



“We Need to Take Away Children”

Zero Accountability Six Years After “Zero Tolerance”

HUMAN
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TEXAS
CIVIL RIGHTS
PROJECT

The Allard K. Lowenstein
International Human Rights Clinic
Yale Law School

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Printed in the United States of America
ISBN: 979-8-88708-190-8
Cover design by Ivana Vasic

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Glossary

Border Patrol	The United States Customs and Border Protection agency responsible for immigration and customs enforcement between official border stations (“ports of entry”).
CBP	US Customs and Border Protection, the branch of the US Department of Homeland Security that includes the Border Patrol.
DHS	US Department of Homeland Security, the federal department created in 2002 that includes US Customs and Border Protection, US Citizenship and Immigration Services, and US Immigration and Customs Enforcement, along with other agencies.
DOJ	US Department of Justice, the federal department responsible for enforcing federal law. The department is headed by the Attorney General and includes the Federal Bureau of Investigation, the US Marshals Service, the Executive Office for Immigration Review, and other agencies, in addition to federal prosecutors.
HHS	US Department of Health and Human Services, the federal department that includes the Administration for Children and Families.
ICE	US Immigration and Customs Enforcement, the agency of the US Department of Homeland Security that enforces immigration laws in the interior of the United States.
Migrant	This term has no precise definition in international law but is commonly used to refer to a person who moves away from their place of usual residence, whether within a country or

across an international border, temporarily or permanently, and for any of a variety of reasons or combination of reasons.

ORR	Office of Refugee Resettlement, the agency in the US Department of Health and Human Services' Administration for Children and Families responsible for the care and protection of unaccompanied children.
Port of entry	An official border crossing point
Refugee	A person who has fled their country to escape conflict, violence, or persecution and has sought safety in another country.
Separated child	A child who has been separated from both parents, or from their previous legal or customary primary caregiver, but not necessarily from other relatives.
Unaccompanied child	A child who has been separated from both parents and other relatives and is not being cared for by an adult who, by law or custom, is responsible for doing so.
USCIS	US Citizenship and Immigration Services, the branch of the US Department of Homeland Security that adjudicates visa petitions, naturalization applications, and asylum applications (other than those made in the course of a removal, or deportation, hearing).

Government Officials Behind the Forcible Family Separation Policy

L. Francis Cissna	Director, US Citizenship and Immigration Services (USCIS), October 2017-June 2019
Gene Hamilton	Senior counselor to the secretary of homeland security, January-October 2017; counselor to the attorney general, October 2017-January 2021
Thomas Homan	Acting director, US Immigration and Customs Enforcement (ICE), January 2017-June 2018
John Kelly	Secretary of homeland security, January-July 2017; White House chief of staff, July 2017-January 2019
Kevin McAleenan	Acting commissioner, US Customs and Border Protection, January 2017-March 2018; CBP commissioner, March 2018-April 2019; acting secretary of homeland security, April-November 2019. (The Government Accountability Office (GAO) found in August 2020 that McAleenan's appointment as acting secretary was invalid.)
Kirstjen Nielsen	Chief of staff under Secretary Kelly, Department of Homeland Security (DHS), January-July 2017; White House principal deputy chief of staff (also under Kelly), September-December 2017; secretary of homeland security, December 2017-April 2019
Rod Rosenstein	US deputy attorney general, April 2017-May 2019
Jeff Sessions	US attorney general, February 2017-November 2018

Matthew Whitaker

Chief of staff to Attorney General Jeff Sessions, September 2017-November 2018; acting US attorney general, November 2018-February 2019

Chad Wolf

DHS chief of staff under Secretary Nielsen, July 2017-February 2019. Wolf was later acting secretary of homeland security, November 2019-January 2021, an appointment the GAO found invalid.

Summary

In the last few months of 2017, public defenders working in United States communities along the US-Mexico border began noticing a pattern. Over several months, they had seen an increasing number of people facing criminal charges for irregularly crossing the border arriving in court with a new concern: When these people had a chance to speak in court, their primary worry was not that they were facing prosecution; instead, they were asking the judges where their children were.

These public defenders were seeing the early days of the forcible family separation policy put in place by the administration of US President Donald J. Trump and developed in a larger context of overheated, dehumanizing, and at times racist official rhetoric toward migrants. The policy began in March 2017 as a pilot program in and around El Paso, Texas, and was then rolled out along the entire US-Mexico border in early 2018.

The policy deployed a minor federal criminal charge—“improper entry”—to force children and parents apart. Its official name, “Zero Tolerance,” referred to Attorney General Jeff Sessions’ directive that every adult who entered the United States irregularly would face prosecution.

Criminal charges for improper entry have long been misused as a means of immigration enforcement, raising serious human rights concerns. More than five years before Sessions’ “zero tolerance” directive, improper entry and improper reentry were the most prosecuted federal crimes in the United States. As misguided and abusive as this earlier use of such charges was, it had not deliberately targeted children and their parents. In fact, before mid-2017, the US Department of Homeland Security (DHS) generally did not request prosecution of parents arriving with their children and federal prosecutors had usually declined to pursue improper entry charges against parents traveling with their children precisely to avoid separating arriving families.

The policy developed at Sessions’ directive did not appear primarily aimed at securing convictions. Although a criminal conviction would mean more serious consequences on a subsequent irregular entry, the offense is, as a federal magistrate judge observed, “quite

literally one of the least serious federal offenses.”¹ The real payoff, as far as the architects of the policy were concerned, was that a criminal charge could be used as a reason to transfer the immediate responsibility for protective care of the child. Parents who faced charges were in the custody of the US Marshals Service. Their children remained in US Customs and Border Protection (CBP) detention.

The parents were rapidly convicted—some spent less than a minute in front of the judge once their case was called, and most received sentences of time already served in government custody, so they were back in CBP holding cells in short order.

In the meantime, however, DHS, the federal government department that includes CBP, had deemed their children to be unaccompanied. DHS agents not only knew exactly where the parents were but also knew that the parents would quickly return to CBP detention. Even so, the department treated the brief change in custody as meaning that parents were not “available” to provide care.

Unaccompanied migrant children are entitled to specific protections. In response to a court case settled in 1997, *Flores v. Reno*, care of unaccompanied children is the responsibility of the Office of Refugee Resettlement (ORR), an agency of the US Department of Health and Human Services (HHS). A 2008 anti-trafficking law requires DHS to transfer unaccompanied children to ORR expeditiously, usually within 72 hours.

The forcible family separation policy weaponized these requirements. Keeping families together is, in the vast majority of these types of cases, in children's best interests. But instead of making every effort to keep families together, DHS transferred the children it had separated to ORR, without planning for or putting measures in place that would enable authorities to reunite them with their parents.

Discussions about separating children from their parents at the border began less than a month after President Trump took office. One federal prosecutor commented in early 2017,

¹ Opinion, p. 15 n.14, *United States v. Dominguez-Portillo*, No. EP-17-MJ-4409-MAT (W.D. Texas January 5, 2018), <https://s3.documentcloud.org/documents/4546884/Dominguez-Portillo-Magistrate-Opinion.pdf> (accessed September 30, 2024).

“History would not judge that kindly.”² In March 2017, after *Reuters* broke the story that family separation was under consideration, a DHS staffer emailed Allen Blume, the department’s budget director, to say, “I would be truly grateful if you could tell me this isn’t being seriously considered.”³

This report is based on a review of public and internal government documents, legal proceedings, and the findings of DHS, DOJ, and HHS internal investigations, drawing on Human Rights Watch’s extensive interviews with forcibly separated children and parents in 2018 and 2019. It finds that the forcible separation of children from their parents was a deliberate, targeted policy choice taken even though the architects of the policy knew or should have known that it would inflict anguish and suffering on families.

Forcible separation of children from their families inflicted harms that were severe and foreseeable. Once parents realized they would not be immediately reunited with their children, they were distraught.

Some children sobbed uncontrollably. Many felt abandoned. Nearly all were bewildered, not least because immigration officials would not tell them where their parents were or gave responses that proved to be lies. Children forcibly separated from their parents experienced anxiety, had nightmares, regressed to earlier developmental stages, or found it difficult to trust others and form attachments. Some lashed out. Others stopped speaking.

² Office of the Inspector General, US Department of Justice, Review of the Department of Justice’s Planning and Implementation of Its Zero Tolerance Policy and Its Coordination with the Departments of Homeland Security and Health and Human Services (January 2021, revised April 2022), p. 14, https://oig.justice.gov/sites/default/files/reports/21-028_o.pdf (accessed September 30, 2024).

³ Email to Allen Blume (sender’s name redacted), March 3, 2017, in Third Interim Release, DHS FOIA Litigation No. 2019-HQLI-00010, p. 64.



March 2017

Two months into the administration of President Donald J. Trump, Secretary of Homeland Security John Kelly confirms reports that the US government is considering separating migrant families at the border. He disavows this policy proposal three weeks later.



March-November 2017

Border Patrol works with federal prosecutors in El Paso, Texas, and Yuma, Arizona, to pilot forcible family separation.



November 2017

US Department of Homeland Security (DHS) officials tell counterparts in the US Department of Health and Human Services that DHS did not have an official policy to separate families.



February 2018

The American Civil Liberties Union sues the US government on behalf of Ms. L, a Congolese woman forcibly separated from her 7-year-old daughter in San Diego.



April 2018

More than 700 children have been forcibly separated from their parents in the previous six months.

Attorney General Jeff Sessions issues the “zero tolerance” memo, instructing federal prosecutors to pursue improper entry charges for all adults who arrive irregularly at the border, including parents travelling with their children.



May 2018

Secretary of Homeland Security Kristjen Nielsen tells a Senate committee, “We do not have a policy to separate children from their parents.” But Sessions and other senior officials publicly acknowledge the forcible family separations policy. Kelly, by now the White House chief of staff, says, “The children will be taken care of—put into foster care or whatever.”



June 2018

Office of Refugee Resettlement Director Scott Lloyd emails senior DHS officials “We have 790 kids in our shelters who are not able to contact their parents.” Internal emails describe DHS recordkeeping as “a mess. No tracking at all.”

President Trump issues an executive order that purports to uphold family unity at the border but does not unequivocally prohibit forcible family separation.

A court order in the Ms. L case halts automatic family separations and directs the government to reunite separated children and their parents.



July 2018

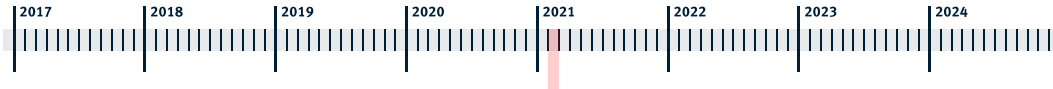
The government reports that it had forcibly separated some 2,500 children from their parents.

DHS continues to forcibly separate children from their parents in significant numbers through the end of 2019.



July 2019

A monitoring team finds that separated children are being held in a border station in Clint, Texas, for weeks, far longer than the regular 72-hour limit set by law, in overcrowded, squalid conditions.



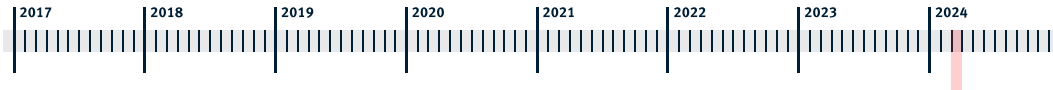
February 2021

President Joe Biden establishes a task force to reunite forcibly separated families.



August 2021

The task force estimates that more than 3,900 children were forcibly separated from their parents during the Trump administration.



March 2024

The task force estimate of the number of separated children increases to 4,656. Of that total, 3,225 children have reunited with parents and other reunifications were in process—but more than 1,300 children remained unaccounted for.

The policy amounted, in the words of two doctors who served as experts for the DHS Office for Civil Rights and Civil Liberties, to “an act of state sponsored child abuse.”⁴ A Border Patrol agent described his role in carrying out forcible family separations as “the most horrible thing I’ve ever done.”⁵

By the time President Trump disavowed the policy in June 2018, forcible family separation had drawn worldwide condemnation. Former First Lady Laura Bush described it as “cruel” and “immoral.”⁶ Pope Francis, former Prime Minister of the United Kingdom Theresa May, and other world leaders denounced it. Four members of the US Homeland Security Advisory Council resigned, saying, “Were we consulted, we would have observed that routinely taking children from migrant parents was morally repugnant, counter-productive and ill-considered.”⁷

It quickly became clear that the government had no plan for reuniting families after parents’ criminal and immigration cases concluded. Apart from the efforts of a few enterprising officials, notably in ORR but also including some in CBP, federal agencies were not tracking the parents and children they separated. DHS’s only systems to link family records in its databases were added on the fly by proactive border agents once they saw how the policy was being implemented. A federal judge observed the “startling reality” that “under the present system migrant children are not accounted for with the same efficiency and accuracy as *property*.”⁸

⁴ Letter to Sen. Charles E. Grassley, chair, Senate Whistleblowing Caucus, and Sen. Ron Wyden, vice chair, Senate Whistleblowing Caucus, from Dr. Scott Alan and Dr. Pamela McPherson, July 17, 2018, p. 2, <https://www.wyden.senate.gov/imo/media/doc/Doctors%20Congressional%20Disclosure%20SWC.pdf> (accessed September 30, 2024).

⁵ Patrice Taddonio, “‘The Most Horrible Thing I’ve Ever Done’: A Border Patrol Officer Who Separated Families Speaks Out,” *Frontline*, January 7, 2020, <https://www.pbs.org/wgbh/frontline/article/the-most-horrible-thing-ive-ever-done-a-border-patrol-officer-who-separated-families-speaks-out/> (accessed September 30, 2024).

⁶ Laura Bush, “Laura Bush: Separating Children from Their Parents at the Border ‘Breaks My Heart,’” *Washington Post*, June 17, 2018, https://www.washingtonpost.com/opinions/laura-bush-separating-children-from-their-parents-at-the-border-breaks-my-heart/2018/06/17/f2df517a-7287-11e8-9780-b1dd6a09b549_story.html (accessed September 30, 2024).

⁷ David Nakamura, “‘Morally Repugnant’: Homeland Security Advisory Council Members Resign over Immigration Policies,” *Washington Post*, July 17, 2018, <https://www.washingtonpost.com/news/post-politics/wp/2018/07/17/morally-repugnant-homeland-security-advisory-council-members-resign-over-immigration-policies/> (accessed September 30, 2024).

⁸ Order Granting Plaintiffs’ Motion for Classwide Preliminary Injunction, pp. 14-15, *Ms. L. v. ICE*, No. 18-cv-0428 (S.D. Cal. June 26, 2018), ECF No. 83, <https://www.aclu.org/cases/ms-l-v-ice?document=ms-l-v-ice-order-amending-briefing-schedule> (accessed September 30, 2024).

Reuniting children with their parents was a fraught process. One woman was initially handed the wrong baby.

To complicate matters, “[i]nstead of working to reunify families after parents were prosecuted, officials worked to keep them apart for longer,” the investigative journalist Caitlin Dickerson concluded in a 2022 in-depth article for *The Atlantic*.⁹

As a result, unraveling the chaos created by the policy has taken time. In many cases, families have not yet been reunited.

In February 2018, the American Civil Liberties Union (ACLU) brought a court case that compelled the US government to disclose how many children were forcibly separated from their parents under the policy. Authorities struggled to provide this information, eventually telling the court that more than 2,800 children had been forcibly separated from their parents in May and June 2018.

By the end of 2018, forcible family separation had cost US taxpayers at least US\$80 million, according to one conservative estimate. Even at that point, the true cost was certainly much higher.

The total number of children forcibly separated from their parents was also much higher than the government stated in its initial court disclosures. The policy’s true scope only became apparent after years of efforts to identify, locate, and reunite separated children and their parents. The government’s best estimate to date is that it forcibly separated more than 4,600 children from their parents between 2017 and 2021.

For instance, a government report published in January 2019 found that the policy went into effect much earlier than the administration had up to that point acknowledged.

The government also eventually acknowledged that forcible family separations continued well after the June 2018 executive order that purported to end the policy. In some cases, these were triggered by minor, nonviolent offenses, such as a 20-year-old nonviolent theft

⁹ Caitlin Dickerson, “The Secret History of the U.S. Government’s Family Separation Policy,” *The Atlantic*, August 7, 2022, p. 39, <https://www.theatlantic.com/magazine/archive/2022/09/trump-administration-family-separation-policy-immigration/670604/> (accessed October 25, 2024).

conviction in one case and possession of a small amount of marijuana in another, in cases reviewed by the *New York Times*. Most of these cases did not list detailed reasons for the separation. These figures did not include the number of children who were forcibly separated from relatives other than parents.

The government reached a settlement in October 2023 in *Ms. L v. US Immigration and Customs Enforcement (ICE)*, the court case brought by the ACLU five years earlier.

More than six years after Attorney General Jeff Sessions publicly acknowledged in May 2018 that the Justice Department was working with Homeland Security to separate thousands of children from their families, the US government has gone to significant lengths to reunite these families, including by bringing many deported parents back to the United States and providing them with temporary status and work authorization. But in 2024, as many as 1,360 children, nearly 30 percent of all known separated children, may remain separated from their parents. The architects of forcible family separation have not been held to account. The Family Reunification Task Force established by the administration of President Joe Biden in 2021 has not yet made public “recommendations to ensure that the Federal Government will not repeat the policies and practices leading to the separation of families at the border,” as mandated by the executive order that created it. A new administration will take office in January 2025, potentially meaning that the task force has only a few weeks to conclude its work.

The *Ms. L* settlement limits the circumstances under which children can be forcibly separated from their parents or guardians at the border. This protection remains in effect until 2031.

Even so, family separation still happens at the border—not as the result of improper entry charges, but in specific scenarios, including when a parent has a criminal record or when a child is travelling with an older sibling, a grandparent, or another relative. A criminal record is not automatic grounds for loss of parental rights in any other context, and there is no practical justification for routinely separating a child from a non-parental relative. These practices should end; DHS should instead adopt standards that presumptively keep families together, separating them only when in the child’s best interest, and Congress should enact these protections into law.

The forcible separation of children from their parents violated their internationally recognized rights to protection from harm and preservation of their family relations.

Many separations involved the government's refusal, for days or even weeks, to disclose the fate and whereabouts of children to their parents, and as such were enforced disappearances.

Forcible family separations may also have resulted in torture, defined as the intentional infliction of severe pain or suffering for an improper purpose by a state agent.

Enforced disappearance and torture are grave human rights violations. Even a single instance of enforced disappearance or torture is a crime under international law.

Effective remedies for the extraordinary harms the US government inflicted on these families require more than grants of temporary status and short-term access to mental health services. To the extent that forcible family separation amounts to torture or enforced disappearance, these particularly serious human rights violations require comprehensive redress.

Congress and the executive branch should consider extending these families permanent residence as partial redress for the wrongs they suffered. Supportive services, including mental health services, should be available on an ongoing basis to families who request it.

Fully reckoning with the serious human rights violations inherent in forcible family separations requires a public accounting, an apology, compensation, and other steps to ensure that these wrongs never recur. The task force should publicly report its recommendations. Congress should prepare a full report on forcible family separation, including its impacts, the extraordinary efforts required to address the severe harms it wrought, and safeguards against recurrence.

To the extent that forcible family separation rises to the level of torture or enforced disappearance, it involved crimes under international law for which the architects of the policy potentially bear individual responsibility. The US Department of Justice should investigate, and if appropriate prosecute, the architects of the forcible family separation policy for these international crimes.

Forcible Family Separations, Step by Step

US-Mexico border, 2017–2018

① The family crosses the border



Parents travel with their children to the US-Mexico border, enter the United States irregularly, and turn themselves in to **US Border Patrol** agents to seek asylum.

② Border Patrol detains them in the *hielera*



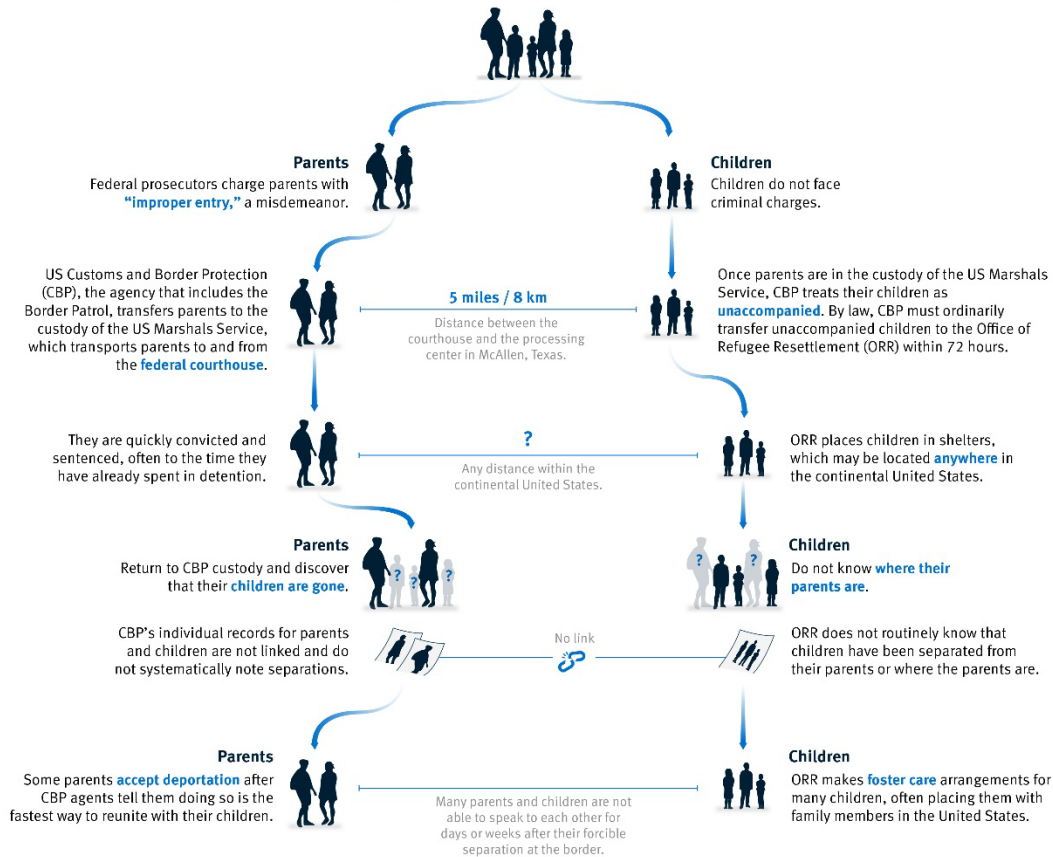
Border Patrol detains the family in the *hielera* (literally, “the freezer”), an immigration holding cell that is often **uncomfortably cold**.

③ The family is transferred to processing centers



Border Patrol often then transfers families to larger processing centers. Some hold people in rows of caged pens that resemble a **dog kennel**.

④ Family in the processing center



More than 1,300 children may remain separated from their parents



Methodology

This report reviews government memoranda, internal investigations, the statements of public officials, congressional hearings, court filings, and news reports on forcible family separation. It draws on Human Rights Watch interviews with separated children, parents, lawyers, and Border Patrol officials in 2018 and 2019 and Human Rights Watch’s observations during site visits of immigration holding cells during this time.

Human Rights Watch conducted interviews in McAllen (June 2018), Brownsville (July 2018), Karnes City (July 2018), Port Isabel (July 2018), Tornillo (October 2018), El Paso (July 2019), and Clint (July 2019), all in Texas; Santa Teresa, New Mexico (July 2018); San Pedro Sula and Yoro, Honduras (July 2018); and Homestead, Florida (March 2019).

The researchers who conducted these interviews also took part in inspections of and interviews at immigration detention facilities as part of periodic monitoring teams assessing immigration authorities’ compliance with the 1997 *Flores* settlement agreement.¹⁰ Court filings reviewed for this report include the sworn declarations collected by *Flores* monitoring teams in 2018 and 2019, including those collected by teams that did not include Human Rights Watch staff. These declarations are publicly available in redacted form on the federal courts’ electronic records system¹¹ and, for the relevant period, on the website of Project Amplify.¹²

Many of the memoranda and other government documents on the development and implementation of the forcible family separation policy were disclosed in litigation by the ACLU¹³ and other groups¹⁴ or in response to Freedom of Information Act requests, including

¹⁰ Stipulated Settlement Agreement, *Flores v. Reno*, No. CV 85-4544 (C.D. Cal. January 17, 1997), <https://www.aclu.org/legal-document/flores-v-meese-stipulated-settlement-agreement-plus-extension-settlement> (accessed September 30, 2024).

¹¹ This system, known as PACER (or Public Access to Court Electronic Records), is available at <https://pacer.uscourts.gov/>.

¹² “Child Migrants Speak Truth to Power,” undated, Project Amplify, <https://www.project-amplify.org/declarations> (accessed September 30, 2024).

¹³ “Ms L. v. ICE,” ACLU, last updated September 26, 2024, <https://www.aclu.org/cases/ms-l-v-ice#summary> (accessed September 30, 2024).

¹⁴ For example, Criminal Prosecution of Aliens Who Entered Unlawfully: Legal Guidance on Potential Separation of Family Members, Memorandum for the Secretary from John M. Mitnick, general counsel, US Department of Homeland Security, April 24, 2018, in Plaintiffs’ Administrative Motion for Leave to File Exhibit with Joint Discovery Letter, Exhibit A, *P.G. v. United States*, Case No. 4:21-cv-04457-KAW (N.D. Cal. filed September 15, 2023), ECF No. 100-2.

those by the American Immigration Council and other groups,¹⁵ American Oversight,¹⁶ and Caitlin Dickerson, an investigative journalist with *The Atlantic*.¹⁷ Others were leaked to journalists and described in news accounts.

Human Rights Watch researchers conducted interviews in 2018 and 2019 with separated children and parents in Spanish or Portuguese. We explained to all interviewees the purpose and public nature of our reporting, that the interviews were voluntary and confidential, and that they would receive no personal service or benefit for speaking to us, and we obtained oral consent from each adult interviewee and oral assent from each child interviewee.

This report uses pseudonyms for all migrant or asylum-seeking children and adults. Human Rights Watch interviews are assigned a pseudonym consisting of a first name followed by an initial (for example, “Edgar Q.”) and note the date and place of the interview. Sworn declarations collected by the *Flores* monitoring teams and other references to separated children or parents in court documents follow the form used in those documents, which in most cases identify children and their parents by initials.¹⁸

Human Rights Watch has also withheld the names and other identifying information of some lawyers and government officials who requested that we not publish this information.

Human Rights Watch sought comment from each of the government officials we identified as having developed or approved the forcible family separation policy. As of December 2,

¹⁵ American Immigration Council, “Government Documents on Family Separation,” undated, <https://www.americanimmigrationcouncil.org/foia/government-documents-family-separation-tracking-policys-evolution-implementation-and-harm> (accessed September 30, 2024).

¹⁶ See American Oversight, “DHS Records Relating to Family Separation from 2017 to 2019,” March 15, 2023, <https://americanoversight.org/featuredocument/dhs-records-relating-to-family-separation-from-2018-to-2019/> (accessed November 19, 2024).

¹⁷ Caitlin Dickerson, “The Family-Separation Files,” *The Atlantic*, December 31, 2022, <https://www.theatlantic.com/politics/archive/2022/12/the-secret-history-of-family-separation-document-collection/672146/> (accessed September 30, 2024).

¹⁸ See, for example, Declaration of K.G. (June 15, 2018), in Redacted Exhibits in Support of Plaintiffs’ Response to Defendants’ First Juvenile Coordinator Reports, Ex. 99, *Flores v. Sessions*, No. 2:85-cv-04544-DMG-AGR (C.D. Cal. July 19, 2018), ECF No. 462-7, available at Project Amplify, “Child Migrants Speak Truth to Power,” July 2018 tabs, <https://www.project-amplify.org/declarations> (accessed September 30, 2024).

2024, when this report was finalized for publication, none of these officials had provided comments on our findings or answers to our questions.¹⁹

In line with international standards, the term *child* refers to a person under the age of 18.²⁰ As the United Nations Committee on the Rights of the Child and other international authorities do, we use the term *unaccompanied children* in this report to refer, in the context of migration, to children “who have been separated from both parents and other relatives and are not being cared for by an adult who, by law or custom, is responsible for doing so.”²¹ *Separated children* are those who are “separated from both parents, or from their previous legal or customary primary caregiver, but not necessarily from other relatives,”²² meaning that they may be accompanied by other adult family members.

This report uses *refugee* to mean a person who meets the criteria in the 1951 Refugee Convention and its 1967 Protocol, under which a refugee is a person with a “well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion,” who is outside of the country of nationality and is unable or unwilling, because of that fear, to return.²³ The UN Refugee Agency (UNHCR) has concisely restated this standard in these terms: “Refugees are people who have fled their countries to escape conflict, violence, or persecution and have sought safety in another country.”²⁴ People are refugees as soon as they fulfill the criteria in the Refugee Convention and Protocol. UNHCR explains:

¹⁹ One official, former Deputy Attorney General Rod Rosenstein, replied to our letter but did not answer our questions or otherwise comment on our findings. Email from Rod Rosenstein to Michael Garcia Bochenek, November 25, 2024 (on file with Human Rights Watch).

²⁰ Convention on the Rights of the Child, November 20, 1989, 1577 U.N.T.S. 3 (entered into force September 2, 1990), art. 1. The United States has signed the convention, obligating it to refrain from actions that would defeat the convention’s object and purpose, but has not ratified it.

²¹ United Nations Committee on the Rights of the Child, General Comment No. 6: Treatment of Unaccompanied and Separated Children Outside Their Country of Origin, U.N. Doc. CRC/GC/2005/6 (September 1, 2005), para. 7; United Nations High Commissioner for Refugees (UNHCR), United Nations Children’s Fund (UNICEF), et al., *Inter-Agency Guiding Principles on Unaccompanied and Separated Children* (Geneva: International Committee of the Red Cross, 2004), p. 13, <https://shop.icrc.org/inter-agency-guiding-principles-on-unaccompanied-and-separated-children-pdf-en.html> (accessed October 25, 2024).

²² Committee on the Rights of the Child, General Comment No. 6, para. 8; *Inter-Agency Guiding Principles on Unaccompanied and Separated Children*, p. 13. See also *Separated Children in Europe Programme: Statement of Good Practice* (Copenhagen: Save the Children, UNHCR, and UNICEF, 4th rev. ed. 2009), <https://resourcecentre.savethechildren.net/pdf/5034.pdf> (accessed October 25, 2024).

²³ Convention relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 150 (entered into force April 22, 1954), art. 1; Protocol relating to the Status of Refugees, January 31, 1967, 606 U.N.T.S. 267 (entered into force October 4, 1967), art. 1. The United States acceded to the Refugee Protocol on November 1, 1968.

²⁴ UNHCR, “Who We Protect: Refugees,” undated, <https://www.unhcr.org/us/refugees> (accessed September 30, 2024).

A person is a refugee within the meaning of the 1951 Convention as soon as he fulfils the criteria contained in the definition. This would necessarily occur prior to the time at which his refugee status is formally determined. Recognition of his refugee status does not therefore make him a refugee but declares him to be one. He does not become a refugee because of recognition, but is recognized because he is a refugee.²⁵

The term *migrant* is not defined in international law; our use of this term is in its “common lay understanding of a person who moves away from his or her place of usual residence, whether within a country or across an international border, temporarily or permanently, and for a variety of reasons.”²⁶ It includes asylum seekers and refugees, and the term *migrant children* includes children who may be refugees or seeking asylum.

²⁵ UNHCR, Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees, U.N. Doc. HCR/IP/4/Eng/REV.3 (2011), para. 28, <https://digitallibrary.un.org/record/752983?v=pdf> (accessed October 25, 2024).

²⁶ International Organization for Migration (IOM), *Glossary on Migration* (Geneva: IOM, 2019), p. 132, https://publications.iom.int/system/files/pdf/iml_34_glossary.pdf (accessed September 30, 2024).

I. Systematic Separations in 2017 and 2018

A distraught but determined 6-year-old Salvadoran girl pleads repeatedly for someone to call her aunt. Just one call, she begs anyone who will listen. She says she’s memorized the phone number, and at one point, rattles it off to a consular representative.

—Ginger Thompson, “Listen to Children Who’ve Just Been Separated from Their Parents at the Border,” *ProPublica*, June 18, 2018

Abrupt separation from primary caregivers or parents is a major psychological emergency.

—Jack P. Shonkoff, professor of pediatrics, Harvard Medical School, interviewed by Isaac Chotiner for *The New Yorker*, July 13, 2019

Rolando B. and his son, Johan, then 11 months old, crossed the US-Mexico border into Texas on March 16, 2018, and turned themselves in to the Border Patrol. They were held for four days together in the chain-link cages of the Ursula detention center in McAllen. On the fourth day, an officer wearing a US Immigration and Customs Enforcement (ICE) t-shirt told Rolando to hand over his child. “He said, ‘Say goodbye to your son, because you’re not going to see him anymore,’” Rolando told Human Rights Watch in San Pedro Sula, Honduras, in July 2018.²⁷

Well before March 2018, there had been ample indication that the US government was considering family separation. John Kelly, then secretary of homeland security, had publicly floated the idea 12 months before and then quickly walked it back.²⁸ But Attorney General Jeff Sessions did not issue his “zero tolerance” policy until April 2018, and the US

²⁷ Human Rights Watch interview with Rolando B., San Pedro Sula, Honduras, July 20, 2018. For a fuller account of Rolando and Johan’s case, see Clara Long, “Deported Parent Worries 1-Year-Old Will Have Lasting Trauma,” Human Rights Watch, July 20, 2018, <https://www.hrw.org/news/2018/07/20/deported-parent-worries-1-year-old-will-have-lasting-trauma>; Astrid Galvan, “1-Year-Old Separated from Dad Will Return to Honduras Soon,” *U.S. News and World Report*, July 13, 2018, <https://www.usnews.com/news/us/articles/2018-07-13/1-year-old-separated-from-dad-will-return-to-honduras-soon> (accessed September 30, 2024).

²⁸ Daniella Diaz, “Kelly: DHS Is Considering Separating Undocumented Children from Their Parents at the Border,” *CNN*, March 7, 2017, www.cnn.com/2017/03/06/politics/john-kelly-separating-children-from-parents-immigration-border/index.html (accessed September 30, 2024); Tal Kopan, “Kelly Says DHS Won’t Separate Families at the Border,” *CNN*, March 29, 2017, <https://www.cnn.com/2017/03/29/politics/border-families-separation-kelly/index.html> (accessed September 30, 2024).

Department of Homeland Security (DHS) did not implement it along the border until the following month.²⁹

As Rolando and Johan’s case illustrates, however, the US government began separating children from families well before Sessions formally issued the policy. In addition to carrying out a targeted pilot program in New Mexico and western Texas, the US government had, elsewhere along the border, “quietly begun taking hundreds of children away from their parents to deter would-be asylum seekers from coming to the United States,” according to Lee Gelernt of the American Civil Liberties Union (ACLU).³⁰ Just a few days after US border agents forcibly separated Rolando and Johan, the ACLU asked a federal judge to issue a nationwide injunction to stop the practice.³¹

Most of these separations were of children from parents who had entered the United States irregularly. Improper entry is a misdemeanor, and the government used this minor federal charge to deem parents “unavailable,” transferring their children to shelters run by the Office of Refugee Resettlement (ORR), an agency of the US Department of Health and Human Services (HHS). In addition, US Customs and Border Protection (CBP) separated dozens of children from parents who had requested asylum at ports of entry—cases that involved no improper entry—following vague guidance and in many instances for reasons that appeared to be inconsistent with CBP policy.³²

²⁹ See Joshua Barajas, “How Trump’s Family Separation Policy Became What It Is Today,” *PBS News*, June 14, 2018, updated June 21, 2018, <https://www.pbs.org/newshour/nation/how-trumps-family-separation-policy-has-become-what-it-is-today> (accessed September 30, 2024).

³⁰ Lee Gelernt, “The Battle to Stop Family Separation,” *New York Review of Books*, December 19, 2018, <https://www.nybooks.com/online/2018/12/19/the-battle-to-stop-family-separation/> (accessed September 30, 2024).

³¹ Motion for Preliminary Injunction for Classwide Relief, *Ms. L. v. ICE*, No. 3:18-cv-00428-DMS-AHG (S.D. Cal. March 19, 2018), ECF No. 48.

³² Office of Inspector General, Department of Homeland Security, CBP Separated More Asylum-Seeking Families at Ports of Entry Than Reported and for Reasons Other Than Those Outlined in Public Statements, OIG-20-35 (May 29, 2020), pp. 6-9, <https://www.oig.dhs.gov/sites/default/files/assets/2020-06/OIG-20-35-May20.pdf> (accessed September 30, 2024); Neena Satija and Anayansi Diaz-Cortez, “Why Did the Trump Administration Separate Asylum-Seekers from Their Kids?” *Texas Tribune*, October 2, 2018, <https://www.texastribune.org/2018/10/02/why-did-trump-administration-separate-asylum-seekers-their-kids/> (accessed September 30, 2024); Neena Satija, “The Trump Administration Is Not Keeping Its Promises to Asylum Seekers Who Come to Ports of Entry,” *Texas Tribune*, July 5, 2018, <https://www.texastribune.org/2018/07/05/migrants-seeking-asylum-legally-ports-entry-turned-away-separated-fami/> (accessed September 30, 2024); Paloma Esquivel and Brittney Mejia, “The Trump Administration Says It’s a ‘Myth’ That Families That Ask for Asylum at Ports of Entry Are Separated. It Happens Frequently, Records Show,” *Los Angeles Times*, July 1, 2018, <https://www.latimes.com/local/lanow/la-me-ln-port-of-entry-separations-20180701-story.html> (accessed September 30, 2024); Katie Shepherd, “Border Patrol Agents May Have Separated Families at Legal Ports of Entry Despite Promises Not To,” *Willamette Week*, June 19, 2018, <https://www.wweek.com/news/courts/2018/06/19/border-patrol-agents-may-have-separated-families-at-legal-ports-of-entry-despite-promises-not-to/> (accessed September 30, 2024).

By June 2018, with “zero tolerance” in full swing, forcibly separated parents were arriving in federal court anxious to know when they would see their children again. “All the parents asked about their kids, but the judge said he was not there to handle the children. He was just there to sentence us for the crime of crossing the river,” a 28-year-old Honduran woman told members of a volunteer team of lawyers monitoring compliance with the *Flores* settlement agreement, which had set minimum standards of care for children in immigration detention.³³

Most parents later learned that their children had been or were about to be sent to an ORR shelter, but in at least one case, a woman returned from court to learn that her 13-year-old son had been returned to Mexico.³⁴

In some cases, parents spent weeks without knowing where their children were; in other cases, they were deported alone with no information about their separated children, who remained in the United States. Some parents said that immigration officials induced them to waive their rights, including to seek asylum, telling them it was the only way, or the fastest way, to be reunited with their children.

Similarly, many of the children interviewed by Human Rights Watch lawyers and others on the *Flores* monitoring teams said they did not know where their parents were, how long they would be locked up, or what would happen next.

Forcible separation was unquestionably devastating for children and their parents. Health professionals warned at the time that family separation inflicted severe, potentially lifelong psychological harm. Six years later, therapists who work with reunited families confirm that children and parents are still struggling with trauma stemming from their forcible separation.

³³ Declaration of R.M., June 29, 2018, para. 13 [Ex. 16]. June and July 2018 declarations cited by exhibit number in this chapter are from the 12-volume July 2018 filing by *Flores* class counsel and are available on Project Amplify’s website. See Exhibits in Support of Plaintiffs’ Response to Defendants’ First Juvenile Coordinator Report, Volumes 1-12, *Flores v. Sessions*, Case No. 85-cv-4544 DMG (C.D. Cal. filed July 19, 2018), ECF Nos. 462-1 to 462-12, available at Project Amplify, “Child Migrants Speak Truth to Power,” July 2018 tabs, last updated August 2019, <https://www.project-amplify.org/declarations> (accessed September 30, 2024).

³⁴ Declaration of P.H., June 29, 2018, para. 7 [Ex. 159]. See also Declaration of A.A., June 29, 2018, para. 4 [Ex. 156].

The forcible family separation policy was rolled out along the US-Mexico border as President Trump described immigrants as “animals” and “rapists” and in other overheated, dehumanizing, and racist terms.³⁵

The government officials who developed the forcible family separation policy aimed to separate all families who crossed the US-Mexico border irregularly, or at least as many as possible.

When somebody is deprived of liberty, as all separated parents and children were, and the government then refuses to disclose the whereabouts of the person it has detained to the person’s family, the result is an enforced disappearance, a gross violation of human rights.³⁶ As discussed in subsequent chapters, forcible family separation also may have met the constituent elements of torture.³⁷

The Mechanism

The forcible family separation policy deployed minor federal charges to transfer parents from the custody of US Customs and Border Protection (CBP), an agency within DHS, to that of the US Marshals Service, part of the US Department of Justice (DOJ). DHS and DOJ then interpreted a provision of federal anti-trafficking laws to treat their children as unaccompanied—even though DHS had apprehended the family together, would resume custody of parents facing federal charges within a few days, and knew at all times where the parents were.

The first step in this process was a federal criminal charge for improper entry. First-time improper entry is a misdemeanor—a federal magistrate judge described it as “quite literally one of the least serious federal offenses.”³⁸ These cases are often disposed of in a

³⁵ See Nicole Austin-Hillery, “Trump’s Racist Language Serves Abusive Immigration Policies,” Human Rights Watch, May 22, 2018, <https://www.hrw.org/news/2018/05/22/trumps-racist-language-serves-abusive-immigration-policies>.

³⁶ See Chapter VII, “Prohibition of Enforced Disappearance” section.

³⁷ See Chapter VII, “Prohibition of Torture” section.

³⁸ Opinion, p. 15 n.14, *United States v. Dominguez-Portillo*, No. EP-17-MJ-4409-MAT (W.D. Texas January 5, 2018), <https://s3.documentcloud.org/documents/4546884/Dominguez-Portillo-Magistrate-Opinion.pdf> (accessed September 30, 2024).

matter of minutes and usually result in sentences of time already served.³⁹ Improper entry charges had long been problematic: they were disproportionately pursued against people with no criminal record or whose only convictions were for minor offenses; they effectively criminalized efforts to seek asylum, in violation of international refugee law; and they inappropriately deployed criminal law to regulate migration.⁴⁰ Criminalization of irregular entry is inconsistent with international standards.⁴¹

Nonetheless, Attorney General Jeff Sessions directed federal prosecutors to make improper entry, along with several more serious charges, “higher priorities” in April 2017.⁴² DHS officials described these prosecutions as a means of deterring parents and other relatives from bringing or paying to have children brought to the United States.⁴³ In early April 2018, Sessions instituted a “zero tolerance” policy for improper entry,⁴⁴ publicly announcing the policy in a May 2018 speech.⁴⁵

³⁹ Eleanor Acer, “Criminal Prosecutions and Illegal Entry: A Deeper Dive,” Just Security, July 18, 2019, <https://www.justsecurity.org/64963/criminal-prosecutions-and-illegal-entry-a-deeper-dive/> (accessed September 30, 2024); Office of the Inspector General, US Department of Justice, Review of the Department of Justice’s Planning and Implementation of Its Zero Tolerance Policy and Its Coordination with the Departments of Homeland Security and Health and Human Services (January 2021, revised April 2022), p. 5, https://oig.justice.gov/sites/default/files/reports/21-028_o.pdf (accessed September 30, 2024).

⁴⁰ See Human Rights Watch, *Turning Migrants into Criminals: The Harmful Impact of US Border Prosecutions* (New York: Human Rights Watch, 2013), <https://www.hrw.org/report/2013/05/22/turning-migrants-criminals/harmful-impact-us-border-prosecutions>.

⁴¹ See, for example, UN Committee on the Elimination of Racial Discrimination, Concluding Observations: United States of America, U.N. Doc. CERD/C/USA/CO/10-12 (September 21, 2022), para. 52(c); UN Working Group on Arbitrary Detention, Revised Deliberation No. 5 on Deprivation of Liberty of Migrants, para. 10, in UN Human Rights Council, Report of the Working Group on Arbitrary Detention, U.N. Doc. A/HRC/39/45 (July 2, 2018), annex.

⁴² Office of the Attorney General, US Department of Justice (DOJ), Memorandum for All Federal Prosecutors: Renewed Commitment to Criminal Immigration Enforcement (April 11, 2017), https://www.justice.gov/d9/speeches/attachments/2017/04/11/memo_on_renewed_commitment_to_criminal_immigration_enforcement_o.pdf (accessed September 30, 2024).

⁴³ Ron Nixon and Caitlin Dickerson, “Immigration Officials Taking New Steps to Discourage Smuggling of Children,” *New York Times*, September 24, 2017, <https://www.nytimes.com/2017/09/24/us/politics/parents-illegal-immigrants-human-smuggling.html> (accessed September 30, 2024); Lomi Kriel, “ICE Targeting Relatives Who Pay to Illegally Bring Children into U.S.,” *Houston Chronicle*, updated July 1, 2017, <https://www.houstonchronicle.com/news/houston-texas/houston/article/ICE-targeting-relatives-who-pay-to-illegally-11260232.php> (accessed September 30, 2024).

⁴⁴ “I direct each United States Attorney’s Office along the Southwest Border—to the extent practicable, and in consultation with DHS—to adopt immediately a zero-tolerance policy for all offenses referred for prosecution under section 1325(a).” Office of the Attorney General, Memorandum for Federal Prosecutors Along the Southwest Border: Zero Tolerance for Offenses Under 8 U.S.C. § 1325(a) (April 6, 2018), available at <https://www.justice.gov/opa/press-release/file/1049751/dl> (accessed October 25, 2024).

⁴⁵ “The Department of Homeland Security is now referring 100 percent of illegal Southwest Border crossings to the Department of Justice for prosecution. And the Department of Justice will take up those cases.” DOJ Office of Public Affairs, “Attorney General Sessions Delivers Remarks Discussing the Immigration Enforcement Actions of the Trump Administration,” May 7, 2018, <https://www.justice.gov/opa/speech/attorney-general-sessions-delivers-remarks-discussing-immigration-enforcement-actions> (accessed September 30, 2024).

Next, DHS and DOJ employed a strained interpretation of federal law intended to afford specific protections to unaccompanied children. Under federal anti-trafficking legislation and regulations, an “unaccompanied child” is an undocumented child under 18 who has no parent or legal guardian in the United States who is available to provide care and physical custody.⁴⁶

The parents charged with improper entry were still in the United States—they were in a federal courthouse, in many cases just a few miles from the CBP holding cells where their children remained. But at that point they were in the custody of the US Marshals Service, and DHS and DOJ treated this temporary transfer of custody as the basis for stating that charged parents were not “available.” The departments made no allowance for the fact that the parents would be back in DHS custody within days.

Finally, once DHS deemed their children “unaccompanied,” it handed the children off to ORR, the HHS agency responsible for the care of unaccompanied migrant children. ORR placed the children in shelters while it sought longer-term placements with other relatives already in the United States, other “sponsors,” or foster care.⁴⁷

In fact, as established in combination by official memoranda, emails, notes of internal discussions, and interviews by investigative journalists, the “zero tolerance” directive was a policy designed to systematically separate children from migrant parents who entered the United States irregularly.⁴⁸

Children in Cages

The children will be taken care of—put into foster care or whatever.

—White House chief of staff John Kelly, in a National Public Radio interview, May 11, 2018

DHS had done no real planning for how it would provide age-appropriate care for the hundreds of children it had abruptly and forcibly separated from their parents. Transfers of children to ORR are not immediate—DHS ordinarily has 72 hours to carry them out and is

⁴⁶ 6 U.S.C. § 279(g); 8 C.F.R. § 236.3(a)(3).

⁴⁷ Office of Inspector General, US Department of Health and Human Services (HHS), Separated Children Placed in Office of Refugee Resettlement Care (January 2019), p. 3, <https://oig.hhs.gov/oei/reports/oei-BL-18-00511.pdf> (accessed April 23, 2014).

⁴⁸ See Chapter VI, “Family Separation Was Intentional” section.

allowed more time in “exceptional” circumstances.⁴⁹ In the meantime, the children were DHS’s responsibility.

CBP holding cells have no recreational areas, no place to run around and play, and no toys or books of any kind.⁵⁰ “We’re not set up as a child-care facility,” an official in the Central Processing Center, on Ursula Avenue in McAllen, told Human Rights Watch in June 2018.⁵¹ That was stating the obvious: people held in the Ursula detention center usually called it the *perrera*, or “dog kennel,” because its rows of caged pens look like they might have been designed to hold animals.⁵²

Human Rights Watch lawyers and others taking part in *Flores* monitoring visits in June 2018 watched as hundreds of unaccompanied children—toddlers, teenagers, and all ages in between—sat in Ursula’s caged pens. Two boys, each about 10 years old, improvised a game with their water bottles, tossing them back and forth. Most of the children huddled under foil blankets for warmth. Some looked bewildered and lost.

The only staff we saw were uniformed guards—a handful assigned to a cluster of cages that each held 20 to 30 children. Their interactions with the children consisted almost entirely of barked commands, either for individual children to come forward or for everybody in a particular area to move to another or to line up for food.

The cages were very cold, as were holding cells in other border detention centers Human Rights Watch visited as part of the monitoring team. In fact, *hielera*, meaning “freezer,” is the term commonly used by detained children and adults, along with many border agents,

⁴⁹ 8 U.S.C. § 1232(b)(3).

⁵⁰ For an overview of these and other longstanding problems with the detention of children in CBP holding cells, see Human Rights Watch, *In the Freezer: Abusive Conditions for Women and Children in US Immigration Holding Cells* (New York: Human Rights Watch, 2018), <https://www.hrw.org/report/2018/02/28/freezer/abusive-conditions-women-and-children-us-immigration-holding-cells>.

⁵¹ Human Rights Watch interview, McAllen, Texas, June 17, 2018. See also Michael Garcia Bochenek, “‘Whatever’—What Happens to Kids Taken from Families at US Border,” Human Rights Watch, June 18, 2018, <https://www.hrw.org/news/2018/06/18/whatever-what-happens-kids-taken-families-us-border>.

⁵² Ursula closed for renovations in 2020 and reopened in 2022 without the chain-link cages. Miriam Jordan, “U.S. Shutters Warehouse Where Migrants Were Kept in ‘Cages,’” *New York Times*, November 25, 2020, <https://www.nytimes.com/2020/11/25/us/border-migrant-children-cages-ursula-warehouse.html> (accessed September 30, 2024); Valerie Gonzalez, “Renovated CBP Processing Center Reopens in McAllen,” *myRGV.com*, March 14, 2022, <https://myrgv.com/local-news/2022/03/14/renovated-cbp-processing-center-reopens-in-mcallen/> (accessed September 30, 2024).

to refer to Border Patrol holding cells other than Ursula, which is no less frigid but stood out for its distinctively inhumane cages.⁵³ “Human heat was not enough to warm the babies,” a 23-year-old Honduran woman told the inspection team.⁵⁴

As in all immigration holding cells, the lights in the Ursula facility were on 24 hours a day and never dimmed, with potentially severe physical and mental health impacts.⁵⁵ Children found the experience disorienting: when Human Rights Watch interviewed a 13-year-old boy in the early afternoon, he asked whether the sun had risen yet.⁵⁶

Immigration holding cells have specific rules that children and their parents struggled to understand. Guards sometimes ordered children not to touch each other.⁵⁷ All but the youngest children were usually held apart from parents, and men and women are separated, so members of a single family might be placed in three different cells.⁵⁸ At Ursula, guards told some women and children they would be “punished” or “deported right now” for looking at each other while they were in different cages.⁵⁹

Too often, border guards casually subjected children and adults to other degrading treatment in these holding cells. Commonly, this took the form of insults or other verbal abuse, but many of the parents and children in Ursula also described waking up to guards kicking them.⁶⁰ In one case, guards refused to let an 8-year-old girl shower or rinse out her underwear after she soiled herself, forcing her to remain in that state for several days.⁶¹

⁵³ See Human Rights Watch, *In the Freezer*, pp. 1, 4-5.

⁵⁴ Declaration of B.F., June 29, 2018, para. 4 [Ex. 18].

⁵⁵ See Angus C. Burns et al., “Day and Night Light Exposure Are Associated with Psychiatric Disorders: An Objective Light Study in 85,000 People,” *Nature Mental Health*, vol. 1 (2023), pp. 853-62, <https://doi.org/10.1038/s44220-023-00135-8>; Christine Bloom, Corrado Garbazza, and Manuel Spitschan, “Effects of Light on Human Circadian Rhythms, Sleep and Mood,” *Somnologie* (Berlin), vol. 23 (2019), pp. 147-56, <https://doi.org/10.1007/s11818-019-00215-x>.

⁵⁶ Human Rights Watch interview with Byron L., McAllen, Texas, June 15, 2018.

⁵⁷ See, for example, Daniella Silva, “‘Like I Am Trash’: Migrant Children Reveal Stories of Detention, Separation,” *NBC News*, July 29, 2018, <https://www.nbcnews.com/news/latino/i-am-trash-migrant-children-reveal-stories-detention-separation-n895006> (accessed September 30, 2024).

⁵⁸ Declaration of D.R., June 29, 2018, para. 3 [Ex. 4].

⁵⁹ Declaration of L.S., June 29, 2018, para. 5 [Ex. 3]; Declaration of D.R., June 29, 2018, para. 6 [Ex. 4]. See also Declaration of L.X., June 28, 2018, para. 9 [Ex. 30].

⁶⁰ Declaration of D.R., June 29, 2018, para. 6 [Ex. 4]; Declaration of K.M., June 29, 2018, para. 8 [Ex. 6]; Declaration of I.E., June 28, 2018, para. 3 [Ex. 7]; Declaration of D.S., June 29, 2018, para. 9 [Ex. 8]; Declaration of A.V., June 29, 2018, para. 3 [Ex. 10]; Declaration of R.M., June 29, 2018, para. 14 [Ex. 16]; Declaration of D.M., June 29, 2018, para. 9 [Ex. 27]; Declaration of S.S., June 28, 2018, para. 8 [Ex. 33]; Declaration of S.P., June 29, 2018, para. 8 [Ex. 188].

⁶¹ Declaration of F.O., June 28, 2018, para. 3 [Ex. 22].



Children in the Ursula processing center, McAllen, Texas, June 17, 2018. © 2018 Mil image / Alamy Stock Photo

These and other longstanding inadequacies made border cells inappropriate and inhumane places for children. These cells were not designed for overnight stays—nor were they designed to house children, so they did not have beds and often did not have enough mats for everybody. Food typically consisted of microwaved frozen burritos, sometimes only partially thawed, or ham sandwiches, with no attempt to provide food adjusted to the needs and tastes of infants and toddlers. Guards usually confiscated toiletries, medication, and other personal items. Holding cells did not issue toothbrushes or toothpaste, often did not provide soap, and had limited access to showers. Children of all ages spent nights on concrete floors cold, hungry, and dirty, without parents or other caregivers to comfort them.

Guards were not equipped to deal with children. At one point during a June 2018 visit, Michelle Brané, then the director of the Migrant Rights and Justice Program at the Women’s

Refugee Commission,⁶² interrupted her interview with a teenage girl to break up a squabble between two 5-year-old boys who had begun to sob. The lone guard standing 30 feet away had either failed to notice that two of his charges had been reduced to tears or had not bothered to intervene.⁶³

A 17-year-old who was in Ursula at about the same time of the monitoring team's visit gave a similar account:

It felt like there were a ton of people in the cage with me. My guess is that there were 40 to 50 children in the cage with me. Some of them were teenagers like me. Others were much younger, including children only four and five years old. . . . They did not have their parents with them. There was no one to care for them. The guards did not care that the little kids were crying.⁶⁴

Brané also discovered that a group of teenage girls had been taking turns caring for a young girl in diapers for three days. The teens reported that guards had done nothing more than check off the girl's name at roll call.⁶⁵

During the same monitoring visit on the same day, a Human Rights Watch lawyer spoke to a 5-year-old boy the lawyer had seen the day before with his mother. Asked about his mother, his face dropped. "I haven't seen her since yesterday," he said. "I don't know where she is." He had been sitting in a caged area for nearly 24 hours with older children he didn't know; nobody had told him where his mother was or what would happen to him.⁶⁶

⁶² Brané served as the first executive director of the DHS Family Reunification Task Force, established by an executive order issued by President Joe Biden in February 2021. She became the DHS ombudsperson for immigration detention in April 2024. "WRC's Michelle Brané Tapped for Biden Administration," Women's Refugee Commission, March 1, 2021, <https://www.womensrefugeecommission.org/press-releases/michelle-brane-tapped-for-biden-administration/> (accessed September 30, 2024); "Michelle Brané, Ombudsman for Immigration Detention," US Department of Homeland Security, last updated May 10, 2024, <https://www.dhs.gov/person/michelle-brane> (accessed September 30, 2024).

⁶³ Michael Garcia Bochenek (Human Rights Watch), "Trump's Cruel Separation Policy Has Not Ended," Op-ed, *The Progressive*, June 25, 2018, <https://www.hrw.org/news/2018/06/25/trumps-cruel-separation-policy-has-not-ended>.

⁶⁴ Declaration of K.Y., July 13, 2018, para. 4 [Ex. 224].

⁶⁵ Michael Garcia Bochenek, "'Whatever'—What Happens to Kids Taken from Families at US Border," Human Rights Watch, June 18, 2018, <https://www.hrw.org/news/2018/06/18/whatever-what-happens-kids-taken-families-us-border>. See also Declaration of K.B., June 15, 2018, pp. 5-6 [Ex. 98]; Declaration of R.Y., June 15, 2018, paras. 3-7 [Ex. 101].

⁶⁶ Human Rights Watch interview with Evan C., McAllen, Texas, June 15, 2018.

When children realized they were being separated from their parents, many were despondent and anxious. Some were furious—at their parents, whom they blamed for abandoning them.

Pablo Z., deported to Honduras without his 4-year-old son, told Human Rights Watch he could not communicate with the boy for two weeks. “He said he didn’t want to talk to me because he said I left him there,” Pablo said. “When he says this, it makes me cry. I can’t speak. I just want to see him and hug him.”⁶⁷

A 14-year-old Honduran girl said, “I found out my mother will be charged with a crime and I will be sent away to a shelter. I am very sad and afraid. I want to be with my mom. I don’t know what will happen to her.”⁶⁸

No Explanations, Outright Lies

I was worried when we weren’t in the same group. Then [Border Patrol] started putting us into vehicles. When I left and my dad wasn’t with me, they told me not to worry, that he would be coming in a moment. I went in the car and felt very relieved and happy that he would follow. But it wasn’t like that. He didn’t come. I haven’t seen him since then.

—S.C., a 16-year-old Guatemalan boy, Brownsville, Texas, July 13, 2018

CBP agents often did not tell parents they were forcibly taking their children from them. For example, in mid-June 2018, Michelle Brané of the Women’s Refugee Commission was in the middle of an interview with a man and his daughter in a McAllen immigration holding cell when officials started to pull the girl out of the room without explanation; when Brané determined that the officials were separating the family, she prevailed on them to give the two a few minutes to say goodbye.⁶⁹ In another such case the same month, a man identified in court documents as F.G. said that guards asked his 17-year-old son to come

⁶⁷ Human Rights Watch interview with Pablo Z., Yoro, Honduras, July 19, 2018.

⁶⁸ Declaration of S.G., June 14, 2018, p. 3 [Ex. 92].

⁶⁹ Michael Garcia Bochenek, “Watching as US Officials Take Children from Their Parents,” Human Rights Watch, June 16, 2018, <https://www.hrw.org/news/2018/06/16/watching-us-officials-take-children-their-parents>.

with them without telling either F.G. or his son that they were being separated. He did not see his son again for more than 50 days.⁷⁰

In many instances, immigration agents simply lied about what they were doing, parents and children said. For example, Jessyca N., from El Salvador, told Human Rights Watch in July 2018, “The agents told us our children would be waiting for us when we returned from court.”⁷¹

Edwin H., a 45-year-old Honduran man interviewed in July 2018, said, “When they took us to court, they said we would see our kids right afterward. I thought I would come right back and see my son again. When we realized we weren’t going back to where our children were, we all started crying and pleading.”⁷²

Héctor G., 28, from El Salvador, spoke to us a month after CBP forcibly separated him from his 6-year-old son on June 12, 2018: “They took me away from my son when we were in the *huelera*. They said I had to go to court and would see my son right after. I haven’t seen him since.”⁷³

Eduardo M., an 11-year-old from Guatemala, told Human Rights Watch:

After two days a guard came and called my name. He said come with him. When I asked why, he said so I could shower in another center. I asked if I could see my father and say goodbye and he said “no” and kept walking. They put me in a van and took me to another detention center.⁷⁴

A month later, Eduardo was in an ORR shelter in Brownsville, Texas, waiting to hear what would happen to him.⁷⁵ Eduardo’s account of a border agent lying about taking him to a shower was not unusual. “It depends on who the agent is on that day. They’ll be told,

⁷⁰ Declaration of Laila Arand, paras. 6-7, *Ms. L. v. ICE*, Case No. 18-cv-00428 (S.D. Cal. filed July 28, 2018), ECF No. 163-1, <https://www.aclu.org/cases/ms-l-v-ice?document=ms-l-v-ice-exhibit-58> (accessed September 30, 2024).

⁷¹ Human Rights Watch interview with Jessyca N., Port Isabel, Texas, July 12, 2018.

⁷² Human Rights Watch interview with Edwin H., Port Isabel, Texas, July 16, 2018.

⁷³ Human Rights Watch interview with Héctor G., Port Isabel, Texas, July 12, 2018.

⁷⁴ Human Rights Watch interview with Eduardo M., Brownsville, Texas, July 13, 2018.

⁷⁵ *Ibid.*

‘We’re going to separate your kids so they can bathe.’ And that’s not true,” a public defender told *CNN* in June 2018.⁷⁶ Such reports even reached the US attorney for the Western District of Texas.⁷⁷

In other cases, immigration agents took children from their parents in the middle of the night.⁷⁸

Limited or No Contact After Forcible Separation

Many children and parents said they had no contact with each other for weeks after their forcible separation. As one indication of the scale of this issue, ORR Director Scott Lloyd emailed senior DHS officials in June 2018 saying, “We have 790 kids in our shelters who are not able to contact their parents.”⁷⁹ Those Human Rights Watch interviewed consistently described this period of uncertainty and dread as anguishing. For example, Erick P., a 15-year-old Guatemalan boy, told Human Rights Watch that after border agents separated him from his father in May 2018:

I didn’t know where my father was for over 20 days. . . . During those 20 days, I did not know if my father was dead or alive, if he was sent back home, or where he was. I was scared and sad. I asked everyone to help me find my father but they told me they could not tell me where he was.⁸⁰

⁷⁶ Ed Lavandera, Jason Morris, and Darran Simon, “She Says Federal Officials Took Her Daughter While She Breastfed the Child in a Detention Center,” *CNN*, June 14, 2018, <https://www.cnn.com/2018/06/12/us/immigration-separated-children-southern-border/index.html> (accessed June 24, 2024).

⁷⁷ DOJ Office of the Inspector General, Review of the Department of Justice’s Planning and Implementation of Its Zero Tolerance Policy and Its Coordination with the Departments of Homeland Security and Health and Human Services (January 2021, revised April 2022), p. 49, https://oig.justice.gov/sites/default/files/reports/21-028_o.pdf (accessed September 30, 2024).

⁷⁸ See, for example, Madeline Halpert, “‘Like a Kidnapping’: Migrant Family Separated Under Trump Reunited After Four Years,” *BBC News*, May 8, 2023, <https://www.bbc.com/news/world-us-canada-64959802> (accessed September 30, 2024).

⁷⁹ Email from Scott Lloyd to Thomas Homan and Matthew Albence, June 16, 2018, in Statement of Undisputed Material Facts in Support of Plaintiffs’ Motion for Summary Judgment, Ex. 47, *C.M. v. United States*, No. 2:19-cv-05217-SRC (D. Ariz. March 9, 2023), ECF No. 379-18, available at American Immigration Council, “Government Documents Submitted as Summary Judgment Exhibits,” https://www.americanimmigrationcouncil.org/sites/default/files/litigation_documents/separated_family_members_seek_monetary_damages_from_united_states_summary_judgment_exhibits.pdf (accessed September 30, 2024).

⁸⁰ Human Rights Watch interview with Erick P., Brownsville, Texas, July 13, 2018.

Dozens of children gave similar accounts in sworn declarations filed with the judge overseeing the *Flores* settlement agreement.⁸¹ In one, a 16-year-old boy from Nicaragua said that he was separated from his mother on June 2, 2018, and had not seen her in six weeks. “After I was separated from my mother, I felt very afraid that I would never see my mother again. I feel terrorized, nervous, anxious and worried,” he told the judge.⁸² Another boy, 16 and from Guatemala, said he had no idea where his father was 40 days after they were separated: “I worry about him. . . . I am very sad because I don’t know where my dad is. I don’t know if he is okay.”⁸³ S.C., a 16-year-old from Guatemala, reported that he was not able to speak to his father for a month after they were separated in May 2018, adding:

I have only spoken with my father a total of 20 minutes in these 45 days, and did not speak with any family at all for one month. I had absolutely no idea what was going on and have been very scared.⁸⁴

Other parents and children also described very limited contact with each other after their forcible separation: often just phone or video calls once a week for 10 minutes at a time. Many went for a week or longer without any word about where their loved ones were or how they were doing. For example, Jenri Q., separated from his father on May 19, 2018, told Human Rights Watch:

It is very stressful to be away from my father. We have been separated for almost two months and I have only spoken to him once. It was so great to talk to him so he could assure me he was okay and I could tell him that I was okay too.⁸⁵

Human Rights Watch heard similar accounts from separated parents.

⁸¹ See, for example, Daniella Silva, “‘Like I Am Trash’: Migrant Children Reveal Stories of Detention, Separation,” *NBC News*, July 29, 2018, <https://www.nbcnews.com/news/latino/i-am-trash-migrant-children-reveal-stories-detention-separation-n895006> (accessed September 30, 2024); Kaelyn Forde, “10-Year-Old Girl Describes Life in Immigration Detention: ‘I Began Crying All the Time’,” *ABC News*, July 26, 2018, <https://abcnews.go.com/US/10-year-girl-describes-life-immigration-detention-began/story?id=56757513> (accessed September 30, 2024).

⁸² Declaration of J.R.B., July 13, 2018 (on file with Human Rights Watch).

⁸³ Declaration of J.S.B.L., July 13, 2018 (on file with Human Rights Watch).

⁸⁴ Declaration of S.C., July 13, 2018, para. 4 [Ex. 58].

⁸⁵ Human Rights Watch interview with Jenri Q., Brownsville, Texas, July 13, 2018.

Edwin H., detained in the Port Isabel immigration detention center in Texas, spoke to his 11-year-old son twice between June 11 and July 16, 2018. “I tried to call the number they gave me maybe five other times, but there was no answer,” he told us.⁸⁶

On July 16, 2018, Aurelio L., a Honduran man who was also detained in Port Isabel, told Human Rights Watch he had spoken to his 10-year-old son only once in the 33 days since they were forcibly separated.⁸⁷

Jessyca N., from El Salvador, told us she was not able to speak to her 9-year-old daughter for six days after they were forcibly separated in McAllen on June 14, 2018.⁸⁸

Héctor G. had no word on his 6-year-old son’s whereabouts or well-being for 20 days, until a guard in the Port Isabel detention center handed him a phone number on a slip of paper, without explanation. “Until then, I had no idea what had happened to him,” he told Human Rights Watch.⁸⁹

“We couldn’t see him on his first birthday,” said Rolando B., who was separated from his son, then 11 months old, and deported to Honduras. “We can only talk to him via video once a week for 20 minutes. It’s so painful.”⁹⁰

Calls from some immigration detention centers cost \$5 or more for 10 minutes, an amount detained parents struggled to afford.⁹¹ ORR did not authorize shelters to accept collect calls from detained parents until May 31, 2018, and shelter providers then found that they did not have an easy way to authorize payment for collect calls.⁹²

⁸⁶ Human Rights Watch interview with Edwin H., Port Isabel, Texas, July 16, 2018.

⁸⁷ Human Rights Watch interview with Aurelio L., Port Isabel, Texas, July 16, 2018.

⁸⁸ Human Rights Watch interview with Jessyca N., Port Isabel, Texas, July 12, 2018.

⁸⁹ Human Rights Watch interview with Héctor G., Port Isabel, Texas, July 12, 2018.

⁹⁰ Human Rights Watch interview with Rolando B., San Pedro Sula, Honduras, July 20, 2018.

⁹¹ See, for example, Complaint, para. 46, *Lyon v. ICE*, No. 13-cv-05878 (N.D. Cal. filed Dec. 19, 2013), <https://www.aclunc.org/sites/default/files/001%202013.12.19%20Complaint.pdf> (accessed September 30, 2024).

⁹² Email from Sarah Viola, Administration for Children and Families, May 31, 2018 (authorizing collect calls from parents), and email from Jacqueline De Puy to Sarah Viola and James De la Cruz, June 4, 2018 (forwarding logistical questions about putting funds in children’s accounts to be able to receive collect calls), in American Immigration Council, Family Separation FOIA Response from HHS: Records of Reunification Efforts, pp. 24-25, https://www.americanimmigrationcouncil.org/sites/default/files/foia_documents/family_separation_foia_request_hhs_production_records_of_reunification_efforts.pdf (accessed July 10, 2024).

Eduardo M., an 11-year-old from Guatemala, told Human Rights Watch that the cost of calls limited his communication with his father, from whom he had been forcibly separated, and added to the stress he felt:

I can only talk to my dad when he can call from detention but the amount of time we can talk is very short. Sometimes the phone cuts off, I think because he runs out of money to pay for the call. I'm so scared they will deport him and I'll be here alone.⁹³

Until July 13, 2018, DHS required parents to pay for the cost of their children's transport.⁹⁴ Those costs were \$1,900 in one case documented by the American Civil Liberties Union.⁹⁵

Pressure on Parents to Accept Deportation

Some parents told Human Rights Watch they agreed to deportation because officials told them they would be deported with their child or said they should waive their right to seek asylum in exchange for reunification. Others described being pressured to sign forms they did not understand. As discussed more fully later in this report, such practices violated norms of fundamental fairness, may have denied people the right to seek asylum, and risked refoulement (that is, return to serious harm), among other human rights violations.⁹⁶

In one such case, Edwin H., from Honduras, told Human Rights Watch:

An official gave me the results of my interview [an initial credible fear interview, the first stage in pursuing an asylum claim]. He pointed to a box and told me to mark it and sign the form. I said I wasn't going to sign it because I didn't know what I was signing. He got angry. "You have to sign.

⁹³ Human Rights Watch interview with Eduardo M., Brownsville, Texas, July 13, 2018.

⁹⁴ See Miriam Jordan, "Sponsors of Migrant Children Face Steep Transport Fees and Red Tape," *New York Times*, July 1, 2018, <https://www.nytimes.com/2018/07/01/us/migrant-children-families.html> (accessed November 18, 2024).

⁹⁵ Tom Hals, "Judge Tells U.S. to Pay Costs of Reuniting Immigrant Families," *Reuters*, July 14, 2018, <https://www.reuters.com/article/us-usa-immigration/judge-tells-u-s-to-pay-costs-of-reuniting-immigrant-families-idUSKBN1K31A7/> (accessed July 10, 2024).

⁹⁶ See Chapter VII.

You don't want to have your son back?" Under that pressure, I signed. I didn't understand it because it was all in English.⁹⁷

When Human Rights Watch examined the document he signed, we saw that he had waived the right to see an immigration judge to explain the reasons why he feared returning to Honduras.

In another case, Pablo Z., also from Honduras, told Human Rights Watch he and his 4-year-old son had gone to the port of entry in Brownsville, Texas, on June 11, 2018. He said:

We were held for two days at the bridge. On the first day, the officers there asked me why I came to the United States. I told them I was coming to ask for asylum for me and my son and that I was afraid of returning to my country. I told them that we had both been threatened by a narco-trafficker. They told me to sign some papers, but I didn't know what they were. They told me that the papers weren't a deportation, so I signed them.

Pablo told us he never spoke with another official further about his claim of fear before he was deported without his son one week later.⁹⁸

Case workers at ORR shelters heard similar accounts.⁹⁹

Other parents said forcible separation from their children left them unable to focus on their asylum claims, despite officials' insistence that they continue through adjudication procedures. Jessyca N., from El Salvador, interviewed by Human Rights Watch in a Texas detention center in July 2018, said:

The officials told me I would have to do an interview in the next few weeks. I want to have this interview, but right now all I can think about is how my

⁹⁷ Human Rights Watch interview with Edwin H., Port Isabel, Texas, July 16, 2018.

⁹⁸ Human Rights Watch interview with Pablo Z., Yoro, Honduras, July 19, 2018.

⁹⁹ For example, Incident Report, KidsPeace, June 19, 2018 (account of mother coerced into signing deportation documents), in American Immigration Council, Family Separation FOIA Response from HHS: Records of Trauma, pp. 58-59, https://www.americanimmigrationcouncil.org/sites/default/files/foia_documents/family_separation_foia_request_hhs_production_records_of_trauma.pdf (accessed September 30, 2024).

daughter is and when I'll see her. It's not right to make me do that interview now because I can't focus. I'm just thinking about my daughter.¹⁰⁰

Similarly, when Ariel P., from Guatemala, had a credible fear interview in an immigration detention center near San Antonio, he had not spoken to his son in more than 20 days and had not been told where his son was. He said the forcible separation and uncertainty left him despondent and affected his ability to concentrate on his interview:

All I could think about was how he was and when I would see him again. Every night when I went to sleep, I would think about where he was sleeping. At every meal, if there was some food I didn't like, I would wonder if he was eating food he didn't like. If I didn't eat and felt hungry, I would wonder if he was also hungry that day. I kept returning to these thoughts, and it was impossible for me to focus on anything else.¹⁰¹

No Plan to Reunite Children and Parents

The government readily keeps track of personal property of detainees in criminal and immigration proceedings. Money, important documents, and automobiles, to name a few, are routinely catalogued, stored, tracked and produced upon a detainees' release, at all levels—state and federal, citizen and alien. Yet, the government has no system in place to keep track of, provide effective communication with, and promptly produce alien children. The unfortunate reality is that under the present system migrant children are not accounted for with the same efficiency and accuracy as *property*.

—Judge Dana Sabraw, issuing a preliminary injunction in *Ms. L. v. ICE*, June 26, 2018

¹⁰⁰ Human Rights Watch interview with Jessyca N., Port Isabel, Texas, July 12, 2018.

¹⁰¹ Human Rights Watch interview with Ariel P., Karnes City, Texas, July 17, 2018.

DHS had neither developed a plan for how to care for separated children while they were in its custody nor alerted ORR in advance of either the 2017 El Paso initiative or the 2018 border-wide separations policy.¹⁰²

In fact, DHS actively misled ORR. When ORR staff asked DHS in November 2017 about the increase they were seeing in the numbers of children reporting that they had crossed the border with a parent, “DHS officials stated that DHS did not have an official policy to separate families.”¹⁰³ The separations ORR was identifying were the product of a pilot program in the El Paso area that ran from July to November 2017, an initiative that served as a model for border-wide forcible family separations in 2018.¹⁰⁴

DHS did not, on its own or with HHS, do any meaningful advance planning to enable families to reunite after parents returned from federal court. “Data systems maintained by Customs and Border Protection and by the Office of Refugee Resettlement did not include a designated field to indicate a child had been separated from a parent,” the Government Accountability Office found.¹⁰⁵ CBP did not send Border Patrol agents guidance on how to document family separations until separations had already begun.¹⁰⁶ DHS did not even begin discussing with HHS how the two departments would share information on family separations until April 2018.¹⁰⁷ When senior DHS officials asked in June 2018 how many

¹⁰² See, for example, Government Accountability Office (GAO), *Unaccompanied Children: Agency Efforts to Reunify Children Separated from Parents at the Border* (October 2018), pp. 14-15, <https://www.gao.gov/assets/gao-19-163.pdf> (accessed September 30, 2024); Scott Pelley, “The Chaos Behind Donald Trump’s Policy of Family Separation at the Border,” *60 Minutes*, November 26, 2018, <https://www.cbsnews.com/news/trump-family-separation-policy-mexican-border-60-minutes-investigation-greater-in-number-than-trump-administration-admits/> (accessed September 30, 2024).

¹⁰³ GAO, *Agency Efforts to Reunify Children*, p. 14. See also Statement of Kathryn A. Larin, director, Education, Workforce and Income Security, Government Accountability Office, in *Examining the Failures of the Trump Administration’s Inhumane Family Separation Policy*, Hearing Before the Subcommittee on Oversight and Investigations of the Committee on Energy and Commerce, House of Representatives, 116th Congress, 1st sess., February 7, 2019, Serial No. 116-3, p. 16, <https://www.govinfo.gov/content/pkg/CHRG-116hhrg35404/pdf/CHRG-116hhrg35404.pdf> (accessed September 30, 2024); Caitlin Dickerson, “The Secret History of the U.S. Government’s Family Separation Policy,” *The Atlantic*, August 7, 2022, p. 50, <https://www.theatlantic.com/magazine/archive/2022/09/trump-administration-family-separation-policy-immigration/670604/> (accessed July 10, 2024).

¹⁰⁴ GAO, *Agency Efforts to Reunify Children*, p. 15. For a fuller discussion of the El Paso initiative, see Chapter VI, “The Policy Drew on Earlier Initiatives” section, below.

¹⁰⁵ Statement of Kathryn A. Larin, in *Examining the Failures of the Trump Administration’s Inhumane Family Separation Policy*, p. 16. See also GAO, *Agency Efforts to Reunify Children*, p. 16.

¹⁰⁶ GAO, *Agency Efforts to Reunify Children*, p. 22.

¹⁰⁷ US Department of Homeland Security, Office of Inspector General, *DHS Lacked Technology Needed to Successfully Account for Separated Migrant Families*, OIG-20-06 (November 25, 2019), p. 20, <https://www.oig.dhs.gov/sites/default/files/assets/2019-11/OIG-20-06-Nov19.pdf> (accessed September 30, 2024).

parents were reunited with their children after their improper entry convictions, they received the reply: “this is a mess. No tracking at all.”¹⁰⁸

As a result of this lack of coordination and other failures to prepare for the policy’s implementation, “[i]n June of 2018, no centralized system existed to identify, track, or connect families separated by DHS,” the HHS Office of Inspector General found in a January 2019 review.¹⁰⁹

After a federal judge ordered the US government to identify and reunite separated families, a government attorney admitted, “I can't say today that there is a formalized process”¹¹⁰ for communication among DHS, DOJ, and HHS on separated families. The judge eventually found:

Measures were not in place to provide for communication between governmental agencies responsible for detaining parents and those responsible for housing children, or to provide for ready communication between separated parents and children. There was no reunification plan in place, and [as of June 2018] families have been separated for months. Some parents were deported at separate times and from different locations than their children. Migrant families that lawfully entered the United States at a port of entry seeking asylum were separated. And families that were separated due to entering the United States illegally between ports of entry

¹⁰⁸ Email to Tae Johnson (sender’s name redacted), June 20, 2018, in Statement of Undisputed Material Facts in Support of Plaintiffs’ Motion for Summary Judgment, Ex. 49, *C.M. v. United States*, No. 2:19-cv-05217-SRC (D. Ariz. March 9, 2023), ECF No. 379-18, https://www.americanimmigrationcouncil.org/sites/default/files/litigation_documents/separated_family_members_seek_monetary_damages_from_united_states_summary_judgment_exhibits.pdf (accessed September 30, 2024).

¹⁰⁹ HHS Office of Inspector General, Separated Children Placed in Office of Refugee Resettlement Care, HHS OIG Issue Brief OEI-BL-18-00511 (January 2019), p. 5, <https://oig.hhs.gov/oei/reports/oei-BL-18-00511.pdf> (accessed September 30, 2014). Similarly, the Interagency Task Force on the Reunification of Families, established by President Joe Biden in February 2021, found that “[n]o comprehensive, interagency system was in place at the time [of the policy] to track separated parents and their minor children to ensure that families could promptly and successfully be reunited once the parents were released from detention.” Interagency Task Force on the Reunification of Families, Initial Progress Report (June 2, 2021), p. 3, https://www.dhs.gov/sites/default/files/publications/21_0602_s1_family-reunification-task-force-120-day-progress-report.pdf (accessed September 30, 2024).

¹¹⁰ Status Conference Transcript (June 22, 2018), pp. 33-35, *Ms. L. v. ICE*, Case No. 18-cv-0428 (S.D. Cal.), <https://www.aclu.org/cases/ms-l-v-ice?document=ms-l-v-ice-plaintiffs-reply-support-motion-classwide-preliminary-injunction> (accessed September 30, 2024).

have not been reunited following the parent’s completion of criminal proceedings and return to immigration detention.¹¹¹

“As of March 2019,” the DHS Office of Inspector General found, a joint ICE-HHS working group that had been created in June 2018 “still did not have a formal reunification plan in place.”¹¹²

Well before the El Paso pilot, nongovernmental organizations had already been warning of “the government’s lack of consistent mechanisms for identifying and tracking family members,” including children it separated from their parents.¹¹³ These problems were apparent once the El Paso initiative was underway:

This poor family reunification planning mirrored what occurred during the 2017 El Paso initiative. In a July 2017 draft memo, El Paso Sector management acknowledged concerns from local judges that Border Patrol, ERO [Enforcement and Removal Operations, a component of US Immigration and Customs Enforcement], and ORR needed a coordinated reunification plan for rejoining and repatriating families. However, they never developed a plan and children separated under the El Paso initiative could have remained separated from their parents for long periods.¹¹⁴

By mid-2017, ORR had begun seeing a significant increase in the number of children who reported that CBP had separated them from their parents. It tracked such cases, but its

¹¹¹ Order Granting Plaintiffs’ Motion for Classwide Preliminary Injunction, pp. 2-3, *Ms. L. v. ICE*, Case No. 3:18-cv-0428 (S.D. Cal. June 26, 2018), ECF No. 83, <https://www.aclu.org/cases/ms-l-v-ice?document=ms-l-v-ice-order-amending-briefing-schedule> (accessed September 30, 2024).

¹¹² DHS Office of Inspector General, *DHS Lacked Technology Needed to Successfully Account for Separated Migrant Families*, p. 24.

¹¹³ Women’s Refugee Commission, Lutheran Immigration and Refugee Service (LIRS), and Kids in Need of Defense (KIND), *Betraying Family Values: How Immigration Policy at the United States Border Is Separating Families* (Washington, D.C.: KIND, Women’s Refugee Commission, and LIRS, January 2017), p. 1, <https://www.womensrefugeecommission.org/wp-content/uploads/2020/09/BetrayingFamilyValues-Feb2017.pdf> (accessed October 28, 2024).

¹¹⁴ DHS Office of Inspector General, *DHS Lacked Technology Needed to Successfully Account for Separated Migrant Families*, p. 24.

processes for doing so were informal; there was no integrated system between HHS and DHS for identifying and tracking separated families.¹¹⁵

After April 2018, some CBP agents also added codes or notes to records in an attempt to link adults and children who, following their separation, had individual electronic records, they told Human Rights Watch and other members of the *Flores* monitoring team in June 2018.¹¹⁶ Describing these methods, the DHS Office of Inspector General wrote, “Border Patrol agents used *ad hoc* workarounds to capture the reasons for family separations.”¹¹⁷ The inspector general’s report continued:

The downstream effect of *ad hoc* typing in case notes became apparent when CBP headquarters began efforts to identify separated families needing reunification after the policy ended in June 2018. To locate and reunify family members, Border Patrol headquarters personnel had to review all separations coded as “Criminal History” or “Other Reasons” in the system, as well as all the accompanying case notes. This process was neither easy nor accurate.¹¹⁸

As a result, government agencies struggled to identify all separated children and match them with their parents. In January 2019, the HHS Office of Inspector General reported, “The total number and current status of all children separated from their parents or guardians by DHS and referred to ORR’s care is unknown.”¹¹⁹ For its part, as of November 2019, the DHS Office of Inspector General still “could not confirm the total number of families DHS separated during the Zero Tolerance period.”¹²⁰

¹¹⁵ HHS Office of Inspector General, Separated Children Placed in Office of Refugee Resettlement Care, HHS OIG Issue Brief OEI-BL-18-00511 (January 2019), pp. 6-7, <https://oig.hhs.gov/oei/reports/oei-BL-18-00511.pdf> (accessed September 30, 2024).

¹¹⁶ Human Rights Watch interview with CBP official, McAllen, Texas, June 15, 2018.

¹¹⁷ DHS Office of Inspector General, DHS Lacked Technology Needed to Successfully Account for Separated Migrant Families, p. 10.

¹¹⁸ *Ibid.*, p. 11.

¹¹⁹ HHS Office of Inspector General, Separated Children Placed in Office of Refugee Resettlement Care, p. 13.

¹²⁰ DHS Office of Inspector General, DHS Lacked Technology Needed to Successfully Account for Separated Migrant Families, p. 8.

A Context of Racist Rhetoric

The senior government officials who developed and implemented the forcible family separation policy did so in a context of overheated, dehumanizing, and racist official rhetoric. Donald J. Trump had referred to Mexican migrants as “rapists” and “bringing drugs” when he announced his campaign for the presidency in June 2015,¹²¹ and he brought up those remarks again in April 2018.¹²² In a closed-door meeting in January 2018, he questioned why the United States would want to admit people from Haiti and “shithole countries” in Africa.¹²³ In May 2018, he described immigrants as “animals,” later saying that he meant only MS-13 gang members.¹²⁴ As criticism of the forcible family separation policy mounted in June 2018, he equated Latin American migrants with gang members, saying that they “pour into and infest our Country.”¹²⁵ And at the end of 2018, he suggested that migrant caravans were filled with “tough people” who have “injured” and “attacked,” saying, “Some people call it an invasion.”¹²⁶

President Trump continued to describe migrants as security risks in 2019 and throughout his time in office. Assessing the claims he made in a January 2019 speech in McAllen, Texas, *Houston Chronicle* reporter Lomi Kriel wrote, “[T]he crisis he has repeatedly tried to

¹²¹ “Here’s Donald Trump’s Presidential Announcement Speech,” *Time*, June 16, 2015, <https://time.com/3923128/donald-trump-announcement-speech/> (accessed September 30, 2024).

¹²² Z. Byron Wolf, “Trump Basically Called Mexicans Rapists Again,” *CNN*, April 6, 2018, <https://www.cnn.com/2018/04/06/politics/trump-mexico-rapists/index.html> (accessed September 30, 2024).

¹²³ Alan Fram and Jonathan Lemire, “Trump: Why Allow Immigrants from ‘Shithole Countries?’”, Associated Press, January 12, 2018, <https://apnews.com/article/immigration-north-america-donald-trump-ap-top-news-international-news-fdda2ff0b877416c8ae1c1a77a3cc425> (accessed September 30, 2024).

¹²⁴ Scott Neuman, “During Roundtable, Trump Calls Some Unauthorized Immigrants ‘Animals,’” NPR, May 17, 2018, <https://www.npr.org/sections/thetwo-way/2018/05/17/611877563/during-roundtable-trump-calls-some-unauthorized-immigrants-animals> (accessed September 30, 2024); Linda Qiu, “The Context Behind Trump’s ‘Animals’ Comment,” *New York Times*, May 18, 2018, <https://www.nytimes.com/2018/05/18/us/politics/fact-check-trump-animals-immigration-ms13-sanctuary-cities.html> (accessed September 30, 2024). President Trump has since repeated the characterization of irregular migrants as “animals” without indicating that he was only referring to members of gangs. Nathan Layne, Gram Slattery, and Tim Reid, “Trump Calls Migrants ‘Animals,’ Intensifying Focus on Illegal Migration,” *Reuters*, April 3, 2024, <https://www.reuters.com/world/us/trump-expected-highlight-murder-michigan-woman-immigration-speech-2024-04-02/> (accessed September 30, 2024).

¹²⁵ Donald J. Trump (@realDonaldTrump), Twitter, June 19, 2018, <https://x.com/realDonaldTrump/status/1009071403918864385> (accessed September 30, 2024). See also Betsy Klein and Kevin Liptak, “Trump Ramps Up Rhetoric: Dems Want ‘Illegal Immigrants’ to ‘Infest Our Country,’” *CNN*, June 19, 2018, <https://www.cnn.com/2018/06/19/politics/trump-illegal-immigrants-infest/index.html> (accessed September 30, 2024).

¹²⁶ “AP Fact Check: President Trump’s Rhetoric and the Truth About Migrant Caravans,” *PBS*, November 2, 2018, <https://www.pbs.org/newshour/politics/ap-fact-check-president-trumps-rhetoric-and-the-truth-about-migrant-caravans> (accessed September 30, 2024).

portray — dangerous migrants pouring across the border, bringing massive drugs and crime— does not exist.”¹²⁷

¹²⁷ Lomi Kriel, “Trump Presses Border Crisis in McAllen, But Reality Is Different,” *Houston Chronicle*, January 10, 2019, <https://www.houstonchronicle.com/news/houston-texas/houston/article/Trump-presses-border-crisis-in-McAllen-but-13525102.php> (accessed September 30, 2024).

II. Official Denials and Misleading Messaging

It's strange to behold Trump distancing himself from the zero-tolerance policy ("the Democrats gave us that law") while Nielsen claims it doesn't exist ("it's not a policy") and Sessions defends it in speech after speech.

—Salvador Rizzo, "The Facts About Trump's Policy of Separating Families at the Border," *Washington Post*, June 19, 2018

Reporters increasingly sought comment from the government in April 2018 and the months that followed on whether it was separating children from their parents and, if so, why. In response, officials offered a combination of denial, deflection, and dismissal of the impact of their policy choices. Notably, Attorney General Jeff Sessions and Kirstjen Nielsen, who had become secretary of homeland security in December 2017, appeared at times to contradict each other—and in Nielsen's case, herself. Overall, the government's approach to media inquiries and widespread criticism was to offer a variety of responses in turn, seemingly testing what would placate the public.

The government's public statements were in many cases deliberately deceptive. In combination, they also reveal that officials sought to cover up what they were doing.

Nielsen advanced the most categorical of the denials. In mid-May 2018, she told the Senate Homeland Security and Government Affairs Committee, "We do not have a policy to separate children from their parents. Our policy is, if you break the law we will prosecute you."¹²⁸ The following month, she posted on Twitter (now X), "We do not have a policy of separating families at the border. Period."¹²⁹

But the department she headed had already been qualifying its denials for several months. As an ACLU complaint on behalf of a woman and her daughter—the *Ms. L* case—was

¹²⁸ Miriam Jordan, "It's Horrendous': The Heartache of a Migrant Boy Taken from His Father," *New York Times*, June 7, 2018, <https://www.nytimes.com/2018/06/07/us/children-immigration-borders-family-separation.html> (accessed September 30, 2024).

¹²⁹ Secretary Kirstjen M. Nielsen (@SecNielsen), Twitter, June 17, 2018, <https://x.com/SecNielsen/status/1008467414235992069> (accessed September 30, 2024). See also "DHS Sec. Kirstjen Nielsen Denies Family Separation Policy Exists, Blames Media," *CBS News*, June 18, 2018, <https://www.cbsnews.com/news/dhs-sec-kirstjen-nielsen-denies-family-separation-policy-exists-blames-media/> (accessed September 30, 2024).

beginning to draw media notice, Chad Wolf, then Nielsen’s chief of staff, emailed Nielsen on March 4 to advise her, “We’re receiving a number of press inquiries regarding an asylum seeking Congolese woman and her child who have been separated and are currently in detention facilities in the U.S.” Wolf told Nielsen that DHS was replying to the media with a statement that began:

DHS does not currently have a policy of separating women and children. However, we retain the authority to do so in certain circumstances—particularly to protect a child from potential smuggling and trafficking activities.¹³⁰

In April, James W. McCament, the deputy undersecretary of the Office of Strategy, Policy, and Plans at DHS, repeated this line, telling a Congressional committee, “We do not currently have a policy of separating women and children.”¹³¹ Also that month, DHS told Caitlin Dickerson, a journalist then with the *New York Times*, that the department did not separate families at the border for deterrence purposes.¹³²

And in May, the government included the following carefully worded statement in a court brief:

ICE has no family separation policy for ulterior law enforcement purposes, and considers each case on the facts available at the time a placement decision must be made. In addition, such a policy would be antithetical to the child welfare values of ORR, which is not a law enforcement agency.¹³³

¹³⁰ Email from Chad Wolf to Kirstjen Nielsen, March 4, 2018, <https://s3.documentcloud.org/documents/23557142/dhs-official-to-reporters.pdf> (accessed September 30, 2024).

¹³¹ Maria Sacchetti, “Top Homeland Security Officials Urge Criminal Prosecution of Parents Crossing Border with Children,” *Washington Post*, April 26, 2018, https://www.washingtonpost.com/local/immigration/top-homeland-security-officials-urge-criminal-prosecution-of-parents-who-cross-border-with-children/2018/04/26/aobdceeo-4964-11e8-8b5a-3b1697adcc2a_story.html (accessed September 30, 2024).

¹³² Caitlin Dickerson, “Hundreds of Immigrant Children Have Been Taken from Parents at U.S. Border,” *New York Times*, April 20, 2018, <https://www.nytimes.com/2018/04/20/us/immigrant-children-separation-ice.html> (accessed September 30, 2024).

¹³³ Opposition to Motion for Preliminary Injunction, p. 2, *Ms. L. v. ICE*, Case No. 3:18-cv-0428 (S.D. Cal. May 16, 2018), ECF No. 46.

Even at the time, these qualified denials were telling: saying DHS did not “currently” have a policy, that separation was not “for deterrence purposes,” and that there was no policy “for ulterior law enforcement purposes” did not deny that there was a planned border-wide family separation policy for other purposes.

By early April, internal communications among senior DHS staff were focused on justifying family separation rather than disavowing it. In advance of Nielsen’s April testimony at a congressional hearing, her chief of staff sent an internal email with the subject line “Messaging on FAMU [Family Unit] Separation”:

In preparation for S1’s hearing next week, I want to develop a good narrative (supported by facts and cases) on the separating issue.¹³⁴

“Human smuggling” and “human trafficking,” both suggested by Wolf in early March, were two of the three narratives DHS landed on in response to the April messaging email. (The other was “unclear family relationship.”)¹³⁵ In late April, after the leak of a DHS draft family separation memo, DHS spokesperson Katie Waldman told reporters:

DHS does not have a policy of separating families at the border for deterrence purposes. DHS does, however, have a legal obligation to protect the best interests of the child whether that be from human smugglings, drug traffickers, or nefarious actors who knowingly break our immigration laws and put minor children at risk.¹³⁶

Notwithstanding Wolf’s request prior to the April hearing for “support[] by facts and cases,” the internal emails make clear that DHS developed this messaging in the hope that facts would follow: just before Nielsen’s congressional testimony on April 26, staffers were

¹³⁴ Internal email from DHS chief of staff, April 2018, <https://www.documentcloud.org/documents/6785901-3-8-19-ICE-Prod1#document/p347/a553911> (accessed September 30, 2024).

¹³⁵ Internal email from DHS Operations Chief-Ops North, April 23, 2018, in FOIA Disclosure 2018-ICLI-00046, in American Immigration Council, “Family Separation FOIA Response From ICE,” pp. 345-6, https://www.americanimmigrationcouncil.org/sites/default/files/foia_documents/family_separation_foia_request_ice_production_03.08.19.pdf (accessed September 30, 2024).

¹³⁶ Maria Sacchetti, “Top Homeland Security Officials Urge Criminal Prosecution of Parents Crossing Border with Children.”

still being asked for supporting “case examples” for these narratives.¹³⁷ At an earlier hearing on April 11, Nielsen’s response to a question about family separation began, “When we separate, we separate because the law tells us to” and went on to refer generically to “instances where traffickers have used children to cross the border and gain illegal entry” without describing specific cases.¹³⁸

Nielsen’s reply at the April 11 hearing and the March line for media response misleadingly implied that the government separated families only in exceptional cases. But DHS had separated at least 700 children, and likely many more, from their parents in the previous six months.¹³⁹

As with attempts to deny the existence of the policy, the implication that family separation was rare was quickly disproven and served only to suggest that the US government was careless, deceitful, or both. When Dickerson, the *New York Times* journalist, asked HHS in April for official comment on the estimate of more than 700 separated children, shared with her by an ORR source, HHS initially claimed that the numbers did not come from ORR.¹⁴⁰ Dickerson’s blistering response prompted a flurry of emails among half a dozen officials, including the ORR director, until one contacted a field supervisor who informed them that ORR had in fact been keeping statistics on separations and that by mid-April, the agency’s estimate had increased to more than 800 children separated by DHS since October 2017.¹⁴¹

¹³⁷ Compare Internal DHS emails, April 2018, <https://www.documentcloud.org/documents/6785901-3-8-19-ICE-Prod1#document/p347/a553911> (accessed September 30, 2024), with internal DHS emails, April 23, 2018, in American Immigration Council, “Family Separation FOIA Response from ICE,” pp. 346-49, https://www.americanimmigrationcouncil.org/sites/default/files/foia_documents/family_separation_foia_request_ice_production_03.08.19.pdf (accessed September 30, 2024).

¹³⁸ “Fiscal Year 2019 Homeland Security Budget Request,” C-SPAN, April 11, 2018 (video at 1:33:50), <https://www.c-span.org/video/?443752-1/fiscal-year-2019-homeland-security-budget-request> (accessed September 30, 2024).

¹³⁹ Caitlin Dickerson, “Hundreds of Immigrant Children Have Been Taken from Parents at U.S. Border,” *New York Times*, April 20, 2018, <https://www.nytimes.com/2018/04/20/us/immigrant-children-separation-ice.html> (accessed September 30, 2024).

¹⁴⁰ Email from Victoria Palmer, HHS Administration for Children and Families, to Caitlin Dickerson, *New York Times*, April 19, 2018, in House Committee on the Judiciary, Majority Staff Report: The Trump Administration’s Family Separation Policy: Trauma, Destruction, and Chaos (October 2020), App. E, p. A-355, https://democrats-judiciary.house.gov/uploadedfiles/the_trump_administration_family_separation_policy_trauma_destruction_and_chaos.pdf (accessed September 30, 2024).

¹⁴¹ House Committee on the Judiciary, Majority Staff Report: The Trump Administration’s Family Separation Policy, App. E, pp. A-350 to A-355.

HHS ultimately responded to Dickerson with the anodyne comment, “When UAC [unaccompanied children] are referred to ORR, ORR is not routinely informed about how or when the UAC became separated from their parent(s) or the whereabouts of the parents.”¹⁴² The response continued:

For safety and other reasons children can be separated, by DHS, from their parents and referred to ORR. In some cases, after arriving in ORR care, UAC will disclose that they have been separated from their parent(s). In other cases, parents, attorneys and other relatives will also contact ORR looking for separated children. Since October 2017, ORR has collaborated with DHS in approximately 700 cases to locate parent(s) in DHS custody.¹⁴³

This and similar responses were by that point transparent attempts to avoid acknowledgement that the forcible family separation policy was different in kind and degree than previous instances of family separation at the border.¹⁴⁴ In a message that was typical of the media inquiries DHS and HHS received in early March after the ACLU sued on behalf of Ms. L and her child, a *Washington Post* editorial writer asked:

Could you please shed light on why it isn’t possible to detain them together? And is it now the policy of DHS to detain asylum-seeking parents

¹⁴² Email from Katie Waldman to Jonathan Hoffman and Chad Wolf, April 22, 2018 (including text of “the final response that was sent from HHS to the NYT”), <https://s3.documentcloud.org/documents/23558322/in-internal-emails-dhs-officials-push-back-against-the-story-about-700-separated-children-claiming-inaccurately-that-the-actual-number-is-much-lower.pdf> (accessed September 30, 2024). An earlier version of this reply was circulated within HHS in emails made public by the Senate Judiciary Committee’s Democratic Caucus. See email from Kenneth Wolfe, HHS Administration for Children and Families, to Scott Lloyd, Tricia Swartz, and Jallyn Sualog, HHS Administration for Children and Families, April 19, 2018 (“The Office of Refugee Resettlement (ORR) at HHS’ Administration for Children and Families is not informed by federal partners if a particular child referred to our care has been separated, or the whereabouts of the parents.”), in House Committee on the Judiciary, Majority Staff Report: The Trump Administration’s Family Separation Policy, App. E, pp. A-350 and A-351.

¹⁴³ Email from Katie Waldman to Jonathan Hoffman and Chad Wolf, April 22, 2018 (including text of “the final response that was sent from HHS to the NYT”).

¹⁴⁴ The senior DHS officials who developed the forcible family separation policy were aware that it affected far more children and parents than earlier instances of family separation at the border. For instance, asked in a 2022 deposition, “It [family separation] certainly never happened on the scale that it happened in May and June of 2018 before, correct?” Thomas Homan, acting ICE director from January 2017 to June 2018, answered, “Correct.” Deposition of Thomas B. Homan, September 9, 2022, pp. 49-50, in Plaintiffs’ Response to Defendant’s 56.1 Statement, Ex. 7, *C.M. v. United States*, No. 2:19-cv-05217-SRB (D. Ariz. April 24, 2023), ECF No. 404-2, in American Immigration Council, “Government Documents Submitted as Summary Judgment” [Ex. 7], https://www.americanimmigrationcouncil.org/sites/default/files/litigation_documents/separated_family_members_seek_monetary_damages_from_united_states_summary_judgment_exhibits.pdf (accessed September 30, 2024).

and children separately? If so, is this meant as a deterrent for future asylum seekers? Or for another reason?¹⁴⁵

Nonetheless, DHS continued such attempts at deflection long after litigation and leaks had begun to establish the true scope of the forcible family separation policy. In late July, as one example, Secretary Nielsen wrote to DHS staff:

For years—and under previous Administrations—adults and children have been separated at our borders in cases where DHS is unable to determine there is a custodial relationship, when DHS determines that an adult may pose a risk to the child, or when an adult is charged with a crime and transferred to a criminal detention setting.¹⁴⁶

Perhaps in recognition of the reality that denial and dissembling were ineffective, by May, DHS and HHS leadership had largely pivoted to talking points that attempted to justify family separation as a necessary and logical consequence of the rule of law. This approach brought DHS and HHS closer to the line Sessions was taking, as exemplified in a May 7 speech in which he stated, “We need legality and integrity in the system.”¹⁴⁷ In late May, DHS deputy press assistant Katie Waldman suggested this public response:

Families with children that enter into the United States illegally will be separated when the parent is transferred to federal criminal custody. If parents do not wish to be separated from their children, they should not break the law.¹⁴⁸

¹⁴⁵ Email from Tyler Houlton to Jonathan Hoffman et al., March 3, 2018 (forwarding “the latest inquiry from WaPo” and advising, “Every major outlet asked about specifics on Wednesday.”), <https://s3.documentcloud.org/documents/23557142/dhs-official-to-reporters.pdf> (accessed July 10, 2024).

¹⁴⁶ Message from Secretary Kirstjen M. Nielsen on Family Reunifications and Securing the Border, July 27, 2018, in FOIA Disclosure 2018-ICLI-00046, available in American Immigration Council, “Family Separation FOIA Response from ICE,” p. 274, https://www.americanimmigrationcouncil.org/sites/default/files/foia_documents/family_separation_foia_request_ice_production_03.08.19.pdf (accessed July 10, 2024).

¹⁴⁷ Office of Public Affairs, US Department of Justice, “Attorney General Sessions Delivers Remarks Discussing the Immigration Enforcement Actions of the Trump Administration,” May 7, 2018, <https://www.justice.gov/opa/speech/attorney-general-sessions-delivers-remarks-discussing-immigration-enforcement-actions> (accessed July 10, 2024).

¹⁴⁸ Email from Katie Waldman to Jonathan Hoffman, Chad Wolf, Gene Hamilton, et al., May 27, 2018, <https://www.documentcloud.org/documents/20536840-doj-records-of-emails-between-stephen-miller-and-gene-hamilton-part-4#document/p310/a2160642> (accessed July 10, 2024).

An HHS fact sheet developed at the same time with Waldman’s input contained similar wording.¹⁴⁹ Earlier in the month, President Trump had already taken up this line and added to it by claiming, untruthfully, that lawmakers from the opposing party were to blame: “We have to break up families. The Democrats gave us that law. It’s a horrible thing. We have to break up families.”¹⁵⁰

By mid-June, administration officials were frequently relying on variations on the rule-of-law line. Speaking to a group of law enforcement officers on June 18, Nielsen declared, “We will not apologize for the job we do.”¹⁵¹ Four days earlier, responding to reporters’ questions about why the government was separating families, White House press secretary Sarah Huckabee Sanders claimed, “Because it’s the law, and that’s what the law states.”¹⁵² The Border Patrol issued a five-paragraph statement elaborating on this theme.¹⁵³ Sessions even quoted a New Testament verse in defense of family separation, saying, “I would cite you to the Apostle Paul and his clear and wise command in Romans 13, to obey the laws of the government because God has ordained the government for the purpose of order.”¹⁵⁴

¹⁴⁹ US Department of Health and Human Services, “Fact Sheet: Border Security Loopholes Drive Massive Surge in Unaccompanied Alien Children,” undated, <https://www.hhs.gov/sites/default/files/fact-sheet-border-security-loopholes.pdf> (accessed July 8, 2024). HHS sent Waldman and other officials a draft of the fact sheet for comment, and she added the line that parents who did not wish to be separated from their children should not break the law. See Email from Judy Stecker to Stephen Miller et al., May 27, 2018, <https://www.documentcloud.org/documents/20536840-doj-records-of-emails-between-stephen-miller-and-gene-hamilton-part-4#document/p310/a2160642> (accessed July 10, 2024); Email from Waldman to Hoffman, Wolf, Hamilton, et al., May 27, 2018.

¹⁵⁰ “Remarks by President Trump at a California Sanctuary State Roundtable,” White House archives, May 16, 2018, <https://trumpwhitehouse.archives.gov/briefings-statements/remarks-president-trump-california-sanctuary-state-roundtable/> (accessed September 30, 2024).

¹⁵¹ Nick Miroff, “Facing Outcry over Family Separations, DHS Chief Says, ‘We Will Not Apologize,’” *Washington Post*, June 18, 2018, https://www.washingtonpost.com/world/national-security/facing-outcry-over-family-separations-dhs-chief-says-we-will-not-apologize/2018/06/18/d1e85466-7305-11e8-9780-b1dd6a09b549_story.html (accessed September 30, 2024).

¹⁵² Callum Borchers, “‘You’re a Parent!’ Things Got Personal in the White House Briefing Room,” *Washington Post*, June 14, 2018, <https://www.washingtonpost.com/news/the-fix/wp/2018/06/14/youre-a-parent-things-got-personal-in-the-white-house-briefing-room/> (accessed September 30, 2024). See also Stephanie Murray, “Sarah Huckabee Sanders Gets in Heated Exchanges over Family Separation Policy,” *Politico*, June 14, 2024, <https://www.politico.com/story/2018/06/14/sarah-huckabee-sanders-gets-in-heated-exchanges-over-family-separation-policy-646861> (accessed September 30, 2024).

¹⁵³ Comment from Border Patrol, June 18, 2018, <https://www.documentcloud.org/documents/4519977-June-18-2018-Comment-From-Border-Patrol.html> (accessed September 30, 2024).

¹⁵⁴ Office of Public Affairs, US Department of Justice, “Attorney General Sessions Addresses Recent Criticisms of Zero Tolerance by Church Leaders,” June 14, 2018, <https://www.justice.gov/opa/speech/attorney-general-sessions-addresses-recent-criticisms-zero-tolerance-church-leaders> (accessed September 30, 2024). Sessions’ reference to the verse was particularly notable because of its historical use as justification for slavery in the United States and apartheid in South Africa. See Julia Jacobs, “Sessions’ Use of Bible Passage to Defend Immigration Policy Draws Ire,” *New York Times*, June 15, 2018, <https://www.nytimes.com/2018/06/15/us/sessions-bible-verse-romans.html> (accessed September 30, 2024); Ruth Graham, “Jeff Sessions Cherry-Picked a Bible Passage to Defend Trump’s Immigration Policy,” *Slate*, June 15, 2018,

The government also promoted President Trump’s false claim that his administration was not responsible for family separation. For instance, a June 18 White House Twitter post claimed, “This Administration did not create a policy of separating families at the border.”¹⁵⁵ Similarly, a June 22 message from Nielsen to DHS staff included the line, “Congress must change the law to provide a lasting solution to family separation.”¹⁵⁶ In fact, the law Sanders, Trump, and presumably Nielsen were referring to, the William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, did not require family separation.¹⁵⁷

For his part, Sessions relied frequently on the anti-smuggling narrative as a justification for family separation. On June 7, he said, “I hope that we don’t have to separate any more children from any more adults. But there’s only one way to ensure that is the case: it’s for people to stop smuggling children illegally. Stop crossing the border illegally with your children.”¹⁵⁸ On June 18, he included the following line in a speech to a conference of sheriffs: “We cannot and will not encourage people to bring children by giving them blanket immunity from our laws.”¹⁵⁹

Nielsen reiterated this anti-smuggling justification in her own remarks at the June 18 sheriffs’ conference, saying that DHS had seen “a staggering 315 percent increase in illegal

<https://slate.com/human-interest/2018/06/jeff-sessions-chose-romans-13-to-defend-trumps-immigration-policy-and-heres-why-hes-wrong.html> (accessed September 30, 2024).

¹⁵⁵ The White House 45 Archived (@WhiteHouse45), Twitter, June 19, 2018, <https://x.com/WhiteHouse45/status/1008836005292474369> (accessed September 30, 2024).

¹⁵⁶ Message from Secretary Nielsen on Affording Congress an Opportunity to Address Family Separation, June 22, 2018, <https://www.documentcloud.org/documents/6785901-3-8-19-ICE-Prod1#document/p601> (accessed September 30, 2024).

¹⁵⁷ See, for example, Salvador Rizzo, “Recidivism Watch: Trump Administration Again Blames Others for Its Own Family Separation Policy,” *Washington Post*, June 14, 2018, <https://www.washingtonpost.com/news/fact-checker/wp/2018/06/14/recidivism-watch-trump-administration-again-blames-others-for-its-own-family-separation-policy/> (accessed September 30, 2024); David J. Bier, “Defenses of Separating Children from Parents—And Why They’re Wrong,” Cato Institute, June 28, 2018, <https://www.cato.org/blog/defenses-separating-children-parents-why-theyre-wrong> (accessed September 30, 2024).

¹⁵⁸ Office of Public Affairs, US Department of Justice, “Attorney General Jeff Sessions Delivers Remarks to the 24th Annual Joint Conference of the Montana Association of Chiefs of Police and the 88th Annual Montana Police Protective Association,” June 7, 2018, <https://www.justice.gov/opa/speech/attorney-general-jeff-sessions-delivers-remarks-24th-annual-joint-conference-montana> (accessed September 30, 2024).

¹⁵⁹ Office of Public Affairs, US Department of Justice, “Attorney General Sessions Delivers Remarks to the National Sheriffs’ Association Annual Conference,” June 18, 2018, <https://www.justice.gov/opa/speech/attorney-general-sessions-delivers-remarks-national-sheriffs-association-annual> (accessed September 30, 2024).

aliens fraudulently using children to pose as family units to gain entry into the country.”¹⁶⁰ This statement, perhaps the clearest articulation of the anti-smuggling rationale DHS had been advancing since March, is revealing: the statistic was technically accurate, but Nielsen did not specify that the total number of fraudulent cases was under 200, amounting to less than 1 percent of families apprehended at the US-Mexico border.¹⁶¹

Nielsen’s defense of family separation in June was notable in another respect: while most senior officials and departmental spokespeople appeared to shift from one justification to another over time, she attempted to keep all options on the table. In a 20-minute press briefing in June, she alternately stated that family separation was a “long-existing policy,” that separation took place when “we cannot determine a familial or custodial relationship exists” or “if the adult is suspected of human trafficking,” and that family separation was “not a policy.”¹⁶²

¹⁶⁰ DHS, “Secretary Kirstjen M. Nielsen Remarks at National Sheriffs’ Association Conference,” June 18, 2018, <https://www.dhs.gov/news/2018/06/18/secretary-kirstjen-m-nielsen-remarks-national-sheriffs-association-conference> (accessed September 30, 2024); Rebecca Morin, “Nielsen Defends Family Separations: ‘We Will Not Apologize for Doing Our Job,’” *Politico*, June 18, 2018, <https://www.politico.com/story/2018/06/18/family-separations-kirstjen-nielsen-650876> (accessed September 30, 2024). This statistic was also included in a DHS news release posted the same day. DHS, “Myth vs. Fact: DHS Zero-Tolerance Policy,” June 18, 2018, <https://www.dhs.gov/news/2018/06/18/myth-vs-fact-dhs-zero-tolerance-policy> (accessed September 30, 2024).

¹⁶¹ The 315-percent increase was from 46 fraudulent cases in fiscal year 2017 to 191 cases in the first five months of fiscal year 2018. Linda Qiu, “Nielsen Justifies Family Separation by Pointing to Increase in Fraud. But the Data Is Very Limited,” *New York Times*, June 18, 2018, <https://www.nytimes.com/2018/06/18/us/politics/nielsen-family-separation-factcheck.html> (accessed September 30, 2024); Philip Bump, “How to Mislead with Statistics, DHS Secretary Nielsen Edition,” *Washington Post*, June 18, 2018, <https://www.washingtonpost.com/news/politics/wp/2018/06/18/how-to-mislead-with-statistics-dhs-secretary-nielsen-edition/> (accessed September 30, 2024).

¹⁶² See Aaron Blake, “Kirstjen Nielsen’s Mighty Struggle to Explain Separating Families at the Border, Annotated,” *Washington Post*, June 19, 2018, <https://www.washingtonpost.com/news/the-fix/wp/2018/06/19/kirstjen-nielsen-tries-to-explain-separating-families-at-the-border-annotated/> (accessed September 30, 2024).

III. Widespread Separations Continued into 2019

A Border Patrol agent came in our room with a two-year-old boy and asked us, “Who wants to take care of this little boy?”

—A 15-year-old girl held in the Clint Border Patrol Station, Clint, Texas, June 19, 2019

After images of children in cages, leaked recordings of border agents mocking crying children, and other news of the extent and impact of the administration’s policy prompted public outcry,¹⁶³ President Trump signed an executive order on June 20, 2018, that he said ended family separation.¹⁶⁴ Six days later, a federal judge halted systemic family separations and directed the government to reunite separated children and their parents.¹⁶⁵

President Trump’s executive order was not, however, a definitive directive to cease all family separation: it opened with the statement that the US government would continue to prosecute all instances of improper entry, the vehicle that the administration had used to separate parents from their children.¹⁶⁶ The new policy it announced, family detention in the name of family unity, had foreseeable legal problems. (The order also falsely blamed Congress and the federal courts for the policy Trump’s administration had developed and implemented, continuing the narrative he had started to promote a month earlier.)

¹⁶³ In one indication of the public response—and the concern the outcry prompted within the administration—DHS tracked more than 600 family separation protests, at least one in every state as well as the District of Columbia and Puerto Rico, scheduled on a single day in June 2018. Email from Threat Researcher, DHS Reston Office (name withheld), with subject line “Family Separation Day’ Protests in U.S., on June 30th,” in FOIA Disclosure 2018-ICLI-00046, p. 333 (attaching 8-page spreadsheet), <https://www.documentcloud.org/documents/5980360-LookingGlass.html> (accessed September 30, 2024). See also Alexandra Yoon-Hendricks and Zoe Greenberg, “Protests Across U.S. Call for End to Migrant Family Separations,” *New York Times*, June 30, 2018, <https://www.nytimes.com/2018/06/30/us/politics/trump-protests-family-separation.html> (accessed September 30, 2024); Jesse Franzblau, “New Documents Expose Government Monitoring of Protests Against Family Separation,” National Immigrant Justice Center, April 29, 2019, <https://immigrantjustice.org/staff/blog/new-documents-expose-government-monitoring-protests-against-family-separation> (accessed September 30, 2024).

¹⁶⁴ Affording Congress an Opportunity to Address Family Separation, Executive Order 13,841 of June 20, 2018, 83 Fed. Reg. 29,435 (June 25, 2018).

¹⁶⁵ Order Granting Plaintiffs’ Motion for Classwide Preliminary Injunction, *Ms. L v. ICE*, No. 3:18-cv-00428-DMS-MDD (S.D. Cal. June 26, 2018), ECF No. 83.

¹⁶⁶ See Executive Order 13,841, sec. 1. In fact, CBP announced on June 25, 2018, that it had temporarily halted referrals of adults travelling with their children because ICE did not have family detention space available. See Ron Nixon, Erica L. Green, and Michael D. Shear, “Border Officials Suspend Handing Over Migrant Families to Prosecutors,” *New York Times*, June 25, 2018, <https://www.nytimes.com/2018/06/25/us/politics/border-officials-suspend-handing-over-migrant-families-to-prosecutors.html> (accessed September 30, 2024).

The judge’s orders, in turn, had significant caveats that gave the government broad latitude to continue separating families. Crucially, parents who DHS determined had a criminal history of any kind, even for minor offenses that had no bearing on their ability as caregivers, were not covered by the order. Nor were adult relatives other than parents, meaning that DHS could continue to separate children from their grandparents, aunts and uncles, and adult siblings.

Prior administrations had separated families on these grounds, and the Biden administration has continued to do so. But parent-child separations were rare before 2017.¹⁶⁷ Under Trump, the US government made aggressive use of these grounds, particularly after the June 20 executive order. Between July 2018 and December 2019, the US government separated 1,150 children from their parents, HHS reports.¹⁶⁸

As with earlier forcible family separations, many of those that took place after June 2018 resulted in enforced disappearance and may have amounted to other forms of torture.¹⁶⁹

The continued use of forcible family separation led to other human rights violations. As a *Flores* monitoring team found in July 2019, separated children were held in immigration detention far longer than the regular 72-hour limit set by law—and in overcrowded, squalid conditions.

¹⁶⁷ See, for example, Congressional Research Service, The Trump Administration’s “Zero Tolerance” Immigration Enforcement Policy (updated February 2, 2021), p. 20, <https://crsreports.congress.gov/product/pdf/R/R45266> (accessed September 30, 2024); Office of Inspector General, US Department of Homeland Security, DHS Lacked Technology Needed to Successfully Account for Separated Migrant Families, OIG-20-06 (November 25, 2019), p. 5, <https://www.oig.dhs.gov/sites/default/files/assets/2019-11/OIG-20-06-Nov19.pdf> (accessed September 30, 2024).

¹⁶⁸ Administration for Children and Families, US Department of Health and Human Services, Monthly Report to Congress on Separated Children, January 2024, pp. 5-6, <https://www.hhs.gov/sites/default/files/january-2024-monthly-report-on-separated-children.pdf> (accessed September 30, 2024). See also DHS Office for Civil Rights and Civil Liberties, Recommendations Memo: Family Separation (July 25, 2019), p. 2 (“CRCL has continued to receive allegations claiming wrongful family separation since family separations related to Zero Tolerance officially ended on June 21, 2018”), <https://www.dhs.gov/publication/recommendations-memo-cbp-and-ice-concerning-family-separation> (accessed September 30, 2024); Texas Civil Rights Project, *The Real National Emergency: Zero Tolerance and the Continuing Horrors of Family Separation at the Border* (Austin: Texas Civil Rights Project, 2019), p. 9, https://www.txcivilrights.org/_files/ugd/aab911_5b57ffa8b7e14389ac92f8955f0fdbf8.pdf (accessed September 30, 2024); John Washington, “The Government Has Taken at Least 1,100 Children from Their Parents Since Family Separations Officially Ended,” *The Intercept*, December 9, 2019, <https://theintercept.com/2019/12/09/family-separation-policy-lawsuit/> (accessed September 30, 2024).

¹⁶⁹ See Chapter VII, “Prohibition of Enforced Disappearance” and “Prohibition of Torture” sections.

In fact, there is a direct line from the forcible family separation policy to President Trump’s alternative policy of family detention to other serious violations of migrant children’s rights in 2019. By normalizing neglect and abuse, the policy and the executive order enabled the prolonged mass detention of children in tents in the desert, a converted Walmart, a repurposed military base, and a border station so overcrowded that some children slept on a loading dock.¹⁷⁰ The Trump administration only retreated from forcible separations in significant numbers as it developed and deployed alternative abusive means of migration management. These alternatives notably included its “Remain in Mexico” program and, after the Covid-19 pandemic, summary expulsions with no pretence of due process.¹⁷¹

Continued Forcible Separation of Children from Their Parents

“The immigration agents separated me from my father right away,” a 5-year-old Honduran boy held in the Clint border station in Texas told lawyers in June 2019. “I was very frightened and scared. I cried. I have not seen my father again.” The boy did not know how long he had been separated from his father. “I am frightened, scared, and sad.”¹⁷²

¹⁷⁰ See, for example, Tanvi Misra, “A Tent City in Tornillo, Texas, Housed Thousands of Migrant Children. Now It’s Almost Gone,” *Pacific Standard*, January 24, 2019, <https://psmag.com/social-justice/a-tent-city-in-texas-is-seeing-its-final-days> (accessed September 30, 2024); Michael E. Miller, Emma Brown, and Aaron C. Davis, “Inside Casa Padre, the Converted Walmart Where the U.S. Is Holding Nearly 1,500 Immigrant Children,” *Washington Post*, June 14, 2018, https://www.washingtonpost.com/local/inside-casa-padre-the-converted-walmart-where-the-us-is-holding-nearly-1500-immigrant-children/2018/06/14/ocd65ce4-6eba-11e8-bd50-b80389a4e569_story.html (accessed September 30, 2024); John Burnett, “Inside the Largest and Most Controversial Shelter for Migrant Children in the U.S.,” NPR, February 13, 2019, <https://www.npr.org/2019/02/13/694138106/inside-the-largest-and-most-controversial-shelter-for-migrant-children-in-the-u-> (accessed September 30, 2024).

¹⁷¹ For Human Rights Watch reporting on “Remain in Mexico” returns, summary expulsions, and an initiative known as the US-Guatemala Asylum Cooperative Agreement see, for example, Human Rights Watch, “US: Border Program’s Huge Toll on Children,” February 4, 2022, <https://www.hrw.org/news/2022/02/04/us-border-programs-huge-toll-children>; Michael Garcia Bochenek, “Trump Administration Uses Pandemic as Excuse to Expel Migrants,” Human Rights Watch, May 20, 2020, <https://www.hrw.org/news/2020/05/20/trump-administration-uses-pandemic-excuse-expel-migrants>; Human Rights Watch, “*Like I’m Drowning: Children and Families Sent to Harm by the US “Remain in Mexico” Program* (New York: Human Rights Watch, 2021), <https://www.hrw.org/report/2021/01/06/im-drowning/children-and-families-sent-harm-us-remain-mexico-program>; Refugees International and Human Rights Watch, *Deportation with a Layover: Failure of Protection Under the US-Guatemala Asylum Cooperative Agreement* (New York: Human Rights Watch, 2020), <https://www.hrw.org/report/2020/05/19/deportation-layover/failure-protection-under-us-guatemala-asylum-cooperative>; Human Rights Watch, “*We Can’t Help You Here: US Returns of Asylum Seekers to Mexico* (New York: Human Rights Watch, 2019), <https://www.hrw.org/report/2019/07/02/we-cant-help-you-here/us-returns-asylum-seekers-mexico>.

¹⁷² Declaration of J.I.L.Z., June 18, 2019, paras. 3, 6 [Ex. 3]. June 2019 declarations cited by exhibit number in this chapter are from the June 2019 temporary restraining order filing by Flores class counsel and are available on Project Amplify’s website. *Flores v. Sessions*, No. 85-cv-4544 DMG (C.D. Cal. filed June 26, 2019), ECF Nos. 569-2 to 569-12, available at Project Amplify, “Child Migrants Speak Truth to Power,” June 2019 tabs, last updated August 2019, <https://www.project-amplify.org/declarations> (accessed September 30, 2024).

In another such case, a 17-year-old boy said he had been separated from his mother in early June 2019 immediately after entering the United States:

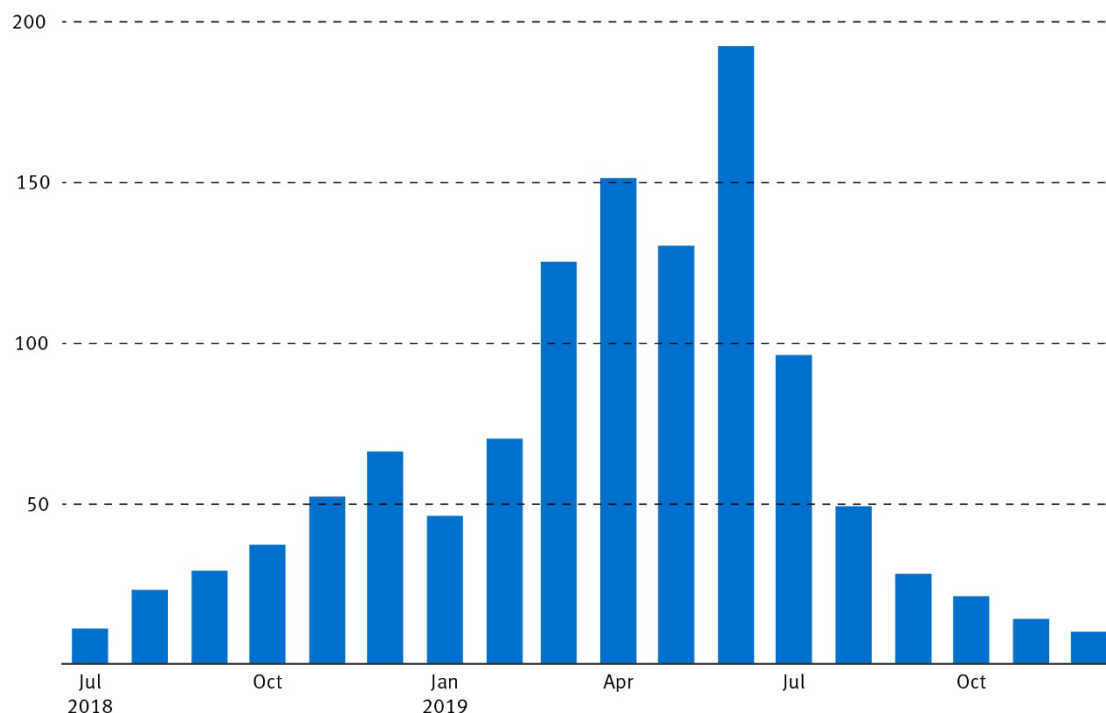
We presented ourselves to border patrol agents, who then separated us. They refused to explain why they were doing so. Since that moment, I have not known where my mother is. I have not known if my mother was in the United States or elsewhere, or even if she was alive. I have been extremely worried about her.¹⁷³

Forcible separations dropped sharply the month after the federal court's order, from 1,510 in May and 991 in June to 11 in July 2018. As the table on the following page illustrates, however, DHS continued to forcibly separate children from their parents in significant numbers through the end of 2019, particularly between November 2018 (52 forcible separations) through August 2019 (49 forcible separations). DHS forcibly separated more than 100 children each month from March through June 2019, and nearly 100 in July 2019.¹⁷⁴

¹⁷³ Declaration of M.J.R.R., June 7, 2019, para. 2 [Ex. 58].

¹⁷⁴ Administration for Children and Families, US Department of Health and Human Services, Monthly Report to Congress on Separated Children, January 2024, p. 5, <https://www.hhs.gov/sites/default/files/january-2024-monthly-report-on-separated-children.pdf> (accessed September 30, 2024). See also HHS, Instances of Family Separation, February 2018-March 2019 (63-page spreadsheet listing children separated from family members at the border), https://www.americanimmigrationcouncil.org/sites/default/files/foia_documents/family_separation_foia_request_hhs_production_instances_of_family_separation.pdf (accessed September 30, 2024).

Children Forcibly Separated from their Parents, by Month July 2018-December 2019



Source: US Department of Health and Human Services, Monthly Report to Congress on Separated Children, January 2024

The June 2018 court order barred DHS from separating children from their parents “absent a determination that the parent is unfit or presents a danger to the child.”¹⁷⁵ DHS interpreted the order to permit family separation because of health issues requiring hospitalization of either the parent or the child, danger to the child, concerns that the adult might not be the child’s parent, or because of a parent’s criminal history. In July 2019, for example, the first month for which a detailed breakdown is available, DHS separated 48 children from their parents because of “parent criminal history and immigration history,” 18 for “parent criminal history,” 5 for “parent cartel/gang affiliation and immigration history,” and 3 for “parent cartel/gang affiliation.” No children were

¹⁷⁵ Order Granting Plaintiffs’ Motion for Classwide Preliminary Injunction, pp. 22-23, *Ms. L. v. ICE*, No. 18-cv-0428 (S.D. Cal. June 26, 2018), <https://www.aclu.org/cases/ms-l-v-ice?document=ms-l-v-ice-order-amending-briefing-schedule> (accessed September 30, 2024), ECF No. 83.

separated from parents that month because of “parent fitness[]/child danger concerns” or because the family relationship could not be verified.¹⁷⁶

Separation was triggered in some cases by minor, nonviolent offenses by the parent, for instance, a 20-year-old nonviolent robbery conviction in one case and possession of a small amount of marijuana in another, analysis by the *New York Times* found. Most of these cases did not list detailed reasons for the separation.¹⁷⁷ But as an HHS assistant inspector general told a House subcommittee hearing, “from a child welfare perspective, not all criminal history rises to a level that would imperil a child’s safety or preclude release back to their parents.”¹⁷⁸

Children Taken from Grandmothers, Aunts, and Uncles

Before and since the forcible family separation policy, CBP has regularly separated children from adult relatives who are not parents. The US government has never disclosed how many children it separates from these relatives, but Human Rights Watch identified many such cases in 2019 in our own interviews and the declarations we reviewed.

In one of these cases, an 8-year-old Honduran boy detained along with his 6-year-old sister in the Clint Border Station in Texas said, “They took us away from our grandmother and now we are all alone.” He did not know precisely how long they had been apart from their grandmother, saying only, “We have been here for a long time.”¹⁷⁹

In another, a 12-year-old girl who traveled to the United States with her grandmother and 8- and 4-year-old sisters said that border agents woke them up at 3 a.m. [in June 2019]:

¹⁷⁶ Administration for Children and Families, US Department of Health and Human Services, Monthly Report to Congress on Separated Children, last reviewed October 24, 2019, table 1, <https://www.hhs.gov/programs/social-services/unaccompanied-children/report-to-congress-on-separated-children/index.html> (accessed September 30, 2024).

¹⁷⁷ Miriam Jordan and Caitlin Dickerson, “U.S. Continues to Separate Migrant Families Despite Rollback of Policy,” *New York Times*, March 9, 2019, <https://www.nytimes.com/2019/03/09/us/migrant-family-separations-border.html> (accessed July 10, 2024).

¹⁷⁸ Testimony of Ann Maxwell, assistant inspector general, Office of Evaluation and Inspections, Office of Inspector General, US Department of Health and Human Services, in Examining the Failures of the Trump Administration’s Inhumane Family Separation Policy, p. 41, <https://www.govinfo.gov/content/pkg/CHRG-116hrg35404/pdf/CHRG-116hrg35404.pdf> (accessed September 30, 2024).

¹⁷⁹ Declaration of M.Z.L., June 18, 2019, para. 3 [Ex. 10].

[T]he officers told us that our grandmother would be taken away. My grandmother tried to show the officers a paper signed by my parents saying that my grandmother had been entrusted to take care of us. The officers rejected the paperwork saying that it had to be signed by a judge. Then the officers took my dear grandmother away. We have not seen her since that moment. . . . Thinking about this makes me cry at times. . . . My sisters are still upset because they love her so much and want to be with her.¹⁸⁰

Similarly, an 11-year-old boy who traveled to the United States with his 3-year-old brother and their 18-year-old uncle to escape gang violence in Honduras said that border agents separated him and his brother from their uncle when they were apprehended, saying, “I don’t know where they sent my uncle. We were not allowed to say goodbye to each other.”¹⁸¹ And a 12-year-old Guatemalan girl said that border agents separated her from her aunt and cousin when the three entered the United States at the beginning of June 2019.¹⁸²

In many of these cases, border agents separated children from relatives who were raising them. For instance, an 8-year-old told lawyers he had been separated from his aunt, who had been taking care of him back home in Guatemala. “I cried and they did not tell me where I was going,” he said.¹⁸³

Siblings Forced Apart

Similarly, US border agents regularly separate children travelling with adult siblings, a practice that began long before the forcible family separation policy. In one such case, a 14-year-old Guatemalan girl said that immediately after she and her 18-year-old sister crossed the river to enter the United States, border agents “lined us up and checked our skin and our hair. . . . That is when they took my sister away from me and now I am very worried about her. I don’t know where she is or if she is ok.”¹⁸⁴

¹⁸⁰ Declaration of M.F.M.O., K.M.M.O, and S.N.M.O, June 18, 2019, para. 6 [Ex. 9].

¹⁸¹ Declaration of L.L.D., June 17, 2019, para. 5 (on file with Human Rights Watch).

¹⁸² Declaration of C.V.L.G., June 20, 2019, para. 1 [Ex. 46].

¹⁸³ Declaration of C.A.H.H., June 18, 2019, para. 3 (on file with Human Rights Watch).

¹⁸⁴ Declaration of K.A.R.L., June 17, 2019, para. 4 [Ex. 54].

A Salvadoran girl, 15, said that she and her younger brother, age 11, were separated from their 19-year-old brother.¹⁸⁵ Similarly, two 11-year-old Salvadoran twin girls were separated from their 19-year-old sister and her 3-year-old son.¹⁸⁶ In their case, the separation meant that they had not been able to call their parents, who lived in New Jersey, during the 13 days they had been in Clint:

When they separated us from my sister, we lost contact with my family. My sister had a paper with my parents' address and phone number on it, and she also has that information memorized. I don't know my parents' number. I have asked the guards here twice if they can ask my sister for my parents' phone number.¹⁸⁷

Detention in Inhuman Conditions

There are about 50 kids in [the room] and 8 or 10 beds. There are no workers inside to take care of us so the kids try to take care of one another. When the workers come to clean our room, we get to go out in the hallway. We have only been outside [in a concrete courtyard] twice.

We sleep on a mat on the floor. There are about 10 kids who sleep on our mat. There is another mat, too. Some children sleep directly on the floor. It is tile. We shared our mat with a teenage mom and her baby, but she left so now one of the kids who has been sleeping on the floor can now sleep on the mat with us.

My [9-year-old] brother and I have had one shower since we came here, but they have not called [my 7-year-old sister] for any showers yet. We have only brushed our teeth once. We take a shower in a big truck with three showers inside.

¹⁸⁵ Declaration of A.M.O.R., June 19, 2019, para. 2 [Ex. 41].

¹⁸⁶ Declaration of A.J.E.M., June 19, 2019, para. 2 [Ex. 44].

¹⁸⁷ *Ibid.*, para. 7.

The toilet is inside of the room where we sleep. There is no separate room, just two stalls with no doors. The older girls try to cover themselves with a blanket so we don't see them when they go to the bathroom. The bunkbeds are right in front of the toilet stalls and so the people from the top bunks can see the kids going to the bathroom, but they try to look away to give the person on the toilet privacy and the person using the toilet usually tries to cover themselves.

Nobody takes care of us here. I try to take care of my little brother and sister since no one will take care of them. There are little kids here who have no one to take care of them, not even a big brother or sister. Some kids are only two or three years old and they have no one to take care of them.

—an 11-year-old boy from Ecuador, describing the conditions he and his siblings faced during more than two weeks in the Clint Border Patrol Station, Clint, Texas, June 18, 2019

More than 350 children, some as young as 5 months old, were being warehoused in a packed border station in Clint, Texas, about 30 minutes southeast of El Paso, when a *Flores* monitoring team visited the facility in June 2019. (Three Human Rights Watch lawyers were part of the monitoring team.) Some had traveled to the United States on their own; others had been separated from parents, older siblings, or other relatives upon apprehension.

Most had been in the Clint border station for weeks. When the monitoring team asked Border Patrol agents why so many children had been held in Clint far in excess of the 72-hour time limit for most transfers to Office of Refugee Resettlement (ORR) shelters, border agents replied that ORR shelters were at capacity as an ongoing consequence of the 2018 forcible separations.¹⁸⁸

The children the team saw were visibly dirty. In an account that was typical of those the team heard, one boy said he had been in the Clint border station for 11 days without being

¹⁸⁸ See Cedar Attanasio, Garance Burke, and Martha Mendoza, "Attorneys: Texas Border Facility Is Neglecting Migrant Kids," Associated Press, June 21, 2019, <https://apnews.com/article/46da2dbe04f54adbb875cfbc06bbc615> (accessed September 30, 2024); Isaac Chotiner, "Inside a Texas Building Where the Government Is Holding Immigrant Children," *New Yorker*, June 22, 2019, <https://www.newyorker.com/news/q-and-a/inside-a-texas-building-where-the-government-is-holding-immigrant-children> (accessed September 30, 2024).

able to shower or change his clothes.¹⁸⁹ Some children had matted hair, faces streaked with dirt, or clothing spattered with mud or vomit. When children did get access to showers, they were given three minutes to wash.¹⁹⁰ “The stench of the children’s dirty clothing was so strong it spread to the agents’ own clothing—people in town would scrunch their noses when they left work,” the *New York Times* later heard.¹⁹¹

Cinder-block cells held twice their capacity, a fact that children could readily see by comparing their numbers with the posted signs. Older boys were in a section of a loading area where staff had set up a row of triple-stacked bunk beds, they told the monitoring team. A 12-year-old Guatemalan boy said that in the 17 days he had been in the Clint station, his cellblock had held as many as 70 boys ranging in age from 3 to 17.¹⁹² Girls described cells so packed that many had to sleep on the concrete floor. Many children said they were not getting enough to eat.¹⁹³

In response to outbreaks of influenza, chickenpox, and scabies, border agents had begun to use some cells to quarantine sick children, meaning that the remaining areas were even more overcrowded.¹⁹⁴

Many children remained in these conditions for well over the 72 hours federal law ordinarily gives DHS to transfer unaccompanied children to ORR shelters. Another boy said

¹⁸⁹ Declaration of K.M.C.T., June 18, 2019, para. 11 [Ex. 6].

¹⁹⁰ See, for example, “Kids in Cages: Inhumane Treatment at the Border,” Testimony of Clara Long Before the U.S. House Committee on Oversight and Reform, Subcommittee on Civil Rights and Civil Liberties, July 11, 2019, <https://www.hrw.org/news/2019/07/11/written-testimony-kids-cages-inhumane-treatment-border>; Caitlin Dickerson, “‘There Is a Stench’: Soiled Clothes and No Baths for Migrant Children at a Texas Center,” *New York Times*, June 21, 2019, <https://www.nytimes.com/2019/06/21/us/migrant-children-border-soap.html> (accessed September 30, 2024); Dahlia Lithwick, “‘Some Did Not Have Socks. Their Hair Was Dirty’: An Interview with an Immigration Lawyer Who Visited the Detained Children in Clint, Texas,” *Slate*, July 1, 2019, <https://slate.com/news-and-politics/2019/07/kids-at-clint-border-crisis-immigration-lawyer-weighs-in.html> (accessed September 30, 2024).

¹⁹¹ Simon Romero, Zolan Kanno-Youngs, Manny Fernandez, Daniel Borunda, Aaron Montes, and Caitlin Dickerson, “Hungry, Scared and Sick: Inside the Migrant Detention Center in Clint, Tex.,” *New York Times*, July 9, 2019, <https://www.nytimes.com/interactive/2019/07/06/us/migrants-border-patrol-clint.html> (accessed September 30, 2024).

¹⁹² Declaration of L.G.L.L., June 18, 2019, para. 5 [Ex. 8]. See also, for example, Declaration of K.M.C.T., June 18, 2019, para. 14 [Ex. 6].

¹⁹³ Graham Kates, “‘I’m Hungry Here at Clint All the Time’: Lawyers Use Kids’ Testimonies to Seek Access to Border Patrol Facilities,” *CBS News*, June 27, 2019, <https://www.cbsnews.com/news/clint-texas-border-patrol-facility-lawyers-use-kids-testimonies-to-see-access/> (accessed September 30, 2024).

¹⁹⁴ See, for example, Chantal Da Silva, “Lawyers Who Visited Detained Migrant Children Say Border Officials Barred Them from Seeing the Sickest Kids, Who Were Held Separately,” *Newsweek*, July 1, 2019, <https://www.newsweek.com/lawyers-barred-seeing-sick-migrant-children-detained-border-1446774> (accessed September 30, 2024).

he had been in Clint for 19 days;¹⁹⁵ a third boy said he had been there for more than 14 days.¹⁹⁶ Another 12-year-old, held together with his 4-year-old brother, had been in Clint for 13 days.¹⁹⁷

Children repeatedly told the monitoring team that they were left on their own, with nobody to care for them. In another such account, a 16-year-old girl, her 14-year-old brother, and their 16-year-old cousin reported:

There are very young children who are here all by themselves for many days. In the cell for boys, there is a four-year-old and his brother who is maybe seven or eight years old. They have been here for about 13 days. They do not have anyone to care for them. In the cell for girls, there are girls as young as three and four years old who do not have anyone to care for them.¹⁹⁸

A 15-year-old Salvadoran girl who was taking care of a 2-year-old boy at Border Patrol's request described how guards punished everybody in her cell after one of them lost a comb:

Today a nurse got mad at us because a comb is missing. Two girls asked to use a comb, but only one was returned. We are not allowed to keep combs, so they came in and took out all of the beds and all of the blankets in order to punish us. Now we will have to sleep on the floor.¹⁹⁹

Other girls corroborated her account.²⁰⁰

The same week the monitoring team was in Flint, a government lawyer argued in federal court that the legal requirement to hold children in "safe and sanitary" conditions did not include access to medicine, blankets, toothbrushes and toothpaste, or soap. One of the

¹⁹⁵ Declaration of U.E.P.F., June 18, 2019, para. 5 [Ex. 11].

¹⁹⁶ Declaration of A.F.L.P., June 17, 2019, paras. 3, 6 [Ex. 40].

¹⁹⁷ Declaration of W.A.S.G., June 18, 2019, para. 4 [Ex. 12].

¹⁹⁸ Declaration of K.P.T.M., R.A.T.P., and B.D.T.P., June 19, 2018, para. 8 [Ex. 14].

¹⁹⁹ Declaration of A.M.O.R., June 19, 2019, para. 6 [Ex. 41].

²⁰⁰ For example, Declaration of G.M.C.B., June 2019 [Ex. 51].

three judges at the hearing asked if she was serious.²⁰¹ As awareness grew of the conditions children faced in CBP holding cells, Vice President Mike Pence faced questions about the position the government had taken at the court hearing. He confirmed that these items were “of course” basic necessities for children.²⁰²

Conditions in Clint may have been even worse in the two months prior to the monitoring team’s June visit. In April and May, more than 700 children were held in the Clint border station, analysis by the *New York Times* and the *El Paso Times* found—twice as many children as there were during the team’s visit. Until about June, the station also held families in a warehouse.²⁰³

Clint was not an aberration. *Flores* monitoring teams who went to CBP detention centers in the Rio Grande Valley earlier in June found substantially similar conditions.²⁰⁴ The reports they collected matched the findings of DHS inspectors from the same month, who observed dangerous levels of overcrowding in CBP detention facilities in the Rio Grande Valley; some cells were standing-room only. Children and adults had no access to showers. More than 800 children had been in the cells for more than 72 hours; 165 had been held for more than a week.²⁰⁵

Nearly 30 incident reports obtained by *NBC News* documented alleged abuse, sexual assault, and mistreatment of detained children in Yuma, Arizona, between April and June

²⁰¹ Oral Argument, 17-56297 *Jenny Flores v. William Barr*, June 18, 2019, <https://www.youtube.com/watch?v=Z2GkDz9yEJA&t=6s> (accessed September 30, 2024).

²⁰² Caroline Kelly and Paul LeBlanc, “Pence: ‘Of Course’ Migrant Children Should Have Toothbrushes, Blankets, and Medicine,” *CNN*, June 23, 2019, <https://www.cnn.com/2019/06/23/politics/mike-pence-border-conditions-congress/index.html> (accessed July 10, 2024).

²⁰³ Simon Romero, Zolan Kanno-Youngs, Manny Fernandez, Daniel Borunda, Aaron Montes, and Caitlin Dickerson, “Hungry, Scared and Sick: Inside the Migrant Detention Center in Clint, Tex.,” *New York Times*, July 9, 2019, <https://www.nytimes.com/interactive/2019/07/06/us/migrants-border-patrol-clint.html> (accessed July 10, 2024).

²⁰⁴ Testimony of Hope Frye, executive director, Project Lifeline, House Subcommittee on Civil Rights and Civil Liberties, July 10, 2019, <https://www.congress.gov/116/meeting/house/109763/witnesses/HHRG-116-GO02-Wstate-FryeH-20190710.pdf> (accessed September 30, 2024).

²⁰⁵ Office of Inspector General, US Department of Homeland Security, Management Alert—DHS Needs to Address Dangerous Overcrowding and Prolonged Detention of Children and Adults in the Rio Grande Valley, OIG-19-51 (July 2, 2019), https://www.oig.dhs.gov/sites/default/files/assets/2019-07/OIG-19-51-Jul19_.pdf (accessed September 30, 2024); DHS Office of Inspector General, Capping Report: CBP Struggled to Provide Adequate Detention Conditions During 2019 Migrant Surge, OIG-20-38 (June 12, 2020), <https://www.oig.dhs.gov/sites/default/files/assets/2020-06/OIG-20-38-Jun20.pdf> (accessed September 30, 2024); Hamed Aleaziz, “Investigators Found Immigrant Kids and Families Locked in Disgusting Conditions in Border Camps,” *BuzzFeed News*, June 26, 2019, <https://www.buzzfeednews.com/article/hamedaleaziz/inspector-disgusting-conditions-border-migrants-children> (accessed September 30, 2024).

2019. In one of these reports, a 15-year-old Honduran girl said a male CBP agent put his hands inside her bra, pulled down her underwear, and groped her. In another, a 16-year-old Guatemalan boy said CBP agents pulled sleeping mats out of their cell in retaliation for complaints, an allegation of collective punishment that matched reports that the *Flores* monitoring team heard in Clint.²⁰⁶

At least six children died while in or shortly after release from CBP custody between September 2018 and May 2019.²⁰⁷ One of these children, a 7-year-old girl held with her father, died in December 2018 from septic shock that “cascaded into multiple organ failure” after inadequate health screening by CBP and a four-hour delay in providing medical attention after her father requested it.²⁰⁸ In another case, a 16-year-old boy died after border agents placed him in a quarantine cell and then failed to check on him for at least four-and-a-half hours.²⁰⁹

²⁰⁶ Jacob Soboroff and Julia Ainsley, “Migrant Kids in Overcrowded Arizona Border Station Allege Sex Assault, Retaliation from U.S. Agents,” *NBC News*, July 10, 2019, <https://www.nbcnews.com/politics/immigration/migrant-kids-overcrowded-arizona-border-station-allege-sex-assault-retaliation-n1027886> (accessed September 30, 2024).

²⁰⁷ Molly Hennessy-Fiske, “Six Migrant Children Have Died in U.S. Custody. Here’s What We Know About Them,” *Los Angeles Times*, May 24, 2019, <https://www.latimes.com/nation/la-na-migrant-child-border-deaths-20190524-story.html> (accessed September 30, 2024).

²⁰⁸ Testimony of Dr. Fiona S. Danaher, pediatrician, Chelsea Pediatrics, Child Protection Team, Massachusetts General Hospital, in *Children in CBP Custody: Examining Deaths, Medical Care Procedures, and Improper Spending*, Hearing Before the House Committee on Homeland Security, 116th Cong., 2d sess., Serial No. 116-77 (July 15, 2020), p. 12, <https://www.congress.gov/116/chr/CHRG-116hrg43865/CHRG-116hrg43865.pdf> (accessed September 30, 2024).

²⁰⁹ See *ibid.*, p. 16.

IV. The Serious, Long-Lasting Trauma of Forcible Separation

There may be nothing more frightening for a vulnerable child than to be forcibly separated from their parent. Even this short-term separation will have lasting impact on their physical and emotional well-being.

Separation of children from their parents threatens the parent-child relationship, especially if the child believes that the parent should have been capable of preventing the separation and thus any imagined or real subsequent injury. In a child's mind, a parent is supposed to protect them from evil and dangers. When the parent or primary caregiver is seen as impotent in a dangerous situation, this threatens their trust in that caregiver and will be difficult to restore.

—Dr. Marsha Griffin, a professor of pediatrics with extensive experience of providing clinical care to migrant children in the Rio Grande Valley, in a declaration filed in the *Ms. L* case, March 3, 2018

Children said everything about their forcible separation from their parents was profoundly distressing. Many had never been apart from their parents before.

For instance, a 15-year-old Guatemalan boy told Human Rights Watch in March 2019 that he felt “really desperate and heartbroken and worried” when he was forcibly separated from his father after border agents apprehended them six months earlier. He described the two months he had been apart from his father:

It is really difficult to be apart from my dad. I don't know when I will be able to see him, and it makes me really sad. Because I am thinking about my dad and being apart from him, I have difficulty concentrating in class. It's hard for me to pay attention to what I should be doing. I feel anxious and worried a lot. There are days I don't have any appetite. I never had a problem eating before, and I think if I weren't so sad about being apart from my dad I wouldn't have a problem with eating now. . . . When I start thinking

about what happened, I feel sad and I start to cry. This never happened before. . . . This is new. It's caused by the stress I'm under now.²¹⁰

After they were reunited, parents told Human Rights their children had developed nightmares or mood swings. Some had mostly stopped talking; others blamed their parents for what had happened to them. Younger children became inconsolable if they were briefly out of sight of parents. Eight- and nine-year-olds had begun to wet their beds in the time they were separated. “When I met with one of the original families in the lawsuit after their reunification,” Lee Gelernt of the ACLU wrote, “the mother told me that her four-year-old was still asking her, two months later, whether anyone was going to come in the night and take him away.”²¹¹

ORR staff recorded trauma reported by separated children in “significant incident” reports and other forms documenting children’s circumstances. For instance:

- A 5-year-old boy from Guatemala who had been separated from his mother “was tearful when he arrived, and would not speak or engage in conversation with anyone.”²¹²
- A 12-year-old Salvadoran boy “reported feeling sad for being separated from his mother and not knowing anything about her.”²¹³
- A 12-year-old Guatemalan boy reported that he developed suicide ideation while in detention after his forcible separation from his aunt and 6-year-old cousin.²¹⁴

²¹⁰ Human Rights Watch interview, Homestead, Florida, March 27, 2019.

²¹¹ Lee Gelernt, “The Battle to Stop Family Separation,” *New York Review of Books*, December 19, 2018, <https://www.nybooks.com/online/2018/12/19/the-battle-to-stop-family-separation/> (accessed September 30, 2024).

²¹² Significant Incident Report, Cayuga Centers, New York, June 29, 2018, <https://www.documentcloud.org/documents/6779444-2-19-19-HHS-ACF-Prod4-p85-86#document/p1/a551192> (accessed September 30, 2024).

²¹³ Significant Incident Report, Cayuga Centers, April 30, 2018, <https://www.documentcloud.org/documents/6780877-1-16-19-HHS-ACF-Prod3#document/p29/a553713> (accessed September 30, 2024). See also, for example, UC Clinician Progress Note, Cayuga Centers, May 22, 2018 (12-year-old Salvadoran boy), <https://www.documentcloud.org/documents/6780877-1-16-19-HHS-ACF-Prod3#document/p11/a553710> (accessed September 30, 2024); Significant Incident Report, KidsPeace, June 7, 2018 (16-year-old Guatemalan girl), <https://www.documentcloud.org/documents/6780877-1-16-19-HHS-ACF-Prod3#document/p32/a553701> (accessed September 30, 2024).

²¹⁴ Significant Incident Report, Cayuga Centers, Bronx, New York, June 18, 2018, <https://www.documentcloud.org/documents/6779475-3-22-19-HHS-ACF-Prod5-p1-9#document/p2/a551231> (accessed September 30, 2024).

- In some of these reports, as in the case of a 9-year-old Salvadoran girl’s forcible separation from her mother, ORR staff record the incident as “abuse in DHS custody.”²¹⁵

These accounts are consistent with research findings that family separation causes severe and long-lasting harm. As Dr. Martin H. Teicher, a psychiatrist at Harvard Medical School, observed:

Forcibly removing a child from their parents is one of the most profound traumas a child can experience, since it undermines a pivotal foundation they require for self-regulation and resilience. Similarly, having your children forcibly taken, not knowing where they are, and not being allowed to contact them, is many parents’ worst nightmare.²¹⁶

Dr. Teicher and other researchers have found that separation from a parent or other caregiver is inherently stressful, particularly for young children.²¹⁷ Dr. Colleen Kraft, then the president of the American Academy of Pediatrics, noted:

[H]ighly stressful experiences, like family separation, can cause irreparable harm, disrupting a child’s brain architecture and affecting his or her short-

²¹⁵ Significant Incident Report, Bethany Christian Services TFC, June 15, 2018, <https://www.documentcloud.org/documents/6681851-12-17-18-HHS-ACF-Prod2-Pt2#document/p1/a546766> (accessed September 30, 2024).

²¹⁶ Martin H. Teicher, “Childhood Trauma and the Enduring Consequences of Forcibly Separating Children from Parents at the United States Border,” *BMC Medicine*, vol. 16 (2018), p. 146, https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6103973/pdf/12916_2018_Article_1147.pdf (accessed September 30, 2024).

²¹⁷ *Ibid.*; Anne Bentley Waddoups, Hirokazu Yoshikawa, and Kendra Strouf, “Developmental Effects of Parent-Child Separation,” *Annual Review of Developmental Psychology*, vol. 1 (2019), pp. 387-410, <https://doi.org/10.1146/annurev-devpsych-121318-085142> (accessed September 30, 2024). Other studies have confirmed that parents and other caregivers can help children cope with stress and, in fact, that the mere presence of a parent is helpful to children in this regard. See, for example, Megan R. Gunnar, Camelia E. Hostinar, Mar M. Sanchez, Nim Tottenham, and Regina M. Sullivan, “Parental Buffering of Fear and Stress Neurobiology: Reviewing Parallels Across Rodent, Monkey, and Human Models,” *Social Neuroscience*, vol. 10 (2015), pp. 474-78, <https://doi.org/10.1080/17470919.2015.1070198> (accessed September 30, 2024); Megan R. Gunnar and Bonny Donzella, “Social Regulation of the Cortisol Levels in Early Human Development,” *Psychoneuroendocrinology*, vol. 27 (2002), pp. 199-220, [https://doi.org/10.1016/S0306-4530\(01\)00045-2](https://doi.org/10.1016/S0306-4530(01)00045-2) (accessed September 30, 2024).

and long-term health. This type of prolonged exposure to serious stress – known as toxic stress – can carry lifelong consequences for children.²¹⁸

Dr. Reshem Agarwal and Dr. Marsha Griffin, both pediatricians, explained, “This kind of stress makes children susceptible to acute and chronic conditions such as extreme anxiety, depression, post-traumatic stress disorder, hypertension and heart disease.”²¹⁹

Migrant children who have been forcibly separated from their parents demonstrate greater emotional and behavioral difficulties than children who have never been separated, suggesting that “separation is associated with an increase in psychological distress.”²²⁰ As a 2020 study found, even short periods of separation are traumatic for children:

[T]hose who had been forcibly separated for shorter periods of time had similar rates of distress to those with longer duration of separation. This suggests that, regardless of how long a child is kept from their parent, the act of being separated may be particularly traumatic.²²¹

Separation also took a toll on parents. Parents repeatedly told Al Otro Lado, a legal services organization based in Tijuana, that forced separation from their children was “the

²¹⁸ American Academy of Pediatrics, AAP Statement Opposing Separation of Children and Parents at the Border, July 19, 2018, <https://docs.house.gov/meetings/IF/IF14/20180719/108572/HHRG-115-IF14-20180719-SD004.pdf> (accessed September 30, 2024).

²¹⁹ Reshem Agarwal and Marsha Griffin, “Taking Immigrant Kids from Parents Shows Contempt for Families,” *Houston Chronicle*, June 3, 2018, <https://www.houstonchronicle.com/opinion/outlook/article/Taking-immigrant-kids-from-parents-shows-contempt-12963039.php> (accessed September 30, 2024).

²²⁰ Sarah A. MacLean, Priscilla O. Agyeman, Joshua Walther, Elizabeth K. Singer, Kim A. Baranowski, and Craig L. Katz, “Mental Health of Children Held at a United States Immigration Detention Center,” *Social Science and Medicine*, vol. 230 (2019), p. 305, <https://doi.org/10.1016/j.socscimed.2019.04.013> (accessed October 30, 2024). See also Anne Elizabeth Sidamon-Eristoff, Emily M. Cohodes, Dyland G. Gee, and Catherine Jensen Peña, “Trauma Exposure and Mental Health Outcomes Among Central American and Mexican Children Held in Immigration Detention at the United States-Mexico Border,” *Developmental Psychobiology*, vol. 64 (2022), p. e22227, <https://doi.org/10.1002/dev.22227> (accessed September 30, 2024).

²²¹ Sarah A. MacLean, Priscilla O. Agyeman, Joshua Walther, Elizabeth K. Singer, Kim A. Baranowski, and Craig L. Katz, “Characterization of the Mental Health of Immigrant Children Separated from Their Mothers at the U.S.–Mexico Border,” *Psychiatry Research*, vol. 286 (2020), p. 112555, <https://doi.org/10.1016/j.psychres.2019.112555> (accessed September 30, 2024). See also Declaration of Marsha R. Griffin, para. 9, *Ms. L. v. ICE*, No. 18-cv-00428 (S.D. Cal. March 3, 2018), ECF No. 21-1, Ex. 3, <https://www.aclu.org/cases/ms-l-v-ice?document=Ms-L-v-ICE-Memo-ISO-Motion-for-Preliminary-Injunction-and-Updated-Exhibits-3-3> (accessed September 30, 2024); Declaration of Julie M. Linton, paras. 4(e), (f), *Ms. L. v. ICE*, No. 18-cv-00428 (S.D. Cal. filed March 3, 2018), ECF No. 21-1, Ex. 5, <https://www.aclu.org/cases/ms-l-v-ice?document=Ms-L-v-ICE-Memo-ISO-Motion-for-Preliminary-Injunction-and-Updated-Exhibits-3-3> (accessed September 30, 2024).

worst thing they had ever experienced”²²² and reported “continued disturbances in sleep, nightmares, loss of appetite, loss of interest, fear for the future, constant worry, hopelessness, and loss of the ability to concentrate.”²²³ In May 2018, a man killed himself after CBP agents forcibly separated him from his children.²²⁴

Separated children spent days, weeks, or even months in immigration detention before US officials reunited them with their parents, allowed them to live with other relatives, or arranged foster placements. Such periods of immigration detention are an additional source of trauma. In fact, research has found that children find even brief periods of detention acutely stressful, with consequences that can persist months after release.²²⁵

Mayra S., a 29-year-old woman from Mexico who was not separated from her children, told a *Flores* monitoring team how detention had affected her 9-year-old:

My son is badly traumatized. He has been wetting his bed and is fearful all the time. He saw someone bound with chains and asked me whether I would be chained in the same way. He also overheard a woman say that she had been separated from her children, and asked me whether we would be separated as well. He wonders when we will get to the United States. I do not tell him that we are already here. He wouldn’t believe that the United States would treat us this way.²²⁶

The known harms to children of immigration detention are serious enough that the American Medical Association, the American Psychiatric Association, the American

²²² Physicians for Human Rights, “*Part of My Heart Was Torn Away*”: *What the U.S. Government Owes the Tortured Survivors of Family Separation* (New York: Physicians for Human Rights, 2022), p. 2, <https://phr.org/our-work/resources/part-of-my-heart-was-torn-away/> (accessed October 30, 2024).

²²³ *Ibid.*, p. 3.

²²⁴ Nick Miroff, “A Family Was Separated at the Border, and This Distraught Father Took His Own Life,” *Washington Post*, June 9, 2018, https://www.washingtonpost.com/world/national-security/a-family-was-separated-at-the-border-and-this-distraught-father-took-his-own-life/2018/06/08/24e40b70-6b5d-11e8-9e38-24e693b38637_story.html (accessed July 10, 2024).

²²⁵ See, for example, Rachel Kronick, Cécile Rousseau, and Janet Cleveland, “Asylum-Seeking Children’s Experiences of Detention in Canada: A Qualitative Study,” *American Journal of Orthopsychiatry*, vol. 85 (2015), pp. 287-94, <https://psycnet.apa.org/doi/10.1037/ort0000061> (accessed October 30, 2024).

²²⁶ Declaration of M.S., June 26, 2018, para. 15 [Ex. 15], in Exhibits in Support of Plaintiffs’ Response to Defendants’ First Juvenile Coordinator Report, Volumes 1-12, *Flores v. Sessions*, Case No. 85-cv-4544 DMG (C.D. Cal. filed September 19, 2018), ECF Nos. 462-1 to 462-12, available at Project Amplify, “Child Migrants Speak Truth to Power,” July 2018 tabs, last updated August 2019, <https://www.project-amplify.org/declarations> (accessed September 30, 2024).

Academy of Pediatrics, and the American College of Physicians have opposed immigration detention of families with children.²²⁷

The forcible separation of children from their parents at the border was different in kind and degree from other contexts in which children are separated from their parents, including the separation of families that results from a parent’s incarceration or deportation. As with Mayra’s 9-year-old son, many had arrived in the United States in the belief that they would find protection. Other than the minor offense of irregular entry, they had not committed a crime. Many arriving parents and children were asylum seekers, who should not be penalized for improper entry.²²⁸ More generally, the criminalization of irregular entry does not prevent or resolve irregular status and, under international human rights standards, exceeds governments’ legitimate interests in regulating migration.²²⁹ Border agents frequently lied to children and their parents about what was happening. In many cases, children did not know for days or weeks where their parents were, and vice versa. Once they did, they had very limited opportunity to communicate. Separated children often faced prolonged periods of immigration detention—including, as in Clint, in

²²⁷ American Medical Association, “AMA Adopts New Policies to Improve Health of Immigrants and Refugees,” June 12, 2017, <https://www.ama-assn.org/press-center/press-releases/ama-adopts-new-policies-improve-health-immigrants-and-refugees> (accessed September 30, 2024); American College of Physicians, The Health Impact of Family Detention in Immigration Cases, July 3, 2018, https://www.acponline.org/sites/default/files/acp-policy-library/policies/family_detention_position_statement_2018.pdf (accessed September 30, 2024); Julie M. Linton, Marsha Griffin, Alan J. Shapiro, Council on Community Pediatrics, et al., “Detention of Immigration Children,” *Pediatrics*, vol. 139 (2017), p. e 20170483 (AAP policy statement), <https://publications.aap.org/pediatrics/article/139/5/e20170483/38727/Detention-of-Immigrant-Children> (accessed September 30, 2024); Devin Miller, “Pediatricians Speak Out: Detention Is Not the Answer to Family Separation,” American Academy of Pediatrics News, July 24, 2018, <https://publications.aap.org/aapnews/news/12792/Pediatricians-speak-out-Detention-is-not-the> (accessed September 30, 2024). See also Miriam Jordan, “Whistle-Blowers Say Detaining Migrant Families ‘Poses High Risk of Harm,’” *New York Times*, July 18, 2018, <https://www.nytimes.com/2018/07/18/us/migrant-children-family-detention-doctors.html> (accessed September 30, 20124).

²²⁸ “The Contracting States shall not impose penalties, on account of their *illegal entry* or presence, on refugees who, coming directly from a territory where their life or freedom was threatened in the sense of Article 1, enter or are present in their territory without authorization, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence.” Convention relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 150 (entered into force April 22, 1954), art. 31(1) (emphasis added). The protections of article 31 have been interpreted to include asylum seekers (those whose claims have not yet been adjudicated) because it cannot be determined at the point of entry whether the person qualifies as a refugee or not. See United Nations High Commissioner for Refugees, Detention Guidelines: Guidelines on the Applicable Criteria and Standards Relating to the Detention of Asylum-Seekers and Alternatives to Detention (2012), paras. 11, 13, <https://www.refworld.org/policy/legalguidance/unhcr/2012/en/87776> (accessed September 30, 2024).

²²⁹ See, for example, UN Working Group on Arbitrary Detention, Revised Deliberation No. 5 on Deprivation of Liberty of Migrants, para. 10, in Human Rights Council, Report of the Working Group on Arbitrary Detention, U.N. Doc. A/HRC/39/45 (July 2, 2018), annex; Human Rights Council, Report of the Working Group on Arbitrary Detention, U.N. Doc. A/HRC/13/30 (January 18, 2010), para. 58; Human Rights Council, Report of the Special Rapporteur on the human rights of migrants, François Crépeau, U.N. Doc. A/HRC/20/24 (April 2, 2012), para. 13.

overcrowded and otherwise abusive conditions—before they were transferred to ORR facilities.

Dr. Jack P. Shonkoff, a professor of pediatrics at Harvard Medical School, told Isaac Chotiner of the *New Yorker*:

From the perspective of what we know about children’s health and well-being, what we know about trauma, abrupt separation is one area where we have a lot of research and a lot of evidence about its consequences. But prolonged institutionalization is a separate area in which we have an equally deep research base and knowledge about how damaging that kind of setting is for kids. We are dealing with two very well-studied, serious assaults on the health and well-being of children.²³⁰

²³⁰ Isaac Chotiner, “How the Stress of Separation and Detention Changes the Lives of Children,” *New Yorker*, July 13, 2019 (interview with Jack P. Shonkoff), <https://www.newyorker.com/news/q-and-a/how-the-stress-of-separation-and-detention-changes-the-lives-of-children> (accessed September 30, 2024).

V. Efforts to Reunite Families

Numerous lawsuits challenged the 2017 and 2018 forcible family separations. Several of these were incorporated into a suit brought by the American Civil Liberties Union (ACLU), known as the *Ms. L* case. That litigation had immediate impact, including an injunction against systematic separations of parents and children in June 2018 and subsequent orders to locate and reunite many separated children with their families.²³¹ Another case, *J.P. v. Sessions*, ordered the government to provide mental health treatment for parents and children who had been separated.²³²

These efforts were still ongoing when President Joe Biden took office in 2021. That February, less than two weeks after his inauguration, President Biden established a task force to reunite the families separated by the US government during the Trump administration.

More than six years after the court ordered reunification of families, more than 1,300 of more than 4,600 children separated during the Trump administration remain unaccounted for.

The Struggle to Identify Separated Children

The US government’s failure to identify and prepare for the consequences of the forcible family separation policy, as described earlier in this report, meant that ORR scrambled to identify all separated children.

DHS had not consistently flagged for ORR which children it had separated.²³³ In fact, DHS maintained a “large number of data sets from the numerous information systems maintained by its various components, sectors, and offices . . . that were neither de-

²³¹ Order Granting Plaintiffs’ Motion for Classwide Preliminary Injunction, *Ms. L v. US Immigration and Customs Enforcement*, No. 18-cv-00428-DMS-MDD (S.D. Cal. June 26, 2018), ECF No. 83; Settlement Agreement, *Ms. L v. US Immigration and Customs Enforcement*, No. 18-cv-00428-DMS-AHG (S.D. Cal. December 11, 2023), ECF No. 721-1, <https://www.together.gov/assets/docs/Ms.%20L%20v.%20ICE%20Settlement.pdf> (accessed September 30, 2024).

²³² Order, *J.P. v. Sessions*, No. 2:18-cv-06081-JAK-SK (C.D. Cal. November 5, 2019), ECF No. 251, <https://clearinghouse.net/doc/106233/> (accessed July 10, 2024), appeal filed, No. 19-56400 (9th Cir. Nov. 29, 2019), but subsequently voluntarily dismissed by the government, Order, *J.P. v. Barr*, No. 19-56400 (9th Cir. Feb. 21, 2020). See also Miriam Jordan, “U.S. Must Provide Mental Health Services to Families Separated at the Border,” *New York Times*, November 6, 2019, <https://www.nytimes.com/2019/11/06/us/migrants-mental-health-court.html> (accessed July 10, 2024).

²³³ See Chapter I, “No Plan to Reunite Children and Parents” section, above.

conflicted nor integrated,” ORR found when it began to work with DHS in response to a court order.²³⁴

Moreover, HHS recordkeeping systems were “not originally designed for aggregated tracking of separated children in ORR care,” Jonathan White, former ORR deputy director, told the court; instead, it was created to manage individual children’s care plans. As a result, “when the Ms. L. Court issued its orders on June 26, 2018, there was not an aggregated list of the children who had been separated by DHS and were then in ORR care.”²³⁵

By August 2021, six months after President Biden ordered the establishment of the Interagency Task Force on the Reunification of Families,²³⁶ it had identified more than 3,900 children whom DHS separated from their parents at the border between July 2017 and January 2021.²³⁷ At that point, 2,073 children had been reunified with their parents either as the result of litigation or the task force’s efforts.²³⁸ These numbers increased as the task force continued its work.²³⁹

Locating parents who had been deported was particularly challenging. Representatives of Justice in Motion, the nongovernmental organization that led many of these efforts, obtained and reviewed parents’ birth records and then sent representatives who spoke Indigenous languages to their places of birth to try to locate them. An August 2018 update

²³⁴ Declaration of Jallyn Sualog, ORR deputy director, para. 7, *Ms. L. v. ICE*, No. 18-cv-00428 (S.D. Cal. February 1, 2019), ECF No. 347-2, <https://www.aclu.org/cases/ms-l-v-ice?document=govt-response-declaration-2> (accessed September 30, 2024).

²³⁵ Declaration of Jonathan White, para. 13, *Ms. L. v. ICE*, No. 18-cv-00428 (S.D. Cal. filed February 1, 2019), ECF No. 347-1, <https://www.aclu.org/cases/ms-l-v-ice?document=govt-response-filing-1> (accessed September 30, 2024).

²³⁶ Establishment of Interagency Task Force on the Reunification of Families, Executive Order 14,011 of February 2, 2021, 86 Fed. Reg. 8273 (February 5, 2021).

²³⁷ Interagency Task Force on the Reunification of Families, Interim Progress Report (August 1, 2021), p. 3, https://www.dhs.gov/sites/default/files/publications/21_0826_s1_interim-progress-report-family-reunification-task-force.pdf (accessed September 30, 2024).

²³⁸ *Ibid.*

²³⁹ For instance, the task force had identified 3,948 separated children as of September 2021 and 3,951 as of November 2021. Interagency Task Force on the Reunification of Families, Interim Progress Report (September 30, 2021), p. 4, https://www.dhs.gov/sites/default/files/publications/21_0930_s1_interim-progress-report-family-reunification-task-force.pdf (accessed September 30, 2024); Interagency Task Force on the Reunification of Families, Interim Progress Report (November 29, 2021), p. 3, https://www.dhs.gov/sites/default/files/2021-12/21_1129_s1_interim-progress-report-family-reunification-task-force.pdf (accessed September 30, 2024).

to the court reported that nearly two months of “[t]hese efforts have reached six parents and will continue”²⁴⁰

In 2022, nongovernmental organizations working with the task force and the *Ms. L* Steering Committee were still contacting families outside the United States.²⁴¹ The task force estimated that it took 20 hours per family to make contact and register them.²⁴² When Justice in Motion’s government contract ended at the end of April 2023, it continued its searches outside the United States using private funds.²⁴³

Other factors impeded swift reunification. New background check requirements that ORR implemented in June 2018 required fingerprints from parents and all adults living in the household.²⁴⁴ Lengthy home studies also delayed the process until the court ordered the government to adopt a streamlined process.²⁴⁵

As of March 20, 2024, the task force reported that 4,656 children had been separated during the Trump administration. Of that total, it had identified 3,225 children who had reunited with their parents—many as an outcome of the *Ms. L* litigation, others as the result of the task force’s efforts, and some thanks to their families’ or their own efforts. Another 71 children were in the process of being reunited with their parents. Some 1,360

²⁴⁰ Joint Status Report, p. 10, *Ms. L. v. ICE*, Case No. 18-cv-0428 (S.D. Cal. August 23, 2018), <https://www.aclu.org/cases/ms-l-v-ice?document=defendants-notice-regarding-implementation-plan-reunification-abroad> (accessed October 30, 2024), ECF No. 204.

²⁴¹ Interagency Task Force on the Reunification of Families, Interim Progress Report (September 30, 2022), pp. 1, 4, https://www.dhs.gov/sites/default/files/2022-10/22_1026_sec-frtf-interim-progress-report-september-2022-cleared.pdf (accessed September 30, 2024).

²⁴² Interagency Task Force on the Reunification of Families, Interim Progress Report (March 31, 2022), p. 4, https://www.dhs.gov/sites/default/files/2022-04/22_0420_frtf-interim-progress-report-march-2022.pdf (accessed April 24, 2024).

²⁴³ Interagency Task Force on the Reunification of Families, Interim Progress Report (November 30, 2023), p. 5, https://www.dhs.gov/sites/default/files/2023-12/2023_1215_sec-frtf-interim-progress-report-final-november-2023.pdf (accessed September 30, 2024).

²⁴⁴ US Government Accountability Office, Unaccompanied Children: Agency Efforts to Reunify Children Separated from Parents at the Border (October 2018), p. 10, <https://www.gao.gov/assets/gao-19-163.pdf> (accessed September 30, 2024).

²⁴⁵ *Ibid.*, p. 11; Order Following Status Conference, p. 2, *Ms. L. v. ICE*, No. 18-cv-0428 (S.D. Cal. July 10, 2018), ECF No. 101, <https://www.aclu.org/cases/ms-l-v-ice?document=ms-l-v-ice-order-granting-plaintiffs-motion-classwide-preliminary-injunction> (accessed October 30, 2024).

children were still “without confirmed reunifications,” including 648 for whom the task force had no contact information.²⁴⁶

The table below shows the number of children identified as having been separated along with the cumulative number of children reunited with their families by the dates given.

Reunification Progress

Date	Number of Children Identified as Separated	Number of Children Reunited with Parents
<u>2018</u>		
July 12, 2018	81*	58
July 18, 2018	2,551	364
July 19, 2018	2,654	364
August 1, 2018	2,654	1,535
August 9, 2018	2,654	1,569
August 16, 2018	2,654	1,616
August 23, 2018	2,654	1,923
September 24, 2018	2,654	2,025
October 9, 2018	2,654	2,070
October 23, 2018	2,668	2,104
November 6, 2018	2,667	2,115
November 27, 2018	2,667	2,125
December 11, 2018	2,816	2,131
<u>2019</u>		
February 1, 2019	2,816	2,155
February 13, 2019	2,816	2,155
March 4, 2019	2,816	2,155
March 25, 2019	2,816	2,159
April 11, 2019	2,814	2,162
May 6, 2019	2,814	2,166
June 4, 2019	2,814	2,167
July 7, 2019	2,814	2,167
August 13, 2019	2,814	2,167
September 6, 2019	2,814	2,168
October 9, 2019	2,814	2,168
November 4, 2019	2,814	2,168
<u>2020</u>		

²⁴⁶ Interagency Task Force on the Reunification of Families, Interim Progress Report (April 22, 2024), p. 5, https://www.dhs.gov/sites/default/files/2024-05/24_0422_sec_frtf-interim-progress-report-final-508.pdf (accessed September 30, 2024).

January 13, 2020	2,815	2,168
February 28, 2020	2,815	2,166
May 27, 2020	3,845	2,166
July 8, 2020	3,845	2,166
August 19, 2020	3,949	2,166
October 20, 2020	3,949	2,166
December 2, 2020	4,013	2,166
<u>2021</u>		
January 13, 2021	4,013	2,166
February 2, 2021	4,013	1,779**
June 2, 2021	3,913	1,786
August 1, 2021	3,914	2,073
September 23, 2021	3,948	2,221
November 17, 2021	3,951	2,248
<u>2022</u>		
January 17, 2022	3,842	2,290
March 17, 2022	3,843	2,331
May 1, 2022	3,843	2,521
July 14, 2022	3,851	2,634
September 14, 2022	3,855	2,766
November 18, 2022	3,811***	2,837
<u>2023</u>		
January 17, 2023	3,923	2,896
March 16, 2023	3,925	2,969
May 16, 2023	3,927	3,033
July 16, 2023	3,932	2,092
September 15, 2023	4,227	3,126
November 14, 2023	4,227	3,147
<u>2024</u>		
March 20, 2024	4,656	3,225

* The initial status report to the court focused on the identification and reunification of children under the age of 5; it did not report the total number of separated children the government had identified.²⁴⁷

** Reunification numbers initially reported by the task force were lower than those reported to the court because the early task force numbers included reunifications that occurred while children were in government custody (for example, in ORR shelters) but not after placement with relatives or other sponsors.²⁴⁸

²⁴⁷ Joint Status Report Regarding Reunification, *Ms. L v. ICE*, No. 18-cv-00428 (S.D. Cal. July 12, 2018), ECF No. 104.

²⁴⁸ Interagency Task Force on the Reunification of Families, Initial Progress Report (June 2, 2021), p. 11, https://www.dhs.gov/sites/default/files/publications/21_o602_s1_family-reunification-task-force-120-day-progress-report.pdf (accessed November 22, 2024).

*** As the task force reconciled overlapping government databases, the number of children it identified as separated decreased in November 2022 compared to the previous month.²⁴⁹

Source: *Ms. L. Status Conference Reports*, July 2018-April 2021; Interagency Task Force on the Reunification of Families Progress Reports, June 2021-April 2024.

Addressing the Harm to Families

The Biden administration has taken notable steps to address the harms families faced from their forced separation, including allowing parents to enter and temporarily remain in the United States, agreeing to reopen their asylum cases and allowing them to work, and providing some mental health services to reunited parents and children. Many of these initiatives were in fulfillment of court orders in the *Ms. L* case. Others were at the recommendation of the task force.

The government has facilitated parents' return to the United States in other ways. For example, at the task force's recommendation, the US government negotiated with Guatemala to expedite passport applications from separated parents.²⁵⁰

Parents who returned to the United States on their own to find their children can also receive temporary status under a program known as "parole in place."²⁵¹

HHS provided "behavioral health screenings and appropriate treatment for behavioral health conditions caused by the family separation for separated parents and children living in the United States."²⁵² In May 2022, the court extended these health services for up to one year while settlement negotiations were continuing.²⁵³

²⁴⁹ Interagency Task Force on the Reunification of Families, Interim Progress Report (November 29, 2022), p. 7, https://www.dhs.gov/sites/default/files/2022-12/22_1219_sec-frtf-interim-progress-report-november-2022-cleared.pdf.pdf (accessed November 22, 2024).

²⁵⁰ Interagency Task Force on the Reunification of Families, Interim Progress Report (November 29, 2021), p. 8, https://www.dhs.gov/sites/default/files/2021-12/21_1129_s1_interim-progress-report-family-reunification-task-force.pdf (accessed July 10, 2024).

²⁵¹ See Catholic Legal Immigration Network (CLINIC), "Parole for Formerly Separated Families," October 2023, <https://www.cliniclegal.org/sites/default/files/2023-10/Parole%20for%20Formerly%20Separated%20Families.pdf> (accessed July 10, 2024).

²⁵² Interagency Task Force on the Reunification of Families, Interim Progress Report (August 1, 2021), p. 5, https://www.dhs.gov/sites/default/files/publications/21_0826_s1_interim-progress-report-family-reunification-task-force.pdf (accessed September 30, 2024).

²⁵³ Order Requiring the Government to Provide Behavioral Health Services, *Ms. L v. ICE*, No. 18-cv-0428-DMS (MDD) (S.D. Cal. May 2, 2022), <https://storage.courtlistener.com/recap/gov.uscourts.casd.564097/gov.uscourts.casd.564097.644.o.pdf> (accessed November 20, 2024).

While positive, some of these initiatives have fallen short. The task force acknowledged in August 2021, “Many of the families that have been reunified by the Task Force are facing homelessness, food insecurity, and other challenges.”²⁵⁴ DHS did not authorize funding to pay for support services for families requesting parole until after March 2022.²⁵⁵

The settlement agreement in the *Ms. L* case, approved on December 11, 2023, should address some of these limitations. It includes six months of housing support, immigration legal assistance, medical services, and other benefits.²⁵⁶

But the parole and work authorization that families receive under the settlement agreement are still temporary, limited to 36 months,²⁵⁷ although families whose asylum claims are reopened and still pending after that period would be eligible for work authorization under other regulatory provisions.²⁵⁸

Reunited families have no options other than asylum for long-term status in the United States.²⁵⁹ When DHS Secretary Alejandro Mayorkas met with a group of reunified families in August 2021, “all seven of the families who spoke to the Secretary raised the importance and urgency for some kind of permanent immigration status in order for them to feel safe and continue on a path to healing from the trauma they suffered.”²⁶⁰

The *Ms. L* settlement limits—but does not wholly prohibit—the separation of children from their parents or legal guardians at the border: families may still be separated for reasons of public safety or national security, concerns for a child’s safety, medical care, or the prosecution of a parent for a felony.²⁶¹ “Where no other permissible circumstances for

²⁵⁴ Interagency Task Force on the Reunification of Families, August 2021 Interim Progress Report, p. 6.

²⁵⁵ Interagency Task Force on the Reunification of Families, Interim Progress Report (May 31, 2022), p. 8, https://www.dhs.gov/sites/default/files/2022-06/22_0531_frtf_interim-progress-report-final.pdf (accessed September 30, 2024).

²⁵⁶ Settlement Agreement, *Ms. L v. ICE*, No. 18-cv-00428-DMS-AHG (S.D. Cal. December 1, 2023), ECF No. 721-1, <https://www.together.gov/assets/docs/Ms.%20L%20v.%20ICE%20Settlement.pdf> (accessed September 30, 2024).

²⁵⁷ *Ibid.*, section IV.C.1.

²⁵⁸ 8 C.F.R. § 274a.12(c)(8).

²⁵⁹ Interagency Task Force on the Reunification of Families, August 2021 Interim Progress Report, pp. 7-8.

²⁶⁰ Interagency Task Force on the Reunification of Families, Interim Progress Report (September 30, 2021), p. 6, https://www.dhs.gov/sites/default/files/publications/21_0930_s1_interim-progress-report-family-reunification-task-force.pdf (accessed September 30, 2024).

²⁶¹ *Ms. L* Settlement Agreement, section V.

separation are present,” US Customs and Border Protection (CBP) will not refer an adult traveling with their children for prosecution on first-time improper entry charges “if the adult . . . is the only parent or Legal Guardian traveling with the child.”²⁶² These limits on future family separation are in effect until October 2031, eight years from the settlement’s effective date.²⁶³

Independent of the *Ms. L* litigation, about 940 families sued the government under the Federal Tort Claims Act (FTCA)²⁶⁴ for the harms they experienced during family separation. Some of these cases have been successful, including a lawsuit that concluded in November 2024.²⁶⁵

Despite the success of the case concluded in November, such litigation faces significant limitations. First, pursuing these claims is a lengthy process that requires legal counsel willing and able to take on a multiyear commitment with an uncertain outcome. Second, these claims cannot easily be filed as class-action suits,²⁶⁶ meaning that each family must find its own attorney and file its own claim. Third, the statute of limitations for these claims is two years,²⁶⁷ a deadline that thousands of families missed in 2020 and 2021 because they were unaware of their rights. Finally, the only remedy for successful FTCA claims is monetary compensation, and FTCA claims are subject to restrictions on the types and amount of compensation that can be awarded.²⁶⁸ The government entered into but ultimately withdrew from negotiations in 2021 that would have settled all pending FTCA family separation cases.²⁶⁹

²⁶² *Ibid.*, section V.C.5.

²⁶³ *Ibid.*, section I.P.

²⁶⁴ 28 U.S.C. §§ 1346(b), 2671-80. See generally Congressional Research Service, The Federal Tort Claims Act (FTCA): A Legal Overview, updated April 17, 2023, <https://crsreports.congress.gov/product/pdf/R/R45732> (accessed November 18, 2024).

²⁶⁵ Order Approving Settlement of Minors’ Claims, *P.G. v. United States*, No. 4:21-cv-04457-KAW (N.D. Cal. November 18, 2024); Hannah Albarazi, “Calif. Judge OKs Biggest Family Separation Settlement Yet,” *Law360*, November 19, 2024, <https://www.law360.com/california/articles/2262714/calif-judge-oks-biggest-family-separation-settlement-yet> (accessed November 21, 2024).

²⁶⁶ See *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 349-50 (2011); *M.D. ex rel. Stukenberg v. Perry*, 675 F.3d 832, 871 (5th Cir. 2012).

²⁶⁷ 28 U.S.C. § 2401(b); *Redlin v. United States*, 921 F.3d 1133, 1136 (9th Cir. 2019).

²⁶⁸ See Congressional Research Service, The Federal Tort Claims Act, pp. 32-33.

²⁶⁹ See Michelle Hackman, Aruna Viswanatha, and Sadie Gurman, “U.S. in Talks to Pay Hundreds of Millions to Families Separated at Border,” *Wall Street Journal*, updated October 28, 2021, <https://www.wsj.com/articles/biden-administration-in-talks-to-pay-hundreds-of-millions-to-immigrant-families-separated-at-border-11635447591> (accessed November 18, 2024); Vanessa Romo and Joel Rose, “Justice Department Breaks Off Talks on Compensation for Separated Families,” *NPR*, December 16, 2021, <https://www.npr.org/2021/12/16/1065044185/justice-department-breaks-off-talks-on-compensation-for-separated-families> (accessed November 18, 2024).

VI. The Road to Family Separation

We need to take away children.

—Attorney General Jeff Sessions, May 11, 2018

Officials began to discuss family separation at least by February 14, 2017, less than a month after President Donald J. Trump’s inauguration. One government official later described many of the attendees at that February meeting as “shell-shocked”; another attendee reportedly said of the senior officials promoting the policy, “They’re going to the Hague and I’m not going to testify for them,”²⁷⁰ referring to the city in the Netherlands where individuals accused of international crimes are put on trial.

Over the course of 2017, the Office of the Attorney General, under the direction of Attorney General Jeff Sessions, discussed “within DOJ and with DHS, potential policy changes” that “explicitly included” the prosecution of adults travelling with their children and “the separation of the children from [those] adults,” the Justice Department’s Office of the Inspector General found.²⁷¹ As they developed what became the forcible family separation policy, Sessions and other senior DOJ officials drew on two earlier experiences, including a 2017 initiative in the Border Patrol’s El Paso Sector that was effectively a blueprint for the border-wide policy that Sessions announced in April 2018.

Sessions was candid about his aim in a call with five federal prosecutors in May 2018. “We need to take away children,” one of the prosecutors’ handwritten notes records Sessions saying.²⁷² Gene Hamilton, who by then had left DHS to take on the role of counselor to the attorney general, told the prosecutors in a follow-up call that “the Attorney General’s

²⁷⁰ Jacob Soboroff, *Separated: Inside an American Tragedy* (New York: Custom House, 2020), p. 32.

²⁷¹ Office of the Inspector General, US Department of Justice, Review of the Department of Justice’s Planning and Implementation of Its Zero Tolerance Policy and Its Coordination with the Departments of Homeland Security and Health and Human Services (January 2021, revised April 2022), p. 12, https://oig.justice.gov/sites/default/files/reports/21-028_o.pdf (accessed September 30, 2024).

²⁷² *Ibid.*, p. 39. See also Michael D. Shear, Katie Benner, and Michael S. Schmidt, “‘We Need to Take Children Away,’ No Matter How Young, Justice Dept. Officials Said,” *New York Times*, October 6, 2020 (updated October 28, 2021), <https://www.nytimes.com/2020/10/06/us/politics/family-separation-border-immigration-jeff-sessions-rod-rosenstein.html> (accessed September 30, 2024); Adolfo Flores and Hamed Aleaziz, “Top Justice Department Officials Pushed to Separate Immigrant Families Despite Knowing It Would Be Hard to Reunite Them,” *BuzzFeed News*, January 14, 2021, <https://www.buzzfeednews.com/article/adolfoflores/justice-department-immigrant-family-separation-report> (accessed September 30, 2024).

message was that ‘no one was exempt’ from prosecution, including parents traveling with children.”²⁷³ Deputy Attorney General Rod Rosenstein told prosecutors on another call in late May 2018 that it did not matter how young the children were.²⁷⁴

Sessions and the other senior officials who settled on forcible family separation as the policy of the United States justified it as a deterrent. The logic was that inflicting tremendous harm on families who had already crossed the US-Mexico border would dissuade others from doing so in the future. “A big name of the game is deterrence,” John Kelly, by then the White House chief of staff, told NPR in response to specific questions about family separation in a May 2018 interview. “The children will be taken care of—put into foster care or whatever—but the big point is they elected to come illegally into the United States, and this is a technique that no one hopes will be used extensively or for very long.”²⁷⁵

Over time, through leaks, litigation, congressional hearings, internal investigations, and Freedom of Information Act disclosures, a picture emerged of “a design that was both deliberately cruel and callously incompetent,” in the words of *New Yorker* staff writer Jonathan Blitzer.²⁷⁶

As it moved to start implementing the policy, DHS estimated that it would separate more than 26,000 children in the four months from May to September 2018.²⁷⁷ But the department gave its agents very little notice when it rolled out the policy across the US-Mexico border—some sectors had less than 12 hours of warning; others heard about the policy between one and three days before they were expected to implement it.²⁷⁸

²⁷³ DOJ Office of the Inspector General, Review of the Department of Justice’s Planning and Implementation of Its Zero Tolerance Policy, p. 40.

²⁷⁴ *Ibid.*, p. 42; Shear, Benner, and Schmidt, “We Need to Take Children Away.”

²⁷⁵ “Transcript: White House Chief of Staff John Kelly’s Interview with NPR,” NPR, May 11, 2018, <https://www.npr.org/2018/05/11/610116389/transcript-white-house-chief-of-staff-john-kellys-interview-with-npr> (accessed September 30, 2024).

²⁷⁶ Jonathan Blitzer, “Do I Have to Come Here Injured or Dead?” *New Yorker*, January 28, 2024, <https://www.newyorker.com/books/page-turner/do-i-have-to-come-here-injured-or-dead> (accessed September 30, 2024).

²⁷⁷ Office of Inspector General, US Department of Homeland Security, DHS Lacked Technology Needed to Successfully Account for Separated Migrant Families, OIG-20-06 (November 25, 2019), <https://www.oig.dhs.gov/sites/default/files/assets/2019-11/OIG-20-06-Nov19.pdf> (accessed September 30, 2024).

²⁷⁸ Email to El Paso Sector staff (sender’s name and identifying information redacted), May 4, 2018, in House Committee on the Judiciary, Majority Staff Report: The Trump Administration’s Family Separation Policy: Trauma, Destruction, and Chaos

The sharp increase in the number of children it was responsible for took ORR by surprise. As described earlier in this report, DHS had no effective means of tracking the families it separated.²⁷⁹ And after the fact, some senior DOJ officials claimed they had not realized that families would not be immediately reunited after parents were convicted and sentenced on improper entry charges.²⁸⁰

Nonetheless, government memos, internal correspondence, internal investigators' interviews with officials, and the public statements of senior government officials establish that family separation was intentional, that officials knew that forcible separation was likely to inflict severe and long-lasting harms, and that they developed and implemented forcible family separation as a deterrent even though the likely harms of the policy were wholly disproportionate to the aim of border management.

The Policy Drew on Earlier Initiatives

DHS and DOJ drew on two earlier initiatives to roll out forced family separation along the US-Mexico border in 2018. First, under a program known as Operation Streamline in effect at some points along the US-Mexico border between 2004 and 2014, Border Patrol agents referred many adults—but not parents travelling with their children—for prosecution on improper entry charges. Second, beginning in mid-2017, the El Paso Border Patrol sector, which includes New Mexico as well as western Texas, piloted forcible family separation—and provided ample warning that the government was unprepared to track and eventually reunite the children and parents it separated.

CBP minimized such concerns. Instead, it described each of these initiatives as successful, attributing decreases in irregular arrivals to the improper entry prosecutions, though the evidence for a deterrent effect was limited.

Family separation was also fleetingly discussed by officials in the administration of President Barack Obama (2009-2017) after a federal appeals court ruled in 2016 that

(October 2020), App. J, p. A-368, https://democrats-judiciary.house.gov/uploadedfiles/the_trump_administration_family_separation_policy_trauma_destruction_and_chaos.pdf (accessed September 30, 2024).

²⁷⁹ See Chapter I, “No Plan to Reunite Children and Parents” section, above.

²⁸⁰ See, for example, DOJ Office of the Inspector General, Review of the Department of Justice’s Planning and Implementation of Its Zero Tolerance Policy, p. 50. But see *ibid.*, p. 51 n.62.

children held with their parents in immigration detention should be released quickly. At the time, officials rejected family separation as too detrimental to children’s safety.²⁸¹ Cecilia Muñoz, director of the White House Domestic Policy Council in the Obama administration, recalled in a 2018 interview that the possibility came up during discussions in which “the agencies were surfacing every possible idea.” She continued, “I do remember looking at each other like, ‘We’re not going to do this, are we?’ We spent five minutes thinking it through and concluded that it was a bad idea.”²⁸²

Operation Streamline

Improper entry was rarely prosecuted before 2004. Instead, US Border Patrol returned most Mexican nationals to Mexico under a process known as “voluntary return” or placed people in administrative removal proceedings; it generally only referred for prosecution those people who had a criminal record or whom agents suspected of smuggling.²⁸³

But starting that year, federal prosecutors agreed at Border Patrol’s request to prosecute most adults who arrived irregularly in a “target enforcement zone” in the Del Rio sector,²⁸⁴ which includes the stretch of the border between Comstock and Eagle Pass, Texas. Under the program, which became known as Operation Streamline and then simply Streamline:

Border Patrol apprehended illegal aliens, processed them, and decided whether to refer them to DOJ for prosecution CBP attorneys, deputized as Special Assistant U.S. Attorneys (SAUSAs), assisted with criminal immigration proceedings. [The US Attorney’s Office] prosecuted illegal

²⁸¹ Daniella Diaz, “Kelly: DHS Is Considering Separating Undocumented Children from Their Parents at the Border, *CNN*, March 7, 2017, <https://www.cnn.com/2017/03/06/politics/john-kelly-separating-children-from-parents-immigration-border/index.html> (accessed September 30, 2024); Samantha Schmidt, “DHS Is Considering Separating Mothers and Children Who Cross the Border Illegally,” *Washington Post*, March 7, 2017, <https://www.washingtonpost.com/news/morning-mix/wp/2017/03/07/dhs-is-considering-separating-mothers-and-children-who-cross-the-border-illegally/> (accessed September 30, 2024).

²⁸² Julie Hirschfeld Davis and Michael Shear, “How Trump Came to Enforce a Practice of Separating Migrant Families,” *New York Times*, June 16, 2018, <https://www.nytimes.com/2018/06/16/us/politics/family-separation-trump.html> (accessed September 30, 2024).

²⁸³ See Office of Inspector General, Department of Homeland Security, Streamline: Measuring Its Effect on Illegal Border Crossing, OIG-15-95 (May 15, 2015), p. 3, https://tracfed.syr.edu/tracker/dynadata/2015_07/OIG_15-95_May15.pdf (accessed September 30, 2024).

²⁸⁴ *Ibid.*, p. 4. CBP explained that this and other enforcement zones were chosen as “high-traffic and problematic areas that had the most illegal activity.” Memorandum to John Roth, inspector general, from Eugene H. Schied, assistant commissioner, CBP Office of Administration, April 22, 2015, p.1, in DHS Office of Inspector General, Streamline: Measuring Its Effect on Illegal Border Crossing, App. C, p. 23.

immigration cases in U.S. courts. The U.S. Marshals Service (USMS) transported and took custody of aliens during their sentences. After aliens had served their sentences, [Enforcement and Removal Operations] or the Border Patrol took custody of the aliens from USMS and processed them for removal.²⁸⁵

“Streamline” was a euphemism—this policy resulted in mass trials in which “[e]ach of the accused had 25 seconds, give or take, to hear the charges against him, enter a plea and receive a sentence,” a *New York Times* investigation found.²⁸⁶ The initiative functioned in up to six Border Patrol sectors in Texas and Arizona at least through the end of December 2014.²⁸⁷ CBP noted that the program was “not a zero-tolerance initiative”;²⁸⁸ in the Tucson sector, for example, one criterion for referral for prosecution was that the person apprehended by Border Patrol agents had a prior order of removal.²⁸⁹

CBP officials described Streamline as an effective means of deterring irregular entry, but the DHS Inspector General found that the Border Patrol did not track people’s entry history over multiple years, meaning that it was “not fully and accurately measuring Streamline’s effect on deterring aliens from entering and reentering the country illegally.”²⁹⁰

The El Paso Initiative

While Operation Streamline differed in significant respects from the 2018 forcible family separation policy, the 2017 El Paso pilot project was virtually a blueprint for the more recent border-wide policy.

²⁸⁵ DHS Office of Inspector General, *Streamline: Measuring Its Effect on Illegal Border Crossing*, p. 4.

²⁸⁶ Fernanda Santos, “Detainees Sentenced in Seconds in ‘Streamline’ Justice on Border,” *New York Times*, February 11, 2014, <https://www.nytimes.com/2014/02/12/us/split-second-justice-as-us-cracks-down-on-border-crossers.html> (accessed September 30, 2024).

²⁸⁷ DHS Office of Inspector General, *Streamline: Measuring Its Effect on Illegal Border Crossing*, p. 5.

²⁸⁸ Memorandum to Roth from Schied, p. 2.

²⁸⁹ *Ibid.*, p. 10.

²⁹⁰ DHS Office of Inspector General, *Streamline: Measuring Its Effect on Illegal Border Crossing*, “What We Found” section, first paragraph.

The pilot program was not publicly acknowledged—in fact, it is not clear how widely its existence was known at DHS and DOJ headquarters until late 2017.²⁹¹ But Sessions used the El Paso initiative as a model for the 2018 policy, Deputy Attorney General Rod Rosenstein told the Justice Department’s Office of the Inspector General.²⁹²

Once the initiative was underway, federal judges in El Paso began to observe a “voluminous” number of improper entry prosecutions of parents who did not know where their children were, causing parents tremendous anxiety.²⁹³ In August 2017, the Western District’s deputy criminal chief emailed the acting US attorney:

We have now heard of us taking breast feeding defendant moms away from their infants, I did not believe this until I looked at the duty log and saw the fact we had accepted prosecution on moms with one and two year olds.²⁹⁴

In November 2017, the *Houston Chronicle* reported that at least 22 parents with no history of immigration violations had been prosecuted for improper entry and separated from their children.²⁹⁵ In fact, 99 parents with children were prosecuted under the pilot program, a prosecutor’s office memorandum reported without specifying the total number of children affected.²⁹⁶

²⁹¹ See email from Carla Provost, chief, US Border Patrol, to Kevin K. McAleenan, CBP commissioner, November 18, 2017, in FOIA Request CBP-2018-065314, 15th Release, March 15, 2023, pp. 1860-1861, <https://www.documentcloud.org/documents/23794878-dhs-records-relating-to-family-separation-part-11?responsive=1&title=1&onlyshoworg=1#document/p1861/a2383518> (accessed September 30, 2024).

But see Office of the Inspector General, US Department of Justice, Review of the Department of Justice’s Planning and Implementation of Its Zero Tolerance Policy and Its Coordination with the Departments of Homeland Security and Health and Human Services (January 2021, revised April 2022), p. 32 n.51, https://oig.justice.gov/sites/default/files/reports/21-028_o.pdf (accessed September 30, 2024).

²⁹² *Ibid.*, p. 32.

²⁹³ Status Conference, pp. 2-5, *United States v. Dominguez-Portillo*, Case No. 17-MJ-4409 (W.D. Tex. November 1, 2017), ECF No. 7, <https://s3.documentcloud.org/documents/4528076/Dominguez-Portillo-Transcript-11-1-17.pdf> (accessed September 30, 2024). See also Bench Trial and Sentencing, pp. 43-46, *United States v. Dominguez-Portillo*, Case No. 17-MJ-4409 (W.D. Tex. December 15, 2017), ECF No. 50, <https://www.documentcloud.org/documents/4525744-Dominguez-Portillo-Transcript-of-Trial-12-18-17.html> (accessed September 30, 2024); DOJ Office of the Inspector General, Review of the Department of Justice’s Planning and Implementation of Its Zero Tolerance Policy, p. 17.

²⁹⁴ DOJ Office of the Inspector General, Review of the Department of Justice’s Planning and Implementation of Its Zero Tolerance Policy, p. 16.

²⁹⁵ Lomi Kriel, “Trump Moves to End ‘Catch and Release,’ Prosecuting Parents and Removing Children Who Cross Border,” *Houston Chronicle*, November 25, 2017, <https://www.houstonchronicle.com/news/houston-texas/houston/article/Trump-moves-to-end-catch-and-release-12383666.php> (accessed September 30, 2024).

²⁹⁶ DOJ Office of the Inspector General, Review of the Department of Justice’s Planning and Implementation of Its Zero Tolerance Policy, p. 16.

The acting US attorney, Richard Durbin, said in an email message to assistant US attorneys, “History would not judge [the initiative] kindly.”²⁹⁷

Although the pilot program was for the El Paso sector, there was a similar number of family separations in the Yuma sector in Arizona in the second half of 2017.²⁹⁸

Although Sessions and the Office of the Attorney General used this pilot as a model, they did so selectively: a review by the Justice Department’s Office of the Inspector General found “no evidence that the [Office of the Attorney General] sought information about the challenges encountered during the El Paso Initiative, including the government’s inability to reunify separated families”²⁹⁹

Family Separation Was Intentional

Attorney General Jeff Sessions, other senior Justice Department officials, and senior DHS officials were aware that the “zero tolerance” policy would result in family separation. More than that, there is abundant evidence that family separation was a deliberate policy choice.

Forcible Family Separation Explicitly Discussed by Officials

Forcible family separation was a step the Office of the Attorney General and senior DHS officials explicitly discussed over the course of 2017 and 2018.³⁰⁰ For instance:

²⁹⁷ Ibid., p. 14.

²⁹⁸ Interagency Task Force on the Reunification of Families, Initial Progress Report (June 2, 2021), p. 22, https://www.dhs.gov/sites/default/files/publications/21_0602_s1_family-reunification-task-force-120-day-progress-report.pdf (accessed September 30, 2024)

²⁹⁹ DOJ Office of the Inspector General, Review of the Department of Justice’s Planning and Implementation of Its Zero Tolerance Policy, p. 32.

³⁰⁰ Ibid., p. 12.

- Family separation was discussed at a CBP meeting on February 14, attended by other officials from DHS, DOJ, and ORR.³⁰¹ In a February 16 email, Maggie Wynne, the HHS counselor for human services policy, wrote, “DHS proposes separating children in family units from their parents and referring them to ORR as Unaccompanied Alien Children (UACs).”³⁰² Following the meeting, DHS staff prepared a document titled “White Paper—Separating Family Units and Detaining Parents.”³⁰³
- Senior DHS officials discussed the proposed family separation policy after *Reuters* reported on it on March 4.³⁰⁴ Nielsen, then the DHS chief of staff, emailed the article to other DHS officials the following day with a request for talking points and the

³⁰¹ Email from Kevin K. McAleenan, acting commissioner, US Customs and Border Protection, to Juan Osuna et al., February 13, 2017 (invitation to a meeting “for the Senior Action Officers from ICE, CBP, DoJ, CIS, and HHS to plan to implement the ‘no release’ policy on recent border apprehensions”), in Plaintiffs’ Response to Defendant’s 56.1 Statement, Ex. 28, *C.M. v. United States*, No. 2:19-cv-05217-SRB (D. Ariz. April 24, 2023), ECF No. 404-3, pp. 17-18; Testimony of Jonathan White, ORR deputy director for children’s programs, in House Committee on Energy and Commerce, Subcommittee on Oversight and Investigations, Examining the Failures of the Trump Administration’s Inhumane Family Separation Policy, 116th Cong., 1st sess. (February 7, 2019), Serial No. 116-3, p. 61, <https://www.govinfo.gov/content/pkg/CHRG-116hhrg35404/pdf/CHRG-116hhrg35404.pdf> (accessed September 30, 2024). See also Anne Flaherty, “Government Official Says He Warned Trump Administration Against Family Separations,” *ABC News*, February 7, 2019, <https://abcnews.go.com/Politics/government-official-warned-family-separations/story?id=60910531> (accessed September 30, 2024).

³⁰² Email from Maggie Wynne (recipients’ names redacted), February 16, 2017, in Plaintiffs’ Response to Defendant’s 56.1 Statement, Ex. 79, *C.M. v. United States*, No. 2:19-cv-05217-SRB (D. Ariz. April 24, 2023), ECF No. 404-5. This email is available at American Immigration Council, Government Documents Submitted as Summary Judgment, undated, p. 30, https://www.americanimmigrationcouncil.org/sites/default/files/litigation_documents/separated_family_members_seek_monetary_damages_from_united_states_summary_judgment_exhibits.pdf (accessed September 30, 2024). In this chapter, emails and other documents available in the American Immigration Council collection of *C.M.* exhibits cite the electronic page number where the document is located in the collection and also note the electronic case file (ECF) number and exhibit number of the court submission.

³⁰³ Email from Dimple Shah to Timothy S. Robbins, March 1, 2017, responding to email from Timothy S. Robbins to Dimple Shaw, February 22, 2017, in Plaintiffs’ Response to Defendant’s 56.1 Statement, Ex. 29, *C.M. v. United States*, No. 2:19-cv-05217-SRB (D. Ariz. April 24, 2023), ECF No. 404-3.

³⁰⁴ Julia Edwards Ainsley, “Exclusive—Trump Administration Considering Separating Women, Children at Mexico Border,” *Reuters*, March 4, 2017, <https://www.reuters.com/article/world/exclusive-trump-administration-considering-separating-women-children-at-mexico-b-idUSKBN16A2JK/> (accessed September 30, 2024). In addition, an *MSNBC* news report published the same day and immediately circulated among senior DHS officials, including Nielsen, described a new DHS plan that would “break from the current policy keeping families together. Instead, it would separate women and children after they’ve been detained—leaving mothers to choose between returning to their country of origin with their children, or being separated from their children while staying in detention to pursue their asylum claim.” Email from David Lapan to Kirstjen Nielsen et al., March 4, 2017, in Third Interim Release for DHS FOIA Litigation No. 2019-HQLI-00010 (November 5, 2019), pp. 89-91 (forwarding Chris Hayes and Brian Montopoli, “Exclusive: Trump Admin. Plans Expanded Immigrant Detention,” *MSNBC*, March 4, 2017, <https://www.msnbc.com/all-in/exclusive-trump-admin-plans-expanded-immigrant-detention-msna969601> (accessed September 30, 2024)).

- “inside story.”³⁰⁵ The *Reuters* story also prompted the House Committee on Appropriations to advise Kevin McAleenan, then the acting CBP commissioner, that a family separation policy would have “serious ramifications” and that the committee chairman “expects to be informed prior to adopting it.”³⁰⁶
- Asked in a *CNN* interview on March 6 if DHS was considering family separation, Homeland Security secretary John Kelly said, “[I]n order to deter more movement along this terribly dangerous network ... I am considering exactly that.”³⁰⁷
 - On March 7, the acting DHS assistant secretary for international affairs wrote to Gene Hamilton, a senior counselor to Kelly, “We should also discuss the ‘separating families’ issues raised at the morning huddle.”³⁰⁸
 - On April 18, DHS staff sent drafts of the “Separating Family Units and Detaining Parents” white paper to Thomas Homan, Matthew Albence, and other officials.³⁰⁹
 - Senior DHS officials were again actively discussing family separation in August. Homan wrote to McAleenan, Wolf, Hamilton, and Jonathan Hoffmann on August 8, “we need to discuss my proposal for separation.”³¹⁰ Later that afternoon, forwarding a chain that included Homan’s email, another official said, “Tom [Homan] has been advocating that we need to separate family units and send the adults to adult detention and the children to HHS. If we announced that, how bad do you think it would get??”³¹¹ On August 14, the same official reported to Homan that he had left a meeting with “[n]o authorization to separate families”³¹² and “[w]orried about loss of momentum.”³¹³

³⁰⁵ Email from Kirstjen Nielsen to Susan Corbin, Ben Cassidy, and Jonathan Hoffman, March 5, 2017, in Third Interim Release for DHS FOIA Litigation No. 2019-HQLI-00010 (November 5, 2019), pp. 62-63.

³⁰⁶ Email from clerk (name redacted), House Committee on Appropriations, to Allen Blume and Kevin K. McAleenan, March 5, 2017, in Third Interim Release for DHS FOIA Litigation No. 2019-HQLI-00010 (November 5, 2019), p. 63.

³⁰⁷ Daniella Diaz, “Kelly: DHS Is Considering Separating Undocumented Children from Their Parents at the Border,” *CNN*, March 7, 2017, <https://www.cnn.com/2017/03/06/politics/john-kelly-separating-children-from-parents-immigration-border/> (accessed July 10, 2024).

³⁰⁸ Email from Dimple Shah to Gene Hamilton, March 7, 2017, in Third Interim Release for DHS FOIA Litigation No. 2019-HQLI-00010 (November 5, 2019), p. 57.

³⁰⁹ Email from Timothy S. Robbins to Thomas Homan, Matthew Albence, and Tracy Short, April 18, 2017, in Plaintiffs’ Response to Defendant’s 56.1 Statement, Ex. 31, *C.M. v. United States*, No. 2:19-cv-05217-SRB (D. Ariz. April 24, 2023), ECF No. 404-3.

³¹⁰ Email from Thomas Homan to McAleenan, Chad Wolf, Hamilton, and Hoffman, August 8, 2017, in American Immigration Council, Government Documents Submitted as Summary Judgment, p. 39 (ECF No. 404-5, Ex. 81).

³¹¹ Email from Thomas Blank (recipient redacted), August 8, 2017, in American Immigration Council, Government Documents Submitted as Summary Judgment, p. 37 (ECF No. 404-5, Ex. 81).

³¹² Email from Blank to Homan, August 14, 2017, 5:14 p.m., in American Immigration Council, Government Documents Submitted as Summary Judgment, p. 32 (ECF No. 404-3, Ex. 33).

³¹³ Email from Blank to Homan, August 14, 2017, 10:30 p.m., in American Immigration Council, Government Documents Submitted as Summary Judgment, p. 32 (ECF No. 404-3, Ex. 33).

- On September 6, Homan wrote in an email to Hamilton and McAleenan, “I just saw a draft of a DHS Policy memo pushing back on my proposed family response.”³¹⁴ (“DHS Policy” is a short name for DHS Office of Strategy, Policy and Plans.) The same day, Hamilton emailed Chad Wolf to say, “I am happy to write out some memos . . . and cut off Policy from the process, because what was sent up is not acceptable.”³¹⁵ The content of Homan’s proposed “family response” and the comments from the Office of Strategy, Policy and Plans do not appear to have been fully disclosed publicly; one internal memo, fully redacted apart from the sender and subject lines, was titled “Limiting Reliance on Family Detention.”³¹⁶ Other internal emails sent in early September refer to a “Family Separation/Detention” memo under review by DHS Policy.³¹⁷ An official who emailed the DHS Policy memo to Homan described it as “a strong statement of opposition to what ICE wants to do in terms of separating families.”³¹⁸
- An ORR staffer wrote to Jonathan White on September 27: “DHS Policy is working on a family separation policy again, to send all children to ORR.”³¹⁹
- These discussions were ongoing in late October, as illustrated by an exchange between Homan and two ICE legal advisers: in response to Homan’s request for “the paper [they] did on FAMU [Family Unit] separation,”³²⁰ they replied, “Attached is an email chain to familiarize you with the prior discussion on separating families.”³²¹

³¹⁴ Email from Homan to Hamilton and McAleenan, September 6, 2017,

<https://www.documentcloud.org/documents/20407168-eac-records-regarding-foreign-interference-in-us-elections-part-2#document/p1739> (accessed September 30, 2024).

³¹⁵ Email from Gene Hamilton to Chad Wolf, September 6, 2017, in American Immigration Council, Government Documents Submitted as Summary Judgment, p. 34 (ECF No. 404-3, Ex. 34).

³¹⁶ Limiting Reliance on Family Detention, Memorandum for the Acting Secretary from Michael Dougherty, assistant secretary for border, immigration, and trade, DHS Office of Policy (date redacted, likely September 15, 2017), <https://www.documentcloud.org/documents/6780394-DHS-Records-Regarding-Communications-with#document/p1219/a2065312> (accessed July 10, 2024).

³¹⁷ Email to Chad Wolf and Gene Hamilton (sender’s name redacted), September 5, 2017, in American Immigration Council, Government Documents Submitted as Summary Judgment, pp. 34-35 (ECF No. 404-3, Ex. 34).

³¹⁸ Email from Thomas Blank to Thomas Homan, September 5, 2017, in Plaintiffs’ Response to Defendant’s 56.1 Statement, Ex. 76, *C.M. v. United States*, No. 2:19-cv-05217-SRB (D. Ariz. April 24, 2023), ECF No. 404-5.

³¹⁹ Jacob Soboroff, *Separated: Inside an American Tragedy* (New York: Custom House, 2020), p. 59.

³²⁰ Email from Homan to Tracy Short and Mike P. Davis, ICE legal advisers, October 30, 2017, <https://www.documentcloud.org/documents/7038565-DHS-USCIS-18-0360-T#document/p4/a2065356> (accessed September 30, 2024).

³²¹ Email from Short to Homan, October 31, 2017, <https://www.documentcloud.org/documents/7038565-DHS-USCIS-18-0360-T#document/p4/a2065356> (accessed September 30, 2024).

- In November, under the heading “Limiting Reliance on Family Detention,” an internal ICE email recommended “separating detained parents from their children during removal proceedings.”³²² The email explained: “[T]he parent will generally be detained for proceedings. When this occurs the child(ren) will be referred to ORR for placement”³²³
- In mid-December, DHS chief of staff Chad Wolf and other DHS officials circulated bullet points for an “options paper” for Nielsen that included “separating family units, placing the adults in adult detention and placing the minors under the age of 18 in the custody of HHS as unaccompanied children.”³²⁴
- Wolf emailed Hamilton, by then counselor to the attorney general, a document proposing 16 policy options, the first two of which were “increase prosecution of family unit parents” and “separate family units.”³²⁵ Hamilton replied the following day “expressing his support for the proposals.”³²⁶
- Matthew Whitaker, chief of staff in the Office of the Attorney General, also reviewed this policy options memo, later reporting “that Sessions and Hamilton were primarily responsible for immigration policy at the time and ‘were on the same page’ about the options to increase the number of immigration prosecutions at the

³²² Email from deputy assistant director (name redacted), Custody Programs Division, ICE Enforcement and Removal Operations, November 30, 2017, in American Immigration Council, Government Documents Submitted as Summary Judgment, p. 67 (ECF No. 404-6, Ex. 87).

³²³ Ibid.

³²⁴ Email from Dimple Shah to Chad Wolf and Tracy Short, December 15, 2017, in American Immigration Council, Government Documents Submitted as Summary Judgment, p. 69-70 (ECF No. 404-6, Ex. 88); email from Wolf to McAleenan et al., December 16, 2017, in Plaintiffs’ Response to Defendant’s 56.1 Statement, Ex. 89 (noting “Attached is the Options Paper discussed below”), *C.M. v. United States*, No. 2:19-cv-05217-SRB (D. Ariz. April 24, 2023), ECF No. 404-6.

³²⁵ The explanation of the first option included the following: “The parents would be prosecuted for illegal entry (misdemeanor) or illegal reentry (felony) and the minors present would be placed in HHS custody as UACs.” Under the second option, the memo explicitly noted that “minors under the age of 18” would be placed “in the custody of HHS as unaccompanied alien children (UACs) because the minors will meet the definition of ‘unaccompanied alien child’” because “no parent or legal guardian in the U.S. is available to provide care and physical custody.” Office of the Inspector General, US Department of Justice, Review of the Department of Justice’s Planning and Implementation of Its Zero Tolerance Policy and Its Coordination with the Departments of Homeland Security and Health and Human Services (January 2021, revised April 2022), pp. 12-13, https://oig.justice.gov/sites/default/files/reports/21-028_o.pdf (accessed September 30, 2024). See also Julia Ainsley, “Trump Admin Weighed Targeting Migrant Families, Speeding Up Deportation of Children,” *NBC News*, January 18, 2019, <https://www.nbcnews.com/politics/immigration/trump-admin-weighed-targeting-migrant-families-speeding-deportation-children-n958811> (accessed September 30, 2024); Julie Hirschfeld Davis and Michael D. Shear, *Border Wars: Inside Trump’s Assault on Immigration* (New York: Simon and Schuster, 2019), pp. 253-54. For the full text of the memo, see Sen. Jeff Merkley, “Merkley Reveals Secret Trump Administration Plan to Create Border Crisis,” *Medium*, January 18, 2019, <https://medium.com/@SenJeffMerkley/merkley-reveals-secret-trump-administration-plan-to-create-border-crisis-f72a7c3de2bd> (accessed July 10, 2024).

³²⁶ DOJ Office of the Inspector General, Review of the Department of Justice’s Planning and Implementation of Its Zero Tolerance Policy, p. 13.

border, including by signaling to DHS the Department’s support for prosecuting family unit adults.”³²⁷

- “Separate family units,” the second of the 16 policy options discussed in the DHS memo, was an administrative measure that the journalist Caitlin Dickerson reported “would have allowed the agency to separate not only families that crossed the border illegally but also those who presented themselves at legal ports of entry, requesting asylum.”³²⁸ McAleenan and Homan presented these options to Homeland Security secretary Kirstjen Nielsen and other DHS officials.³²⁹ They also described the El Paso pilot program to them.³³⁰
- The US attorney for the Western District of Texas briefed DOJ headquarter officials in late December about the El Paso initiative, for which the US attorney’s office had “developed guidelines to prosecute family unit adults in certain circumstances even if this resulted in the separation of children from those prosecuted adults.”³³¹

2018

- Talking points updated in January 2018 at the request of Nielsen’s office explained effect of “[s]ignificantly increas[ing] the prosecution of family unit parents when encountered between the points of entry”: “DHS would refer parents to DOJ for criminal prosecution and for placement in the custody of the U.S. Marshals Service to await trial. Due to the parents’ unavailability, minors would be referred to HHS care and custody as unaccompanied alien children (UACs).”³³²

³²⁷ Ibid.

³²⁸ Caitlin Dickerson, “The Secret History of the U.S. Government’s Family Separation Policy,” *The Atlantic*, August 7, 2022, p. 53.

³²⁹ See email from Tracy Short to Patrick S. Flanagan, Thomas Blank, and Lora L. Ries, December 8, 2017 (“Separating family units, placing adults in detention and placing children in HHS custody as UACs” included among “solutions” for discussion at Nielsen’s immigration and border security briefing), and email from Tracy Short, December 9, 2017 (including “separation of families proposal” on agenda for the briefing for Nielsen), in American Immigration Council, Government Documents Submitted as Summary Judgment, pp. 44-47 (ECF No. 404-4, Ex. 47).

³³⁰ Caitlin Dickerson, “The Secret History of the U.S. Government’s Family Separation Policy,” p. 53.

³³¹ DOJ Office of the Inspector General, Review of the Department of Justice’s Planning and Implementation of Its Zero Tolerance Policy, p. 13.

³³² Upcoming DHS UAC Policy Decisions Talking Points, January 19, 2018, attached to email to Tracy Short (sender’s name redacted), January 19, 2018, in American Immigration Council, Government Documents Submitted as Summary Judgment, p. 63 (ECF No. 404-4, Ex. 55).

- Nielsen’s office scheduled a “Family Separation Issue Meeting” on March 19 at which the expected attendees included Albence, Homan, McAleenan, and Wolf, in addition to Nielsen herself.³³³
- In late March, amid reports that a large “caravan” of people from Central America was heading through Mexico toward the United States, a US Citizenship and Immigration Services (USCIS) adviser assessed potential responses in an email to the director of USCIS, L. Francis Cissna. In addition to family detention, she wrote, “The other option, which I know is the subject of discussion, is that DHS may detain only the parents throughout the removal process, placing the child with HHS for placement as a now unaccompanied child under TVPRA [the Trafficking Victims Protection Reauthorization Act].”³³⁴
- On April 19, McAleenan sent Homan, along with Cissna and James McCament, a DHS deputy undersecretary, “a draft decision memorandum proposing increased prosecution (toward 100%) of all adults who cross illegally, whether they present as single adults or in family units.”³³⁵
- Homan and Cissna added their signatures to McAleenan’s in the final version of the memo. They recommended the third of three options presented in the memo, the “initiative that would pursue prosecution of all amenable adults cross our border illegally, including those presenting with a family unit.”³³⁶ Homan understood that

³³³ Invitation to Family Separation Issue Meeting sent March 15, 2018, in Plaintiffs’ Response to Defendant’s 56.1 Statement, Ex. 56, *C.M. v. United States*, No. 2:19-cv-05217-SRB (D. Ariz. April 24, 2023), ECF No. 404-4.

³³⁴ Email from Kaitlin V. Stoddard to Francis Cissna et al., March 30, 2018, in USCIS FOIA Release, Control No. NRC2018159378 (November 15, 2019).

³³⁵ Email from Kevin K. McAleenan, commissioner, US Customs and Border Protection, to Thomas Homan, acting director, US Immigration and Customs Enforcement; L. Francis Cissna, director, US Citizenship and Immigration Services; and James McCament, deputy undersecretary, Office of Strategy, Policy, and Plans, US Department of Homeland Security, April 19, 2018, <https://s3.documentcloud.org/documents/22126997/april-19th-email.pdf> (accessed September 30, 2024). See also email from Cissna to Todd P. Young and Kaitlin V. Stoddard, advisor to the director, USCIS, April 19, 2018, in FOIA Request DHS-18-0360-A, p. 51, <https://www.documentcloud.org/documents/6845646-DHS-USCIS-18-0360-A.html#document/p51/a562498> (accessed November 19, 2024).

³³⁶ Increasing Prosecutions of Immigration Violations, Memorandum for the Secretary from Kevin K. McAleenan, commissioner, US Customs and Border Protection, L. Francis Cissna, director, U.S. Citizenship and Immigration Services, and Thomas D. Homan, acting director, U.S. Immigration and Customs Enforcement, April 23, 2018, in American Immigration Council, Government Documents Submitted as Summary Judgment, pp. 4-8 (ECF No. 379-13, Ex. 19). See also Julie Hirschfeld Davis and Michael D. Shear, *Border Wars* (New York: Simon and Schuster, 2019), p. 257; Maria Sacchetti, “Top Homeland Security Officials Urge Criminal Prosecution of Parents Crossing Border with Children,” *Washington Post*, April 26, 2018, https://www.washingtonpost.com/local/immigration/top-homeland-security-officials-urge-criminal-prosecution-of-parents-who-cross-border-with-children/2018/04/26/aobdcee0-4964-11e8-8b5a-3b1697adcc2a_story.html (accessed September 30, 2024).

- families would be separated under this option, as he confirmed in a 2022 federal court deposition.³³⁷
- A legal analysis of the final April memo, prepared for Nielsen and signed by John M. Mitnick, DHS’s general counsel, left no room for doubt that the result of the third option would be family separation.³³⁸ A contemporaneous *Washington Post* account of the memo described it as “a stark change in policy that would result in the separation of families that until now have mostly been kept together” and warned that “[i]f approved, the zero-tolerance measure could split up thousands of families.”³³⁹ Nielsen approved the third option on May 4.³⁴⁰
 - On May 12, Hamilton told the five US attorneys for the districts on the US-Mexico border that “prosecution makes separation a reality.”³⁴¹
 - An undated ICE Enforcement and Removal Operations memo issued in late April or early May stated that the “new Attorney General guidelines” would mean that “[f]amily units will be separated.”³⁴²

Effect of “Zero Tolerance” Policy on Parents and Children Clear to Officials

The April 2018 “zero tolerance” memo was intended to remove discretion from federal prosecutors on prosecuting cross-border migrants. This outcome was not apparent from the wording of the memo itself, which only directed prosecutions “to the extent practicable.”³⁴³ But Sessions and other senior Justice Department officials made clear that

³³⁷ Deposition of Thomas B. Homan, September 9, 2022, p. 48, in American Immigration Council, Government Documents Submitted as Summary Judgment, p. 337 (ECF No. 404-2, Ex. 7).

³³⁸ Criminal Prosecution of Aliens Who Entered Unlawfully: Legal Guidance on Potential Separation of Family Members, Memorandum for the Secretary from John M. Mitnick, general counsel, US Department of Homeland Security, April 24, 2018, in Plaintiffs’ Administrative Motion for Leave to File Exhibit with Joint Discovery Letter, Ex. A, *P.G. v. United States*, Case No. 4:21-cv-04457-KAW (N.D. Cal. September 15, 2023), ECF No. 100-2.

³³⁹ Sacchetti, “Top Homeland Security Officials Urge Criminal Prosecution of Parents Crossing Border with Children.”

³⁴⁰ Email from Office of the Executive Secretary, Department of Homeland Security, to McAleenan et al., May 4, 2018 (attaching signed memorandum), in American Immigration Council, Government Documents Submitted as Summary Judgment, p. 3 (ECF No. 379-13, Ex. 19).

³⁴¹ Office of the Inspector General, US Department of Justice, Review of the Department of Justice’s Planning and Implementation of Its Zero Tolerance Policy and Its Coordination with the Departments of Homeland Security and Health and Human Services (January 2021, revised April 2022), p. 40, https://oig.justice.gov/sites/default/files/reports/21-028_o.pdf (accessed September 30, 2024).

³⁴² ICE Enforcement and Removal Operations, ERO Family Unit Processing, undated, attachment to email from Matthew Albence to Thomas Homan, May 10, 2018, in American Immigration Council, Government Documents Submitted as Summary Judgment, p. 325 (ECF No. 379-15, Ex. 44).

³⁴³ Office of the Attorney General, US Department of Justice, Memorandum for Federal Prosecutors Along the Southwest Border: Zero Tolerance for Offenses Under 8 U.S.C. § 1325(a) (April 6, 2018).

the expectation was that all or nearly all adults would be prosecuted, including parents travelling with their children:

- Deputy Attorney General Rod Rosenstein told US attorneys that the April 2018 memo was “a significant policy change,” the Justice Department’s Office of the Inspector General found: “Rosenstein said that the April 2017 memorandum had made illegal reentry cases a priority ‘but didn’t tell [the prosecutors] to stop declining cases, [whereas the] 2018 message was, “don’t decline these cases.”³⁴⁴
- Rosenstein said “that he initiated several calls with the U.S. Attorneys and that the focus of these calls was to ensure that the U.S. Attorneys were fully engaged on immigration prosecutions.”³⁴⁵ Rosenstein also stated that he wanted the US attorneys to understand “how significant the zero tolerance policy was to the Attorney General and that the [Justice] Department was monitoring the volume of prosecutions at the Attorney General’s direction.”³⁴⁶
- When assistant US attorneys in Arizona declined prosecution of six parents on May 9, Hamilton emailed an official in the Office of the Deputy Attorney General asking, “Why would they be declining these cases?” The official forwarded the message to the acting US attorney for the District of Arizona.³⁴⁷
- After Sessions held a conference call with the five southwest border US attorneys on May 11—the meeting in which he said, “We need to take away children”³⁴⁸—the US attorney for the Southern District of Texas emailed his staff saying of Sessions, “he doesn’t want excuses” for failing to prosecute parents.³⁴⁹
- On May 12, Hamilton told the five US attorneys that “the Attorney General’s message was that ‘no one was exempt’ from prosecution, including parents traveling with children.”³⁵⁰
- On May 22, in the first of a series of conference calls with the five US attorneys, Rosenstein “instructed that, per the [Attorney General’s] policy, we should NOT be categorically declining immigration prosecutions of adults in family units because

³⁴⁴ DOJ Office of the Inspector General, Review of the Department of Justice’s Planning and Implementation of Its Zero Tolerance Policy, p. 24.

³⁴⁵ *Ibid.*, p. 41.

³⁴⁶ *Ibid.*, p. 41.

³⁴⁷ *Ibid.*, p. 37.

³⁴⁸ *Ibid.*, p. 39.

³⁴⁹ *Ibid.*, p. 40.

³⁵⁰ *Ibid.*, p. 40.

of the age of a child.”³⁵¹ John Bash, the US attorney for the Western District of Texas, wrote to supervisory assistant US attorneys in the district: “I had understood that [the Border Patrol] itself had a policy of not referring parents to us when doing so would separate children under 5 from the parents. But apparently [the Border Patrol] did so yesterday in El Paso in two cases, and we declined per our understanding of the policy. Under the directive I just received from the DAG [deputy attorney general], however, those two cases should not have been declined.”³⁵²

- Bash summarized the messages from Rosenstein and Hamilton to mean that “it was a categorical, ‘We’re prosecuting all.’ . . . [N]o one in this office, including me, had any discretion”³⁵³
- Reviewing these and other exchanges, the Justice Department’s Office of the Inspector General concluded, “We found that the Attorney General expected Southwest border USAOs [US attorney’s offices] to prosecute as many illegal entry cases as possible, including cases involving family unit adults, until all available resources were exhausted.”³⁵⁴

Senior government officials, including Sessions and Nielsen, were aware that a “zero tolerance” policy administered with little room for prosecutorial discretion would result in family separation. As the DOJ Office of the Inspector General observed in a 2021 review of the policy, one of the reasons for the DHS practice “since at least 1992” of not referring parents travelling with their children for prosecution was “to avoid the separation of the family during the pendency of the adult’s prosecution.”³⁵⁵

Moreover, well before the rollout of the “zero tolerance” policy across the US-Mexico border, the El Paso initiative had made it obvious that family separation was the outcome of such an approach.³⁵⁶

³⁵¹ Ibid., p. 42. Although Rosenstein disputed this understanding of his instructions, the notes of another US attorney confirm the account of John Bash, US attorney for the Western District of Texas. Ibid.

³⁵² Ibid.

³⁵³ Ibid., p. 41.

³⁵⁴ Ibid., p. 41.

³⁵⁵ Ibid., pp. 1-2.

³⁵⁶ See “The Policy Drew on Earlier Initiatives” section, “The El Paso Initiative” subsection, above in this chapter.

It is not clear how widely the El Paso initiative was known, but even accepting at face value officials' claims that the El Paso sector carried out the initiative without the approval or knowledge of more senior officials, McAleenan and other senior CBP officials certainly knew about it by mid-November 2017, including that it "include[d] family members, thus separating them from children."³⁵⁷

As the DOJ Office of the Inspector General review noted:

When the [Office of the Inspector General] asked Rosenstein whether he knew that strict implementation of the zero tolerance policy would result in the separation of families, Rosenstein stated: "I think the answer is yes. I think everybody understood that what it meant was [that] we are going to prosecute without—everybody who committed a crime without regard [to] whether they brought a child."³⁵⁸

Other statements by Rosenstein and Hamilton to the Office of the Inspector General repeated in more categorical terms that Sessions was aware that his policy would separate families:

According to Rosenstein and Hamilton, Sessions was aware at the time he announced the zero tolerance policy that its full implementation would require the prosecution of family unit adults and result in the separation of families. Rosenstein stated that he thought Sessions "understood what the consequences were"

Hamilton stated that prosecuting adults entering the country as part of a family unit was a "difficult" choice for Sessions but that Sessions "thought it was the right thing to do."³⁵⁹

³⁵⁷ See email from Carla Provost, chief, US Border Patrol, to Kevin K. McAleenan, CBP commissioner, November 18, 2017, in FOIA Request CBP-2018-065314, 15th Release, March 15, 2023, pp. 1860-1861, <https://www.documentcloud.org/documents/23794878-dhs-records-relating-to-family-separation-part-11?responsive=1&title=1&onlyshoworg=1#document/p1861/a2383518> (accessed September 30, 2024).

³⁵⁸ DOJ Office of the Inspector General, Review of the Department of Justice's Planning and Implementation of Its Zero Tolerance Policy, p. 9.

³⁵⁹ *Ibid.*, p. 24.

Similarly, with regard to Nielsen:

Whitaker told [the Office of the Inspector General] that he recalled speaking with then DHS Secretary Nielsen in “a couple conversations leading up to [the zero tolerance policy] where the discussion was that if we had a zero tolerance policy and we prosecuted all illegal entry and re-entry cases that would lead to unexpected consequences, including what is known as family separation.”³⁶⁰

Despite Whitaker’s gloss on family separation as one of the zero tolerance policy’s “unexpected consequences,”³⁶¹ families were not merely collaterally affected by zero tolerance: Sessions and Hamilton intended them to be among its targets.

Sessions was candid about this purpose in a call with five federal prosecutors in May 2018. “We need to take away children,” one of the prosecutors’ handwritten notes records Sessions saying.³⁶² Gene Hamilton, then counselor to the attorney general, told the prosecutors in a follow-up call that “the Attorney General’s message was that ‘no one was exempt’ from prosecution, including parents traveling with children.”³⁶³ And Rosenstein told prosecutors on another call in late May that it did not matter how young the children were.³⁶⁴

In addition:

- Hamilton told the DOJ Office of the Inspector General that among Sessions’ concerns was that there were “no consequences for unlawful entry, especially if

³⁶⁰ Ibid., p. 27.

³⁶¹ Ibid., p. 27.

³⁶² Ibid., p. 39. See also Michael D. Shear, Katie Benner, and Michael S. Schmidt, “‘We Need to Take Children Away,’ No Matter How Young, Justice Dept. Officials Said,” *New York Times*, October 6, 2020 (updated October 28, 2021), <https://www.nytimes.com/2020/10/06/us/politics/family-separation-border-immigration-jeff-sessions-rod-rosenstein.html> (accessed September 30, 2024); Adolfo Flores and Hamed Aleaziz, “Top Justice Department Officials Pushed to Separate Immigrant Families Despite Knowing It Would Be Hard to Reunite Them,” *BuzzFeed News*, January 14, 2021, <https://www.buzzfeednews.com/article/adolfoflores/justice-department-immigrant-family-separation-report> (accessed September 30, 2024).

³⁶³ DOJ Office of the Inspector General, Review of the Department of Justice’s Planning and Implementation of Its Zero Tolerance Policy, p. 40.

³⁶⁴ Ibid., p. 42; Shear, Benner, and Schmidt, “‘We Need to Take Children Away.’”

people were coming over with children ... and there needed to be consequences.”³⁶⁵

- Hamilton also told the Office of the Inspector General that part of the context for Sessions’ adoption of the zero tolerance policy was the arrival of “[h]undreds of thousands of family unitsThese [were] matters of which the Attorney General was well aware and that were discussed among relevant agencies at the highest levels, including DHS and HHS.”³⁶⁶

For his part, when Hamilton distributed a memo of proposed immigration policies in late 2017, journalist Caitlin Dickerson found:

At the top were two proposed methods of achieving family separations: either administratively—by placing children and parents in separate detention centers—or via criminal prosecutions, which would place parents in the Department of Justice’s custody instead of the Department of Homeland Security’s.³⁶⁷

The Office of the Inspector General report suggests that Sessions and other senior Justice Department officials assumed that parents could be quickly prosecuted and families reunited prior to their deportation. But Sessions’ own statements belie this interpretation. On May 7, 2018, for instance, Sessions said:

I have put in place a “zero tolerance” policy for illegal entry on our Southwest border. If you cross this border unlawfully, then we will prosecute you. It’s that simple. If you smuggle illegal aliens across our border, then we will prosecute you. If you are smuggling a child, then we will prosecute you and that child will be separated from you as required by law.³⁶⁸

³⁶⁵ DOJ Office of the Inspector General, Review of the Department of Justice’s Planning and Implementation of Its Zero Tolerance Policy, p. 24.

³⁶⁶ *Ibid.*, p. 24.

³⁶⁷ Caitlin Dickerson, “The Secret History of the U.S. Government’s Family Separation Policy,” *The Atlantic*, August 7, 2022, p. 49.

³⁶⁸ Office of Public Affairs, US Department of Justice, “Attorney General Sessions Delivers Remarks Discussing the Immigration Enforcement Actions of the Trump Administration,” May 7, 2018, <https://www.justice.gov/opa/speech/attorney-general-sessions-delivers-remarks-discussing-immigration-enforcement-actions> (accessed September 30, 2024).

The Office of the Inspector General concluded:

[W]e determined that Sessions intended that the zero tolerance policy would be strictly implemented by the U.S. Attorneys, that it would result in DHS changing its longstanding policy and referring for criminal prosecution adult family unit members who entered the country illegally with children, and that the U.S. Attorneys' discretion to decline such cases would be limited.³⁶⁹

Hamilton followed up with US attorneys and other DOJ and DHS officials to convey the expectation that referrals and prosecutions, including of parents travelling with their children, would increase. On April 22, 2018, he emailed the Executive Office for US Attorneys a detailed statistical breakdown by sector on Border Patrol apprehensions, including of families, and specifically raised the prosecution of parents.³⁷⁰ On April 24, he emailed the DHS chief of staff and the CBP commissioner, saying, "We simply need more cases referred for prosecution across the board," including of parents.³⁷¹ Indeed, the Justice Department's Office of the Inspector General concluded that the Office of the Attorney General (OAG) "was a driving force behind the decision to refer family unit adults for prosecution, as evidenced by Sessions's and the OAG's urging and support for this change to DHS policy between December 2017 and May 2018."³⁷²

From DHS's side, "during April and into May, as the OAG was pushing DHS for more referrals, DHS leadership was also flagging cases that had been referred for prosecution but declined by [US attorneys]."³⁷³ For instance, Deputy Attorney General Rod Rosenstein told the Justice Department's Office of the Inspector General that Nielsen requested a meeting with him on May 14 to discuss the "need to work together to ensure all are prosecuted" under the "zero tolerance" policy.³⁷⁴

³⁶⁹ DOJ Office of the Inspector General, Review of the Department of Justice's Planning and Implementation of Its Zero Tolerance Policy, p. 9. Sessions refused to speak with the Department of Justice's Office of the Inspector General, as did Edward O'Callaghan, the former principal associate deputy attorney general. *Ibid.*, p. 7.

³⁷⁰ *Ibid.*, p. 28.

³⁷¹ *Ibid.*, p. 29. See also *ibid.*, p. 33.

³⁷² *Ibid.*, p. 34.

³⁷³ *Ibid.*, p. 30.

³⁷⁴ *Ibid.*, p. 30.

Emails to and from Matthew Albence, then the executive associate director for enforcement and removal operations at ICE, to other DHS colleagues in May 2018 show that he and at least some other DHS officials were concerned primarily with family separation rather than criminal convictions. On May 10, after Albence heard that in Arizona, parents might be “back in the exact same facility as their children—possibly in a matter of hours,”³⁷⁵ he asked Homan and other DHS officials to “confirm that the expectation is that we are NOT to reunite the families.”³⁷⁶ On May 25, another DHS official advised Albence, “CBP is Reuniting adults with kids after prosecution in McAllen. . . . What a fiasco.”³⁷⁷ On May 26, he wrote to McAleenan, Homan, and Ronald Vitello, the acting CBP deputy commissioner:

Not sure if you are aware. It sounds like ORR is refusing to take the children as UAC [unaccompanied children] if the parent arrives back [to] the processing site [from federal court] and the child is still there. . . . This obviously undermines the entire effort³⁷⁸

Senior Officials Knew Family Separation Would Be Harmful

The senior officials who developed the policy were repeatedly warned by ORR officials of the likelihood that it would inflict serious, potentially irreparable harm on children. For their part, by the time Sessions and Nielsen approved the policy in the first half of 2018, they knew or should have known of these likely harms.

³⁷⁵ Email from Albence to Homan, May 10, 2018, in Plaintiffs’ Reply in Support of Motion to Compel Review of Documents *in Camera*, Ex. 11, *C.M. v. United States*, No. 2:19-cv-05217-SRC (D. Ariz. March 9, 2023), ECF No. 210-2. See also Camilo Montoya-Galvez, “Trump Officials Complained About Separated Migrant Families Being Reunited Too Quickly, Emails Show,” *CBS News*, June 8, 2022, <https://www.cbsnews.com/news/immigration-family-separations-trump-officials-emails/> (accessed September 30, 2024).

³⁷⁶ Email from Albence to Homan, May 10, 2018, in American Immigration Council, Government Documents Submitted as Summary Judgment, p. 324 (ECF No. 379-15, Ex. 44).

³⁷⁷ Email from Tae D. Johnson, deputy associate director, Enforcement and Removals Operations, ICE, to Nathalie R. Asher and Matthew Albence, May 25, 2018, in American Immigration Council, Government Documents Submitted as Summary Judgment, p. 330 (ECF No. 379-15, Ex. 45).

³⁷⁸ Email from Albence to McAleenan, Homan, and Vitello, May 26, 2018, in American Immigration Council, Government Documents Submitted as Summary Judgment, p. 330 (ECF No. 379-15, Ex. 45).

DHS senior staff were aware that some HHS officials, notably Jonathan White, an ORR deputy director, were concerned that family separation was inconsistent with children’s best interests and presented capacity and other operational challenges.

White attempted to alert McAleenan, Homan, and other senior DHS staff with increasing urgency that ORR would struggle to provide appropriate care to the children separated from their parents under the policy. In addition to repeatedly asking senior HHS officials to convey those points to their DHS counterparts,³⁷⁹ he “also raised these concerns in interagency discussions with DHS staff and leadership,” White said.³⁸⁰ He identified at least 26 specific instances, including in-person meetings, telephone meetings, written briefings, and emails, in which he communicated these concerns to either HHS or DHS officials.³⁸¹ These instances included a meeting with “senior officials from ICE and CBP” on February 14, 2017; a meeting with HHS Secretary Tom Price on August 1, 2017; a telephone conversation with Homan and McAleenan on November 16, 2017; an email with an attached spreadsheet sent to McAleenan and copied to Homan on November 17, 2017; and a follow-up email and spreadsheet sent to Homan and copied to McAleenan on December 4, 2017.³⁸²

Separately, when the DHS Office for Civil Rights and Civil Liberties (CRCL) began to receive calls from parents who had been forcibly separated from their children during the El Paso pilot program, Scott Shuchart, a CRCL senior adviser, and others in the office urged the

³⁷⁹ Testimony of Jonathan White, in *Examining the Failures of the Trump Administration’s Inhumane Family Separation Policy*, Hearing Before the Subcommittee on Oversight and Investigations of the Committee on Energy and Commerce, House of Representatives, 116th Congress, 1st sess., February 7, 2019, Serial No. 116-3, p. 61, <https://www.govinfo.gov/content/pkg/CHRG-116hhrg35404/pdf/CHRG-116hhrg35404.pdf> (accessed September 30, 2024). See also Jeremy Stahl, “The Trump Administration Was Warned Separation Would Be Horrific for Children, Did It Anyway,” *Slate*, July 31, 2018, <https://slate.com/news-and-politics/2018/07/the-trump-administration-was-warned-separation-would-be-horrific-for-children.html> (accessed July 10, 2024). White’s description of his efforts to alert senior HHS officials was, if anything, understated: the investigative journalist Caitlin Dickerson wrote, “Documents I obtained show that White took his concerns about the family-separation proposal to his superiors dozens of times.” Caitlin Dickerson, “The Secret History of the U.S. Government’s Family Separation Policy,” *The Atlantic*, August 7, 2022, p. 50.

³⁸⁰ Document obtained by *The Atlantic* (undated), p.1, <https://s3.documentcloud.org/documents/22123292/documents-i-obtained.pdf> (accessed September 30, 2024).

³⁸¹ *Ibid.*, pp. 1-4. See also, for example, Email from White to McAleenan, November 17, 2017, in House Committee on the Judiciary, Majority Staff Report: *The Trump Administration’s Family Separation Policy: Trauma, Destruction, and Chaos* (October 2020), App. B, p. A-341, https://democrats-judiciary.house.gov/uploadedfiles/the_trump_administration_family_separation_policy_trauma_destruction_and_chaos.pdf (accessed September 30, 2024).

³⁸² Document obtained by *The Atlantic* (undated), pp. 1-3, <https://s3.documentcloud.org/documents/22123292/documents-i-obtained.pdf> (accessed September 30, 2024).

head of the office, Cameron Quinn, to oppose the policy.³⁸³ One CRCL manager printed out photographs of separated children to show Quinn.³⁸⁴ On May 12, 2018, Shuchart and other senior CRCL staff sent Quinn a memo that warned, in italics, that “*harm to children is being deliberately used for its deterrent effect.*”³⁸⁵ On May 21, Shuchart and others raised these concerns with the DHS general counsel, John Mitnick.³⁸⁶

Although senior DOJ officials claimed after the fact that they had understood that children would be reunited with their parents in days or even hours, documents they exchanged indicate otherwise. For example, Hamilton told the Justice Department’s Office of the Inspector General, “We didn’t ever imagine DHS would lose track of the kids and their location. Like sending children off to a shelter in New Jersey. That was not our understanding at all.”³⁸⁷ But talking points Hamilton drafted for Sessions in May 2018 observed that children separated under the policy would “likely [be] eventually transferred to the Office of Refugee Resettlement.”³⁸⁸ And Rosenstein was certainly aware that DHS ordinarily transferred unaccompanied children to ORR within 72 hours. In June 2018, he asked the DHS deputy secretary if it was possible to extend the 72-hour period for such transfers; Hamilton advised him that 72 hours was the limit set by statute.³⁸⁹

Moreover, Hamilton and other senior DOJ officials knew or should have known, based on the information they had before or immediately after the policy was implemented, that “immediate reunification of the family while the child remained in DHS custody was a

³⁸³ Julie Hirschfeld Davis and Michael D. Shear, *Border Wars: Inside Trump’s Assault on Immigration* (New York: Simon and Schuster, 2019), pp. 259-60.

³⁸⁴ Caitlin Dickerson, “On Family Separation, Federal Officials Often Agonized over Enforcement,” *New York Times*, June 23, 2018, <https://www.nytimes.com/2018/06/23/us/migrant-children-federal-agency-border.html> (accessed September 30, 2024).

³⁸⁵ Julie Hirschfeld Davis and Michael D. Shear, reporters with the *New York Times*, obtained a copy of the six-page memorandum and reprinted excerpts of it in *Border Wars*, p. 260.

³⁸⁶ Scott Shuchart, “Careless Cruelty: Civil Servants Said Separating Families Was Illegal. The Administration Ignored Us,” *Washington Post*, October 25, 2018, <https://www.washingtonpost.com/news/posteverything/wp/2018/10/25/feature/civil-servants-said-separating-families-was-illegal-the-administration-ignored-us/> (accessed September 30, 2024).

³⁸⁷ Office of the Inspector General, US Department of Justice, Review of the Department of Justice’s Planning and Implementation of Its Zero Tolerance Policy and Its Coordination with the Departments of Homeland Security and Health and Human Services (January 2021, revised April 2022), p. 51, https://oig.justice.gov/sites/default/files/reports/21-028_o.pdf (accessed September 30, 2024).

³⁸⁸ *Ibid.*, p. 51 n.62.

³⁸⁹ *Ibid.*, pp. 54-55.

practical impossibility,” as the Justice Department’s Office of the Inspector General concluded.³⁹⁰

The Dubious Justification of Deterrence

When reports emerged in early 2017 and again at the end of the year that the US government was actively considering forcible family separation, official sources for those news accounts cited deterrence as one of the reasons for considering the policy change.³⁹¹

Nonetheless, after Sessions announced “zero tolerance” in April 2018 and DHS began to implement forcible family separations along the US-Mexico border, Nielsen denied that the policy was meant as a deterrent. A June 18 press conference included the following exchange with reporters:

Q: “Are you intending for this to play out as it is playing out? Are you intending for parents to be separated from their children? Are you intending to send a message?”

Nielsen: “I find that offensive. No. Because why would I ever create a policy that purposely does that?”

Q: “Perhaps as a deterrent.”

Nielsen: “No.”³⁹²

³⁹⁰ Ibid., p. 50. See also pp. 53-56.

³⁹¹ Julia Edwards Ainsley, “Exclusive—Trump Administration Considering Separating Women, Children at Mexico Border,” *Reuters*, March 4, 2017 (“Part of the reason for the proposal is to deter mothers from migrating to the United States with their children . . .”), <https://www.reuters.com/article/world/exclusive-trump-administration-considering-separating-women-children-at-mexico-b-idUSKBN16A2JK/> (accessed September 30, 2024); Nick Miroff, “To Curb Illegal Border Crossings, Trump Administration Weighs New Measures Targeting Families,” *Washington Post*, December 21, 2017 (officials said the purpose of the measure was “to discourage Central American families from embarking on the long, dangerous journey to the border”), https://www.washingtonpost.com/world/national-security/to-curb-illegal-border-crossings-trump-administration-weighs-new-measures-targeting-families/2017/12/21/19300dc2-e66c-11e7-9ec2-518810e7d44d_story.html (accessed September 30, 2024).

³⁹² Aaron Blake, “Kirstjen Nielsen’s Mighty Struggle to Explain Separating Families at the Border, Annotated” *Washington Post*, June 19, 2018, <https://www.washingtonpost.com/news/the-fix/wp/2018/06/19/kirstjen-nielsen-tries-to-explain-separating-families-at-the-border-annotated/> (accessed September 30, 2024).

But public and internal government documents, official statements, and internal reviews indicate otherwise:

- Internal HHS email summarizing conversations with DHS in early 2017 reported that “DHS would [separate families] . . . as a deterrent to families who have not yet entered the U.S.” and that “the overall intent” of separation was “to serve as a deterrent in the longer term.”³⁹³
- In Session’s April 2017 memorandum directing US attorneys to develop guidelines for prosecuting irregular entry, he stated, “These guidelines should aim to accomplish the goal of deterring first-time improper entrants.”³⁹⁴
- At an August 2017 DHS meeting, “Hamilton told us that over the next few days we’d need to generate paperwork laying out everything we could do to deter immigrants from coming to the U.S. illegally,” according to an official who attended the meeting. The memos produced in response included forcible family separation among other possible policies.³⁹⁵
- A November 2017 ICE proposal to “separat[e] detained parents from their children” explained, “This change would be intended to deter families from illegally entering the United States.”³⁹⁶
- A December 2017 memorandum from DHS to Gene Hamilton stated that “the increase in [section 1325] prosecutions would be reported by the media and it would have substantial deterrent effect.”³⁹⁷
- DHS talking points circulated in January 2018 included the statement: “the significant increase in prosecutions” of parents arriving with their children “would

³⁹³ Email from Maggie Wynne (recipients’ names redacted), February 16, 2017, in American Immigration Council, Government Documents Submitted as Summary Judgment, p. 30 (ECF No. 404-5, Ex. 79).

³⁹⁴ Office of the Attorney General, US Department of Justice, Memorandum for All Federal Prosecutors: Renewed Commitment to Criminal Immigration Enforcement (April 11, 2017), p. 2, https://www.justice.gov/d9/speeches/attachments/2017/04/11/memo_on_renewed_commitment_to_criminal_immigration_enforcement_o.pdf (accessed September 30, 2024).

³⁹⁵ Jonathan Blitzer, “How the Trump Administration Got Comfortable Separating Immigrant Kids from Their Parents,” *New Yorker*, May 30, 2018, <https://www.newyorker.com/news/news-desk/how-the-trump-administration-got-comfortable-separating-immigrant-kids-from-their-parents> (accessed September 30, 2024).

³⁹⁶ Email from deputy assistant director (name redacted), Custody Programs Division, ICE Enforcement and Removal Operations, November 30, 2017, in American Immigration Council, Government Documents Submitted as Summary Judgment, p. 67 (ECF No. 404-6, Ex. 87).

³⁹⁷ Office of the Inspector General, US Department of Justice, Review of the Department of Justice’s Planning and Implementation of Its Zero Tolerance Policy and Its Coordination with the Departments of Homeland Security and Health and Human Services (January 2021, revised April 2022), p. 12, https://oig.justice.gov/sites/default/files/reports/21-028_o.pdf (accessed September 30, 2024).

have a substantial deterrent effect.”³⁹⁸ (Commenting on these talking points, a DHS staffer wrote, “I thought we were supposed to stay away from any mention of separating families as a deterrence tool?”³⁹⁹)

- Talking points prepared by Hamilton and circulated within the Office of the Attorney General and elsewhere in the Justice Department noted, without explicitly addressing family separation, “Increasing prosecutions—and communicating that we will not tolerate illegality along our southern border—should help to produce a deterrent effect.”⁴⁰⁰
- An HHS acting assistant secretary, Steven Wagner, told *CNBC* in June 2018, “We expect that the new policy will result in a deterrence effect, we certainly hope that parents stop bringing their kids on this dangerous journey and entering the country illegally.”⁴⁰¹
- Sessions acknowledged in June 2018 that the policy was intended at least in part as a deterrent. Interviewed by a *Fox News* host who asked four variations of the question, “But is it a deterrent, sir?,” Sessions eventually replied, “So, yes, hopefully people will get the message and come through the border at the port of entry and not break across the border unlawfully.”⁴⁰²
- Rosenstein told the Office of the Inspector General that the “[Attorney General]’s goal . . . was to create a more effective deterrent so that everybody would believe that they had a risk of being prosecuted if they were to violate the law.”⁴⁰³
- Hamilton, in turn, told the Office of the Inspector General, “Sessions was concerned that . . . ‘there was no deterrent, no consequences for unlawful entry, especially if people were coming over with children . . . and there needed to be consequences.’”⁴⁰⁴

³⁹⁸ Upcoming DHS UAC Policy Decisions Talking Points, January 19, 2018, attached to email to Tracy Short (sender’s name redacted), January 19, 2018, in American Immigration Council, Government Documents Submitted as Summary Judgment, p. 63 (ECF No. 404-4, Ex. 55).

³⁹⁹ Email to Tae Johnson (sender’s name redacted), January 17, 2018, in Plaintiffs’ Response to Defendant’s 56.1 Statement, Ex. 97, *C.M. v. United States*, No. 2:19-cv-05217-SRB (D. Ariz. April 24, 2023), ECF No. 404-7.

⁴⁰⁰ DOJ Office of the Inspector General, Review of the Department of Justice’s Planning and Implementation of Its Zero Tolerance Policy, p. 21.

⁴⁰¹ Philip Bump, “Here Are the Administration Officials Who Have Said That Family Separation Is Meant as a Deterrent,” *Washington Post*, June 19, 2018, <https://www.washingtonpost.com/news/politics/wp/2018/06/19/here-are-the-administration-officials-who-have-said-that-family-separation-is-meant-as-a-deterrent/> (accessed September 30, 2024).

⁴⁰² “Sessions Defends Zero Tolerance Immigration Policy,” *Fox News*, June 18, 2018, <https://www.foxnews.com/transcript/sessions-defends-zero-tolerance-immigration-policy> (accessed September 30, 2024).

⁴⁰³ DOJ Office of the Inspector General, Review of the Department of Justice’s Planning and Implementation of Its Zero Tolerance Policy, p. 24.

⁴⁰⁴ *Ibid.*

- DHS documents prepared in April 2018 and obtained by *CNN* in June 2018 indicate that officials thought the policy would have a deterrent effect.⁴⁰⁵

In late 2018, President Trump repeated the deterrence rationale for forcible family separation several times, saying:

- “If they [families] feel there will be separation, they won’t come.”⁴⁰⁶
- “And frankly, when you don’t do separa— when you allow the parents to stay together, okay, when you allow that, then what happens is people are gonna pour into our country.”⁴⁰⁷
- “[I]f you don’t separate, FAR more people will come.”⁴⁰⁸

The evidence for deterrence was always shaky. The April 2018 memo urging Nielsen to sign off on family separation included the claim that during the El Paso pilot program, apprehensions of families decreased in the sector by 64 percent. DHS repeated the claim in May 2018, telling *Vox* that during the pilot “[t]he number of illegal crossings between ports of entry of family units dropped by 64 percent.” In fact, when *Vox* analyzed Border Patrol data, it found that apprehensions of families increased, rather than decreased, by 64 percent. That is, the administration’s “argument that prosecuting parents actually works to deter future border crossings relies on a ‘statistic’ that their own data shows to be fake.”⁴⁰⁹ And an internal DHS document prepared in late May 2018 noted that the policy had not had a deterrent effect.⁴¹⁰

⁴⁰⁵ Tal Kopan, “Exclusive: Trump Admin Thought Family Separations Would Deter Immigrants. They Haven’t,” *CNN*, June 18, 2018, <https://www.cnn.com/2018/06/18/politics/family-separation-deterrence-dhs/index.html> (accessed September 30, 2024).

⁴⁰⁶ Philip Rucker, “Trump Says He Is Considering a New Family Separation Policy at U.S.-Mexico Border,” *Washington Post*, October 13, 2018, https://www.washingtonpost.com/politics/trump-says-he-is-considering-a-new-family-separation-policy-at-us-mexico-border/2018/10/13/ea2f256e-cf25-11e8-920f-dd52e1ae4570_story.html (accessed September 30, 2024).

⁴⁰⁷ Lesley Stahl, “President Trump on Christine Blasey Ford, His Relationships with Vladimir Putin and Kim Jong Un and More,” *CBS News*, October 15, 2018, <https://www.cbsnews.com/news/donald-trump-full-interview-60-minutes-transcript-lesley-stahl-2018-10-14/> (accessed September 30, 2024).

⁴⁰⁸ Donald J. Trump (@realDonaldTrump), Twitter, December 16, 2018, <https://x.com/realDonaldTrump/status/1074339834351759363> (accessed September 30, 2024).

⁴⁰⁹ Responding to this analysis, DHS sent *Vox* statistics that showed that all apprehensions, not just those of families, were 64 percent lower in October 2017 as compared with the same month in 2016. But apprehensions across the border were 43 percent lower in October 2017 compared to October 2016, “making it hard to understand why a 64 percent drop in one sector would be attributable to” the El Paso pilot. Dana Lind, “Trump’s DHS Is Using an Extremely Dubious Statistic to Justify Splitting Up Families at the Border,” *Vox*, May 8, 2018, <https://www.vox.com/policy-and-politics/2018/5/8/17327512/sessions-illegal-immigration-border-asylum-families> (accessed September 30, 2024).

⁴¹⁰ Kopan, “Exclusive: Trump Admin Thought Family Separations Would Deter Immigrants. They Haven’t.”

Moreover, it is difficult to follow the logic of adopting a policy as a deterrent while disavowing the policy publicly.

But the real problem with the deterrence rationale was that forcing families apart inflicted serious and potentially irreparable harm. It was improper and abusive, and wholly disproportionate to the objective of border management. Far from justifying the policy, the fact that senior officials were motivated in significant part by deterrence is a further indication that forcible family separations constituted serious human rights violations.

The Architects of the Policy

The Office of the Attorney General—specifically, Jeff Sessions⁴¹¹ along with Gene Hamilton, his counselor⁴¹²—“was a driving force in the DHS decision to begin referring family unit adults for prosecution,” the Department of Justice’s Office of the Inspector General found.⁴¹³ Kevin McAleenan, the acting CBP commissioner,⁴¹⁴ and Thomas Homan, acting

⁴¹¹ Sessions was US attorney general from February 2017 to November 2018. He was admitted to the Alabama State Bar in 1973 and remains a member in good standing. Member Search Portal, Alabama State Bar, https://members.alabar.org/Member_Portal/member_portal/member-search.aspx (search for status of Jefferson B. Sessions III last run July 26, 2024).

⁴¹² Hamilton was senior counselor to the secretary of homeland security from January to October 2017, when he became counselor to the Attorney General, a post he held until January 2021. He is a member of the District of Columbia, Georgia, and Virginia bars. See “Gene Hamilton,” America First Legal, August 26, 2022, <https://aflegal.org/leadership/gene-hamilton/> (accessed July 10, 2024); Tal Kopan, “First on CNN: Top Trump Immigration Staffer Decamping DHS for DOJ,” *CNN*, October 27, 2017, <https://www.cnn.com/2017/10/27/politics/administration-immigration-official-joining-doj/index.html> (accessed July 10, 2024). For bar admission information, see Searchable Member Directory, DC Bar, <https://my.dcbbar.org/memberdirectory> (search for status of Gene Patrick Hamilton last run July 26, 2024); Member Directory, State Bar of Georgia, <https://www.gabar.org/membership/membersearch.cfm> (search for status of Gene Patrick Hamilton last run July 26, 2024); Virginia Lawyer Directory, Virginia State Bar, https://vsb.org/Site/Shared_Content/Directory/va-lawyer-directory.aspx (search for status of Gene Patrick Hamilton last run July 26, 2024).

⁴¹³ Office of the Inspector General, US Department of Justice, Review of the Department of Justice’s Planning and Implementation of Its Zero Tolerance Policy and Its Coordination with the Departments of Homeland Security and Health and Human Services (January 2021, revised April 2022), p. i, https://oig.justice.gov/sites/default/files/reports/21-028_0.pdf (accessed September 30, 2024).

⁴¹⁴ McAleenan was acting CBP commissioner from January 2017 to March 2018, when the US Senate confirmed his appointment. He continued as CBP commissioner until April 2019, when he became acting DHS secretary. He is an inactive member of the California bar. See “Kevin K. McAleenan,” US Department of Homeland Security, last updated August 7, 2024, <https://www.dhs.gov/person/kevin-k-mcaleenan> (accessed September 30, 2024). For bar admission information, see Attorney Search, State Bar of California, <https://apps.calbar.ca.gov/attorney/LicenseeSearch/QuickSearch> (search for status of Kevin Kealoha McAleenan last run July 26, 2024).

ICE director,⁴¹⁵ were instrumental in pushing the policy through DHS.⁴¹⁶ (Homan defended the policy in a *60 Minutes* interview in October 2024 and said that resuming forcible family separations “needs to be considered, absolutely.”⁴¹⁷) L. Francis Cissna, US Citizenship and Immigration Services (USCIS) director,⁴¹⁸ also urged the policy’s adoption.⁴¹⁹

Matthew G. Whitaker, Session’s chief of staff (and later acting attorney general),⁴²⁰ reviewed the DHS policy options memo circulated in December 2017 that included proposals to “increase prosecution of family unit parents” and “separate family units,” among other proposals,⁴²¹ and, according to Hamilton, expressed support for these proposals.⁴²² He told the Justice Department’s Office of the Inspector General he had “more than one discussion with Nielson, in advance of the zero tolerance policy, about the referral and prosecution of family unit adults.”⁴²³ He was also in at least the first of a series of coordination meetings that commenced in late May 2018 to discuss family separations.⁴²⁴ Nonetheless, he told the Office of the Inspector General that he “didn’t have a full understanding certainly as to what the implementation would cause at the HHS

⁴¹⁵ Homan was executive associate director of ICE Enforcement and Removal Operations (ERO) until January 2017, when he became acting ICE director. See Statement from Secretary Kelly on the President’s Appointment of Thomas D. Homan as Acting ICE Director, US Department of Homeland Security, January 30, 2017, <https://www.dhs.gov/news/2017/01/30/statement-secretary-kelly-presidents-appointment-thomas-d-homan-acting-ice-director> (accessed September 30, 2024). He retired in June 2018. Tal Kopan, “Controversial ICE Chief Retiring, Replacement Named,” *CNN*, June 30, 2018, <https://www.cnn.com/2018/06/29/politics/tom-homan-retirement-replacement/index.html> (accessed September 30, 2024).

⁴¹⁶ See Increasing Prosecutions of Immigration Violations, Memorandum for the Secretary from Kevin K. McAleenan, commissioner, US Customs and Border Protection, L. Francis Cissna, director, U.S. Citizenship and Immigration Services, and Thomas D. Homan, acting director, U.S. Immigration and Customs Enforcement, April 23, 2018, in American Immigration Council, Government Documents Submitted as Summary Judgment, pp. 4-8 (ECF No. 379-13, Ex. 19).

⁴¹⁷ Brian Bennett, “Trump Is Banned from Separating Families at the Border Again. Will He Fight It?,” *Time*, November 25, 2024, <https://time.com/7178744/donald-trump-family-separation-border/> (accessed November 25, 2024).

⁴¹⁸ L. Francis Cissna was director of US Citizenship and Immigration Services (USCIS) from October 2017 to June 2019. “L. Francis Cissna: Director of U.S. Citizenship and Immigration Services, 2017-2019,” USCIS, last updated April 6, 2020, <https://www.uscis.gov/about-us/our-history/explore-agency-history/commissioners-and-directors/l-francis-cissna> (accessed July 10, 2024). He is a member of the District of Columbia bar. Searchable Member Directory, DC Bar, <https://my.dcbbar.org/memberdirectory> (search for status of Lee Francis Cissna last run July 26, 2024).

⁴¹⁹ See Increasing Prosecutions of Immigration Violations, Memorandum for the Secretary from McAleenan, Cissna, and Homan, April 23, 2018.

⁴²⁰ “The Honorable Matthew Whitaker,” America First Policy Institute, undated, <https://americafirstpolicy.com/team/matthewwhitaker> (accessed July 10, 2024). He is a member of the Iowa bar. Search Lawyers Licensed in Iowa, Iowa Judicial Branch, <https://www.iacourtcommissions.org/ords/f?p=106:10> (search for status of Matthew George Whitaker last run July 26, 2024).

⁴²¹ DOJ Office of the Inspector General, Review of the Department of Justice’s Planning and Implementation of Its Zero Tolerance Policy, p. 12.

⁴²² *Ibid.*, p. 13.

⁴²³ *Ibid.*, p. 35 n. 55.

⁴²⁴ *Ibid.*, p. 43.

and DHS level and the fact that HHS and DHS would consider the children to be unaccompanied minors.”⁴²⁵

Nielsen, the DHS secretary from December 2017 to April 2019,⁴²⁶ signed off on the policy, likely in late April and almost certainly prior to June 2018,⁴²⁷ when, as detailed above, she was still publicly claiming that the US government did not have a forced family separation policy.

It is not clear to what extent John Kelly was involved in discussions on family separation after July 2017, when he became the White House chief of staff.⁴²⁸ But he had forthrightly stated, when asked in March 2017 if DHS was planning to separate children from their parents at the border, that he was “considering exactly that” as a deterrent measure.⁴²⁹ In May 2018, he defended forcible family separations as a deterrent—“a big name of the game is deterrence”—that would mean “a much faster turnaround on asylum seekers.” Asked to respond to those who considered family separation heartless, he replied that “the big point is they [families with children] elected to come illegally into the United States.”⁴³⁰

It is also not clear what role Stephen Miller, the White House senior advisor on immigration, played in developing the policy. Investigations by American Oversight, the journalist Jonathan Blitzer, and others have linked Miller to many of the Trump

⁴²⁵ Ibid., p. 52.

⁴²⁶ See “Kirstjen M. Nielsen, Secretary of Homeland Security, 2017-2019,” US Department of Homeland Security, last updated April 22, 2022, <https://www.dhs.gov/kirstjen-m-nielsen> (accessed September 30, 2024). She is a member of the State Bar of Texas. Find a Lawyer, State Bar of Texas, <https://www.texasbar.com/> (search for status of Kirstjen Michele Nielsen last run November 5, 2024).

⁴²⁷ “New Document Shows Nielsen Signed Off on Family Separation Policy,” Project on Government Oversight, September 25, 2018, <https://www.pogo.org/post/new-documents-show-nielsen-signed-off-on-family-separation-policy> (accessed September 30, 2024).

⁴²⁸ John Kelly was secretary of homeland security from January to July 2017 and White House chief of staff from July 2017 to January 2019.

⁴²⁹ Daniella Diaz, “Kelly: DHS Is Considering Separating Undocumented Children from Their Parents at the Border,” *CNN*, March 7, 2017, www.cnn.com/2017/03/06/politics/john-kelly-separating-children-from-parents-immigration-border/index.html (accessed September 30, 2024).

⁴³⁰ “Transcript: White House Chief of Staff John Kelly’s Interview with NPR,” NPR, May 11, 2018, <https://www.npr.org/2018/05/11/610116389/transcript-white-house-chief-of-staff-john-kellys-interview-with-npr> (accessed September 30, 2024).

administration’s most abusive immigration policies,⁴³¹ and he reportedly pushed DHS to back the forcible family separation policy in early 2017 and again at the end of that year.⁴³² Blitzer quotes a senior DHS official as saying, “Miller made clear to us that if you start to treat children badly enough, you’ll be able to convince other parents to stop trying to come with theirs.”⁴³³ He routinely called DHS officials, including Nielsen, to pitch “a barrage of immigration-policy proposals.”⁴³⁴ But the publicly available government documents and the reports of DHS, DOJ, and HHS internal investigations do not show the content of his contributions, if any, to the policy as it was developed.

Other senior officials, notably leading officials at HHS, knew or should have known that changes in DHS policy or practice had begun to threaten the health and well-being of children in ORR care. Scott Lloyd, the ORR director; Steven Wagner, the acting assistant secretary of ACF; and Maggie Wynne, counselor to the secretary for human services, had each received repeated, detailed warnings from Jonathan White.⁴³⁵ These officials failed to act upon these warnings. In fact, after ORR officials began in November 2017 to consider what steps it could take to plan for further increases in the number of separated children, “HHS leadership”—Lloyd and Wynne⁴³⁶—“advised ORR not to engage in such planning since DHS officials told them that DHS did not have an official policy of separating parents and children.”⁴³⁷

⁴³¹ American Oversight, “Stephen Miller’s Influence on Immigration Policy—and Throughout the Administration,” last updated September 12, 2019, <https://www.americanoversight.org/investigation/stephen-millers-influence-on-immigration-policy-and-throughout-the-administration> (accessed September 30, 2024); Jonathan Blitzer, “Get Out,” *New Yorker*, March 2, 2020, pp. 44-53.

⁴³² Caitlin Dickerson, “The Secret History of the U.S. Government’s Family Separation Policy,” *The Atlantic*, August 7, 2022, pp. 46, 49; Terry Gross, “How the Trump White House Misled the World About Its Family Separation Policy,” *Fresh Air*, August 11, 2022, <https://www.npr.org/2022/08/11/1116917364/how-the-trump-white-house-misled-the-world-about-its-family-separation-policy> (accessed September 30, 2024).

⁴³³ Blitzer, “Get Out,” p. 50.

⁴³⁴ Dickerson, “The Secret History of the U.S. Government’s Family Separation Policy,” p. 52.

⁴³⁵ Testimony of Jonathan White, ORR deputy director for children’s programs, in Examining the Failures of the Trump Administration’s Inhumane Family Separation Policy, Hearing Before the Subcommittee on Oversight and Investigations of the Committee on Energy and Commerce, House of Representatives, 116th Congress, 1st sess., February 7, 2019, Serial No. 116-3, p. 63, <https://www.govinfo.gov/content/pkg/CHRG-116hhrg35404/pdf/CHRG-116hhrg35404.pdf> (accessed September 30, 2024).

⁴³⁶ *Ibid.*, p. 80.

⁴³⁷ US Government Accountability Office, Unaccompanied Children: Agency Efforts to Reunify Children Separated from Parents at the Border, GAO-19-163 (October 2018), p. 14, <https://www.gao.gov/assets/gao-19-163.pdf> (accessed September 30, 2024).

VII. Violations of International Law

The US government's forcible separation of families during the Trump administration inflicted immense harm on children, their parents, and other relatives. The senior officials who developed the policy intentionally crafted it to split families, deliberately choosing to set aside longstanding practice, the evidence shows. They did so in the knowledge that forcible family separations would cause serious and long-lasting trauma. And in many cases, they attempted to hide what they were doing.

Through treaties it has ratified, the United States has undertaken to afford special protection to children, respect the right to seek asylum, and refrain from directly or indirectly returning people to serious harm. Forcible family separations were serious violations of these obligations.

Many forcible separations involved the government's refusal, for days or even weeks, to disclose the fate and whereabouts of children to their parents and vice versa. As such, they amounted to enforced disappearances. Forcible family separations may also have resulted in torture, defined as the intentional infliction of severe pain or suffering for an improper purpose by a state agent.

Enforced disappearance and torture are particularly serious human rights violations that require comprehensive redress. In addition, as discussed more fully in the next chapter, they are also crimes under international law for which the architects of the policy potentially bear individual responsibility.

Children's Right to Protection, Including Family Unity

Children have the right to specific protections by virtue of their status as children, as provided by the International Covenant on Civil and Political Rights.⁴³⁸ The protection to which children are entitled includes measures to safeguard them from cruel and inhuman

⁴³⁸ International Covenant on Civil and Political Rights (ICCPR), art. 24, December 19, 1966, 999 U.N.T.S. 171 (entered into force March 23, 1976).

treatment.⁴³⁹ Families are also “entitled to protection by society and the State,”⁴⁴⁰ and in line with this right, everyone, of any age, has the right to freedom from arbitrary interference with their family.⁴⁴¹

Children’s right to protection and assistance should be informed by the foundational principles of the Convention on the Rights of the Child,⁴⁴² a treaty the United States has not ratified but which it actively helped shape.⁴⁴³ These include the principle that all state action affecting children should treat their best interests as a primary consideration and the right of children to life, survival, and development.⁴⁴⁴

Family unity is another principle reflected throughout the Convention on the Rights of the Child.⁴⁴⁵ The convention sets forth the right of children to know and be cared for by their parents⁴⁴⁶ and provides that governments “shall respect the responsibilities, rights and duties of parents” to care for their children.⁴⁴⁷ It includes “family relations” as a core element of the right of children to preserve their identity⁴⁴⁸—and in fact, the right to preservation of identity was a direct response to the forcible separation and enforced disappearance of children in Argentina, Chile, Guatemala, and Peru.⁴⁴⁹ The convention

⁴³⁹ UN Human Rights Committee, General Comment No. 17: Rights of the Child (1989), para. 3, in U.N. GAOR, 44th Sess., Supp. No. 40, Annex VI, pp. 173-75.

⁴⁴⁰ ICCPR, art. 23(1).

⁴⁴¹ *Ibid.*, art. 17(1).

⁴⁴² As a signatory to the convention, the United States has an obligation not to defeat the treaty’s object and purpose. Vienna Convention on the Law of Treaties, art. 18, May 23, 1969, 1155 U.N.T.S. 331 (entered into force January 27, 1980). The United States has not ratified the Vienna Convention on the Law of Treaties but regards it as “the authoritative guide to current treaty law and practice.” “Vienna Convention on the Law of Treaties, Secretary Rogers’ Report,” *Department of State Bulletin*, December 13, 1971, p. 685, <https://www.gc.noaa.gov/documents/treaty-vienna-92-12.pdf> (accessed September 30, 2024).

⁴⁴³ “The United States was by far the most active” of the government delegations involved in the Convention’s drafting. Cynthia Price Cohen, “Role of the United States in Drafting the Convention on the Rights of the Child: Creating a New World for Children,” *Loyola Poverty Law Journal*, vol. 4 (1998), p. 25.

⁴⁴⁴ Convention on the Rights of the Child, arts. 3, 6, November 20, 1989, 1577 U.N.T.S. 3 (entered into force September 2, 1990).

⁴⁴⁵ “Family” or “parents” appears in 21 articles as well as the preamble to the convention. *Ibid.*, pmb., arts. 2-3, 5, 7-10, 14, 16, 18-24, 27, 29, 37, and 40.

⁴⁴⁶ *Ibid.*, art. 7(1).

⁴⁴⁷ *Ibid.*, art. 5.

⁴⁴⁸ *Ibid.*, art. 8(1).

⁴⁴⁹ See Jaap Doek, A Commentary on the United Nations Convention on the Rights of the Child, *Article 8: The Right to Preservation of Identity; Article 9: The Right Not to Be Separated from His or Her Parents* (Leiden and Boston: Martinus Nijhoff, 2006), p. 7.

also provides that children should not be separated from their parents against their will unless separation is in the child’s best interests.⁴⁵⁰

The right to freedom from arbitrary interference with family does not, as a general rule, prevent governments from implementing their immigration policies.⁴⁵¹ The UN Human Rights Committee has observed, however, that the government’s discretion to enforce immigration policies is “not unlimited and may come to be exercised arbitrarily in certain circumstances.”⁴⁵² For instance, the removal of both parents from the country where their 13-year-old son was born and had grown up required a showing of “additional factors justifying the removal of both parents that go beyond a simple enforcement of its immigration law.”⁴⁵³ The use of individual rather than collective assessment, compliance with the principle of proportionality, and use of the least-intrusive option are among several additional elements identified by the UN Committee on the Rights of the Child, which issues authoritative interpretations of the Convention on the Rights of the Child, that can usefully inform whether a migration control measure is an appropriate exercise of state discretion.⁴⁵⁴

In particular, the Committee on the Rights of the Child has confirmed that the principles of the best interests of the child and of family unity apply in the context of migration enforcement, including in “decisions regarding migration enforcement,”⁴⁵⁵ requiring

⁴⁵⁰ Convention on the Rights of the Child, art. 9(1).

⁴⁵¹ The Convention on the Rights of the Child explicitly addresses separation as the result of deportation or imprisonment, directing that in such cases the government should provide “the essential information concerning the whereabouts of the absent member(s) of the family unless the provision of the information would be detrimental to the well-being of the child,” *ibid.*, art. 9(4), and also establishes a framework for cross-border family reunification and children’s rights to maintain personal contact with parents living in different countries, *ibid.*, art. 10.

⁴⁵² *Hendrick Winata and So Lan Li*, Communication No. 930/2000, Human Rights Committee, U.N. Doc. CCPR/C/72/D/930/2000 (July 26, 2001), para. 7.3.

⁴⁵³ *Ibid.*

⁴⁵⁴ See UN Committee on the Rights of the Child, General Comment No. 6: Treatment of Unaccompanied and Separated Children Outside Their Country of Origin, U.N. Doc. CRC/GC/2005/6 (September 1, 2005), para. 18 (“Policing or other measures concerning unaccompanied or separated children relating to public order are only permissible where such measures are based on the law; entail individual rather than collective assessment; comply with the principle of proportionality; and represent the least intrusive option.”). See also UN Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and Committee on the Rights of the Child, Joint General Comment No. 3 (Committee on the Rights of Migrant Workers) and No. 22 (Committee on the Rights of the Child) on the General Principles Regarding the Human Rights of Children in the Context of International Migration, U.N. Doc. CMW/G/GC/3-CRC/C/GC/22 (November 16, 2017), paras. 28, 31 (stressing need for case-by-case assessment).

⁴⁵⁵ Joint General Comment No. 3/22, para. 29.

careful balance and attaching “larger weight . . . to what serves the child best.”⁴⁵⁶ Applying these principles in practice, governments can choose not to pursue minor criminal charges in order to keep families together, as the US government did before mid-2017 and has done after the court-ordered end to forcible family separation. Automatically separating families is inconsistent with these principles. Moreover, as discussed in subsequent sections, deliberately separating families implicates other rights.

Furthermore, the US government’s reliance on immigration detention of children, initially in Border Patrol holding cells and then in ORR facilities, is inconsistent with these principles. The detention of children because of their or their parents’ migration status “constitutes a child rights violation and contravenes the principle of the best interests of the child,” the Committee on the Rights of the Child has determined.⁴⁵⁷ Its analysis is supported by the conclusions of the UN Working Group on Arbitrary Detention, the UN Secretary General, the independent expert for the UN Global Study on Children Deprived of Liberty, the UN special rapporteur on the human rights of migrants, the Parliamentary Assembly of the Council of Europe, the European Court of Human Rights, and the Inter-American Court of Human Rights.⁴⁵⁸ The UN special rapporteur on torture has noted that immigration detention of children puts them at risk of cruel, inhuman, or degrading treatment or punishment,⁴⁵⁹ with implications for their rights to health and to life, survival, and development.

⁴⁵⁶ *Ibid.*, para. 28.

⁴⁵⁷ Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and Committee on the Rights of the Child, Joint General Comment No. 4 (Committee on the Rights of Migrant Workers) and No. 23 (Committee on the Rights of the Child): State Obligations Regarding the Human Rights of Children in the Context of International Migration in Countries of Origin, Transit, Destination and Return, U.N. Doc. CMW/C/GC/4-CRC/C/GC/23 (November 16, 2017), para. 5.

⁴⁵⁸ See UN Human Rights Council, Report of the Working Group on Arbitrary Detention, U.N. Doc. A/HRC/13/30 (January 18, 2010), para. 60; UN General Assembly, International Migration and Development: Report of the Secretary General, U.N. Doc. A/68/190 (July 25, 2013), para. 75; General Assembly, Global Study on Children Deprived of Liberty, U.N. Doc. A/74/136 (July 11, 2019), para. 56; General Assembly, Ending Immigration Detention of Children and Providing Adequate Care and Reception for Them, U.N. Doc. A/75/183 (July 20, 2020); Parliamentary Assembly, Council of Europe, “Unaccompanied Children in Europe: Issues of Arrival, Stay and Return,” Resolution 1810 (2011), para. 5.9; *Popov v. France*, App. Nos. 39472/07 and 39474/07 (Eur. Ct. H.R. January 19, 2012); Rights and Guarantees of Children in the Context of Migration and/or in Need of International Protection, Advisory Opinion OC-21/14 of August 19, 2014 (Inter-Am. Ct. H.R.), paras. 154-60.

⁴⁵⁹ Human Rights Council, Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, U.N. Doc. A/HRC/28/68 (March 5, 2015), para. 80.

In short, forcible family separation violated the core rights of children to protection, to family life, and to have their best interests taken into account in all matters that affect them, with potential adverse consequences for other rights.⁴⁶⁰

The Right to Seek Asylum

The United States government also has obligations under the Protocol relating to the Status of Refugees (the Refugee Protocol), a treaty which incorporated the substantive protections of the Convention relating to the Status of Refugees (the Refugee Convention).⁴⁶¹ The United States Congress enacted the Refugee Act in 1980⁴⁶² “with the understanding that it is based directly upon the language of the Protocol and it is intended that the provision be construed consistent with the Protocol.”⁴⁶³ As the US Supreme Court observed, a principal motivation for the enactment of the Refugee Act was to make “U.S. statutory law clearly reflect[] our legal obligations under international agreements.”⁴⁶⁴

The DHS Office of Inspector General warned in 2015 that the prosecution of asylum seekers, or more generally those “who express fear of persecution or return to their home countries . . . may violate U.S. treaty obligations.”⁴⁶⁵

The Principle of Nonrefoulement

The principle of nonrefoulement prohibits governments from transferring anyone, directly or indirectly, to a place where they would have a well-founded fear of persecution or would

⁴⁶⁰ For a fuller analysis of forcible family separation in light of the core components of the Convention on the Rights of the Child, see Jonathan Todres and Daniela Villamizar Fink, “The Trauma of Trump’s Family Separation and Child Detention Actions: A Children’s Rights Perspective,” *Washington Law Review*, vol. 95 (2020), pp. 377-427.

⁴⁶¹ Protocol relating to the Status of Refugees (Refugee Protocol), Jan. 31, 1967, 606 U.N.T.S. 267 (entered into force October 4, 1967; accession by United States November 1, 1968); Convention relating to the Status of Refugees (Refugee Convention), July 28, 1951, 189 U.N.T.S. 137 (entered into force April 22, 1954). The Refugee Protocol removed the temporal and geographic restrictions contained in the Convention relating to the Status of Refugees. See Refugee Protocol, art. I.

⁴⁶² Pub. L. No. 96-212, 94 Stat. 102 (March 17, 1980).

⁴⁶³ H.R. Conf. Rep. No. 96-781, p. 20 (1980).

⁴⁶⁴ *INS v. Stevic*, 467 U.S. 407, 426 n.20 (1984). See also *INS v. Cardoza-Fonseca*, 480 U.S. 421, 436 (1987) (noting that “one of Congress’ primary purposes was to bring United States refugee law into conformance with” the Refugee Protocol); *INS v. Aguirre-Aguirre*, 526 U.S. 415, 427 (1999) (same); *Negusie v. Holder*, 555 U.S. 551 (2009) (same); *Marincas v. Lewis*, 92 F.3d 195, 198 (3d Cir. 1996) (“[T]he Refugee Act was enacted to fulfill our treaty obligations under the [1967] U.N. Protocol for the benefit of aliens . . . who claim to be fleeing persecution in their homelands.”); *Yusupov v. Att’y Gen.*, 518 F.3d 185, 203 (3d Cir. 2008) (“Congress intended to protect refugees to the fullest extent of our Nation’s international obligations.”).

⁴⁶⁵ Office of Inspector General, Department of Homeland Security, Streamline: Measuring Its Effect on Illegal Border Crossing, OIG-15-95 (May 15, 2015), p. 2, https://tracfed.syr.edu/tracker/dynadata/2015_07/OIG_15-95_May15.pdf (accessed September 30, 2024).

face a risk of torture or other cruel, inhuman, or degrading treatment or punishment. The United States is obligated to respect the principle of nonrefoulement through its obligations under the Refugee Convention and Protocol,⁴⁶⁶ the Convention against Torture,⁴⁶⁷ and the International Covenant on Civil and Political Rights (ICCPR).⁴⁶⁸ The prohibition of refoulement is also a norm of customary international law⁴⁶⁹ and, in the case of returns to risk of torture, a peremptory norm of international law.⁴⁷⁰ There are no exceptions to the prohibition of expulsions or returns that expose people to risk of torture.⁴⁷¹

More generally, under the ICCPR, states are obligated not to extradite, deport, expel, or otherwise remove a person from their territory where there are substantial grounds for believing that there is a real risk of irreparable harm.⁴⁷²

⁴⁶⁶ Refugee Convention, art. 33(1); Refugee Protocol, art. I (applying articles 2 to 34 of the Refugee Convention “without any geographic limitation”).

⁴⁶⁷ Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, art. 3(1), December 10, 1984, 1465 U.N.T.S. 85 (entered into force June 26, 1987; ratified by the United States October 21, 1994).

⁴⁶⁸ ICCPR, art. 7; Human Rights Committee, General Comment No. 20: Article 7 (44th sess., 1992), para. 9 (“States parties must not expose individuals to the danger of torture or cruel, inhuman or degrading treatment or punishment upon return to another country by way of their extradition, expulsion or refoulement.”), in *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, U.N. Doc. HRI/GEN/1/Rev.1 (July 29, 1994), pp. 30-33.

⁴⁶⁹ See, for example, UNHCR, *Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol* (January 26, 2007), para. 15 (stating UNHCR’s view that the prohibition of refoulement is a rule of customary international law), <https://www.unhcr.org/4d9486929.pdf> (accessed September 30, 2024); Elihu Lauterpacht and Daniel Bethlehem, “The Scope and Content of the Principle of *Non-Refoulement*: Opinion,” in Erika Feller, Volker Türk, and Frances Nicholson, eds., *Refugee Protection in International Law: UNHCR’s Global Consultations on International Protection* (Cambridge: Cambridge University Press, 2003), pp. 139-49; Executive Committee of the High Commissioner’s Programme, *Note on International Protection*, U.N. Doc. A/AC.96/951 (September 13, 2001), para. 16 (obligation of nonrefoulement “has come to be considered a rule of customary international law binding on all States”).

⁴⁷⁰ Executive Committee of the High Commissioner’s Programme, *Conclusion No. 25 (XXXIII) 1982*, para. (b) (noting that the principle was “progressively acquiring the character of a peremptory rule of international law”), in *General Assembly, Addendum to the Report of the United Nations High Commissioner for Refugees*, GAOR 37th sess., Suppl. No. 12A (A/37/12/Add.1) (1982), p. 17; Jean Allain, “The *Jus Cogens* Nature of *Non-refoulement*,” *International Journal of Refugee Law*, vol. 13 (2001), pp. 533-58.

⁴⁷¹ See, for example, Committee against Torture, *General Comment No. 4 on the Implementation of Article 3 of the Convention in the Context of Article 22*, U.N. Doc. CAT/C/GC/4 (September 4, 2018), para. 9 (“The principle of ‘non-refoulement’ of persons to another State where there are substantial grounds for believing that they would be in danger of being subjected to torture is . . . absolute.”); Human Rights Committee, *General Comment No. 20*, para. 3 (“The text of article 7 allows of no limitation.”).

⁴⁷² Human Rights Committee, *General Comment No. 20*, para. 9; Human Rights Committee, *General Comment No. 31 on the Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, U.N. Doc. CCPR/C/21/Rev.1/Add.13 (May 26, 2004), para. 12.

The prohibition on refoulement bars constructive as well as direct state action that results in an individual's return to risk.⁴⁷³ Telling a person or leading them to believe that reunification with their children is contingent on accepting an order of deportation or agreeing to “voluntary return” to risk of harm, as in the many cases documented by Human Rights Watch and other groups,⁴⁷⁴ is a form of constructive refoulement.

The Prohibition of Enforced Disappearance

Enforced disappearance—the deprivation of a person's liberty, followed by a refusal to disclose the person's fate or whereabouts⁴⁷⁵—violates the ICCPR.⁴⁷⁶ The UN Working Group on Enforced or Involuntary Disappearances has concluded that there is no required length of time for the deprivation of liberty or the failure to disclose information.⁴⁷⁷ Similarly, the UN Committee on Enforced Disappearances, which monitors compliance with and issues authoritative interpretations of the International Convention for the Protection of All Persons from Enforced Disappearance, has concluded that all cases of deprivation of liberty followed by refusal to acknowledge deprivation of liberty or concealment of a person's fate or whereabouts are enforced disappearances “regardless of the duration of the said deprivation of liberty or concealment.”⁴⁷⁸

⁴⁷³ See, for example, *M.S. v. Belgium*, App. No. 50012/08 (Eur. Ct. H.R. January 31, 2012).

⁴⁷⁴ See Chapter I, “Pressure on Parents to Accept Deportation” section, above.

⁴⁷⁵ See UN Working Group on Enforced or Involuntary Disappearances, General Comment on the Definition of Enforced Disappearance, pmbl. (March 2007), in Human Rights Council, Report of the Working Group on Enforced or Involuntary Disappearances, U.N. Doc. A/HRC/72 (January 10, 2008), para. 26. A similar definition appears in the International Convention for the Protection of All Persons from Enforced Disappearance, December 20, 2006, 2716 U.N.T.S. 3 (entered into force December 23, 2010), art. 2. The United States has neither signed nor ratified the convention.

⁴⁷⁶ The Human Rights Committee has observed that “while the Covenant does not explicitly use the term ‘enforced disappearance’ in any of its articles, enforced disappearance constitutes a unique and integrated series of acts that represent continuing violation of various rights recognized in that treaty.” *Dhakal v. Nepal*, Communication No. 2185/2012, para. 11.5, Human Rights Committee, U.N. Doc. CCPR/C/119/D/2185/2012 (May 5, 2017).

⁴⁷⁷ Human Rights Council, Report of the Working Group on Enforced or Involuntary Disappearances, U.N. Doc. A/HRC/39/46 (July 30, 2018), para. 143. See also Working Group on Enforced or Involuntary Disappearances, General Comment on the Definition of Enforced Disappearance, para. 8.

⁴⁷⁸ *Yrusta v. Argentina*, Communication No. 1/2013, Committee on Enforced Disappearances, U.N. Doc. CED/C/10/D/1/2013 (April 12, 2016), para. 10.3.

These circumstances—deprivation of liberty followed by the refusal to disclose information—have the consequence of placing such a person outside the protection of the law.⁴⁷⁹

In the context of migration, the Committee on Enforced Disappearances has observed:

To prevent migrants from becoming victims of enforced disappearance in the context of immigration detention, they must always be able, from the outset of their detention and regardless of its duration, to communicate with their relatives, consular authorities, legal representatives or any other person whom they could inform about their fate or whereabouts.⁴⁸⁰

Criminal charges for irregular migration increase the risk of enforced disappearance.⁴⁸¹ The committee has also specifically noted that “[t]he separation of children from their families increases the risk of enforced disappearance and should be avoided, unless it is determined to be in the best interests of the child in compliance with international standards.”⁴⁸²

The Working Group on Enforced or Involuntary Disappearances has found that children who are victims of enforced disappearances “suffer particularly severe harm.”⁴⁸³ The working group explains:

[T]he enforced disappearance of children and their separation from their parents or relatives harms in particularly grave ways the mental, physical

⁴⁷⁹ *Yrusta v. Argentina*, Communication No. 1/2013, para. 10.4 (citing Working Group on Enforced or Involuntary Disappearances, General Comment on the Definition of Enforced Disappearance, para. 8); Committee on Enforced Disappearances, Concluding Observations: Paraguay, U.N. Doc. CED/C/PRY/CO/1 (October 20, 2014), para. 14; Human Rights Council, Report of the Working Group on Enforced or Involuntary Disappearances, Addendum: Best Practices on Enforced Disappearances in Domestic Criminal Legislation, U.N. Doc. A/HRC/16/48/Add.3 (December 28, 2010), para. 30; Working Group on Enforced or Involuntary Disappearances, General Comment on the Definition of Enforced Disappearance, para. 5; Working Group on Enforced or Involuntary Disappearances, General Comment on Article 10 of the Declaration, in UN Commission on Human Rights, Report of the Working Group on Enforced or Involuntary Disappearances, U.N. Doc. E/CN.4/1997/34 (December 13, 1996), para. 26; *Case of Osorio Rivera and Family Members v. Peru*, Judgment of November 26, 2013 (Preliminary Objections, Merits, Reparations, and Costs), Inter-Am. Ct. H.R. Ser. C No. 274, para. 170.

⁴⁸⁰ Committee on Enforced Disappearances, General Comment No. 1 on Enforced Disappearance in the Context of Migration, U.N. Doc. CED/C/GC/1 (October 26, 2023), para. 16.

⁴⁸¹ *Ibid.*, para. 30.

⁴⁸² *Ibid.*, para. 29.

⁴⁸³ Working Group on Enforced or Involuntary Disappearances, General Comment on Children and Enforced Disappearances, U.N. Doc. A/HRC/WGEID/98/1 (February 14, 2013), para. 1.

and moral integrity of children. In all circumstances, as child victims of enforced disappearances or as relatives of a person who disappeared, they experience feelings of loss, abandonment, intense fear, uncertainty, anguish, and pain, all of which could vary or intensify depending on the age and the specific circumstances of the child.⁴⁸⁴

Family members of people subject to enforced disappearance are also victims of these serious human rights violations. In an early resolution, the UN General Assembly noted “the anguish and sorrow which such circumstances cause to the relatives of disappeared persons, especially to spouses, children and parents.”⁴⁸⁵ The Human Rights Committee, the Working Group on Enforced or Involuntary Disappearances, and the Inter-American Court on Human Rights, among other authorities, regularly consider a disappeared person’s family members as survivors of human rights violations who are entitled to remedies.⁴⁸⁶ The working group has emphasized, for example, that children are victims of enforced disappearance when “their mother, father, legal guardian or other relative is subjected to enforced disappearance.”⁴⁸⁷

The relatives of people subject to enforced disappearance have a right to the truth, including the right to know about the progress and results of an investigation, the fate or the whereabouts of the disappeared persons, the circumstances of the disappearances, and the identity of the perpetrators.⁴⁸⁸

Many forcible family separations carried out by the United States meet the elements of enforced disappearance. They commenced with apprehension and a transfer of custody—

⁴⁸⁴ Ibid., para. 6.

⁴⁸⁵ UN General Assembly, Res. 33/173 (December 20, 1978).

⁴⁸⁶ See, for example, *María del Carmen Almeida de Quinteros v. Uruguay*, Views, para. 14, Communication No. 107/1981, Human Rights Committee (July 21, 1983), in Selected Decisions of the Human Rights Committee Under the Optional Protocol, vol. 2, U.N. Doc. CCPR/C/OP/2, U.N. Sales No. E.89.XIV.1 (March 1990), p. 142, https://www.ohchr.org/sites/default/files/Documents/Publications/SelDec_2_en.pdf (accessed September 30, 2024); Commission on Human Rights, Report of the Working Group on Enforced or Involuntary Disappearances, U.N. Doc. E/CN.4/1990/13 (January 24, 1990), para. 339; *Anzualdo Castro v. Peru*, Inter-Am. Ct. H.R. (ser. C) No. 202, para. 118 (September 22, 2009).

⁴⁸⁷ Working Group on Enforced or Involuntary Disappearances, General Comment on Children and Enforced Disappearances, para. 2.

⁴⁸⁸ Working Group on Enforced or Involuntary Disappearances, General Comment on the Right to the Truth in Relation to Enforced Disappearance, para. 1, in Human Rights Council, Report of the Working Group on Enforced or Involuntary Disappearances, U.N. Doc. A/HRC/16/48 (January 26, 2011), para. 39; Working Group on Enforced or Involuntary Disappearances, General Comment on Children and Enforced Disappearances, paras. 23-25.

in parents' cases, from DHS to that of the US Marshals Service, and for children, from DHS to ORR.⁴⁸⁹ The officials who carried out these separations often lied about what was happening.⁴⁹⁰ Once DHS separated parents and children, it did not tell them where their loved ones were for days and in some cases for weeks, no matter who they asked or how many times.⁴⁹¹ The lack of any tracking of the families made it difficult for relatives or others to locate many of the children once they were transferred to ORR and subsequently placed with foster families. Both parents and children endured intense anguish and distress as a result.⁴⁹²

The Prohibition of Torture

The prohibition of torture and other cruel, inhuman, or degrading treatment or punishment is absolute under international law. The prohibition is contained in multiple treaties⁴⁹³ and international standards,⁴⁹⁴ and it is the subject matter of specialized treaties.⁴⁹⁵ There are no exceptions nor justifications permitted for resort to prohibited ill-treatment,⁴⁹⁶ as the Human Rights Committee⁴⁹⁷ and other authorities⁴⁹⁸ have reaffirmed. In fact, the prohibition of torture is a peremptory norm of international law.⁴⁹⁹

⁴⁸⁹ See Chapter I, “The Mechanism” section, above.

⁴⁹⁰ See Chapter I, “No Explanations, Outright Lies” section, above.

⁴⁹¹ See Chapter I, “Limited or No Contact After Forcible Separation” section, above.

⁴⁹² See Chapter IV, above.

⁴⁹³ For example, ICCPR art. 7.

⁴⁹⁴ For example, UN Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules), U.N. Doc. A/RES/70/175 (January 8, 2016), annex, Rule 1 (“no circumstances whatsoever may be invoked as a justification” for torture or other ill-treatment).

⁴⁹⁵ Convention against Torture, art. 2. See also European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, November 26, 1987, E.T.S. No. 126.

⁴⁹⁶ “[N]o exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture.” Convention against Torture, art. 2(2).

⁴⁹⁷ Human Rights Committee, General Comment No. 20: Article 7 (Prohibition of Torture or Other Cruel, Inhuman or Degrading Treatment or Punishment), para. 3, in *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, U.N. Doc. HRI/GEN/1/Rev.7 (May 12, 2004), p. 151.

⁴⁹⁸ See, for example, Sub-Commission on the Promotion and Protection of Human Rights, Res. 2005/1 (Absolute Prohibition of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment) (August 8, 2005), in UN Commission on Human Rights, Report of the Sub-Commission on the Promotion and Protection of Human Rights on Its Fifty-Seventh Session, U.N. Doc. E/CN.4/2006/2 (October 17, 2005), pp. 12-13.

⁴⁹⁹ For example, *Questions Relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, Judgment, I.C.J. Reports 2012, pp. 422, 457 (concluding that “the prohibition of torture is part of customary international law and it has become a peremptory norm (*jus cogens*)”); *Prosecutor v. Delalić et al.*, Case No. IT-96-21-T, Judgment of 16 November 1998 (Trial Chamber, International Criminal Tribunal for the Former Yugoslavia), para. 454; *Prosecutor v. Furundžija*, Case No. IT-95-17/1-T, Judgment of 10 December 1998 (Trial Chamber, International Criminal Tribunal for the Former Yugoslavia), paras. 153-55; Commission on Human Rights, Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment: Report by the

As defined in the Convention against Torture, ratified by the United States in 1994, torture is any act of public officials that intentionally inflicts severe physical or mental pain or suffering to fulfil an improper purpose. It does not include pain or suffering arising only from, inherent in, or incidental to lawful sanctions.⁵⁰⁰

Intent and purpose can be inferred from actions and the circumstances in which they are made,⁵⁰¹ including, for example, the preparation required to carry the actions out⁵⁰² or the fact of ill-treatment at the hands of government agents.⁵⁰³ The element that severe pain or suffering be “intentionally inflicted”⁵⁰⁴ does not require a “subjective inquiry into the motivations of the perpetrators”;⁵⁰⁵ it is enough that the perpetrators knowingly inflicted such pain or suffering.⁵⁰⁶

The Convention against Torture gives as examples of the improper purpose element “obtaining from [the person] or a third person information or a confession, *punishing* him for an act he or a third person has committed or is suspected of having committed, or *intimidating* or *coercing him or a third person*, or for any reason based on *discrimination* of any kind”⁵⁰⁷ The forcible family separation policy inflicted suffering for at least four of these improper purposes:

- *Punishment*. Attorney General Jeff Sessions wanted “consequences” for irregular entry, including for “people [who] were coming over with children,” according to

Special Rapporteur, Mr. P. Kooijmans, U.N. Doc. E/CN.4/1986/15 (February 19, 1985), para. 3 (“[T]he prohibition of torture can be considered to belong to the rules of *jus cogens*. If ever a phenomenon was outlawed unreservedly and unequivocally it is torture.”). See also Nigel S. Rodley, “The Prohibition of Torture: Absolute Means Absolute,” *Denver Journal of International Law and Policy*, vol. 34 (2005), pp. 157-58.

⁵⁰⁰ Convention against Torture, art. 1(1).

⁵⁰¹ See UN Committee against Torture, General Comment No. 2: Implementation of Article 2 by States Parties, U.N. Doc. CAT/C/GC/2 (January 24, 2008), para. 9; Oona A. Hathaway, Aileen Nowlan, and Julia Spiegel, “Tortured Reasoning: The Intent to Torture Under International and Domestic Law,” *Virginia Journal of International Law*, vol. 52 (2012), pp. 796, 802.

⁵⁰² *Aksoy v. Turkey* (No. 26), 1996-VI Eur. Ct. H.R. 2260. See also *Aydin v. Turkey* (No. 50), 1997-VI Eur. Ct. H.R. 1867.

⁵⁰³ Gerrit Zach, “Art.1 Definition of Torture,” in Manfred Nowak, Moritz Birk, and Giuliana Monina, eds., *The United Nations Convention Against Torture and Its Optional Protocol: A Commentary*, 2d ed. (Oxford: Oxford University Press, 2019), pp. 53-54 (reviewing the practice of the Committee against Torture).

⁵⁰⁴ Convention against Torture, art. 1(1).

⁵⁰⁵ Committee against Torture, General Comment No. 2, para. 9.

⁵⁰⁶ Hathaway, Nowlan, and Spiegel, “Tortured Reasoning,” pp. 805, 823.

⁵⁰⁷ Convention against Torture, art. 1(1) (emphasis added).

Gene Hamilton.⁵⁰⁸ Characterizing irregular entry of parents with their children as “smuggling,” Sessions stated, “If you are smuggling a child, then we will prosecute you and that child will be separated from you as required by law.”⁵⁰⁹ The conclusion that Sessions and other senior officials intended forcible family separation as a consequence for irregular entry is reinforced by emails from Matthew Albence, ICE executive associate director for enforcement and removal operations, telling Thomas Homan and other DHS officials that “we are NOT to reunite the families” even when parents returned from federal court before DHS had transferred their children to ORR.⁵¹⁰ Reuniting the families in such circumstances “obviously undermines the entire effort,” he wrote.⁵¹¹

- *Intimidation.* Sessions and other senior officials intentionally chose forcible family separation as an extreme measure to dissuade other families from future irregular entries. Official communications and discussions couched this aim in the sanitized language of “deterrence,” describing forcible separations as “a deterrent to families who have not yet entered the U.S.” and “a deterrent in the longer term,”⁵¹² “detering first-time improper entrants,”⁵¹³ and similar terms.⁵¹⁴ President Trump announced this motivation for forcible family separation in several of his public remarks, including one in which he said, “If they [families] feel there will be

⁵⁰⁸ Office of the Inspector General, US Department of Justice, Review of the Department of Justice’s Planning and Implementation of Its Zero Tolerance Policy and Its Coordination with the Departments of Homeland Security and Health and Human Services (January 2021, revised April 2022), p. 24, https://oig.justice.gov/sites/default/files/reports/21-028_o.pdf (accessed September 30, 2024).

⁵⁰⁹ Office of Public Affairs, US Department of Justice, “Attorney General Sessions Delivers Remarks Discussing the Immigration Enforcement Actions of the Trump Administration,” May 7, 2018, <https://www.justice.gov/opa/speech/attorney-general-sessions-delivers-remarks-discussing-immigration-enforcement-actions> (accessed July 10, 2024).

⁵¹⁰ Email from Albence to Homan, May 10, 2018, in Statement of Undisputed Material Facts in Support of Plaintiffs’ Motion for Summary Judgment, Ex. 44, *C.M. v. United States*, No. 2:19-cv-05217-SRC (D. Ariz. March 9, 2023), ECF No. 379-15, available in American Immigration Council, Government Documents Submitted as Summary Judgment, p. 325, https://www.americanimmigrationcouncil.org/sites/default/files/litigation_documents/separated_family_members_seek_monetary_damages_from_united_states_summary_judgment_exhibits.pdf (accessed September 30, 2024). In this chapter, emails and other documents available in the American Immigration Council collection of *C.M.* exhibits cite the electronic page number where the document is located in the collection and also note the electronic case file (ECF) number and exhibit number of the court submission.

⁵¹¹ Email from Albence to McAleenan, Homan, and Vitello, May 26, 2018, in American Immigration Council, Government Documents Submitted as Summary Judgment, p. 330 (ECF No. 379-15, Ex. 45).

⁵¹² Email from Maggie Wynne (recipients names redacted), February 16, 2017, in American Immigration Council, Government Documents Submitted as Summary Judgment, p. 30 (ECF No. 404-5, Ex. 79).

⁵¹³ Office of the Attorney General, US Department of Justice, Memorandum for All Federal Prosecutors: Renewed Commitment to Criminal Immigration Enforcement (April 11, 2017), p. 2, https://www.justice.gov/d9/speeches/attachments/2017/04/11/memo_on_renewed_commitment_to_criminal_immigration_enforcement_o.pdf (accessed September 30, 2024).

⁵¹⁴ See Chapter VI, “The Dubious Justification of Deterrence” section.

separation, they won't come.”⁵¹⁵ These and other statements establish that their aim was not merely the deterrent effect resulting from conviction and sentencing on the minor charge of first-time improper entry. Rather, the deterrent was the threat of forcible separation of children from their parents: “We need to take away children,” Sessions reportedly said;⁵¹⁶ “the expectation is that we are NOT to reunite the families,” in Albence’s words.⁵¹⁷ These and other official statements indicate a purpose that went beyond the permissible aim of deterring violations of the law. Forcibly separating children from their parents was a means of intimidating other families from attempting to enter the United States irregularly, including those who did so to apply for asylum.

- *Coercion.* Some CBP agents pressured parents to accept deportation, withdraw asylum claims, or sign other documents they did not understand, threatening that they would never see their children again if they did not do so.⁵¹⁸ These agents carried out these coercive practices in a context in which Sessions described arriving families as having received “blanket immunity from our laws”⁵¹⁹ and Nielsen misleadingly claimed that “illegal aliens [were] fraudulently using children to pose as family units to gain entry into the country.”⁵²⁰ This was not the first time Human Rights Watch and other groups have documented CBP misconduct: Human Rights Watch heard similar accounts of CBP agents pressuring people to abandon their asylum claims and accept deportation in 2014, 2015, and 2017.⁵²¹ Such coercion was a foreseeable consequence of the forcible family separation policy.

⁵¹⁵ Philip Rucker, “Trump Says He Is Considering a New Family Separation Policy at U.S.-Mexico Border,” *Washington Post*, October 13, 2018, https://www.washingtonpost.com/politics/trump-says-he-is-considering-a-new-family-separation-policy-at-us-mexico-border/2018/10/13/ea2f256e-cf25-11e8-920f-dd52e1ae4570_story.html (accessed July 10, 2024).

⁵¹⁶ Office of the Inspector General, US Department of Justice, Review of the Department of Justice’s Planning and Implementation of Its Zero Tolerance Policy and Its Coordination with the Departments of Homeland Security and Health and Human Services (January 2021, revised April 2022), p. 39, https://oig.justice.gov/sites/default/files/reports/21-028_o.pdf (accessed September 30, 2024).

⁵¹⁷ Email from Albence to Homan, May 10, 2018, in in American Immigration Council, Government Documents Submitted as Summary Judgment, p. 325 (ECF No. 379-15, Ex. 44).

⁵¹⁸ See Chapter I, “Pressure on Parents to Accept Deportation” section.

⁵¹⁹ Office of Public Affairs, US Department of Justice, “Attorney General Sessions Delivers Remarks to the National Sheriffs’ Association Annual Conference,” June 18, 2018, <https://www.justice.gov/opa/speech/attorney-general-sessions-delivers-remarks-national-sheriffs-association-annual> (accessed September 30, 2024).

⁵²⁰ DHS, “Secretary Kirstjen M. Nielsen Remarks at National Sheriffs’ Association Conference,” June 18, 2018, <https://www.dhs.gov/news/2018/06/18/secretary-kirstjen-m-nielsen-remarks-national-sheriffs-association-conference> (accessed September 30, 2024).

⁵²¹ Human Rights Watch, *In the Freezer: Abusive Conditions for Women and Children in US Immigration Holding Cells* (New York: Human Rights Watch, 2018), pp. 30-31; Human Rights Watch, “*You Don’t Have Rights Here*”: *US Border Screening and Return of Central Americans to Risk of Serious Harm* (New York: Human Rights Watch, 2014), p. 27,

- *Discrimination.* The senior government officials who developed the forcible family separation policy did so against the backdrop of racist and dehumanizing official rhetoric, notably President Donald J. Trump’s repeated descriptions of irregular migrants as “rapists,”⁵²² “bringing drugs,”⁵²³ “animals,”⁵²⁴ “tough people,”⁵²⁵ “an invasion,”⁵²⁶ and an “infest[ation].”⁵²⁷

As indicated by the phrase “such as,” this list in the Convention against Torture is not exhaustive.⁵²⁸ Other purposes that have “something in common with the purposes expressly listed” meet this element.⁵²⁹ For example, the infliction of suffering “as a preventive measure,” explicitly included in the Inter-American Convention to Prevent and Punish Torture’s definition of torture,⁵³⁰ is an improper purpose akin to those explicitly listed in the Convention against Torture.

Officials’ characterization of the policy’s purpose as “deterrence” does not insulate it from scrutiny. While governments have legitimate interests in regulating migration and in deterring violations of the law, the means the architects of the policy chose—forcing families apart, in many cases for months, with little communication and often with no

<https://www.hrw.org/report/2014/10/16/you-dont-have-rights-here/us-border-screening-and-returns-central-americans-risk>.

⁵²² Z. Byron Wolf, “Trump Basically Called Mexicans Rapists Again,” *CNN*, April 6, 2018, <https://www.cnn.com/2018/04/06/politics/trump-mexico-rapists/index.html> (accessed September 30, 2024).

⁵²³ “Here’s Donald Trump’s Presidential Announcement Speech,” *Time*, June 16, 2015, <https://time.com/3923128/donald-trump-announcement-speech/> (accessed September 30, 2024).

⁵²⁴ Scott Neuman, “During Roundtable, Trump Calls Some Unauthorized Immigrants ‘Animals,’” *NPR*, May 17, 2018, <https://www.npr.org/sections/thetwo-way/2018/05/17/611877563/during-roundtable-trump-calls-some-unauthorized-immigrants-animals> (accessed September 30, 2024).

⁵²⁵ “AP Fact Check: President Trump’s Rhetoric and the Truth About Migrant Caravans,” *PBS*, November 2, 2018, <https://www.pbs.org/newshour/politics/ap-fact-check-president-trumps-rhetoric-and-the-truth-about-migrant-caravans> (accessed September 30, 2024).

⁵²⁶ *Ibid.*

⁵²⁷ Betsy Klein and Kevin Liptak, “Trump Ramps Up Rhetoric: Dems Want ‘Illegal Immigrants’ to ‘Infest Our Country,’” *CNN*, June 19, 2018, <https://www.cnn.com/2018/06/19/politics/trump-illegal-immigrants-infest/index.html> (accessed September 30, 2024).

⁵²⁸ Convention against Torture, art. 1(1). See also Manfred Nowak, Moritz Birk, and Giuliana Monina, eds., *The United Nations Convention Against Torture and Its Optional Protocol: A Commentary*, 2d ed. (Oxford: Oxford University Press, 2019), p. 75.

⁵²⁹ Herman Burgers and Hans Danelius, *The United Nations Convention against Torture: A Handbook on the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (Leiden: Martinus Nijhoff, 1988), p. 118.

⁵³⁰ Inter-American Convention to Prevent and Punish Torture, December 9, 1985, O.A.S.T.S. No. 67 (entered into force February 28, 1987), art. 2. The United States has neither signed nor ratified this treaty.

information at all for days or even weeks about parents’ and children’s whereabouts—was wholly disproportionate to any legitimate government objective.

As J. Herman Burgers and Hans Danelius, two of the diplomats actively involved in the drafting of the Convention against Torture, observed in a widely cited treatise:

This [the purpose] requirement does not necessarily mean that the purposes must be illegitimate. Several purposes of the list, in particular obtaining information or a confession, punishing or even intimidating and coercing, may be perfectly legitimate on condition that legitimate methods are used to achieve them. In principle, the common element of the purposes listed in the definition should rather be understood to be the existence of some—even remote—connection with the interests or policies of the State and its organs. It is important to note, in this context, that the primary objective of the *Convention* is to eliminate torture committed by or under the responsibility of public officials for purposes connected with their public functions.⁵³¹

A Trial Chamber judgment of the International Criminal Tribunal for the Former Yugoslavia (ICTY) adopted this analysis in a judgment that also noted that the prohibited purpose need not be the exclusive motivation; instead, the purpose “must simply be part of the motivation behind the conduct, and it need not be the predominant or sole purpose.”⁵³²

As specified in the convention, pain or suffering need not be physical. This element is met by “acts that are not violent per se, but nevertheless inflict suffering.”⁵³³ Mental harm need not be “prolonged”; a single act such as a threat that causes serious suffering meets this element.⁵³⁴ Severity should be understood subjectively, taking into account factors such

⁵³¹ Burgers and Danelius, *The United Nations Convention against Torture: A Handbook*, pp. 118-19.

⁵³² *Prosecutor v. Kmojelac*, Case IT-97-25-T, Judgment of 15 March 2002 (Trial Chamber, International Criminal Tribunal for the Former Yugoslavia), para. 184. The Trial Chamber restated this point later in the judgment in the following terms: “To constitute the offence of torture, the prohibited purpose for which the acts of mistreatment are committed need not be the exclusive purpose or the predominant or sole purpose. It is sufficient that the prohibited purpose is one of the results sought to be achieved.” *Ibid.*, para. 241.

⁵³³ Committee against Torture, Concluding Observations: Sri Lanka, U.N. Doc. CAT/C/LKA/CO/3-4 (December 8, 2011), para. 25.

⁵³⁴ Committee against Torture, Concluding Observations: United States of America, U.N. Doc. CAT/C/USA/CO/2 (July 25, 2006), para. 13.

as age and context,⁵³⁵ and should not be taken as the factor that distinguishes torture from other cruel, inhuman, or degrading treatment or punishment.⁵³⁶

Assessing the forcible family separation policy in August 2018 in the context of a request for precautionary measures,⁵³⁷ the Inter-American Commission on Human Rights found:

[T]he prolonged separation of the children from their family is likely to have a serious impact on the affective ties with their relatives, resulting in emotional and psychological distress that could affect their personal integrity by placing the balanced development of their personality at risk.⁵³⁸

Analyzing the ICCPR's prohibition of torture, the Human Rights Committee has regularly cited the "anguish and distress" of relatives in cases of enforced disappearance as evidence of severe pain or suffering.⁵³⁹ As the Human Rights Committee does, the

⁵³⁵ *Case of Lysias Fleury et al. v. Haiti*, Judgment of November 23, 2011 (Merits and Reparations), Inter-Am. Ct. H.R. Ser. C, No. 236, para. 73, cited in UN General Assembly, 72d sess., provisional agenda item 73(b), Extra-Custodial Use of Force and the Prohibition of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment: Report of the Special Rapporteur on Torture, U.N. Doc. A/72/178 (July 20, 2017), para. 28.

⁵³⁶ The UN Human Rights Committee has stated, for example, that when it analyzes potential violations of the ICCPR prohibition of torture and other ill-treatment, "its general approach is to consider that the critical distinction between torture on the one hand, and other cruel, inhuman or degrading treatment or punishment, on the other, will be the presence or otherwise of a relevant purposive element." *Giri v. Nepal*, Communication No. 1761/2008, para. 7.5, Human Rights Committee, U.N. Doc. CCPR/C/101/D/1761/2008 (April 27, 2011). See also *Prosecutor v. Krnojelac*, Case IT-97-25-T, para. 180; Human Rights Council, Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Manfred Nowak, U.N. Doc. A/HRC/13/39 (February 9, 2010), para. 60; Nigel Rodley and Matt Pollard, *The Treatment of Prisoners Under International Law*, 3d ed. (Oxford: Oxford University Press, 2009), p. 123 (purpose is the "dominant element distinguishing torture from cruel or inhuman treatment"); David Weissbrodt and Cheryl Heilman, "Defining Torture and Cruel, Inhuman, and Degrading Treatment," *Law and Inequality*, vol. 29 (2011), p. 386 (concluding that "the purpose requirement sets torture apart from other forms of ill-treatment").

⁵³⁷ Precautionary measures are emergency orders that seek to protect people facing a serious and urgent situation that presents a risk of irreparable harm to their rights. They reflect an assessment of risk using a prima facie standard and are not a determination on the merits. See Inter-American Commission on Human Rights, "About Precautionary Measures," undated, <https://www.oas.org/en/IACHR/jsForm/?File=/en/IACHR/decisions/MC/about-precautionary.asp> (accessed September 30, 2024).

⁵³⁸ Precautionary Measure No. 731-18, Migrant Children Affected by the "Zero Tolerance" Policy Regarding the United States of America, Inter-American Commission on Human Rights Res. 64/2018 (August 16, 2018), para. 27, <https://www.oas.org/en/iachr/decisions/pdf/2018/64-18mc731-18-us-en.pdf> (accessed November 20, 2024). See also Berta Esperanza Hernández-Truyol, "Introductory Note to Resolution 1106 (2168/18) (OAS), Precautionary Measure No. 731-18, and Precautionary Measure No. 505-18 (IACHR), *International Legal Materials*, vol. 58 (2019), pp. 371-73.

⁵³⁹ See, for example, *Azizi v. Algeria*, Communication No. 1889/2009, para. 7.6, Human Rights Committee, U.N. Doc. CCPR/C/110/D/1889/2009 (May 15, 2014); *Faraoun v. Algeria*, Communication No. 1884/2009, para. 7.6, Human Rights Committee, U.N. Doc. CCPR/C/109/D/1884/2009 (November 27, 2013); *Al Daquel v. Libya*, Communication No. 1882/2009, para. 6.7, Human Rights Committee, U.N. Doc. CCPR/C/111/D/1882/2009 (August 26, 2004).

Committee against Torture has consistently regarded enforced disappearance as a form of torture.⁵⁴⁰

Forcible family separation was carried out through the acts of public officials. The policy was developed by senior DHS and DOJ officials, and it was implemented by Border Patrol agents and other government employees. Moreover, senior officials deliberately chose to separate families—separations were not required by law, and the policy overturned longstanding practice that had been explicitly adopted to avoid family separation.

Separations often caused immediate anguish and distress and risked the infliction of further long-term trauma, as described earlier in this report.⁵⁴¹ The senior officials who developed the policy and directed its implementation did so with knowledge of the risk that the policy would result in these serious harms. As discussed above, they did so for the improper purposes of punishment, intimidation, and coercion.

Finally, forcible family separations were not merely incident to lawful sanctions. Instead, the evidence shows that the separations themselves were the goal of the prosecutions for improper entry: that is, officials charged parents with improper entry so they could separate the families with the goal of deterring irregular migration.

The Right to Effective Remedies and Full Reparation

Under the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, adopted by the UN General Assembly in 2005, victims of human rights violations should have effective access to justice and effective remedies.⁵⁴² In cases of gross violations of human rights—including ill-treatment, enforced disappearances, and systematic discrimination⁵⁴³—states have a duty to investigate and,

⁵⁴⁰ See, for example, *Hernández Colmenarez and Guerrero Sánchez v. Venezuela*, Communication No. 456/2011, Committee against Torture, U.N. Doc. CAT/C/54/D/456/2011 (June 26, 2015), paras. 6.4, 6.6.

⁵⁴¹ See Chapter IV, above.

⁵⁴² Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, paras. 3(c), (d); 11; 15, in UN General Assembly, 60th sess., agenda item 71(a), G.A. Res. 60/147, annex, U.N. Doc. A/RES/60/147 (March 21, 2006).

⁵⁴³ For a discussion of what constitutes a gross violation of human rights, see UN Sub-Commission on Prevention of Discrimination and Protection of Minorities, 45th sess., provisional agenda item 4, Study Concerning the Right to Restitution,

if warranted, prosecute and punish those responsible.⁵⁴⁴ Full and effective reparation for victims of gross violations of human rights includes:

- Restitution, the aim of which is to restore people as fully as possible to the original situation. For children forcibly separated from their parents, restitution includes reunification.
- Compensation, as appropriate and proportional to the gravity of the violation and the circumstances of each case, including for physical or mental harm, material and moral damage, lost opportunities, and the cost of medical, psychological, and social services.
- Rehabilitation, including medical and psychological care as well as legal and social services.
- Satisfaction, including full and public disclosure of the truth, public apology, and judicial and administrative sanctions against persons liable for the violations.
- Guarantees of non-repetition, including legal and policy reforms to prevent similar violations from occurring again.⁵⁴⁵

In the case of family separation, guarantees of non-repetition could include legislation prohibiting forcible family separation, regular public reporting on separations for cause, ongoing congressional oversight of any separation of families at the border, and regular internal review of such practices.

In line with the Basic Principles, the UN Human Rights Committee has called on the United States to “redouble its efforts to ensure the reunification of all separated children with their families, guarantee that such family separations are prohibited and that they do not occur and ensure that victims have access to effective remedies and receive full reparation, including adequate compensation and appropriate support services.”⁵⁴⁶

Compensation and Rehabilitation for Victims of Gross Violations of Human Rights and Fundamental Freedoms, U.N. Doc. E/CN.4/Sub.2/1993/8 (July 2, 1993), para. 13.

⁵⁴⁴ Basic Principles and Guidelines on the Right to a Remedy, para. 4.

⁵⁴⁵ *Ibid.*, paras. 19-23. See also Working Group on Enforced or Involuntary Disappearances, General Comments on Article 19 of the Declaration (discussing right of victims of enforced disappearance to obtain redress), in UN Commission on Human Rights, Report of the Working Group on Enforced or Involuntary Disappearances, U.N. Doc. E/CN.4/1998/43 (January 12, 1998), paras. 68-75.

⁵⁴⁶ UN Human Rights Committee, Concluding Observations: United States of America, U.N. Doc. CCPR/C/USA/CO/5 (December 7, 2023), para. 53.

VIII. Individual Criminal Responsibility

The human rights violations carried out under the forcible family separation policy may violate federal criminal law, notably statutes that prohibit conspiracy to deprive people of their rights and participation in serious human rights offenses. The US Department of Justice should investigate these and other potential violations of federal law.⁵⁴⁷

Moreover, to the extent that forcible family separation involved acts of enforced disappearance and torture, these are crimes under international law⁵⁴⁸ for which the architects of the policy potentially bear individual responsibility on the basis of universal jurisdiction.

At the very least, those architects of the policy who are attorneys can be investigated by the Justice Department's Office of Professional Responsibility and by the bars to which they are admitted for potential professional misconduct, including violations of their duty to exercise independent professional judgment and render candid advice and their duty of thoroughness and care.⁵⁴⁹

⁵⁴⁷ For discussions of other potential domestic law violations, see, for example, Jenny-Brooke Condon, "When Cruelty Is the Point: Family Separation as Unconstitutional Torture," *Harvard Civil Rights-Civil Liberties Law Review*, vol. 56 (2021), pp. 37-76; Carrie F. Cordero, Heidi Li Feldman, and Chimène I. Keitner, "The Law Against Family Separation," *Columbia Human Rights Law Review*, vol. 51 (2020), pp. 430-506; Sergio Garcia, "The Unconstitutional Prosecution of Asylum-Seeking Parents Under Trump's Family Separation," *Hastings Constitutional Law Quarterly*, vol. 47 (2019), pp. 49-82.

⁵⁴⁸ See UN Declaration on the Protection of All Persons from Enforced Disappearance, UN General Assembly Res. 47/133 (December 18, 1992), art. 4.1, GAOR, 47th Session, Supplement No. 49, Vol. I ("all acts of enforced disappearance shall be offences under criminal law punishable by appropriate penalties which shall take into account their extreme seriousness"); UN Working Group on Enforced or Involuntary Disappearances, General Comment on Article 4 of the Declaration, in UN Commission on Human Rights, Report of the Working Group on Enforced or Involuntary Disappearances, U.N. Doc. E/CN.4/1996/38 (January 15, 1996), para. 54.

⁵⁴⁹ See Office of Professional Responsibility (OPR), US Department of Justice, Report: Investigation into the Office of Legal Counsel's Memoranda Concerning Issues Relating to the Central Intelligence Agency's Use of "Enhanced Interrogation Techniques" on Suspected Terrorists (July 29, 2009), pp. 18-24 (discussing professional standards for Justice Department attorneys), https://assets.aclu.org/live/uploads/document/OPR_Full_Release.pdf (accessed September 30, 2024). See also *ibid.*, p. 11 (finding that John Yoo and Jay Bybee "committed professional misconduct" by "act[ing] in reckless disregard of [their] duty to exercise independent legal judgment and render thorough, objective, and candid legal advice" when they authorized interrogation practices that amounted to torture). But see David Margolis, associate deputy attorney general, Memorandum of Decision Regarding Objections to the Findings of Professional Misconduct in the OPR's Report of Investigation into the Office of Legal Counsel's Memo Concerning Issues Relating to the CIA's Use of "Enhanced Interrogation Techniques" on Suspected Terrorists (January 5, 2010), p. 67 (overruling OPR's finding), <https://www.thetorturedatabase.org/document/doj-memo-david-margolis-ag-re-memo-decision-re-objections-findings-professional-misconduct-?> (accessed September 30, 2024).

Conspiracy to Deprive People of Their Rights

Federal law criminalizes conspiracy to interfere with “a right or privilege secured . . . by the Constitution or laws of the United States.”⁵⁵⁰ The Criminal Section of the US Department of Justice’s Civil Rights Division enforces this statute and has used it to address misconduct by law enforcement officers.⁵⁵¹ Exercising its authority to enforce this statute, the Criminal Section can examine whether the architects of the forcible family separation policy conspired to interfere with the right to seek asylum, the constitutionally protected right to family integrity, or other rights.

The statute that criminalizes conspiracy to deprive people of their rights, 18 U.S.C. § 241, differs from the general federal conspiracy statute. It does not require an underlying act that is itself a criminal offense;⁵⁵² instead, the statute criminalizes conspiracy to infringe a right secured by the US Constitution or by federal law.⁵⁵³

Charges under section 241 must ordinarily be brought within five years of the date of the commission of the offense,⁵⁵⁴ potentially meaning that the architects of the family separation policy would not face prosecution under this statute for acts committed in 2017 and 2018. But where evidence of a crime is located in another country, which may be the case to the extent that parents separated from their children were deported and have not returned to the United States, the limitations period may be extended for an additional three years.⁵⁵⁵ A longer statute of limitations applies to offenses involving physical abuse or kidnapping of a child.⁵⁵⁶

Deprivation of the Right to Seek Asylum

Federal law provides that “[a]ny alien who is physically present in the United States or who arrives in the United States (whether or not at a designated port of arrival . . .), irrespective

⁵⁵⁰ 18 U.S.C. § 241.

⁵⁵¹ Civil Rights Division, US Department of Justice, “Statutes Enforced by the Criminal Division,” last updated August 15, 2023, <https://www.justice.gov/crt/statutes-enforced-criminal-section> (accessed September 30, 2024).

⁵⁵² See, for example, *Crollich v. United States*, 196 F.2d 879, 880 (5th Cir. 1952).

⁵⁵³ See *United States v. Classic*, 313 U.S. 299, 321-22 (1941) (citing *United States v. Mosley*, 238 U.S. 383 (1915)); *United States v. Mackey*, 652 F. Supp. 3d 309 (E.D.N.Y. 2023).

⁵⁵⁴ 18 U.S.C. § 3282(a).

⁵⁵⁵ 18 U.S.C. § 3292.

⁵⁵⁶ 18 U.S.C. § 3283.

of such alien's status, may apply for asylum.”⁵⁵⁷ The provisos in the asylum statute that a person’s manner of entry or status do not affect the right to seek asylum are consistent with the international obligation not to impose penalties on refugees for irregular entry or presence⁵⁵⁸ and UNHCR’s recommendation that people who seek asylum should not be prosecuted for irregular entry or stay.⁵⁵⁹

Nonetheless, Attorney General Jeff Sessions’ announcement of “zero tolerance,” the predicate of the forcible family separation policy, offered no exception for people seeking asylum: “I have put in place a ‘zero tolerance’ policy for illegal entry on our Southwest border. . . . So if you’re going to come to this country, come here legally. Don’t come here illegally.”⁵⁶⁰ Under Sessions, the Justice Department had already sharply increased prosecutions of people seeking asylum on improper entry charges.⁵⁶¹ As Human Rights First documented in 2017, criminal convictions almost always led to deportation before a person had the opportunity to seek asylum.⁵⁶² In some cases, federal prosecutors required people to waive their right to seek asylum and withholding of removal (a form of relief that prevents deportation to persecution or torture) as a condition of receiving a reduced charge or sentence.⁵⁶³

Sessions’ announcement and the forcible family separation policy that followed should also be viewed in the context of his and other senior officials’ frequent criticism of the

⁵⁵⁷ 8 U.S.C. § 1158(a)(1).

⁵⁵⁸ Refugee Convention, art. 31(1). For an argument that the prosecution of refugees for irregular entry or presence also violates federal law, see Evan J. Criddle, “The Case Against Prosecuting Refugees,” *Northwestern University Law Review*, vol. 115 (2020), pp. 717-98.

⁵⁵⁹ Executive Committee on International Protection, UN High Commissioner for Refugees, Conclusion on Protection Safeguards in Interception Measures, No. 97 (LIV), para. (a)(vi).

⁵⁶⁰ Office of Public Affairs, US Department of Justice, “Attorney General Sessions Delivers Remarks Discussing the Immigration Enforcement Actions of the Trump Administration,” May 7, 2018, <https://www.justice.gov/opa/speech/attorney-general-sessions-delivers-remarks-discussing-immigration-enforcement-actions> (accessed September 30, 2024).

⁵⁶¹ Human Rights First, “The Rise in Criminal Prosecutions of Asylum Seekers,” July 20, 2017, <https://humanrightsfirst.org/library/the-rise-in-criminal-prosecutions-of-asylum-seekers/> (accessed September 30, 2024).

⁵⁶² *Ibid.*

⁵⁶³ Human Rights First, *Punishing Refugees and Migrants: The Trump Administration’s Misuse of Criminal Prosecutions* (New York: Human Rights First, 2018), pp. 19-20, <https://humanrightsfirst.org/library/punishing-refugees-and-migrants-the-trump-administrations-misuse-of-criminal-prosecutions/> (accessed November 7, 2024). For a discussion of asylum and withholding of removal in US law, see American Immigration Council and National Immigrant Justice Center, *The Difference Between Asylum and Withholding of Removal* (Washington, D.C.: American Immigration Council, 2020), https://www.americanimmigrationcouncil.org/sites/default/files/research/the_difference_between_asylum_and_withholding_of_removal.pdf (accessed November 20, 2024).

lawful exercise of the right to seek asylum as enabling “fraud and abuse”⁵⁶⁴ and the improper hurdles the administration placed on access to asylum.⁵⁶⁵ In remarks in October 2017 that were indicative of the administration’s attitude toward asylum, for example, Sessions said of asylum claims, “Saying a few simple words is now transforming a straightforward arrest and immediate return into a probable release and a hearing—if the alien shows for the hearing.”⁵⁶⁶

Many, if not most, people forcibly separated under the policy intended to seek asylum, as indicated by the consistent statements of those Human Rights Watch and other groups interviewed and the explicit provision in the *Ms. L* settlement allowing for the reopening of parents’ and children’s asylum cases.

Deprivation of the Right to Family Integrity

The right of parents and their children to family integrity is constitutionally protected.⁵⁶⁷ As the *Ms. L* court observed, “the right to family integrity still applies” at an international border.⁵⁶⁸ This right can be subject to appropriate limitations: the *Ms. L* court observed, for example, that a separation of a parent who presents a danger to the child is not inconsistent with the right.⁵⁶⁹

⁵⁶⁴ See, for example, Office of Public Affairs, US Department of Justice, “Attorney General Jeff Sessions Delivers Remarks to the Executive Office for Immigration Review,” October 12, 2017, <https://www.justice.gov/opa/speech/attorney-general-jeff-sessions-delivers-remarks-executive-office-immigration-review> (accessed September 30, 2024).

⁵⁶⁵ For instance, until a federal court ordered the government to comply with its own policy directives, the Trump administration adopted a practice that kept nearly all asylum seekers in detention, including those found to have a credible fear of persecution, and took steps to restrict access to asylum. *Damus v. Nielsen*, 313 F. Supp. 3d 317, 339 (D.D.C. 2018); Human Rights Watch, “US: Proposed Asylum Regulation Violates Law,” November 8, 2018, <https://www.hrw.org/news/2018/11/08/us-proposed-asylum-regulation-violates-law>.

⁵⁶⁶ DOJ Office of Public Affairs, “Attorney General Jeff Sessions Delivers Remarks to the Executive Office for Immigration Review.”

⁵⁶⁷ For example, *Quilloin v. Walcott*, 434 U.S. 246, 255 (1978); *Roberts v. United States Jaycees*, 468 U.S. 619-20 (1984); *Troxel v. Granville*, 530 U.S. 57, 65 (2000); *Hodorowski v. Ray*, 844 F.2d 1210, 1216 (5th Cir. 1988); *Rosenbaum v. Washoe County*, 663 F.3d 1071, 1079 (9th Cir. 2011). See generally Rachel Kennedy, “A Child’s Constitutional Right to Family Integrity and Counsel in Dependency Proceedings,” *Emory Law Journal*, vol. 72 (2023), pp. 921-32 (reviewing Supreme Court and circuit court jurisprudence); Human Rights Watch and American Civil Liberties Union, “*‘If I Wasn’t Poor, I Wouldn’t Be Unfit’: The Family Separation Crisis in the US Child Welfare System* (New York: Human Rights Watch, 2022), pp. 129-32 (comparing the constitutional right to family integrity with the right to family unity in international law), <https://www.hrw.org/report/2022/11/17/if-i-wasnt-poor-i-wouldnt-be-unfit/family-separation-crisis-us-child-welfare>.

⁵⁶⁸ Order Granting Plaintiffs’ Motion for Classwide Preliminary Injunction, p. 13, *Ms. L v. ICE*, No. 18-cv-0428 (S.D. Cal. June 26, 2018), ECF No. 83, p. 13, <https://www.aclu.org/cases/ms-l-v-ice?document=ms-l-v-ice-order-amending-briefing-schedule> (accessed November 7, 2024). See also *Ms. L v. ICE*, 302 F. Supp. 3d 1149, 1165 (S.D. Cal. 2018) (holding that the right to family integrity applies to parents and children who seek asylum in the United States and are separated “without any determination [the parents] were unfit or presented a danger to their children”).

⁵⁶⁹ *Ms. L* Preliminary Injunction, p. 15.

Under “zero tolerance,” separation was not predicated on a finding that a parent presented a danger to the child or that it was otherwise in the child’s best interests. In fact, the policy’s effect, if implemented fully, would have been to separate all families that arrived irregularly. And as illustrated by the statements of Sessions and other senior officials, the intent behind the policy was to separate all such families.

In short, the design of the forcible family separation policy was such that it fairly raises questions as to whether it was crafted to deprive parents and children of their constitutionally protected right to family integrity.

Serious Human Rights Offenses

The Human Rights Enforcement Act of 2009 charged the Justice Department with “tak[ing] appropriate legal action against individuals suspected of participating in serious human rights offenses.”⁵⁷⁰ The act defined “serious human rights offenses” to include—but did not limit them to⁵⁷¹—specific federal criminal laws, including the federal anti-torture statute.⁵⁷²

The statute’s use of nonexclusive wording means that the Justice Department can take appropriate action for serious human rights offenses other than those listed. Enforced disappearance, which US Secretary of State Antony J. Blinken has described as “an egregious human rights violation,”⁵⁷³ is one such offense. Acts of torture committed within the United States, which the federal anti-torture statute does not cover,⁵⁷⁴ are also serious

⁵⁷⁰ Human Rights Enforcement Act of 2009, Pub. L. No. 111-122, 123 Stat. 3480, sec. 2(b) (codified at 28 U.S.C. § 509B(b)(1)).

⁵⁷¹ As a rule of interpretation, the words *include* and *including* introduce examples rather than a closed list. See *Federal Land Bank of St. Paul v. Bismark Lumber Co.*, 314 U.S. 95, 100 (1941); *United States v. Philip Morris USA Inc.*, 566 F.3d 1095, 1115 (D.C. Cir. 2009); Antonin Scalia and Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* (St. Paul, Minnesota: Thompson/West, 2012), pp. 132-33.

⁵⁷² 28 U.S.C. § 509B(e).

⁵⁷³ US Department of State, “International Day of the Victims of Enforced Disappearances,” August 30, 2024, <https://www.state.gov/international-day-of-the-victims-of-enforced-disappearances-4/> (accessed September 30, 2024). In other contexts, however, the United States has noted that it is not a party to the International Convention for the Protection of All Persons from Enforced Disappearance and therefore not bound by the treaty. See, for example, Explanation of Position on a Third Committee Resolution on the International Convention for the Protection of All Persons from Enforced Disappearance, United States Mission to the United Nations, November 10, 2023, <https://usun.usmission.gov/explanation-of-position-on-a-third-committee-resolution-on-the-international-convention-for-the-protection-of-all-persons-from-enforced-disappearance/> (accessed November 20, 2024).

⁵⁷⁴ 18 U.S.C. § 2340A(a) (limiting the offense to “whoever *outside the United States* commits or attempts to commit torture”).

human rights offenses that should fall within the remit of the Human Rights Enforcement Act of 2009.

Recommendations

To the US Congress

- Repeal the statutory provisions criminalizing improper entry and improper reentry and state that it is the intent of Congress that irregular entry should be addressed administratively rather than through the criminal justice system.
- Enact legislation, including as necessary through amendments to the Trafficking Victims Protection Reauthorization Act (TVPRA), that directs the Department of Homeland Security (DHS) and other federal authorities who apprehend migrant families at or near the border to presume that family unity is in the best interests of the child in the absence of substantial reason to believe otherwise. Determinations that separation from a parent is in a child's best interests should employ standards that are substantially similar to those used in family court. A parent's criminal record should not be treated as conclusive evidence that separation is in a child's best interests. Family unity should extend to keeping children together with their siblings, grandparents, aunts and uncles, or cousins, except when separation is in an individual child's best interests.
- Use the Congressional Review Act to overturn federal agency actions, including regulations, guidance documents, and policy memoranda, that permit or support family separation other than in a child's best interests.
- Establish a special investigative committee to review the family separation policy, its development, and its implementation. The committee should use its full investigative authority, including by taking the following steps:
 - Subpoena federal contractors who implemented aspects of the family separation policy.
 - Produce a report that analyzes whether government actions under the family separation policy amounted to torture, refoulement, or other human rights violations.
- Reenact legislation requiring DHS and the Department of Health and Human Services (HHS) to report, publicly and on a monthly basis, the number of children separated from their parents by DHS, with a breakdown of reasons for separation and disaggregated by age under 5 years and 5 years and above.
- Provide effective remedies for the serious human rights violations caused by forcible separations of children from their parents. These could include permanent residence as partial reparation for the harms they endured. Remedies should also

include long-term medical and psychological care along with legal and social services; proportional compensation for the parents and children who were separated; and a public apology, including acknowledgement of the facts and acceptance of the government's responsibility.

To the US Department of Homeland Security

- The commissioner of US Customs and Border Protection (CBP) should direct immigration agents to keep families together unless an adult presents a clear threat to a child or separation is otherwise in a child's best interests. A parent's criminal history other than abuse of a child should not be automatically deemed to meet these conditions. The best interests determination should be made by a licensed child welfare professional, such as a social worker, psychologist, or psychiatrist with training and competence to work with children.
- The inspector general's office of the DHS should systematically review all instances of family separation, including of family members other than parents, to determine whether separation was in the child's best interests.
- The department should ensure that attorneys representing detained immigrants have access to CBP detention centers and all other facilities used for immigration detention, both to meet with their clients and to provide other critical legal services, including conducting know-your-rights presentations and participating in the preparation of detainees who are representing themselves in legal proceedings.

To the US Department of Justice

- The Criminal Section of the Civil Rights Division should investigate and, as appropriate, prosecute the architects of the forcible family separation policy for possible violations of 18 U.S.C. §§ 241, conspiracy to deprive persons of their rights, and 242, deprivation of rights under color of law.
- The Human Rights and Special Prosecutions Section of the Criminal Division should investigate and, as appropriate, prosecute the architects of the forcible family separation policy for serious human rights offenses, including acts of torture and enforced disappearance as prohibited under customary international law, the International Covenant on Civil and Political Rights, and the Convention against Torture.

- The Office of Professional Responsibility should investigate whether senior Justice Department attorneys committed professional misconduct in the course of developing the forcible family separation policy.

To the Disciplinary Committees of the Alabama, California, District of Columbia, Georgia, Iowa, Texas, and Virginia Bars

- Investigate and, as appropriate, discipline those architects of the forcible family separation policy who are attorneys, including former Attorney General Jeff Sessions (Alabama), Gene Hamilton, former senior counselor to the secretary of homeland security and former counselor to the attorney general (District of Columbia, Georgia, Virginia), Kevin K. McAleenan, former CBP commissioner and former acting secretary of homeland security (California), Kirstjen Nielsen, former secretary of homeland security (Texas), and Matthew Whitaker, former Department of Justice chief of staff (Iowa).

Acknowledgments

This report was written by Michael Garcia Bochenek, senior counsel in Human Rights Watch's Children's Rights Division. The report draws on research by 2018-2019 Allard K. Lowenstein International Human Rights Clinic students and Clinic fellow Ben Dearden. The team worked under the supervision of Professor James Silk, director of the Lowenstein Clinic, in partnership with Efrén Olivares, then the director of the Racial and Economic Justice Program at the Texas Civil Rights Project (TCRP). The report also incorporates interviews and observations during site visits by Bochenek; Warren Binford, then the director of the Clinical Law Program at Willamette University; and Clara Long, then senior researcher on immigration in the US Program at Human Rights Watch, in 2018 and 2019.

Bede Sheppard, deputy director of the Human Rights Watch Children's Rights Division; Tom Porteous, Human Rights Watch deputy program director; Maria McFarland Sánchez-Moreno, Human Rights Watch senior legal adviser; Joya Fadel, Children's Rights Division senior associate; James Silk; Efrén Olivares; Daniel Hatoum, senior supervising attorney in TCRP's Beyond Borders team; and Danny Woodward, policy attorney in TCRP's Beyond Borders team, edited the report. The following Human Rights Watch staff members also reviewed and commented on the report: Julia Bleckner, Global Health Initiative senior researcher; Elizabeth Evenson, International Justice Program director; Bill Frelick, Refugee and Migrant Rights director; Vicki Gaubeca, associate director for US immigration and border policy; Tanya Greene, US Program director; and Balkees Jarrah, International Justice Program associate director.

Joya Fadel; Travis Carr, publications officer; Fitzroy Hepkins, senior administrative manager, and José Martínez, administrative officer, produced the report. Gabriela Haymes translated the summary and recommendations into Spanish. Claudia Nunez, Spanish web editor, vetted the translation.

Human Rights Watch, TCRP, and the Lowenstein Clinic are grateful to the many groups that generously assisted us during this research. We would also like to thank the children and adults who were willing to share their firsthand experiences with us.



“We Need to Take Away Children” Zero Accountability Six Years After “Zero Tolerance”

More than six years after Attorney General Jeff Sessions publicly acknowledged that the US Justice Department was working with the Department of Homeland Security to deliberately separate thousands of children from their families, the US government has gone to significant lengths to reunite these families, including by bringing many deported parents back to the United States and providing them with temporary status and work authorization.

But as many as 1,360 children remain separated. The architects of forced family separation under the first administration of President Donald Trump have not been held to account. The Family Reunification Task Force established by the Biden administration has not yet published recommendations to prevent the repetition of policies and practices leading to the separation of families at the border.

“*We Need to Take Away Children*” identifies the measures authorities should take to fully reckon with the serious human rights violations the US government intentionally inflicted on children and their parents. Effective remedies for these extraordinary harms include a public accounting, an apology, compensation, and steps to ensure that these wrongs never recur. As a starting point and a catalyst for future reform, the task force should issue its recommendations before the upcoming change in administration.

(Above) Shoes and a teddy bear brought by a group of US mayors are piled outside a detention facility for unaccompanied migrant children in Tornillo, Texas, June 21, 2018.

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(Front Cover) A boy from Central America runs through the hallway of a shelter for unaccompanied children in San Diego after being transferred from an immigration detention center, December 11, 2018.

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