

TRUMP ADMINISTRATION ACCOUNTABILITY PROJECT



Report on the Abuse of Immigrant and Refugee Human Rights

Possible Violation of the Law

Did the Trump Administration violate the Fifth Amendment, Eighth Amendment, and Anti-Torture statutes by arbitrarily separating children from their parents, and subsequently relegating those children to detention in inhumane conditions? Did innocent parents and children suffer the torture of separation in order to disincentivize future immigration?

Introduction

The Trump Administration separated over 5,400 children from their parents at the Mexican border.¹ These separations broke from practices under the Obama Administration, which declined to press immigration-related charges that would separate families arriving in the US for the first time.² House Speaker Nancy Pelosi claimed that the Trump Administration was “holding the kids’ hostage” to motivate reform of immigration law.³ However, the official motives for separating parents and children were not limited to political pressure. In fact, Chief of Staff John Kelley acknowledged that families were separated to “deter more movement” south of the border.⁴ Attorney General Jeff Sessions and Policy Advisor Stephen Miller also supported using the suffering of children and their parents to deter immigration.⁵

The Trump Administration’s family separation program intended to send a message to migrants. It sent that message by taking children from their families. The purpose was to reduce migration into the United States by inflicting “irreparable harm” on innocent children.⁶ The laws of the United States prohibit the abuse of children in custody.⁷ Those laws are only as strong as the political will to enforce them. The next administration must investigate these violations of human rights in order to prevent future abuses.

Facts

Immigration enforcement under the Obama Administration was historically robust, and involved both increased penalties for unauthorized border crossings and a record-high number of deportations.⁸ In the context of this aggressive enforcement, Department of Justice Officials considered and rejected the idea of widespread family separations as “too detrimental to the safety of the children . . . it was always preferable to detain the family as a unit or release the family as a unit.”⁹ In short, the United States has a history of enforcing the law while maintaining policies to keep accompanied minors with their parents.

President Donald Trump entered office with a promise to enforce immigration policies in a more draconian way than his predecessor.¹⁰ Trump began by ordering an end to the Deferred Action for Childhood Arrivals (DACA) program which protects migrants brought to the United States as children.¹¹ The attempt to end DACA was initially delayed and ultimately failed after the Supreme Court ruled the administration had failed to explain its reasons or consider the consequences of a hasty end to the program.¹² Simultaneously, Trump took independent action to unlawfully reject asylum seekers at the border – inventing quotas and other pretexts in order to close the border to individuals protected by US law.¹³ These policies combined with the “Remain in Mexico” program to create a bottleneck at the border, forcing thousands of migrants into ramshackle tent cities outside border checkpoints.¹⁴ Trump also followed through on his promise to implement an unconstitutional “Muslim Ban” which created chaos at ports of entry (the ban was later modified to avoid constitutional issues).¹⁵ These actions demonstrate a pattern of rushed, reckless, and lawless behavior within the Trump Administration while implementing harsh immigration measures.

In July 2017, the Trump Administration began a “pilot program” of its “zero-tolerance” approach to immigrants at the border.¹⁶ This test run separated 1,768 children from their families.¹⁷ To enable the separations, the Department of Homeland Security began charging as many migrants as possible with crimes, including refugees who lawfully presented themselves to immigration officials at the border.¹⁸ These criminal charges were used to justify separating parents from the minors they had arrived with.¹⁹ The Trump Administration concluded this program was effective at deterring new migrant entries.²⁰

On April 6, 2018, Attorney General Jeff Sessions ordered the Department of Justice to begin charging immigrants with misdemeanors in order to separate more families.²¹ When five US Attorneys along the southern border resisted, Sessions reiterated that “we need to take away children” to fulfill President Trump’s wishes.²² Sessions’ order effectively expanded the pilot program to the entire southern border. Throughout the pilot and expansion, the Trump Administration did not take necessary steps to protect the rights of migrants. The program did not effectively track of who was separated, and where the parents and children were sent.²³ As a result, the Department of Homeland Security separated families without plans or systems to reunite them.²⁴

Between April and June of 2018, the Trump Administration separated at least 2,500 children from their families.²⁵ The Administration falsely claimed that all separated families had attempted to enter the country illegally.²⁶ In fact, many of these separations occurred when asylum seekers and refugees presented themselves to immigration officials at lawful ports of entry.²⁷ Officials in the Department of Homeland Security lied to these parents, telling them their children were being taken for baths or simple medical procedures before taking the children away indefinitely.²⁸ Families were ripped apart and sent to facilities that were not designed for humane detention.²⁹ Children were left to care for other children, subjected to freezing cold, and denied access to basic amenities like soap and toothpaste.³⁰ Many slept on cement floors under foil survival blankets.³¹ Republicans in Congress began to call for answers to this lawless conduct toward innocent refugees, but were initially rebuffed.³²

On June 20, 2018, President Trump bowed to pressure from Congress and the public in an executive order that reversed the zero-tolerance policy enabling child separations.³³ That same month, a Federal judge ordered the separated children be reunited with their families.³⁴ Even after this ruling, President Trump pressured members of his administration to secretly resume family separations.³⁵ As of October 2020, over 500 children remained separated from their families as a result of the Trump Administration’s reckless and disordered tactics.³⁶

Possible Misconduct

The planning and execution of the child separation program involved officials in the highest echelons of the Trump Administration. These officials conspired to inflict “irreparable harm” on children by removing them from their parents after an often-traumatic journey to the border.³⁷ These actions were undertaken with the specific intent to harm immigrants in ways that deterred future immigration. The Trump Administration’s child separation policy went beyond law enforcement—it corrupted the U.S. legal system in a concerted effort to harm innocents. These actions violate constitutionally protected rights and may have violated criminal statutes preventing torture.

A. Constitutional Prohibitions on Cruel and Unusual Punishment

Most immigrants in custody are civilly detained without criminal charges.³⁸ In a legal sense, immigration detention should not be conducted for the purpose of punishment.³⁹ Civil detention (of non-criminal or pre-trial detainees) requires the government exercise a higher standard of care than for prisoners who are convicted of a crime and punished.⁴⁰ In an apparent attempt to avoid protections for civil detainees, the Trump Administration embarked on its family separation policy by charging immigrants with the crime of Unlawful Entry under its zero-tolerance policy.⁴¹ These criminal charges were intended to provide the Department of Homeland Security with a pretext to separate the allegedly criminal parents from the minors they arrived with. However, the Constitution does not allow for the violation of human rights based on the legal technicalities invoked by the zero-tolerance program.

The Eighth Amendment forbids “cruel or unusual punishment” for convicted criminals in US custody, regardless of their nationality.⁴² The Fifth Amendment guarantees that individuals will not be deprived of “life, liberty, or property, without due process” to protect their rights.⁴³ At the time these parents were separated from their children, charges for ‘unlawful entry’ were mere allegations, and most migrants had not been convicted of any other crime.⁴⁴ Further, these separations were accomplished without due process of law, since little effort was made to plan for family reunification after the completion of any legal process. In effect, the Trump Administration pretended these detainees were criminals and punished them severely without due process in order to deter other migrants. These actions are an affront to the Constitution.

Violations of the Eighth Amendment are governed by a “deliberate indifference” standard.⁴⁵ As a result, a government official must “know[] of and disregard[] an excessive risk to inmate health or safety” in order to constitute a Constitutional harm.⁴⁶ Here, government officials specifically intended to inflict an excessive risk of harm on the children of migrants.⁴⁷ This intent satisfies the requirements to find a Constitutional wrong under either the Eighth Amendment or the lower

Fifth Amendment standard. However, undocumented immigrants face substantial obstacles in bringing civil rights claims.⁴⁸ As a result, legal action on behalf of migrants has focused largely on eliminating abuses and reestablishing constitutional protections via injunctions, rather than seeking accountability.⁴⁹ The Trump Administration is unlikely to face consequences for these Constitutional violations without concerted action by the next administration to investigate the factual circumstances that led to family separation.

B. Violation of Anti-Torture Statute – 18 U.S.C. 2340A

The United States Code defines torture as an act “specifically intended to inflict severe physical or mental pain or suffering” against a detainee. However, this statute does not cover any pain or suffering that is “incidental to a lawful sanction[.]” Therefore, penalties for child separation under the Federal Anti-Torture statute are only possible if the Trump Administration’s actions constituted an unlawful sanction against migrants.

Current public information does not contain enough facts to determine whether the Anti-Torture statute applies. Information relevant to the lawfulness of these sanctions may be contained in memoranda justifying the separation program. If the Trump Administration did not seek legal opinions on the zero-tolerance policy, or if those opinions used fraudulent reasoning, then sanctions leading to family separation may be unlawful. The sanctions imposed on families who lawfully presented themselves at the border already appear to be unlawful on their face. More information is needed to determine if the officials dealing with asylum seekers believed they were following the law, and what the basis was for that belief. Disclosure of legal documents or policy guidance implementing the child separation program may yet reveal how the Trump Administration attempted to justify their torturous actions.

Conclusion

The Trump Administration’s child separation program represents an especially dark chapter in the history of immigrant rights in the United States. It indicates a dire need for immigration reform to create a humane system that is less prone to abuse based on partisan power politics. The rushed and byzantine process used to separate families at the border must be further investigated to shed light on how these abuses came to pass. It would be a mistake to conclude that these abuses were legal simply because family separation was blessed by Trump Administration officials and attorneys. Both the administration that carried out the policy and the lawyers who sanctioned it should be scrutinized and held accountable. The Trump Administration should not be able to abuse innocent children by relying on a thin legalistic pretext. The United States must not excuse tyrannical abuses of constitutionally protected human rights.

¹ Associated Press, *More than 5,400 children split at border, according to new count*, MSNBC News (Oct. 25, 2019) (available at: <https://www.nbcnews.com/news/us-news/more-5-400-children-split-border-according-new-count-n1071791>).

² Calvin Woodward and Nomaan Merchant, *AP Fact Check: Trump tries to pin child separations on Obama*, AP NEWS (Apr. 9, 2019) (available at: <https://apnews.com/article/dc11025f23a746b2bf858f7ca1d01c4c>).

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- ³ Michael Scherer and Josh Dawsey, *Trump cites as a negotiating tool his policy of separating children from their parents*, WASHINGTON POST (Jun. 15, 2018) (available at: https://archive.vn/20191026190809/https://www.washingtonpost.com/politics/trump-cites-as-a-negotiating-tool-his-policy-of-separating-immigrant-children-from-their-parents/2018/06/15/ade82b80-70b3-11e8-bf86-a2351b5ece99_story.html).
- ⁴ Daniella Diaz, *Kelly: DHS is considering separating undocumented children from their parents at the border*, CNN POLITICS (Mar. 7, 2017) (available at: <https://www.cnn.com/2017/03/06/politics/john-kelly-separating-children-from-parents-immigration-border/index.html>).
- ⁵ Eli Rosenberg, *Sessions defends separating immigrant parents and children: 'We've got to get this message out'*, WASHINGTON POST (Jun. 5, 2018) (available at: <https://www.washingtonpost.com/news/post-politics/wp/2018/06/05/sessions-defends-separating-immigrant-parents-and-children-weve-got-to-get-this-message-out/>); Julie Hirschfeld Davis and Michael Shear, *How Trump Came to Enforce a Practice of Separating Migrant Families*, NEW YORK TIMES (Jun. 16, 2018) (<https://www.nytimes.com/2018/06/16/us/politics/family-separation-trump.html>).
- ⁶ Joel Rose, *Doctors Concerned About 'Irreparable Harm' To Separated Migrant Children*, NPR NEWS (Jun. 15, 2018) (available at: <https://www.npr.org/2018/06/15/620254326/doctors-warn-about-dangers-of-child-separations>).
- ⁷ See, e.g. Kate Englund, *Protecting the Human Rights of Unaccompanied Immigrant Minors*, UNIVERSITY OF CHICAGO SCHOOL OF SOCIAL SERVICE ADMINISTRATION – ADVOCATES FORUM (2011) (available at: <https://www.ssa.uchicago.edu/protecting-human-rights-unaccompanied-immigrant-minors>).
- ⁸ Serena Marshall, *Obama Has Deported More People Than Any Other President*, ABC NEWS (Aug. 29, 2020) (available at: <https://abcnews.go.com/Politics/obamas-deportation-policy-numbers/story?id=41715661>).
- ⁹ Daniella Diaz, *Kelly: DHS is considering separating undocumented children from their parents at the border*, CNN POLITICS (Mar. 7, 2017) (available at: <https://www.cnn.com/2017/03/06/politics/john-kelly-separating-children-from-parents-immigration-border/index.html>).
- ¹⁰ Adam Goodman, *The core of Donald Trump's immigration policy? Fear.*, WASHINGTON POST (Aug. 24, 2017) (available at: <https://www.washingtonpost.com/news/made-by-history/wp/2017/08/24/the-core-of-donald-trumps-immigration-policy-fear/>).
- ¹¹ White House Fact Sheet, *President Donald J. Trump Restores Responsibility and the Rule of Law to Immigration*, WHITEHOUSE.GOV (Sept. 5, 2017) (available at: <https://www.whitehouse.gov/briefings-statements/president-donald-j-trump-restores-responsibility-rule-law-immigration/>).
- ¹² Josh Gerstein and Rebecca Rainey, *Supreme Court rejects Trump effort to end DACA*, POLITICO (Jun. 18, 2020) (available at: <https://www.politico.com/news/2020/06/18/supreme-court-daca-decision-328255>).
- ¹³ Joshua Partlow, *U.S. border officials are illegally turning away asylum seekers, critics say*, WASHINGTON POST (Jan. 16, 2020) (available at: https://www.washingtonpost.com/world/the_americas/us-border-officials-are-illegally-turning-away-asylum-seekers-critics-say/2017/01/16/f7f5c54a-c6d0-11e6-acda-59924caa2450_story.html).
- ¹⁴ Alexa Liautaud, *Thousands of migrants in tent city limbo after Supreme Court keeps 'Remain in Mexico' in place*, NBC NEWS (Mar. 12, 2020) (available at: <https://www.nbcnews.com/news/latino/thousands-migrants-tent-city-limbo-after-supreme-court-keeps-remain-n1155996>).
- ¹⁵ *Timeline of the Muslim Ban*, ACLU WASHINGTON (Feb 10, 2020) (available at: <https://www.aclu-wa.org/pages/timeline-muslim-ban>).
- ¹⁶ Tal Kopan, *Government never had specific plan to reunify families, court testimony shows*, CNN POLITICS (Jun. 29, 2020) (available at: <https://www.cnn.com/2018/06/29/politics/family-separations-reunification-never-plan-court/index.html>).
- ¹⁷ Lisa Riordan Seville and Hannah Rappleve, *Trump admin ran 'pilot program' for separating migrant families in 2017*, NBC NEWS (Jun. 29, 2020) (available at: <https://www.nbcnews.com/storyline/immigration-border-crisis/trump-admin-ran-pilot-program-separating-migrant-families-2017-n887616>).
- ¹⁸ Tal Kopan, *Government never had specific plan to reunify families, court testimony shows*, CNN POLITICS (Jun. 29, 2020) (available at: <https://www.cnn.com/2018/06/29/politics/family-separations-reunification-never-plan-court/index.html>).
- ¹⁹ Julia Preston, *What You Should Know About Family Separations*, THE MARSHALL PROJECT (Jun. 19, 2018) (available at: <https://www.themarshallproject.org/2018/06/19/what-you-should-know-about-family-separations>).

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- ²⁰ Tal Kopan, *Government never had specific plan to reunify families, court testimony shows*, CNN POLITICS (Jun. 29, 2020) (available at: <https://www.cnn.com/2018/06/29/politics/family-separations-reunification-never-plan-court/index.html>).
- ²¹ Jeff Sessions, *Remarks Discussing Immigration Enforcement Actions of the Trump Administration*, US DEPARTMENT OF JUSTICE (May 7, 2018) (available at: <https://www.justice.gov/opa/speech/attorney-general-sessions-delivers-remarks-discussing-immigration-enforcement-actions>).
- ²² Michael Shear, Katie Benner, and Michael Schmidt, *'We Need to Take Away Children,' No Matter How Young, Justice Dept. Officials Said*, NEW YORK TIMES (Oct. 21, 2020) (available at: <https://www.nytimes.com/2020/10/06/us/politics/family-separation-border-immigration-jeff-sessions-rod-rosenstein.html>).
- ²³ Ron Nixon, *Homeland Security's Computers Couldn't track Separated Families, Report Finds*, NEW YORK TIMES (Oct. 2, 2018) (available at: <https://www.nytimes.com/2018/10/02/us/politics/immigration-family-separation-dhs.html>).
- ²⁴ Tal Kopan, *Government never had specific plan to reunify families, court testimony shows*, CNN POLITICS (Jun. 29, 2020) (available at: <https://www.cnn.com/2018/06/29/politics/family-separations-reunification-never-plan-court/index.html>).
- ²⁵ John v. Kelly, *Special Report – Initial Observations Regarding Family Separation Issues Under The Zero Tolerance Policy*, OFFICE OF THE INSPECTOR GENERAL FOR THE U.S. DEPARTMENT OF HOMELAND SECURITY (Sept. 27, 2018) (available at: <https://www.oig.dhs.gov/sites/default/files/assets/2018-10/OIG-18-84-Sep18.pdf>).
- ²⁶ Paloma Esquivel and Brittany 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 (Jul. 1, 2018) (available at: <https://www.latimes.com/local/lanow/la-me-ln-port-of-entry-separations-20180701-story.html#>).
- ²⁷ Neena Satija, *The Trump administration is not keeping its promises to asylum seekers who come to ports of entry*, TEXAS TRIBUNE (Jul. 5, 2018) (available at: <https://www.texastribune.org/2018/07/05/migrants-seeking-asylum-legally-ports-entry-turned-away-separated-fami/>).
- ²⁸ Ellen Cranley, *Border agents telling migrant parents they're taking their kids to get baths illustrates how Trump's 'zero tolerance' policy is being carried out on the ground*, BUSINESS INSIDER (Jun. 18, 2020) (available at: <https://www.businessinsider.com/border-agents-use-baths-to-separate-kids-from-parents-2018-6>) ; Michael D. Shear, Abby Goodnough, and Maggie Haberman, *Trump Retreats on Separating Families, but Thousands May Remain Apart*, NEW YORK TIMES (Jun. 20, 2018) (available at: <https://www.nytimes.com/2018/06/20/us/politics/trump-immigration-children-executive-order.html>).
- ²⁹ John v. Kelly, *Special Report – Initial Observations Regarding Family Separation Issues Under The Zero Tolerance Policy*, OFFICE OF THE INSPECTOR GENERAL FOR THE U.S. DEPARTMENT OF HOMELAND SECURITY (Sept. 27, 2018) (available at: <https://www.oig.dhs.gov/sites/default/files/assets/2018-10/OIG-18-84-Sep18.pdf>).
- ³⁰ Michael Garcia Bochenek, *In the Freezer – Abusive Conditions for Women and Children in US Immigration Holding Cells*, HUMAN RIGHTS WATCH (Dec. 2017) (available at: <https://www.hrw.org/report/2018/02/28/freezer/abusive-conditions-women-and-children-us-immigration-holding-cells>).
- ³¹ *Id.*
- ³² Burgess Everett, *GOP senators demand details from Trump administration about separated families*, POLITICO (Jun. 17, 2018) (available at: <https://www.politico.com/story/2018/06/17/children-separated-border-flake-collins-650779>).
- ³³ Michael D. Shear, Abby Goodnough, and Maggie Haberman, *Trump Retreats on Separating Families, but Thousands May Remain Apart*, NEW YORK TIMES (Jun. 20, 2018) (available at: <https://www.nytimes.com/2018/06/20/us/politics/trump-immigration-children-executive-order.html>).
- ³⁴ Josh Gerstein and Ted Hesson, *Federal judge orders Trump administration to reunite migrant families*, POLITICO (Jun. 26, 2020) (available at: <https://www.politico.com/story/2018/06/26/judge-orders-trump-reunite-migrant-families-678809>).
- ³⁵ Jake Tapper, *Trump pushed to close El Paso border, told admin officials to resume family separations and agents not to admit migrants*, CNN POLITICS (Apr. 9, 2019) (available at: <https://www.cnn.com/2019/04/08/politics/trump-family-separation-el-paso-kirstjen-nielsen/index.html>).
- ³⁶ Caitlin Dickerson, *Parents of 545 Children Separated at the Border Cannot Be Found*, NEW YORK TIMES (Oct. 21, 2020) (available at: <https://www.nytimes.com/2020/10/21/us/migrant-children-separated.html>).
- ³⁷ Joel Rose, *Doctors Concerned About 'Irreparable Harm' To Separated Migrant Children*, NPR NEWS (Jun. 15, 2018) (available at: <https://www.npr.org/2018/06/15/620254326/doctors-warn-about-dangers-of-child-separations>).

³⁸ Emily Kassie, *Detained – How the US built the world’s largest immigrant detention system*, THE GUARDIAN (Sept. 24, 2019) (available at: <https://www.theguardian.com/us-news/2019/sep/24/detained-us-largest-immigrant-detention-trump>).

³⁹ Cesar Cuauhtemoc Garcia Hernandez, *Immigration Detention as Punishment*, 61 UCLA LAW REVIEW 5 (Jun. 3, 2014) (available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2321219); Emily Ryo, *Detention as Deterrence – Symposium on Immigration*, STANFORD LAW REVIEW (Mar. 2019) (available at: <https://www.stanfordlawreview.org/online/detention-as-deterrence/>) (“immigration detention is civil confinement under the law. . . . confinement conditions are often worse than criminal incarceration and immigrant detainees themselves experience their detention as a form of punishment.”).

⁴⁰ Tom Jawetz, *Litigating Immigration Detention Conditions*, ACLU NATIONAL PRISON PROJECT (Jul. 18, 2008) (available at: https://law.ucdavis.edu/alumni/alumni-events/files/mcle-files/jawetz_detention_conditions.pdf).

⁴¹ See 8 U.S.C. § 1325 – Improper entry by alien.

⁴² U.S. Const. amend. VIII.

⁴³ U.S. Const. amend. V.

⁴⁴ *Fact Sheet: Operation Streamline*, NATIONAL IMMIGRATION FORUM (Sept. 1, 2020) (available at: <https://immigrationforum.org/article/fact-sheet-operation-streamline/>) (some fraction of immigrants arriving with children may have been previously convicted of charges under programs like “operation streamline”. However the zero tolerance policy applied specifically to immigrants who had never before crossed the border, and whose first charge in the US, Unlawful Entry, was still pending).

⁴⁵ See *Estelle v. Gamble*, 429 U.S. 97 (1976); See also *Immigration Detention: A Legal Overview*, CONGRESSIONAL RESEARCH SERVICE (Sept. 16, 2019) (available at: <https://fas.org/sgp/crs/homesec/R45915.pdf>).

⁴⁶ *Id.*

⁴⁷ Isaac Chotiner, *How the Stress of Separation and Detention Changes the Lives of Children*, NEW YORKER (Jul. 13, 2019) (available at: <https://www.newyorker.com/news/q-and-a/how-the-stress-of-separation-and-detention-changes-the-lives-of-children>).

⁴⁸ Kim Voss, Fabiana Silva, and Irene Bloemraad, *The limits of rights: claims-making on behalf of immigrants*, JOURNAL OF ETHNIC AND MIGRATION STUDIES (Jan. 28, 2019) (available at: <https://www.law.berkeley.edu/wp-content/uploads/2019/11/Voss-Silva-Bloemraad-Limits-of-Rights-JEMS-online-2019.pdf>).

⁴⁹ Debra Cassens Weiss, *US says it will appeal injunction barring separation of migrant families*, AMERICAN BAR ASSOCIATION JOURNAL (Aug. 27, 2018) (available at: https://www.abajournal.com/news/article/us_says_it_will_appeal_injunction_barring_separation_of_immigrant_families).