

Family reunification: tearing down the razor wire

Peter Costantini ~ Seattle ~ July 2, 2021



(This commentary is a sequel to Costantini's piece, "Was Trump's family-separation policy torture?", published April 12 by the Americas Program.¹)

Reuniting the more than five thousand children forcibly separated from their parents by the Donald Trump administration has been a slow and agonizing process. Efforts by civil-society organizations have helped to bring the number of children still separated down to below 400, despite the Trump bureaucracy's obstruction. Starting in February, the Joe Biden administration has stood up a task force that is working in coordination with non-governmental groups to complete the reunifications and provide support for the families. But other Trump policies that Biden officials have continued are inadvertently contributing to new separations of families at the border.

Forcible separation of immigrant parents and children in United States custody was the signature practice of the Trump régime to enforce its Zero Tolerance policy.² The action Attorney General Jeff Sessions announced he would not tolerate was seeking asylum by crossing the border between official ports of entry and turning oneself into the Border Patrol. Sessions said he would bring criminal charges against all who did this, whether or not they were seeking asylum.³ When families were detained, Customs and Border Protection separated kids from their parents, without effectively tracking the connected cases or notifying the parents where their youngsters were being held.⁴

At the same time, the Trump administration was “metering” the flow of asylum seekers at official border crossings down to a trickle, and sometimes shutting them out completely. This left tens of thousands of mainly Central Americans trapped in dangerous Mexican borderlands controlled by organized crime.⁵

These barriers to asylum, however, violated the United States Refugee Act of 1980⁶ and the United Nations 1951 Refugee Convention,⁷ which permit asking for asylum anywhere along the border – at ports of entry or between them – as well as inside the U.S.⁸

Using the separation of children from their parents to deter and punish asylum seekers and other immigrants was a bridge too far even for many Republicans and conservative groups, and was widely condemned. A study by Physicians for Human Rights⁹ found that the practice of family separation constituted torture and forced disappearance under the United Nations Convention Against Torture.¹⁰ A former United Nations High Commissioner for Human Rights cited the American Association of Pediatrics, which called Trump’s policy a form of “government-sanctioned child abuse” that could cause “irreparable harm” with “lifelong consequences”.¹¹ Other human rights authorities from the U.N. and non-governmental organizations condemned this and other Trump anti-immigrant policies as “xenophobic” and “an outright assault on human rights”¹² that “drastically reduced protections for migrant families.”¹³ And the last surviving prosecutor of the Nazis at the Nuremberg war-crimes trials, Benjamin Ferencz, called it “a crime against humanity”.¹⁴

In a 2018 lawsuit brought by the American Civil Liberties Union, *Ms. L v. ICE*, the court found the family separation policy unconstitutional and ordered the government to reunite all separated families.¹⁵

Undeterred, Trump’s immigration Rasputin, Stephen Miller, later proposed reinstating family separation with a sadistic twist. Under what he called “Binary Choice”, the *New York Times* reported, immigrant parents with children would be forced to choose: voluntarily allow their children to be taken away from them, or waive their children’s humanitarian protections so that the whole family would be imprisoned together indefinitely.¹⁶ (A more accurate name would have been “Sofia’s Choice”.¹⁷)

Officially, Binary Choice was never put into effect. But a total of 5,512 children were separated from their parents between 2017 and 2019, according to the Physicians for Human Rights report.¹⁸ The family separation program actually began in mid-2017 according to NBC News, nearly a year before Sessions announced Zero Tolerance, with a “pilot program” in the El Paso sector.¹⁹ And separations continued in smaller numbers after the court order and Trump’s announcement officially ending the program.²⁰

Civil-society groups have been working since the beginning to reunite parents and children, despite a lack of cooperation from Trump’s apparatchiks. Immigration officials sometimes furnished stale contact information, delayed providing it, or withheld it completely, according the ACLU’s Immigrants’ Rights Project.²¹ “The reason so many families have not been located,” asserted Deputy Director Lee Gelernt, “is because the Trump administration withheld their names and then failed to disclose information that could have helped us find them.”²²

A 2019 report by the Department of Homeland Security’s Office of the Inspector General found that Customs and Border Protection knew since 2017 that it did not have the information technology system functionality needed to track separated migrant families. But it did not upgrade its IT systems or train its staff adequately before executing Zero Tolerance. As a result, CBP tracked family separations using “ad

hoc methods” that “led to widespread errors”.²³ This suggests that increasing the difficulty of reuniting families was a feature rather than a bug of Zero Tolerance.

The number of children still waiting to be reunited was reportedly reduced from 611 in January to roughly 400 in late April,²⁴ and has continued to decline slowly. But the work of reuniting families has apparently become harder as the more straightforward cases are resolved, leaving many remaining ones lacking information or presenting other difficulties.

Biden launches a task force

The Joe Biden administration, fulfilling a campaign promise, issued a February 2, 2021 executive order establishing an Interagency Task Force on the Reunification of Families. It is chaired by Secretary of Homeland Security Alejandro N. Mayorkas, and includes officials from the Departments of State, Health and Human Services, and Justice.²⁵

The Task Force’s first report,²⁶ released June 2, portrayed a slow but accelerating ramp-up of its work. It had been able to reunite only seven families as of the end of May. But it said that in coming weeks 29 more families would reunified. Nearly 50 requests had been filed with U.S. Citizenship and Immigration Services, the report said, of which 37 had been granted humanitarian parole. This is an immigration status that allows the families to enter and stay in the U.S. for three years, with the possibility of renewal, and apply for work authorization.

The accounting of the Task Force largely agreed with that of PHR and the ACLU. It said that so far it had identified 3,913 children separated since July 1, 2017, nearly all of whom had been released to sponsors in the U.S. (not necessarily the parents). But this figure included 2,127 whose reunification status the Task Force still could not verify, although some of them might have been reconnected by NGOs. Among these separated children, it found that 58 percent were from Guatemala and 29 percent from Honduras. It also counted 1,723 other children in government custody going back to January 2017 whose cases it was still reviewing, which brought its total of separated children to 5,636, slightly more than the PHR report.

The report acknowledged that before the Task Force was created, non-governmental organizations were primarily responsible for reuniting 1,779 children with their parents. It said it would continue to coordinate with the ACLU and other NGOs on family reunification. And among the initial problems it was still tackling, it singled out “the absence of family separation records maintained by the prior Administration.”

“The Department of Homeland Security is committed to the relentless pursuit of reunifying families who were cruelly separated by the previous Administration,” Mayorkas pledged in a news release.²⁷ Task Force Executive Director Michelle Brané commented: “For too long, families have been separated under the inhumane policies set in place under the previous Administration. ... We will provide support and services for these families to begin rebuilding their lives.”

The Task Force report said that it will offer assistance and resources to reunite families and settle them temporarily in the U.S. if they choose. This would mean bringing back to the U.S. those parents and children who have been deported or left voluntarily. The report also said the Task Force will provide ongoing treatment and counseling for the mental health and behavioral issues families are confronting as a result of their separation.

A federal judge had already ruled in November 2019 that the implementation of Zero Tolerance had caused “severe mental trauma to parents and their children,” Miriam Jordan of the New York Times reported, and that the U.S. government must offer mental health services to migrant parents and children who had experienced psychological harm as a result.²⁸

Physicians for Human Rights executive director Donna McKay had proposed that separated families be given “legal residency” in the U.S., and called on the Task Force to explore pathways to citizenship for them, as she said Mayorkas had promised.²⁹ The ACLU’s Gelernt also called on the administration to “explore all available means to confer permanent legal status.”³⁰ Beyond the three years of humanitarian parole, the report did not address the possibility of such pathways.

Beyond ongoing trauma care for children and parents, both PHR and the ACLU called for providing basic necessities along with compensation for damages and redress for harm inflicted on families.³¹ PHR’s McKay called for “accountability for the perpetrators” of the policy. “President Biden called the family separation policy ‘criminal’”, she said. “Now his administration must act to help heal those who endured family separation and hold those liable to account.”³²

Human-rights advocates sue for damages

“In 2018, when the country learned that babies and toddlers were being ripped from their parents’ arms, the public revulsion spanned the ideological spectrum. The sentiment was uniform: Our government should not take babies from their parents and use them as political pawns. ... Ultimately, it is a moral imperative to eliminate the historic stain on this country. ... For the sake of these families, the Biden administration must repair the harms inflicted by family separation and ensure such an atrocity never happens again.”
- Lee Gelernt, Deputy Director, ACLU Immigrants' Rights Project¹

Since well before Biden’s election, the ACLU, the Southern Poverty Law Center and other NGOs have brought legal actions against the Trump administration for family separation.

On October 3, 2019, the ACLU filed a class-action civil lawsuit in U.S. District Court in Arizona seeking damages for families torn apart by what it called “the Trump administration’s illegal practice of separating families at the border”. Plaintiffs in *A.I.I.L. v. Sessions* include Guatemalan and Honduran families separated at the U.S.-Mexico border in Arizona for up to 16 months.³³

The lawsuit aims to hold specific officials accountable to deter future wrongdoing, naming defendants including White House advisor Miller; former Attorney General Sessions; former Secretaries of Homeland Security Kirstjen Nielsen, Kevin McAleenan, and John Kelly; and other officials from the Departments of Justice, Homeland Security, Health and Human Services/Office of Refugee Settlement, and the White House.³⁴

In introducing the litigation, the ACLU cited a September 2019 report by the Office of the Inspector General of Health and Human Services, which described separated children who were suffering from “acute grief that caused them to cry inconsolably,” “believed their parents had abandoned them,” experienced “feelings of anger and guilt,” and were “concerned for their parents’ welfare.”³⁵

Last March, the ACLU and the Biden administration announced that they were beginning settlement negotiations for *A.I.I.L. v. Sessions*. The ACLU’s Gelernt told National Public Radio that the government had reached out to begin settlement talks, but that the new Task Force on Reunification must continue working in parallel to reunite the remaining separated families during the negotiations. Issues that immigrant advocates are raising in both venues include the need for permanent legal status for reunited families and mental-health services to redress the harm done by separation.³⁶

The Southern Poverty Law Center, another U.S. non-profit organization, and two law firms have also filed two federal lawsuits in Arizona on behalf of Central American parents seeking damages from the U.S. government for forcibly separating them from their children. The family of plaintiffs in the case “continues to suffer every day as a result of their horrific experience at the hands of the United States government,” said SPLC attorney Gillian Gillers. “The government must be held accountable for the harm done to separated families, and we must ensure this sort of cruelty is never repeated again.”³⁷

“Once we start with these lawsuits, they’re going to reveal more of the intentionality, more of the cruelty, that is really important to hold the Trump administration accountable for what they did,” Cathleen Caron, executive director of the non-profit Justice in Motion told Rafael Carranza of the Arizona Republic. These family separation civil lawsuits, she said, are critical to achieving justice and healing for the families, and greater accountability for the U.S. government.³⁸

Pandemic border closing causes more family separations

While the Biden administration has begun to address the damages caused by some Trump policies, another such policy it has continued has indirectly resulted in renewed separations of families.

Early in the COVID-19 pandemic, Trump officials bullied the Center for Disease Control and Prevention into issuing an order under an obscure federal statute, United States Code Title 42 Section 265,³⁹ entitled “Suspension of entries and imports from designated places to prevent spread of communicable diseases”. The new regulation clamped down on most immigration at the southern border for purported public-health reasons, authorizing border officials to rapidly expel all would-be immigrants without letting them ask for asylum. This prompted an outcry by public-health experts within the CDC and across the field, who objected that there was no public-health justification for shutting out asylum seekers: far greater numbers of non-immigrants were still allowed to cross the border daily for business, work, school, and personal reasons, while the relatively small numbers of asylum seekers could easily be tested, quarantined if necessary, and vaccinated.⁴⁰

The Biden administration has continued the Title 42 lockdown of the border against most immigrants, but decided to accept unaccompanied children into the asylum process at the border. The Trump administration had excluded them until a court ruled that they had to be permitted to enter the country. This humane decision on children, however, had an unintended consequence: the discrepancy gave families who were turned back an incentive to send their children on alone to escape the dangers of the borderlands.

The conflicting Biden policies around Title 42 have been “pushing families to make an impossible choice”, according to a report by Amnesty International. “Likely thousands of children have had to separate from their asylum-seeking parents in order to escape dangerous border regions of northern Mexico, and have then crossed the border alone, since they would otherwise be deported as a family if their parents crossed with them. In addition to compelling families to separate unnecessarily, US border authorities still reportedly turn unaccompanied children away at some of the most heavily trafficked official ports-of-entry and deny them access to asylum procedures. Despite their legal right to request protection at ports-of-entry, the vast majority of unaccompanied children instead take dangerous journeys across the open border – often at the mercy of smugglers.”⁴¹

The Amnesty International report also charged that while many unaccompanied Central American children are being allowed to enter the U.S. to seek asylum, Mexican children are still being sent back into severe danger by the U.S. in violation of international asylum law. It also found that, at Mexico’s southern border, Central American children are being illegally returned to their home countries by Mexico.

After months of criticism by immigrant advocates, the Biden administration appears to be loosening Title 42 border controls. As of mid-May, it agreed to allow up to 250 asylum-seekers trapped in Mexico to enter the U.S. daily, which amounts to roughly 7,750 per month, according to Camilo Montoya-Galvez of CBS News. The agreement to exempt them from Title 42 restrictions came in settlement negotiations in the federal court case brought by the ACLU.⁴² The Mexican newspaper La Razón reported that the government is asking six immigrant advocacy groups to decide which immigrant families are the most vulnerable and should have priority to continue their asylum cases in the U.S.⁴³

Meanwhile, the number of immigrant families trying to cross the southwest border declined in May, while roughly 80 percent of families encountered by the Border Patrol were released into the U.S. to pursue asylum, according to CBP figures. U.S. Representative Henry Cuellar, Democrat of Texas, told Arelis Hernández of the Washington Post that, based on conversations with administration officials, he expected that Title 42 restrictions would be ended by late June or early July.⁴⁴

In another policy change with implications for family separation, on June 1 the Biden administration finally cancelled Trump’s Migrant Protection Protocols, better known as Remain in Mexico, which sent immigrants back to Mexico after being recognized as potential asylees to wait for their initial hearings there. Families in this group have also experienced strong incentives to send their children to the border alone to ask for asylum. The cancellation of the program leaves the remaining 52 thousand migrants stranded in legal limbo in Mexico, Central America and elsewhere awaiting a response, according to the United Nations refugee agency.⁴⁵

So far, the U.S. government has initiated the asylum process for only 16 thousand of the people remanded to Mexico by the program, fewer than a quarter of the total of at least 68 thousand enrolled, Jorge Butrón of La Razón reported.⁴⁶ Of these, the Biden administration has so far allowed 11,200 to enter the U.S. to await asylum hearings, according to the Associated Press.⁴⁷ But it has announced that it would allow all 30 thousand migrants with pending cases to reenter the U.S. to continue them.⁴⁸

As of late June, asylum seekers sent to Mexico under MPP who missed their U.S. court hearings and were subject to deportation will be allowed to restart their cases in the U.S., as will those whose cases

were terminated due to procedural errors, explained Melissa Cruz of the American Immigration Council.⁴⁹ These two groups may account for nearly half of all those enrolled in the program.

“Wherever they are, they should be able to wait in that country [the U.S.] because there is no obstacle and they are registered,” Gretchen Kuhner, director of the Mexican NGO Instituto para las Mujeres en la Migración (Institute for Women in Migration) told Butrón.⁵⁰

While the Trumpist spasm of forcible family separation is being reversed and remedied, immigrants and advocates are taking a longer view of what the pre-existing immigration system, aptly nicknamed “Juan Crow”, has done to immigrant families. The decades of relentless ICE raids, imprisonment, and deportation have separated millions of parents and children, leaving deep gashes in many immigrant communities. The goal of keeping families whole in the throes of migration will not be reached until all these wounds are healed and human mobility can be welcomed and protected without human suffering.



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 - ³¹ Physicians for Human Rights 3/1/2021; Gelernt 4/29/2021
 - ³² Physicians for Human Rights 3/1/2021
 - ³³ ACLU 10/3/2019
 - ³⁴ Carranza 2/9/2021
 - ³⁵ US HHS OIG 9/2019
 - ³⁶ Wiley 3/11/2021
 - ³⁷ Southern Poverty Law Center 1/22/2021
 - ³⁸ Carranza 2/9/2021
 - ³⁹ Legal Information Institute “42 U.S. Code § 265”
 - ⁴⁰ Columbia University Mailman School of Public Health 5/24/2021
 - ⁴¹ Amnesty International 6/2021, p. 7
 - ⁴² Montoya-Galvez 5/18/2021
 - ⁴³ La Razón Online 6/4/2021
 - ⁴⁴ Hernández 6/13/2021
 - ⁴⁵ Butrón 6/5/2021
 - ⁴⁶ Butrón 6/5/2021
 - ⁴⁷ Associated Press 6/1/2021
 - ⁴⁸ Cruz 6/23/2021
 - ⁴⁹ Cruz 6/23/2021
 - ⁵⁰ Butrón 6/5/2021