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Biden is defending key Trump immigration policies in court

The Justice Department is fighting to maintain Trump’s border restrictions and against compensation for separated families.

By Nicole Narea | @nicolenarea | Jan 25, 2022, 7:00am EST



Central American asylum seekers wait as US Border Patrol agents take groups of them into custody on June 12, 2018, near McAllen, Texas. The families were then sent to a US Customs and Border Protection processing center for possible separation. | John Moore/Getty Images

Nicole Narea covers state politics and policy for Vox, focusing on personalities, conversations, and political battles happening in state capitals and why they matter to the entire country. She first joined Vox in 2019, and her work has also appeared in Politico, Washington Monthly, and the New Republic.

President Joe Biden’s administration is defending two of his predecessor’s more inhumane immigration policies in court: pandemic-related border restrictions and family separations.

The Department of Justice is actively fighting in federal court for border restrictions that have barred most asylum seekers from entering the US. In separate federal cases, it has argued that the policy of separating migrant families under former President Donald Trump was lawful, and has fought against payouts for those families.

For the Biden administration, defending some of the Trump administration’s most controversial immigration policies could be an attempt to preserve tools to manage the border, said Stephen Yale-Loehr, a professor of immigration law at Cornell Law School. Or, he said, they could mark an internal disagreement on righting the wrongs of the Trump era.

“Every administration wants to have as much flexibility and discretion as it can on immigration because you never know what conditions will arise in the future,” he said.

Still, it’s a legal strategy that comes as Republicans prepare to make Biden’s immigration record a **key line of attack** in the upcoming midterms, and amid complaints from immigrants’ rights advocates and progressive Democrats that the president’s not doing enough to dismantle his predecessor’s legacy.

There has been a steady stream of resignations among immigration officials in his administration, most recently those of two former advocates, **Tyler Moran and Esther Olavarria**. Meanwhile, Republicans regularly ridicule Biden’s policies, falsely claiming that he is an “open borders” Democrat. They hope that characterization will stick in the midterms, despite the fact that he has maintained Trump’s border restrictions, policies Republicans continue to praise.

On Wednesday, the Justice Department **told** a federal appeals court that the border restrictions known as the Title 42 policy, allowing the federal government to bar noncitizens entry into the US for health reasons, were necessary to protect public health. In just one year, the Biden administration has used the policy to carry out more than 1 million expulsions of migrants arriving on the southern border, either sending them back to potential danger in overwhelmed border cities in Mexico or to their home countries. Public health experts, however, have repeatedly argued that there is no scientific rationale for the policy and that it’s possible to safely process people at the border with the right precautions.

Earlier this month, the DOJ also urged two federal courts in **California** and **Pennsylvania** to dismiss cases brought by migrant families who had been separated by the Trump administration and are seeking compensation. Though Biden has previously said that those families **deserved some form of compensation**, settlement talks have since fallen apart. DOJ lawyers are now claiming that the Trump administration was within its legal right to separate families, meaning that those affected aren’t eligible for compensation.

The White House referred Vox to the Department of Justice, which declined to comment on the Title 42 and family separations cases.

The Biden administration’s defense of Title 42 and the legality of family separations in court may allow the president to truthfully say that he isn’t as “soft” on immigration as Republicans claim. But it also makes it hard to take Biden’s stated commitment to immigration reform seriously, and comes at an enormous cost: depriving hundreds of thousands of people of their legal right to seek asylum and magnifying the suffering of thousands of families broken by US policy.

A migrant mother from Honduras cradles her exhausted 8-year-old daughter after they and fellow asylum seekers crossed the Rio Grande from Mexico into the US on March 26, 2021, in Penitas, Texas. They were subsequently taken into custody by US Border Patrol agents. | John Moore/Getty Images

Biden may have taken **hundreds of administrative actions** to undo Trump’s immigration policies during his first year in office. But his administration’s refusal to renounce Title 42 and fairly compensate separated families for their pain has cast a cloud over those accomplishments.

The Biden administration continues to invoke public health to keep out asylum seekers

Title 42 creates an easy way to reduce the number of people crossing the southern border; there’s no need to increase funding for processing, to ramp up immigration courts, or to invent policy that might reduce migration. Instead, the federal government can just expel people. And the Biden administration has continued to lean on this fact to manage the southern border, despite evidence that it has endangered asylum seekers in the name of what public health experts say is a dubious scientific rationale.

In March 2020, at the outset of the pandemic, Trump began using the special legal authority created by Title 42, a section of the Public Health Service Act that allows the US government to temporarily block noncitizens from entering the US in the interest of public health. Though Centers for Disease Control and Prevention (CDC) scientists initially opposed the policy, arguing that there was no legitimate public health rationale behind it, then-Vice President Mike Pence **ordered** them to implement it anyway.

Biden’s government has maintained that order. In **court on Wednesday**, DOJ lawyer Sharon Swingle said that Title 42 relies on “scientific expertise” and that lifting the policy would allow the coronavirus to spread in Border Patrol facilities

among people detained there, staff, and the public. Those facilities are not designed to quarantine or isolate immigrants who test positive for Covid-19, and the emergence of the delta and omicron variants have led the CDC to conclude that Title 42 remains justified, she said. In August 2021, the CDC did indeed issue a **memo** renewing the policy.

“The government’s goal is to get back to a state of orderly immigration processing for everyone, but currently, in CDC’s view, the public health realities don’t permit that,” Swingle said.

Other **public health experts** say that migrants can be safely processed at the border and that the policy represents an attempt to “unethically and illegally exploit the Covid-19 pandemic to expel, block, and return to danger asylum seekers and individuals seeking protection.” Anthony Fauci, the United States’ top federal infectious disease expert and Biden’s chief medical adviser, has **said** that “expelling [migrants] ... is not the solution to an outbreak.”

Expelling migrants has put them in danger unrelated to Covid-19, however. Under Biden, there have been 8,705 attacks, including kidnappings and sexual assaults, against migrants trapped in Mexico due to the policy and other US border restrictions, according to a recent **report** by Human Rights First. That’s nearly one violent incident for each hour of Biden’s presidency.

Ultimately, the Biden administration’s attempts to justify Title 42 as a public health tool obscure what it really is: a means of avoiding the politically damaging perception of a border crisis at the expense of migrants’ safety.

“It is shameful that an administration that ran on a belief in science and welcoming people with dignity continues to manipulate an obscure public health rule to violate the basic human rights of asylum seekers,” Karla Marisol Vargas, senior attorney at the Texas Civil Rights Project, said in a statement. “Scapegoating Black, indigenous, and other migrants of color as vectors of disease just serves as an example of the ongoing racism entrenched in our immigration system.”

The Biden administration is arguing that family separation was legal

On the campaign trail, Biden **vigorously condemned** Trump’s use of family separations as a means of drawing a moral distinction between himself and his predecessor’s cruelty toward immigrants. While he has rejected the continued use of family separations and is working to ensure it never happens again, his DOJ has left families affected by it in the lurch, by abandoning settlement negotiations with them and dismissing their requests for compensation.



Protesters participate in the “Reunite Our Families Now” rally against continued deportations, demanding family reunifications in Los Angeles in March 2021. | Damian Dovarganes/AP

Some 5,600 families were intentionally separated in immigration detention under President Trump in 2017 and 2018 after they tried to cross the southern US border without authorization, and hundreds have yet to be reunited. Children taken

from their parents were placed in foster care, the homes of relatives in the US, and federal detention centers, while their parents were detained separately.

The Biden administration has created a **task force to reunite families** that remain separated, successfully **reuniting 61 children** with their families as of November, and issued a **callout to the public** asking for recommendations on how to ensure that family separations never happen again. It’s also currently offering affected families counseling and permission to live and work in the US for three years.

But the administration **withdrew** from monthslong settlement talks with separated families in December after Biden **dismissed** the idea of delivering payouts as high as \$450,000, an amount that the DOJ was **reportedly considering** at the time.

For those families, that \$450,000 figure reflected the price of dealing with what could be lifelong psychological and health consequences of the trauma of separation and, in some cases of separated children, physical and sexual abuse they experienced while in **foster care** and in **US custody**. Republicans nevertheless seized on the issue, seeking to weaponize it against Biden and **arguing** that a settlement “would financially reward aliens who broke our laws” and “encourage more lawlessness” at the southern border.

The DOJ has since made a clear reversal. It has argued in court that, despite the fact that the US has condemned the policy, the separations were lawful. In further arguments, the DOJ said affected families aren’t entitled to payouts from the government under the Federal Tort Claims Act, which allows people who have suffered due to negligence or wrongdoing by the federal government to sue for financial damages.

“At issue in this case is whether adults who entered the country without authorization can challenge the federal government’s enforcement of federal immigration laws,” the Justice Department said in a January 7 brief in the Pennsylvania lawsuit. “They cannot.”

The DOJ is now on track to take the cases to trial, prolonging any possible resolution and potentially leaving families empty-handed.

“It’s very frustrating. This is going to take a really long time,” said Conchita Cruz, co-executive director of the Asylum Seeker Advocacy Project, which has brought two cases seeking compensation for separated families and will likely file more. “Had the government not represented that it intended to settle these cases initially, I think a lot of families would have been much farther along [in the court process], some might even have already won in court, and they would be in a different situation. Now, some families are in a worse position for having waited a year later with nothing to show for it.”

The administration has also requested to transfer the cases from California and Pennsylvania to courts in border states such as Texas, where Trump filled every existing federal judicial vacancy with **conservative judges**. That creates more hurdles for families who don’t live in those states to continue to pursue their cases, though Cruz says it probably won’t stop them.

“You’re basically putting people in a situation where, in order to fight this case, you’re going to have to take a week off work and go to another state in the middle of a pandemic for a trial,” Cruz said. “You’re going to have to fly to the place where your trauma began and have to recount the worst moments of your life and likely have to be separated from your family to do it. It’s going to be a major disruption in your life.”

Though Biden has promised to make amends for these families’ suffering, his administration continues to contribute to it.

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