ the least restrictive alternatives to detention; and (4) when detention was necessary, place families in normalized settings. In August 2007, ICE entered into a settlement agreement with the plaintiffs<sup>17</sup> concurring in part to use Hutto as a placement of last resort, to improve the physical plant and policies and procedures so it was less prison-like, to professionalize the workforce, to routinely review detainees’ eligibility for reassignment to less restrictive settings, and to adopt transparent operating standards.

Late in 2007, ICE (n.d.) promulgated Family Residential Standards for the operation of Berks and Hutto, revising minimum expectations for safety and security, for staff selection and training, for program services, and for medical care. The standards, premised upon adult corrections case law for pre-trial defendants, were adopted largely intact after limited input outside of the government. Detainees were permitted only a few personal possessions; movement in the facility and on the grounds was restricted; and access to counsel curtailed. The standards were also advisory, with limited provision to impose sanctions and only a few penalties for non-compliance in place. ICE delegated the operation and the monitoring of the

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<sup>12</sup> H.R. Rep. 109-79, at 38 (2005).

<sup>13</sup> ICE operates Hutto under an Intergovernmental Service Agreement with Williamson Co., Texas, which contracts with Corrections Corp. of America for the facility’s day-to-day operations (ICE, 2011).

<sup>14</sup> Compl. for Declaratory and Injunctive Relief, *In re Hutto Family Detention Ctr.*, No. 07-cv-164-SS (W.D. Tex. 6 March 2007), ECF No. 1.

<sup>15</sup> H.R. Rep. 109-476, at 43 (2006).

<sup>16</sup> Compl. for Declaratory and Injunctive Relief at 2-4, *In re Hutto Family Detention Ctr.*, No. 07-cv-164-SS.

<sup>17</sup> Settlement Agreement, *In re Hutto Family Detention Ctr.*, (26 August 2007), ECF No. 92-1.

family facilities to others.<sup>18</sup> Without checks and balances in place, Berks and Hutto usually received favorable reviews. Inspections were announced and always conducted during business hours. Final reports were frequently pending for months and final scores were routinely adjusted by facility operators and ICE administrators. Penalties were rarely imposed and contracts never cancelled.

### *Reforms to Detention Policy and Practice in 2009*

Early in 2009, shortly after President Obama took office, DHS undertook a comprehensive assessment of detention policy and practices, with the goals of reducing reliance on detention and improving the efficiency and effectiveness of ICE. DHS Secretary Napolitano appointed me to the newly established position of Special Advisor on ICE, which was created to focus on the significant growth in immigration detention and ICE arrest priorities (DHS, 2009). I commenced a national study and immediately began making changes. Among the first steps taken, all of the families at Hutto were removed (Bernstein, 2009). As many as possible were released; the rest were transferred to Berks. In September 2009, after the last of the families was removed, Hutto was re-commissioned as an all-female, adult-only facility.

I also wrote a Report based on a system-wide assessment of the country's detention practices and released by DHS in October 2009 (Schriro, 2009). The Report included recommendations that laid the groundwork for a number of reforms that DHS announced around the time of its release to improve conditions for all detainees including special populations, notably, women, families with minor children, and asylum-seekers.

Among the Report's findings, none was more important than this: In FFY 2008, ICE operated the largest detention and community-release programs in the country with 378,582 migrants from 221 countries in its custody or under its supervision. It was also the most ill-equipped of any agency to assume these responsibilities. ICE was comprised primarily of law enforcement personnel with extensive expertise enforcing immigration law but not in the execution of detention activities and community-based alternatives. The agency lacked the infrastructure needed to execute this critical component of its mission (Schriro, 2009). ICE is still the nation's largest system of incapacitation and it is no more nimble than when the Report was released. Between the administration's first year in office and its last, ICE increased its capacity to detain families by 98 percent—from 84 beds in 2009 to 3,750 beds in 2016—and it plans to add more.

The Report identified several significant steps that the administration needed to take to transform ICE from a substantively penal to a civil system: (1) premising decision-making upon the likelihood of eligibility for relief and a presumption of release to the community as the rule rather than the exception; (2) establishing clear standards of care based upon community standards and civil case law, and not penal practices; (3) putting an organizational infrastructure in place with the requisite management tools and informational systems that included objective assessment instruments and classification tools to continuously inform and align care, custody restrictions, programs, privileges, and delivery of services consistent with individually assessed risk and need; (4) ensuring meaningful access to legal materials and counsel, to a viable grievance mechanism, as well as to visitation,

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<sup>18</sup> ICE entered into agreements with the Counties of Berks, Pennsylvania and Williamson, Texas for both facilities. Berks County operated its facility for ICE whereas Williamson County contracted with the private sector. ICE also contracted with the private sector to ascertain its facilities' compliance with FRC standards.

religious practice, and translation services; (5) establishing a health care system comparable to other government-funded programs and extending its coverage through release to the community or removal from the U.S.; and (6) implementing a system of rigorous and independent oversight by expert federal officials to monitor conditions for compliance, to timely publish objective findings, to take remedial steps, and to impose proportionate sanctions for non-compliance.

In short, the Report urged ICE to put in place an informed plan of action to improve its decision-making, to temper its use of detention and release with excessive supervision requirements, to resolve to continuously improve, to commit to full transparency, to increase its accountability to others and most fundamentally, to comply with the law.<sup>19</sup> The momentum was palpable. A number of plans were put into place to lower cost and improve outcomes, among them establishing the Office of Detention Policy and Planning (ODPP) within ICE. Additionally, there were efforts to enhance oversight and improve accountability during the administration's first year, but overall reform of the system faltered. Immigration reform was not among government's top priorities.

### *The Road to Hell Was Paved with Good Intentions*

Most fundamentally, DHS' core mission is emergency preparedness and preparation in all manner of incursions, both natural and man-made, foreign and domestic. Adopting such a posture is intended to ensure that in the event of a sudden surge in arriving asylum seekers, for example, the government would be ready to respond, lawfully, efficiently, effectively. Despite DHS' best intentions in 2009 to make civil detention more civil for families and other detainees in its custody, ICE failed to take many meaningful steps to that end. Specific to immigration detention, that would have entailed ensuring the family residential facilities that ICE operates comply with the Settlement Agreement that INS had reached in 1997 in the case of *Flores v. Meese*, taking steps to ensure families are detained only when absolutely necessary, for the briefest time necessary and then, only in non-secure, family-friendly, licensed child care facilities.

Instead, ICE continued to employ the practices that INS had adopted, notably including family residential standards it put into place in 2007. These standards mirrored those that INS first applied to foreign-born adult males several years before. They were the antithesis to those principles, policies, and practices that the government agreed to adopt for families in 1997 when it signed the Settlement Agreement. Lacking all manner of strategic thinking and age-appropriate responses, the likelihood that an enforcement agency would continue to default to enforcement strategies in an emergency was seen as suitable. Similarly, the government's repeated failure to make good faith and sustained efforts to comply with that Settlement Agreement ultimately limited its options to successfully manage the humanitarian crisis that was about to unfold.

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<sup>19</sup> In 2001, the U.S. Supreme Court held detention is permissible only to facilitate deportation. Detention cannot be indefinite. *See Zadvydas v. Davis*, 533 U.S. 678 (2001). In 2015, a district court ruled detention cannot be used to deter mass migrations; a discussion of recent developments in *Flores* to follow; *see* [below, in Latin] notes 30 and 31.

### *The Influx in Migrant Families at the southwestern U.S. Border in summer 2014*

The arrival of families and children seeking the protection of the U.S. government along the southwest U.S. border from Central America in the summer of 2014 triggered an immediate and severe response by the administration (Preston and Randal, 2014). Unlawful crossings at the border were at an historic low, but the increased number of children and families presented unique challenges. The women and children were fleeing gang and other forms of violence, extreme poverty in Honduras, Guatemala and El Salvador (also known as the Northern Triangle) and seeking safety, protection and family reunification in the United States.<sup>20</sup>

### *Reasons for the Increase in Migrants from Central America in summer 2014*

The increase in border crossings by mothers with their children and by unaccompanied minors from the Northern Triangle in 2014 was attributed primarily to increased gang and other violence; extreme poverty; and the desire for family reunification (Kennedy, 2014). Violence seemed to be the single greatest motivation, even when other factors were noted (American Immigration Council, 2014). In interviews with unaccompanied children, boys and girls alike cited crime, gang threats, and violence as reasons for leaving home (Kenney, 2014).<sup>21</sup> Children and adolescents were particularly at risk of gangs' attention, with boys targeted for involuntary recruitment and girls to service gang-members (UNHCR, 2014). Mothers and their children also fled domestic and gender-based persecution, both common in the Northern Triangle, and often linked to gang and societal violence (Equiziba et al, 2015).<sup>22</sup>

The number slowed by late fall 2015, then began to rise again (U.S. Border Patrol, n.d.). The temporary drop-off was attributed to a number of factors including cyclical trends, a public relations campaign in Central America intended to deter immigration, and an increase in deportations by Mexico (WOLA, 2015; Ortega, 2015). Through it all, DHS continued to expand its family detention capacity, first repurposing a federal training barrack opening in Artesia New Mexico and shortly afterwards closing the controversial FRC, converting Karnes, an adult male detention center to a FRC, enlarging both Dilley and Berks FRCs, and hardening community release. During the first four months of FFY 2016, October 2015 through January 2016, CBP apprehended 24,616 Central American families at the U.S.-Mexico border. Also, when ICE released families from detention, it was increasingly conditioned with ongoing electronic supervision (PRI, 2016).

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<sup>20</sup> For the first time since record-keeping began in 1992, fewer than half were migrating from Mexico (See U.S. Border Patrol, n.d.; Castillo, 2014).

<sup>21</sup> Notably, there was no significant pattern of arrivals to the United States of families from Nicaragua, which had not experienced the same level of violence as the countries of the Northern Triangle, despite its geographic proximity to Honduras, Guatemala and El Salvador and even higher levels of poverty. See U.S. Border Patrol (n.d) and The Economist (2012).

<sup>22</sup> In Guatemala, the second most common category of crime was violence against women. Abuse and femicide, defined as murder for gender-related motives, occurs frequently as a result of misogyny, as part of gang rituals, and within intimate relationships. Homicide rates in the Northern Triangle are among the highest in the world, with Guatemala, El Salvador and Honduras consistently reporting three of the five highest national murder rates.

## THE OBAMA ADMINISTRATION'S RESPONSE

The administration was conflicted and its response was confusing. In the summer of 2014, the administration designated the Federal Emergency Management Agency (FEMA), another agency of DHS, to organize and coordinate a federal response to the increase in arrivals of unaccompanied children and families at the U.S.-Mexico border (The White House, 2014a), many of whom appeared to be eligible for asylum and related protections under U.S. law. Even as it struggled to address the rapidly-unfolding humanitarian crisis on the southwestern border, the White House was responding to calls to stop unlawful migration with enhanced enforcement measures.

The President asked Congress for approximately \$4 billion in emergency funds (Rogers, 2014), intending to use some of it to increase the capacity of the immigration courts to adjudicate more claims faster and the rest, to expand ICE's detention and supervision capacities (The White House, 2014b). Although the administration did not receive these monies, it still increased the detention of families of Central American asylum-seekers. No funds were allocated to legal counsel for minors or additional immigration judges to handle the influx; instead, the Vice President sought to engage the legal community in discussions about its obligation to respond to the immigration crisis along the border, urging them to increase their collective efforts to provide counsel to the population.

### *Changes at Berks*

ICE relocated Berks to a larger building within the same compound in 2012 and raised the capacity from 84 to 96 beds. In 2014, when the administration changed its detention policy, remanding more families and holding them longer, Berks, the only FRC at the time, filled up quickly. Whereas beforehand families had been held only briefly, time in detention now rose precipitously. Longer stays resulted in a need for more beds; the third floor of the building was renovated and its capacity doubled (Orozco and Turner, 2015; Human Rights First, 2015). Just about that time, the State of Pennsylvania revisited the County's authority to license the facility as a family residential center and determined it could only be licensed to house minors and not children and their parents under state law. The County appealed, and the State responded, permitting its continued operation during the pendency of the process but prohibiting any use of the recently added beds.<sup>23</sup>

### *The Opening and Closing of Artesia*

Late in June 2014, ICE opened the Artesia Family Detention Center (Artesia) in Artesia, New Mexico, to supplement its family detention capacity at Berks (DHS, 2014; Henneberger, 2014). Artesia, formerly a CBP training barracks, in the state's far southeastern corner, was repurposed to hold up to 672 mothers and their children. ICE opened Artesia with the goal of quickly moving Central American families through the removal process to expedite their deportation (Burnett, 2014; Lorca, 2014). It was a secure facility and not licensed.

Artesia attracted an onslaught of criticism (Redmon, 2014; Detention Watch Network, 2014). Amongst its many problems, there were no immigration lawyers in Artesia and none

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<sup>23</sup> The Pennsylvania Department of Human Services gave Berks County until 21 February 2016 to operate as a child residential facility, a charge exceeding the scope of its statutory mandate. See, Juntos (n.d),

nearby when it opened. When counsel arrived, their service was impeded by government practices that made it appear that the system was, in fact, structured to deport families quickly, without regard to eligibility for asylum. The passage rate for credible fear screening interviews was significantly below the national average (see U.S.CIS, 2014) and bond amounts were set five times above the national average (Lorca, 2014).

Within months, amidst increasing negative publicity about significant due process and conditions of confinement issues, ICE closed Artesia in mid-December 2014 (Manning, 2014), insisting that it had been opened on a temporary basis and with fewer families entering the country, it was time to transition to less isolated and better designed facilities (Redmon, 2014). Families remaining at Artesia at the time of its closure were sent to Karnes and Dilley (McCabe, 2014).

### *The Conversion of Karnes Adult Detention Center to a Family Facility and its Expansion*

At the beginning of August 2014, ICE repurposed a county-owned facility in Karnes City, Texas, that it had been using to detain adult males in immigration proceedings, largely asylum-seekers, to hold mothers and their children (ICE, 2012; 2014). In both iterations, ICE contracted with the Karnes County Commission (the Commission), which in turn contracted with the GEO Group, Inc., the country's second largest private prison corporation. ICE changed the name of facility from Karnes Civil Detention Center to Karnes Residential Center (Karnes), but little else. Karnes is still a secure facility run on a rigid schedule with set times for meals and lights on and out, frequent head counts and room checks throughout the day and night, its guards ill-equipped to interact with mothers and children, many of them trauma survivors, seeking asylum.<sup>24</sup>

Initially, Karnes' capacity was 532 mothers and children (ICE, 2012). In December 2014, after a contentious debate, the Commission approved a 626-bed expansion, increasing Karnes' capacity to 1,158. Construction was completed late in 2015 (GEO Group, 2014). It is a secure facility and not licensed (Waslin, 2016).

### *The Development of Dilley*

In December 2014, DHS opened its third, and a much larger, facility to replace Artesia (ICE, 2014), the South Texas Family Residential Center (Dilley) in Dilley, Texas, with a capacity for 2,400 women and children. In its announcement, DHS stated Dilley would "provide invaluable surge capacity should apprehensions of adults with children once again surge." The Corrections Corporation of America, the country's largest for-profit prison corporation, built and currently operates the facility.<sup>25</sup> It is not licensed (Waslin, 2016).

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<sup>24</sup> Memorandum in Support of Motion to Enforce Settlement of Class Action at 14, *Flores v. Johnson*, Case No. 2:85-cv-04544-RJK (C.D. Cal. 2 February 2015).

<sup>25</sup> See Corrections Corporation of America website, <https://www.cca.com/facilities/south-texas-family-residential-center>; South Texas Family Residential Center, <https://www.cca.com/facilities/south-texas-family-residential-center>; Press Release, Human Rights First (12 May 2015), Human Rights First Tours Dilley Detention Facility, Calls for administration to End Family Detention, <http://www.humanrightsfirst.org/press-release/human-rights-first-tours-dilley-detention-facility-calls-administration-end-family>.

## *The Impact of the Deterrence Rationale on Family Detention Policies*

In June 2014, the administration announced that it would pursue wide-scale detention of mothers and children to deter other families from seeking asylum in the United States. Secretary Johnson told Congress, “Our message is clear to those who try to illegally cross our borders: You will be sent back home. He added that the government was “building additional space to detain these groups and hold them until their expedited removal orders are effectuated” (DHS, 2014b). It was, he said, “... [a]n aggressive deterrence strategy focused on the removal and repatriation of recent border crossers.”<sup>26</sup> Immediately thereafter, families apprehended at the border were assigned forthwith to a FRC for expedited proceedings.<sup>27</sup>

In keeping with this rationale, DHS insisted on continued detention during proceedings after families received a favorable decision following the screening interviews. Between June 2014 and February 2015, ICE denied release to nearly all detained families in its initial custody determination, even those who had passed their screening interviews.<sup>28</sup> When families sought reviews of decisions to continue detention before immigration judges, ICE attorneys opposed release, arguing that a “no bond” or “high bond” policy was necessary to “significantly reduce the unlawful mass migration of Guatemalans, Hondurans and Salvadorans.”<sup>29</sup> Notwithstanding ICE’s position, when families were able to secure counsel and proceed to a full bond hearing in court, the judges often ordered that bond be set at a level enabling families to achieve release. ICE’s policy of detaining for deterrence achieved one of its intended results—imposition of lengthy delays for families, even after they had established viable asylum claims.

In December 2014, advocates brought class-action litigation challenging DHS’ categorical detention of asylum-seeking families to deter future migrants.<sup>30</sup> In February 2015,

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<sup>26</sup> Declarations of high-ranking immigration officials filed in court proceedings confirmed that implementation of “no bond” or “high bond” policies were intended to reduce the migration of Guatemalans, Hondurans, and Salvadorans to the United States. *See* Department of Homeland Security’s Submission of Documentary Evidence, AILA InfoNet Doc. No. 4080799 (7 August 2014), <http://www.aila.org/infonet/dhs-blanket-policy-no-release>.

<sup>27</sup> Only in the summer of 2015 did the government begin to place some detained families immediately into full-fledged proceedings before the immigration courts immediately rather than placing them into expedited removal. These proceedings are termed “expedited removal” under Immigration and Nationality Act (“INA”) Section 235 and “reinstatement of removal” under INA Section 241 for individuals with prior deportation orders.

<sup>28</sup> *R.I.L.-R v. Johnson*, No. 1:15-cv-00011, 2015 U.S. Dist. LEXIS 20441, at \*11–12 (D.D.C., 20 February 2015).

<sup>29</sup> *See* Immigration Court Declaration of Philip T. Miller, ICE Assistant Director of Field Operations for Enforcement and Removal Operations (“Miller Decl.”) at ¶ 9 (7 August 2014), <http://www.aila.org/content/default.aspx?docid=49910>; Immigration Court Declaration of Traci A. Lembke, ICE Assistant Director over Investigation Programs for HSI and ICE (“Lembke Decl.”) at ¶ 20 (7 August 2014) (stating “[i]mplementing a ‘no bond’ or ‘high bond’ policy would help. . . by deterring further mass migration.”).

<sup>30</sup> *See* Press Release, U.S. Dep’t of Homeland Sec. (31 July 2014), *So. Texas ICE Detention Facility to House Adults with Children* <http://www.dhs.gov/news/2014/07/31/south-texas-ice-detention-facility-house-adults-children> (stating that repurposing of Karnes to house families was part of DHS’ sustained and aggressive campaign to stem the tide of illegal migration from Cen. Am.); and Press Release (17 November 2014), U.S. Immigration and Customs Enforcement, *ICE’s New Family Detention Center in Dilley, TX to Open in December*, <https://www.ice.gov/news/releases/ices-new-family-detention-center-dilley-texas-open-december> (stating that Dilley was part of a policy aimed at “deterring others from taking the dangerous journey and illegally crossing into the United States”). First Amended Complaint for Injunctive and Declaratory Relief at P5, *R.I.L.-R v. Johnson*, No. 1:15-cv-0001 (D.D.C 6 January 2015), <https://www.aclu.org/cases/rilr-v-johnson>.

a federal district court issued a preliminary injunction prohibiting DHS from using deterrence as a rationale for detaining families or as a factor in custody determinations.<sup>31</sup> The court reaffirmed the premise that immigration detention is civil in nature and so, *must* be justified by a legitimate government interest and not as a form of punishment. It held that depriving a family of liberty so as to deter another potential migrant was an impermissible use of detention, and further, that deterrence was unlikely to mitigate any national security threat.

In May 2015, DHS acquiesced, agreeing to individualize custody determination decisions, but still asserting it had the legal authority to detain for deterrence purposes (ICE, 2015). To that end, DHS also announced another process, new in name only, to “... further focus immigration enforcement resources on high priority cases,” top among them, families who were not part of recent border crossings (DHS, n.d.).

In July 2015, a federal district court held that all minors in custody are protected, whether or not accompanied by a parent, and have a right to release. It ordered DHS to release accompanying mothers to secure the rights of their children to be free from detention; prohibited the use of secure facilities; and required any non-secure facility that ICE used must be licensed.<sup>32</sup> DHS petitioned the court to reconsider its decision, but within a month the court ordered the agency to implement these remedies within 60 days. ICE released some families on bond but also expedited the removal of others, many of whom had sought asylum prior to the exhaustion of their appeals. ICE also pursued licensure for Berks, Dilley and Karnes under the assertion that they are non-secure facilities.<sup>33</sup> In sum, DHS continues to pursue the narrowest aims of court orders, detaining as many families as possible under conditions that do not materially improve.

In spring 2016, the next surge of families from Central America seeking safety crossed the southwestern border from Mexico. They were met at the border by CBP and intercepted in-country by ICE (Gonzalez, 2016).

### *The Final Months of the Obama Presidency*

In June 2015, Secretary Johnson announced the formation of the Advisory Committee on Family Residential Centers (ACFRC). He explained, “(ICE) Director Saldana and I understand the sensitive and unique nature of detaining families, and we are committed to continually evaluating it. We have concluded that we must make substantial changes to our detention practices when it comes to families.”<sup>34</sup> Its mandate was “to provide advice and recommendations” on matters concerning ICE’s family residential centers including detention management and reform.<sup>35</sup> Fourteen subject matter experts were selected to serve. I was among them as well as one of six members who co-chaired three subcommittees. Between October 2015 and October 2016, the ACFRC met three times in person, and

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<sup>31</sup> See *R.I.L.-R v. Johnson*, No. 1:15-cv-00011, 2015 U.S. Dist. LEXIS 20441 (D.D.C. 20 February 2015).

<sup>32</sup> Notice of Motion and Motion to Enforce Settlement of Class Action, Case No. CV 85-4544-RJK (Px) (2 February 2015). In Chambers—Order Re Plaintiffs’ Motion To Enforce Settlement Of Class Action And Defendants’ Motion To Amend Settlement Agreement [100, 120], CV 85-4544 DMG (AGRx) (24 July 2015).

<sup>33</sup> A non-secure facility is one in which detainees move without restriction indoors and outside. A secure facility is one where detainees’ movement is regulated (LIRS 2014).

<sup>34</sup> Jeh C. Johnson, Secretary of Homeland Security, *Statement by Sec. Jeh C. Johnson On Family Residential Centers* (June 24, 2015), <https://www.dhs.gov/news/2015/06/24/statement-secretary-jeh-c-johnson-family-residential-centers>.

<sup>35</sup> U.S. Immigration and Customs Enforcement Advisory Committee on Family residential Centers (July 24, 2015), <https://www.ice.gov/sites/default/files/documents/Document/2015/acfrcCharter.pdf>.

following our tasking in March 2016, usually once a week by phone, at times when ICE personnel was available to participate. Ex parte communication amongst the members was prohibited.

Within a year of our formation, on October 7, 2016, the ACFRC produced a 166-page report consisting of seven chapters, five appendixes, and 282 recommendations, most notably, Recommendation 1-1, which provides in part:

DHS' immigration enforcement practices should operationalize the presumption that detention is generally neither appropriate nor necessary for families – and that detention or the separation of families for purposes of immigration enforcement or management are never in the best interest of children. DHS should discontinue the general use of family detention, reserving it for rare cases when necessary following an individualized assessment of the need to detain because of danger or flight risk that cannot be mitigated by conditions of release.<sup>36</sup>

At the time that this working paper went to the publisher at the end of 2016, the final report had not been published on the DHS website nor had the Administration indicated which, if any, of our recommendations would be adopted.<sup>37</sup>

Also announced by Secretary Johnson during the Administration's final months on August 26, 2016, was the formation of a subcommittee of the Homeland Security Advisory Council to look at ICE's use of privatized immigration detention facilities. The tasking was occasioned by an August 18 announcement by the Department of Justice directing the Bureau of Prisons to reduce and ultimately end its use of private prisons. The Secretary directed that this subcommittee in part, "... address ICE's current policy and practices concerning the use of private immigration detention facilities and evaluate whether this practice should be eliminated."<sup>38</sup>

Top among its core recommendations, but its placement appreciably diminished by the dissent of 17 of its 24 members, was this:

Fiscal considerations, combined with the need for realistic capacity to handle sudden increases in detention, indicate that DHS's use of private for-profit detention continue. But continuation should come with improved and expanded ICE oversight, and with further exploration of other models to enhance ICE control, responsiveness, and sense of accountability for daily operations at all detention facilities.

Its final report dated December 1, 2016, is available on the DHS website.<sup>39</sup>

Of note are several related and recent dates. On November 3, 2016, a month before the release of the subcommittee's report, ICE extended its contract with CoreCivic<sup>40</sup> until 2021, to operate Dilley as a FRC. On December 3, 2016, two days after the release of the subcommittee's report, the 250th District Court issued its final ruling preventing the Texas Department of Family and Protective Services from issuing licenses to CoreCivic to operate

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<sup>36</sup> Ibid., pg. 6.

<sup>37</sup> The preliminary report can be located

<https://www.ice.gov/sites/default/files/documents/Report/2016/ACFRC-sc-16093.pdf>.

<sup>38</sup> See Volume 81 of the Federal Register, page 60713 (Sept. 2, 2016).

<sup>39</sup> See <https://www.dhs.gov/sites/default/files/publications/DHS%20HSAC%20PIDF%20Final%20Report.pdf>.

<sup>40</sup> Formerly, CCA.

Dilley and the GEO Group to operate Karnes as FRCs. The Texas Attorney General is appealing.<sup>41</sup>

## CONCLUSIONS & RECOMMENDATIONS

DHS' main mission is national emergency planning and preparedness. Influxes of individuals arriving into the country seeking safety and freedom are an integral part of its history. It is essential that DHS adequately anticipate and address periodic increases in the migration of families with children and others. History teaches that these influxes are certain to happen again; meaning that competent and comprehensive policies must be put in place as quickly as possible and this requires a commitment to continuous improvement, to well-reasoned thoroughly-researched solutions, and hard work. However, as of this writing at the end of 2016, hopes for these reforms seem more remote than ever as a new president who campaigned on harsh anti-immigrant rhetoric prepares to take office.

This working paper has chronicled the Obama administration's rapid expansion of family detention, an expansion predicated upon underlying policies and practices that were plagued with problems from the start. DHS' 2009 comprehensive study of immigration detention underscored the urgent opportunity for ICE, in coordination with stakeholders, to design and implement a new system premised upon civil, rather than criminal, principles, a premise embedded in case law that migrants must not be detained to deter or to punish. DHS must be better prepared for the inevitable, periodic influxes of migrant families seeking refugee status. Its planning and preparedness must be sufficient to advance both the development and implementation of viable plans to make marked change, to adopt the presumption that release to the community is the rule, not the exception.

### *Specific Remedies: Karnes, Dilley and Berks Family Residential Centers*

Binding standards for the detention and treatment of immigrant children in government custody were established in 1997.<sup>42</sup> Nearly 20 years has passed and the U.S. government continues to resist compliance with *Flores* when it should embrace its tenants in full. To this end, ICE could immediately cease the expansion of the Karnes, Dilley and Berks RFCs and release as many families as are permitted by law. Further, it could provide timely notice that any contracts specific to family detention will not be renewed. To the extent that beds are needed, DHS should use only non-secure and licensed facilities, small in scale and situated in easily assessable communities.

### *Overall Reform of Detention Policies and Practices Impacting Families and Children*

My experience working at ICE left me with several observations. First, organizations' inclination to resist change is deeply ingrained, more so when there is significant tension between its perceived mission and its mandate. This is certainly the case with ICE, experts in enforcement but also responsible for detainees' safety and well-being from their apprehension through adjudication to removal or relief. Second, individuals acting under the

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<sup>41</sup> See <http://www.texasprisonbidness.org/tags/corecivic-formerly-cca>.

<sup>42</sup> See *Flores Settlement Agreement*, *supra* note 7.

auspices of authority can find and fix any number of deficiencies, but a critical mass of like-minded agents in the field is necessary to sustain what the several change agents achieve. Establishing the Office of Detention Policy and Planning to diagnose problems and develop solutions but not to undertake the implementation of reforms is a significant—and likely an insurmountable—impediment. On the other hand, anything that an organization fails to do or undoes, the administration can fix, if it so chooses. The Obama administration did not.

The decision to detain foreign-born persons is sometimes necessary as a matter of law, but more often than not, it is discretionary. Less discretion by government actors and clearer direction and more oversight by the government would produce better results more quickly. To this end, the next administration should adopt various measures, however unlikely the new administration will do so.

First, deterrence-based detention policies are prohibited now. Rather than pursue nominal changes, such as licensing the FRCs and insisting secure facilities are non-secure to continue to use and to expand detention, ICE should adopt a presumption against detention, particularly in the case of families, women and asylum seekers. Every effort should be taken to mitigate impediments to community placement. When timely release into the community is not feasible, ICE should release families intact on their own recognizance or parole. To ensure decisions that ICE makes are informed and uniform, government personnel should use validated instruments to determine the least restrictive means and not contract providers that operate FRCs and community supervision programs for ICE. Where detention is required, it should not be lengthy. When alternatives suffice, they should be based upon individual circumstances. More restrictive alternatives to detention, including electronic monitoring and cash bond, should be used only when demonstrably necessary.

Secondly, to realize these results, ICE must acquire the expertise to perform all of the unique duties associated with detention and its alternatives. These duties include the revision of written instruction, retraining of personnel, and replacement of external providers. ICE must establish and adhere to clear standards of care that do not follow a penal model and are responsive to families, women and asylum seekers. This involves in part, establishing a system of informed immigration enforcement, including management tools and informational systems capable of building and maintaining a continuum of care for those who must remain in ICE custody.<sup>43</sup> Absent this infrastructure, it is unlikely that community placements and detention strategies will be based on objective, individually-assessed risk and need or utilize the least restrictive means to achieve compliance. If the government is unwilling or unable to make this happen, then Congress or the Courts should either expand the charge of ODPP to include executing all decisions regarding detention and alternatives to detention or relocate ODPP to the office of the DHS Secretary, where in either case, operating independently from ICE, it would be possible to replicate the criminal justice system's checks and balances in the civil system's decision-making.

Lastly, there must be a commitment to excellence, transparency, and accountability within DHS and the administration. This requires meaningful federal oversight of the current system and input by the legal community and advocates throughout this transition and after its remaking in order to ensure intended results are realized and to intercede as quickly and as often as may be necessary. It demands an effective complaint mechanism be put into place

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<sup>43</sup> Given the Government's renewed emphasis on raids to achieve more rapid removals, families placed in expedited removal proceedings should receive an individualized custody assessment immediately after a credible or reasonable fear finding, taking into account the family's individual circumstances and specific likelihood that they pose a flight risk or danger to the community.

and that performance metrics are collected and outcomes published to inform decision-making and assure stakeholders there is accountability.

*The Trump Challenge: Truth or Consequences*

This working paper was initially drafted before the November 2016 election. At that time, it was largely unknowable and widely unforeseeable that candidate Donald Trump would be elected 45<sup>th</sup> President of the United States. His positions on immigration although widely known as bumper sticker slogans and political banners (Build a wall and make Mexico pay for it; Keep out all Muslims unless and until we can determine whether they mean to do us harm; Remove anyone who came here, or stayed here, unlawfully and make them all start over) have as many adversaries as advocates within his own circles. It's tempting to tamp back our efforts, and to let go of our higher expectations for ourselves and others. But to these instincts, I say no. We have all worked so hard and every step forward has been hard fought. As the past eight years have shown from the first to the last, those who we hoped would always be our friends, have sometimes been our foes.

Perhaps now the opposite assumptions will bare similar fruit; those who we feared would be our foes, may share our pride in being the nation known for taking in the tired and the weary, a country chock filled with second chances. Throughout the transition from the 2016 Election to the 2017 Inaugural, many in the business community were arguing for more immigration, albeit foreign-born individuals with knowledge, skills and abilities from which corporate America believes it may benefit. Champions may come from other quarters. The country's new First Lady, Melania Trump, came to the U.S. from Yugoslavia on a Work Visa. There are as many states, their economies vanquished by harsh enforcement practices, that may advocate for open borders. In the end, our government consists of three branches, each with its own standing and strength. The Executive can only do that which the Legislative and Judiciary allow, and the Legislative and Judicial branches can undo some of what the Executive does. That gives all of us many opportunities in each of the next four, or eight, years to make every vote count.

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Global Detention Project  
3 rue de Varembe  
1202 Geneva, Switzerland  
[globaldetentionproject.org](http://globaldetentionproject.org)  
+41 (0) 22 733 08 97  
[admin@globaldetentionproject.org](mailto:admin@globaldetentionproject.org)