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The Trump Administration's Family Separation Policy Is Over

What Comes Next?

By Maggie Jo Buchanan, Philip E. Wolgin, and Claudia Flores April 2021

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Introduction and summary

The corruption and cruelty manifested throughout Donald Trump's presidency substantially damaged public trust in government. While recognizing the importance of calls for unity and moving forward as a country, holding individuals and institutions accountable for the abuses they carried out over the past four years is essential to restoring faith in U.S. democracy and preventing further degradation of foundational norms and values.[1] Without accountability, including through legal action when needed, government actors will be seen as being above the law, a notion that has dangerous consequences for the stability of the country. Simply because someone is—or works at the behest of—a politician does not give that individual carte blanche to act in a manner contrary to American law and basic human rights. True unity and healing can best be achieved by ensuring that victims find justice and that all efforts are taken to prevent future evil acts.

The Trump administration's policy of intentionally separating thousands of children from their parents at the U.S.-Mexico border—a policy that, despite concentrated efforts by advocates and the Biden administration to reunite families, has resulted in hundreds remaining separated even today[2]—provides an important case study of why accountability is necessary and how it may be achieved. This report aims to provide a road map of sorts for the myriad ways in which individual and collective accountability can be pursued for this particular abuse, including how some measure of redress can be provided to those who were—and who continue to be—harmed.

At the individual level, Trump administration officials misled Congress and the public about the design and implementation of the family separation policy, refusing even to acknowledge that separating children from their parents was the explicit goal of the policy.[3] Public officials knew from an earlier pilot program conducted in 2017 that they lacked adequate systems to track separated children for the purpose of ensuring that these children could one day be reunited with their parents. Still, these officials nevertheless expanded the policy in 2018, anticipating that more than 26,000 children could be taken from their parents or guardians over just a four-month period.[4] Medical experts describe the policy as a form of child abuse—torture carried out in the name of the American people.[5] It is imperative that those responsible for these actions be subject to further investigation and held accountable in various ways.

Family separation, however, was not only the result of bad acts by individual officials but rather the official policy of the U.S. government. Therefore, collective accountability is required to reckon with the systems that allowed this policy to be carried out and provide full relief. This means that the U.S. government must take official action to reunite families and offer them permanent protection in the United States; make them whole to the greatest extent possible, for example by providing access to mental health care and adequate restitution; and adopt changes to ensure similar abuses do not occur in the future.

Few issues cut through the deafening noise generated during the four years of the Trump administration like family separation. The visceral outrage that people across the country felt about the government carrying out such cruelties led to nationwide demonstrations, widespread news coverage, federal court cases, bipartisan condemnation by members of Congress and former U.S. attorneys,[6] as well as an Oval Office signing ceremony in which President Trump purported to end the policy driven by his most trusted advisers.[7]

By successfully reuniting families separated during the last administration, pursuing individual and collective accountability for this atrocity, and ensuring proper redress, the Biden administration can help to rebuild the public's faith in government institutions and American ideals, reform broken government systems exploited by Trump officials, and prevent further degradation of the rule of law that could invite future abuses. President Biden's February 2 executive order on the "Establishment of Interagency Task Force on the Reunification of Families"[8] strongly indicates that the new administration appreciates the work that must be done to achieve collective accountability and to prevent children from being separated from their parents or guardians in the future. However, there remain questions regarding whether individual actors will be held accountable for their conduct and whether separated families will be made fully whole.

The horrors of family separation

In spring 2017, the U.S. Department of Justice (DOJ) and the U.S. Department of Homeland Security (DHS) launched a pilot program in El Paso, Texas,[9] to systematically separate hundreds of children from their parents at the border. Many children were separated as a result of a new effort to criminally charge parents with illegal entry into the United States or reentry after removal, but children also were separated from parents who came to a port of entry to request asylum and could not, therefore, be criminally prosecuted.[10] The goal of the policy was to deliver a clear message of deterrence to future border crossers—regardless of whether they were fleeing persecution or had other grounds to request protection under federal law—that the United States would no longer adhere to law or basic human decency in its treatment of families seeking refuge.

Throughout 2017, top DOJ and DHS officials exchanged memos and emails proposing to increase family separations. In April and May 2018, the DOJ and DHS together implemented a "zero tolerance" policy designed to achieve this goal by increasing misdemeanor illegal entry prosecutions across the entire southwest border.[11] Briefing federal prosecutors on the plan, then-U.S. Attorney General Jeff Sessions delivered the infamous line: "We need to take away children."[12] At one White House meeting attended by then-Homeland Security Secretary Kirstjen Nielsen, then-U.S. Department of Health and Human Services (HHS) Secretary Alex Azar, then-Secretary of State Mike Pompeo, and others, Stephen Miller, Trump's senior adviser and leading voice on immigration matters within the administration, said that not carrying out the family separation policy would mean "the end of our country as we know it."[13]

Aside from the cruelty and illegality of the separations themselves, the entire policy planning process was grossly deficient. U.S. Customs and Border Protection (CBP) knew in 2017[14] that it lacked any reliable means to track—and eventually reunite—family members who were separated from one another. In addition, the Office of Refugee Resettlement (ORR), which received custody of separated children from the DHS, similarly did not systematically collect and track this information.[15] For its

part, the DOJ Office of the Inspector General later found that Office of the Attorney General "significantly underestimated its [the family separation process's] complexities and demonstrated a deficient understanding of the legal requirements related to" how children rendered unaccompanied by the process would have to be treated.[16]

"We need to take away children."

– Then-U.S. Attorney General Jeff Sessions

In late spring 2018, the American public broadly began to learn the details of the family separation policy, and outrage spread quickly and spilled into the streets. What began as protests in dozens of cities and states developed into hundreds of marches nationwide that dominated the country's attention.[17] On June 6, a federal judge overseeing a putative class-action lawsuit ruled that the practice of family separations "shocks the conscience" and violate the constitutional right to family integrity.[18] In a particularly strong rebuke of the government's policy, the judge observed that while the plaintiff families claimed to be coming to the United States to receive protection from persecution in their home countries, to them, "[T]he government actors responsible for the 'care and custody' of migrant children have, in fact, become their persecutors."[19] Audio of anguished children in a CBP facility crying after they were taken from their parents was obtained by ProPublica and was played across the country, including on the floor of the U.S. House of Representatives.[20] On June 20, 2018, President Trump held an Oval Office ceremony to mark the signing of an executive order that was sold to the public as ending the family separation policy. Days later, a federal court ordered the administration to stop separating families and to promptly reunify thousands of children with their parents.[21]

While the issue largely slipped from public consciousness for a period of time, more than 1,000 additional families were separated even after the executive order and federal court injunction.[22] In fact, the consequences of the Trump administration's family separation policy continue even to this day. Just days before the final presidential debate in October 2020, a status report filed with the court overseeing the class-action lawsuit revealed that organizations working to locate and reunite separated families—almost entirely without the federal government's help—were unable to even make contact with 545 parents of separated children.[23]

Today, hundreds of children taken from their parents nearly three to four years ago remain separated.[24] According to recent NBC News reporting, a senior DHS official said that "President Joe Biden's family separation task force has identified 5,600 'yet-to-be-reviewed' files from the first half of 2017 that may hold evidence of additional family separations during the Trump administration."[25] Even for those who have been reunited, the trauma and toxic stress intentionally inflicted by the U.S. government on these families continues to be devastating. Medical experts describe family separation as akin to torture and state-sanctioned child abuse that will lead to lifelong mental, emotional, and physical damage.[26]

Accountability at the individual level

In considering options to hold those who personally participated in the family separation policy accountable, there is a threshold question regarding which bad actors should be the focus of efforts. Overall, the goal must be to ensure that going forward, the government respects individuals' human rights and acts within just and fair legal constraints. While certain lower-level government actors who carried out orders may very well deserve scrutiny and eventual punishment, the focus should be on senior decision-makers and the flawed and failed systems that were so easily abused when this atrocity was carried out.

Traditional legal action, including criminal and civil liability, as well as forms of accountability such as the removal of professional licenses and more general reputational repercussions, should be considered. And, as Jeff Sessions' refusal to cooperate with the DOJ inspector general's investigation into the family separation policy demonstrates, further congressional investigations should be considered if helpful in establishing a robust record to inform these efforts going forward.

As stated, however, legal liability may include criminal and civil action. In the criminal context, the two civil rights-focused statutes most relevant to the family separation policy are 18 U.S. Code Section 241 and Section 242, which concern conspiracies to violate civil rights and violations of civil rights by government actors, respectively.[27] Domestic experts, as well as the United Nations, have recognized that serious violations of rights occurred because of the family separation policy.[28] An HHS inspector general report detailed the "intense trauma"[29] experienced by children in U.S. custody. Despite ORR staff's repeated warnings in mid-2017 through early 2018 about the trauma that such a family separation policy would cause children in HHS' care, the HHS inspector general found that senior leadership—then-ORR Director Scott Lloyd, then-Acting Assistant Secretary of the Administration for Children and Families Steven Wagner, and then-Counselor to the Secretary for Human Services Policy Maggie Wynne—did nothing to protect the health and safety of children in the agency's care.[30] A recent DOJ inspector general report also found widespread mismanagement that resulted in the suffering of children.[31] Unfortunately, it should be noted that the U.S. Supreme Court precedent, beginning with the 1945 case *Screws et al. v. United States*, has made success under these statutes extremely difficult.[32]

Federal criminal charges derived from false statements in connection to Trump officials' testimony before Congress may have a stronger chance of success.[33] Inspector general reports from the DHS and HHS underscore that top officials' claims about the treatment of children and administration of the program were misleading at best and a cover-up at worst.

In addition, former Attorney General Sessions and many other top officials refused to participate in the oversight investigation conducted over the past several years by the DOJ's inspector general.[34] Former government employees are not required by law to do so, but their refusal was a significant break with precedent and limited the ability of the inspector general to provide a full accounting of what occurred during the implementation of the policy. Furthermore, while former Deputy Attorney General Rod Rosenstein participated in the investigation, he is reported to have provided misleading statements during interviews with investigators.[35] Given the significance of these senior officials' lack of participation and misleading statements, federal prosecutors should consider if these actions violated 18 U.S. Code Section 1505, which prohibits obstruction of proceedings, previously found to include inspector general investigations, before departments, agencies, and committees.[36]

Civil suits, designed to help victims secure monetary compensation for damages, provide another opportunity to challenge the unlawful conduct of government officials and hold those involved responsible.

Under what is known as the *Bivens* doctrine, at least in theory, federal officials can be held liable in their individual capacities for taking actions that violate the constitutional and civil rights of individuals. While there is no specific federal statute that authorizes suits challenging unlawful acts by federal officials and those acting under color of federal law, in the 1971 landmark case *Bivens v. Six Unknown Named Agents,* the Supreme Court recognized individuals' right to sue federal actors for violations in some circumstances. Unfortunately, reflecting some of the same challenges for accountability that exist in the criminal context, over a period of years, the Supreme Court has whittled away at *Bivens* liability to create a near-impenetrable shield for federal actors.[37]

Despite these substantial hurdles to securing justice in such cases, this avenue should not be left unexplored. In 2019, the American Civil Liberties Union (ACLU) filed just such a class-action lawsuit on behalf of separated families against a series of high-ranking government officials at the White House, DOJ, DHS, HHS, and their subcomponents.[38] The suit was filed after the ACLU secured a successful injunction against the implementation of the policy writ large, and it seeks to secure damages

from responsible officials for those harmed by the family separation policy to help children and families heal. As is often the case in these lawsuits, the DOJ is defending the former officials sued in their individual capacity and has moved to dismiss the suit, a position that the Biden administration's DOJ is continuing in its latest court filing.[39] The incoming DOJ leadership may want to consider breaking from this standard practice considering the extreme civil rights violations that occurred.

In addition, as will be explored below, the Federal Tort Claims Act (FTCA) provides another avenue for families to bring suit, though complaints brought under that statute are directed at the government itself as opposed to individual government actors.

While the above discussion focuses on liability based on federal laws, state law may also provide an important avenue for accountability—though, given some short statutes of limitation, those in a position to pursue this avenue may need to act quickly. State prosecutors should consider charges such as child endangerment or false imprisonment when and if evidence reveals such action is appropriate.[40] State child endangerment statutes, for example, can apply when unsafe or dangerous conditions are intentionally created—such as those that occurred when children were taken from their parents and often held in unsafe and inhumane conditions in a deliberate attempt to deter future migration.[41]

It is important to underscore that the possibility of federal and state criminal proceedings is properly not included among the enumerated functions of the administration's new family reunification task force as outlined in President Biden's executive order. As the Biden administration recognizes, it is essential that the White House be separate from prosecutorial decision-making and that the independence of the DOJ be restored.[42] Nevertheless, as the attorney general is a member of the task force, the issue of potential criminal liability must be given due consideration.

Finally, government officials and the general public must consider accountability efforts outside the legal system when appropriate. As a baseline measure, any individuals still in government who designed, supervised, or otherwise helped to perpetuate the policy should be terminated or, depending on the extent of the person's involvement, reassigned as needed. Lawyers and medical professionals who committed acts contrary to the standards of their professions should face discipline and lose their credentials when appropriate. In fact, some accountability efforts of this nature have previously been tried or are currently underway. At the same time that then-ORR Director Lloyd was failing to act on repeated, specific warnings from career staff about the harms of family separation on children in his custody, he was actively interfering with the ability of immigrant

young women in government custody to exercise their right to abortion, including by giving orders that they not be allowed to consult with their attorneys regarding their legal rights.[43] Because of these actions, a government watchdog group filed a complaint with the Virginia State Bar regarding Lloyd's violations of the Virginia State Bar Rules of Professional Conduct.[44] More recently, a Georgia doctor who reportedly conducted unnecessary, invasive procedures, including gynecological surgeries and procedures on detained immigrant women at the Irwin County Detention Center, is the subject of ongoing complaints filed with the state medical board by women who are currently or were formerly detained in Georgia.[45]

The general public and business sectors have a role to play as well, as individuals responsible for the harms stemming from family separation should not be allowed to serve on prestigious boards or enjoy lucrative employment opportunities. One organization, Accountable.US, has launched a campaign called Hate for Hire to urge companies not to hire senior officials behind the policy as well as track the companies that do hire these officials.[46] In response to these types of efforts, some argue that companies who decline to hire former Trump officials may run afoul of state and local laws that prohibit companies from making hiring decisions based on political affiliation. Those laws should have little relevance in this regard. The decision to intentionally torture children and traumatize their parents should be seen not as a political act, but rather an act of severe wrongdoing that the general public should neither accept nor allow to become normalized.

Accountability at the collective level

Had family separation been a policy devised and carried out by a handful of low-level government actors without the official imprimatur of the U.S. government, individual accountability would be sufficient to uphold the rule of law and discourage future bad actors from going rogue. But because family separation was the fully considered—though cruel and ill-conceived—official policy of the U.S. government, designed at the highest levels and carried out under the close watch of supervisory personnel, it is a stain on the country as a whole and requires a measure of collective accountability, which necessarily includes providing proper redress to injured families.

As with individual liability, collective accountability can take multiple forms. Whereas *Bivens* liability provides an opportunity to hold government officials liable in their individual capacity, the FTCA allows the United States itself to be held civilly liable for injurious conduct by federal employees. FTCA claims begin with an administrative complaint that the government can attempt to resolve. If no resolution is reached or, as is too often the case, the government fails to respond in a timely manner, an individual can file suit for monetary damages in federal court.[47]

The Asylum Seeker Advocacy Project and the Lawyers' Committee for Civil Rights of the San Francisco Bay Area have helped to connect more than 270 separated families with attorneys representing them in the filing of FTCA administrative claims. These two groups have additionally responded to hundreds of requests for technical assistance and have published toolkits to assist attorneys filing FTCA administrative claims and subsequent lawsuits challenging the government's conduct.[48] While some separated families have already filed federal lawsuits, as of May 2020, more than 400 administrative claims arising out of family separation remained pending.[49] Providing families with adequate compensation during the administrative FTCA process and working to settle pending litigation would be appropriate steps for the U.S. government to take to accept collective responsibility for the policy and for the damage it caused and continues to cause. Moreover, compensating these families would demonstrate clearly that the current administration's approach is to remedy and ameliorate the policy's harmful effects.

Apart from FTCA suits, there are other family separation lawsuits for injunctive relief that remain pending. Those include the *Ms. L v. U.S. Immigration and Customs Enforcement* case, which resulted in the first injunction halting the policy and ordering that some families be reunited, as well as *Dora v. Sessions* and *M.M.M. v. Sessions*—all three of which were settled together in 2018 but remain active in the enforcement of those agreements.[50] Recognizing that separation caused so much trauma that it effectively interfered with people's right to request asylum, the agreement permits many families to affirmatively request asylum before U.S. Citizenship and Immigration Services (USCIS) rather than raise it first as a defense to removal in immigration court. Another lawsuit, *Ms. J.P. v. Sessions*, resulted in a preliminary injunction ordering the federal government to provide mental health screenings and treatment to thousands of separated immigrant families;[51] the injunction came after the Trump White House reportedly ended ongoing settlement negotiations that could have provided such services to families who endured trauma.[52]

The resolution of these and other lawsuits with court-ordered settlement agreements, including agreements that expand the plaintiff class, could help the reunification task force in carrying out some of its core functions. Included in those functions is the identification and reunification of children with their families, including with lasting protection in the United States, and the provision of additional services and supports. But because full relief may not be available in connection with pending litigation and not all separated families may be included in the class definitions of these suits, the federal government may have to separately take steps to ensure that the task force fully accomplishes its core functions.

With respect to reuniting families, the statutory humanitarian interest parole authority provides wide latitude to bring deported parents and other family members, including the siblings of separated children, into the United States, where they can be united. Establishing durable legal protections for these families to remain in the United States could be accomplished through legislation that provides separated families the opportunity to obtain an immigrant visa at a consulate abroad or to adjust their status from within the United States to that of permanent residence. Legislation providing for much of this relief—the Families Belong Together Act[53]—has been previously introduced in the House of Representatives and Senate by Sen. Richard Blumenthal (D-CT) and Rep. Joaquin Castro (D-TX). If Congress is unable to enact legislation that includes all separated families, the extraordinary nature of the abuses in these cases may warrant just the type of exception to the law that can be found through the private immigration bill process. These bills allow for members of Congress to request immigration relief for specific individuals through legislation, including in cases where there is an urgent humanitarian need.[54] Private immigration bills—and conceivably many such bills—

could be introduced and hopefully enacted into law on behalf of individual or groups of families, and the sheer number of such bills could itself help to build support for federal legislation that offers permanent protection to the full class of separated families.

Short of legislation, some families paroled into the country or paroled in place could find independent means through which to adjust their status to permanent residence or could obtain permanent protection through the asylum process, particularly as many will be able to apply affirmatively with USCIS. Unfortunately, the damage done to asylum law itself[55] over the past four years will make it overly difficult for many families to obtain relief in this way. Moreover, the experience of requesting asylum may cause significant additional trauma to families who have already suffered enough. The government could consider granting asylum, where appropriate, without requiring individuals to present additional testimony. In addition, those willing to assist federal, state, or local law enforcement in any criminal investigations related to family separation—including investigations that may be undertaken by inspectors general within the federal government or by congressional committees—could receive U visa certifications. The government provided U visa certifications, for instance, to more than a dozen undocumented family members of individuals who died in the 9/11 attacks for their willingness to cooperate in the penalty phase of the Zacarias Moussaoui trial or subsequent criminal trials.[56] Although there is a significant U visa backlog today as a result of low statutory caps, the DHS and DOJ could adopt policies to ensure that individuals with pending U visa applications who appear prima-facie eligible are not threatened with arrest and deportation while those applications remain pending.[57] The government's approach to these cases could be informed by the still-operative guidance issued in 2011 by then-U.S. Immigration and Customs Enforcement Director John Morton encouraging the use of "all appropriate prosecutorial discretion" for certain victims and witnesses of crimes and other violations of civil rights or civil liberties.[58]

Similarly, while resolution of the *Ms. J.P. v. Sessions* case and individual FTCA claims or suits may provide an avenue to grant mental health services and other supports, the task force will need to explore additional avenues to provide complete relief to the full class of individuals harmed. For instance, while not all families are now entitled to the mental health treatment and supports ordered by the court in *Ms. J.P.*, the federal government could contract with the provider of those services to make them available to the broader population of separated families. Additionally, the task force should explore whether a restitution fund may be established to provide additional financial assistance to families whose needs resulting from this policy develop over time. The victim compensation fund created by Congress in the aftermath of the 9/11 attacks and the Office of Redress Administration established in the Civil Liberties Act of 1988 to acknowledge, apologize for, and make restitution payments to Japanese Americans interned during World War II, may provide useful models.

While most of the above discussion has focused on individual accountability for higher-ranking supervisory personnel and policymakers and on collective accountability, many individuals carried out acts that helped to facilitate every step of the family separation policy. Some officials left federal employment over the government's policy,[59] but many more stayed and remain in the same jobs. In addition to any necessary and appropriate terminations or reassignments, as noted above, the federal government could design a mandatory workforce training that incorporates restorative justice principles centering the voices of people who were—and who continue to be—injured by this policy. Such a training could not only promote both accountability and healing but also inform government actors—who are all in relative positions of power and privilege compared with the migrants they may encounter at the border—about how parents and children were harmed by the family separation policy and how those harms continue to be manifested. A well-designed training could not only be valuable for preventing future family separations but also improve how CBP agents and officers who encounter migrants at and between the ports of entry understand how their interactions are perceived by migrants and the effects of their actions.

The final piece of collective accountability would be the adoption of policies to prevent family separations taking place in the future except when strictly necessary to serve the best interests of the child.

Conclusion

The architects of the family separation policy must be held to account individually. In addition, the United States must accept collective responsibility for this official policy designed and executed at the highest levels of the federal government.

Individual accountability can and should take many forms, from civil and criminal liability to professional and reputational sanctions. Collective accountability must involve reuniting separated families and granting them the opportunity to remain together in the United States—providing such families with the services, support, and financial compensation they need and deserve to help repair the damage done—and adopting policies to prevent similar abuses from taking place in the future.

Accountability is vital not only to bring justice to those who suffered under the policy but also to begin to rebuild the public's trust in government and America's reputation around the world. Unity is only possible after abuse is recognized, addressed, and prevented from recurring.

About the authors

Maggie Jo Buchanan is the director of Legal Progress at the Center for American Progress.

Philip E. Wolgin is the managing director of Immigration Policy at the Center.

Claudia Flores is the senior campaign manager for Immigration at the Center.

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