

FAMILY SEPARATION IS NOT OVER

HOW THE TRUMP ADMINISTRATION CONTINUES TO SEPARATE CHILDREN
FROM THEIR PARENTS TO SERVE ITS POLITICAL ENDS



EXECUTIVE SUMMARY

The Trump administration continues to separate families, taking children from parents, placing parents in adult immigration detention and children in shelters across the country. During the administration's Zero Tolerance policy, the government separated nearly 4,500 children from their parents. Its stated motive: to deter families from seeking protection in the United States.¹

Since the end of this policy, another 1,100 children have been separated from their parents based on alleged criminal histories, which frequently have no bearing on a parent's ability to care for a child.² The Young Center for Immigrant Children's Rights was appointed to a two-year-old who was separated from a parent after Zero Tolerance ended because immigration officials observed that the child had a diaper rash. In another case, a six-year-old was separated from a parent who had a charge of "breaching the peace" on his record. Teenagers and babies alike were taken from parents with years-old charges for driving under the influence. After spending months in federal custody, all these children were reunited with their parents for the purpose of joint repatriation (deportation).

Today, under the pretense of protecting public health, the border is closed and nearly no children are allowed in. Some families continue to wait in the Remain in Mexico program, which the government ironically calls the Migrant Protection Protocols. The program forces families seeking protection at the U.S. border to wait in Mexico for decisions on their immigration proceedings. Since the policy began in January 2019, nearly 60,000 people have been trapped in appalling conditions at the border.³ Others—including unaccompanied children—have been put on ICE flights and deported, in violation of federal law.

Separation from parents can cause severe, lifelong harm to children. In this report, we seek to galvanize renewed attention to the problem of family separation at the border and offer concrete recommendations to end these practices. We will also share how the Young Center employs its unique model of assigning independent Child Advocates—volunteers, attorneys, social workers, and paralegals—who work to reunify separated children with their families as quickly as possible and ensure that unaccompanied children can live with family in the community as their immigration cases proceed.

KEY RECOMMENDATIONS

1. **Every government agency must make the best interests of the child a primary consideration in every decision about a child.** All federal agencies must be required to consider children's best interests in every decision, regardless of immigration status or opportunity for legal relief.
2. **Congress and agency policy must prohibit family separation in all but the most exceptional cases.** Children must not be separated from their parents unless there is evidence that the parent poses an imminent risk to the child's safety.
3. **Every decision to temporarily separate a child from a parent must be subject to prompt review by a court with expertise in child protection and parental rights—not immigration enforcement officials.** Decisions to separate an immigrant child from a parent should only be made by an independent professional who is culturally sensitive, trained in child welfare, child development, immigration law, and trafficking concerns.
4. **Federal agencies (DHS, DOJ, and HHS) should ensure that every child separated from a parent has an attorney and an independent Child Advocate.** When DHS separates a child and a parent, it should be required to ensure that both parent and child have counsel.
5. **Congress must protect the Flores Settlement Agreement and the Trafficking Victims Protection Reauthorization Act (TVPRA) which provide critical protections for children.** Before Flores and the TVPRA, immigrant children were treated the same as adults; any weakening of these protections will undermine the safety of children.
6. **The Executive Branch must end the Remain in Mexico program/Migrant Protection Protocols and restore access to asylum.**

WHAT HAPPENS TO A CHILD APPREHENDED AT THE BORDER?

In order to understand how the Young Center helps separated and unaccompanied children, it is important to know what happens to a child who is apprehended at the border. There are important differences in the process depending on whether they are designated as “accompanied,” meaning they are traveling with a parent or legal guardian, or “unaccompanied.”

A child will be designated “unaccompanied” if they come into federal custody without a parent or legal guardian physically present to care for them or if they are forcibly separated from these caregivers by U.S. officials.⁴

Following apprehension at the border, accompanied children (those with parents) may be placed into expedited removal proceedings as a family unit. Each accompanied child’s case is linked to that of the parent unless the child affirmatively requests her own case to apply for other forms of relief, such as humanitarian visas for victims of trafficking or severe crimes or Special Immigrant Juvenile Status. In expedited removal, accompanied children may be returned to their home countries in a matter of days. Alternatively, they may be subjected to the administration’s Remain in Mexico policy, and forced to wait for weeks or months in Mexico for their U.S. immigration proceedings in dangerous conditions without access to basic services, much less access to counsel.

Children who are designated as “unaccompanied” must be transferred out of DHS custody to the Office of Refugee Resettlement (ORR) within 72 hours.

STAKEHOLDERS IN A CHILD’S IMMIGRATION PROCESS

Customs and Border Protection of the Department of Homeland Security (CBP): CBP is the law enforcement agency of the Department of Homeland Security. It enforces U.S. regulations, including immigration at the border.

Immigration and Customs Enforcement of the Department of Homeland Security (ICE): ICE is responsible for investigating and removing people from the United States. Adults detained by CBP are transferred to ICE detention. ICE lawyers argue against children in immigration court.

Office of Refugee Resettlement of the Department of Health and Human Services (ORR): Unaccompanied children are transferred from CBP to ORR, which is required to place the child in the least restrictive setting in the child’s best interests. ORR contracts with agencies to care for children until they can be released to sponsors. ORR can appoint a Child Advocate to vulnerable children.

Child Advocates: Child Advocates—attorneys, social workers and volunteers—are appointed to advocate for the best interests of individual children. The volunteers meet with the child they are appointed to each week, spending time and learning their stories. Young Center attorneys and social workers develop best interests recommendations grounded in child welfare and immigration law for every agency making a decision about the child.

Legal Service Providers (LSPs): Legal service providers are federally funded through a grant program, currently administered by the Vera Institute of Justice. LSPs give each unaccompanied child an individual screening to determine eligibility for legal relief, provide children with “Know your Rights” presentations, and in some cases—and often with private funding—represent the child in court.

Once in ORR custody, the government is required to place a child in the “least restrictive setting in the child’s best interests.”⁵ This is the only place in immigration law where a child’s best interests must be considered.

ORR is also required to provide children in its care with education, recreation, access to religious services, and other essential services.⁶ ORR can also appoint a Child Advocate for children who have particular vulnerabilities or unique needs to advocate for their best interests. Under the Trafficking in Victims Protection Reauthorization Act (TVPRA), ORR can appoint a Child Advocate for child trafficking victims and other vulnerable children.

Child Advocates are often appointed to very young children who are unable to tell their story or express their wishes, children with disabilities, children who are pregnant or parenting, and children at risk of aging out of ORR custody and into adult detention. Child Advocates are also frequently appointed to children from indigenous communities or countries from which fewer children come to the United States to seek protection. These children may be isolated from other children by language or culture.

STAKEHOLDERS IN A CHILD’S IMMIGRATION PROCESS (CONTINUED)

U.S. Citizenship and Immigration Services (USCIS) of the Department of Homeland Security: USCIS oversees lawful immigration to the U.S. Unaccompanied children are entitled to an interview with a USCIS asylum officer, before or in place of an adversarial process in immigration court. USCIS also processes U and T non-immigrant visas and petitions for Special Immigrant Juvenile (SIJ) status.

Department of Justice Executive Office of Immigration Review (DOJ EOIR): Under the authority of the Attorney General, EOIR conducts immigration court proceedings, appellate reviews, and administrative hearings. Unaccompanied children appear before EOIR immigration judges for their court hearings.

Unaccompanied Refugee Minors Program: URM is administered by ORR. The program provides children who’ve been granted legal protection with long-term care and services. With support from ORR, states administer the program.

Brothers Separated under Zero Tolerance

Brothers Andy (age 7) and Junior (age 21) were separated at the U.S.-Mexico border in October 2018. Andy was transferred to an ORR facility in New York and Junior was placed in ICE detention in Texas. The brothers were devastated; Junior was his little brother's primary caregiver in Honduras. Four months later, Junior was released from ICE detention. But he still had to go to immigration court before the government would release his little brother to him. A Young Center Child Advocate volunteer visited Andy in custody every week to ensure he didn't feel abandoned during the many months of separation from his brother. Andy and Junior were finally reunited six months later, in April 2019.

REMEMBERING ZERO TOLERANCE

Since 2017, the government has separated children from their parents or legal guardians at an unprecedented scale at the U.S. border, rendering those children “unaccompanied.”⁷ Once separated, a child is transferred to the custody of the Office of Refugee Resettlement (ORR) in the Department of Health and Human Services (HHS), while the parent is detained elsewhere, deported, or sometimes released within the United States.

In April 2018, the Trump administration officially announced a policy it had been implementing on a pilot basis since October 2017. The policy was known as “Zero Tolerance” indicating the Trump administration would criminally prosecute all adults crossing the U.S. border, even if they were seeking asylum. Seeking asylum at our border is a legal right, protected under both U.S. and international law.⁸ Because children could not be held with their parents in *criminal* custody, thousands of children were separated from their parents and rendered unaccompanied. Separations persisted from weeks to months even though parents were often prosecuted quickly, received a sentence of “time served,” and returned to immigration custody within days.

Once made official, the public reacted forcefully to the Zero Tolerance policy, calling for an immediate end to this cruel, immoral, and unlawful practice. On June 20, 2018, President Trump issued an executive order halting the practice. A federal court order enjoining the practice on June 26, 2018 cemented the policy's end.⁹ Days later, that court ordered the near-immediate reunification of all children still separated from their parents. Due to poor record-keeping, separations persisted for months beyond the court order, even for very young children.¹⁰ The policy caused serious damage to children and families which will take generations to correct. While the number of parent-child separations has gone down, the practice continues, whether due to flimsy allegations of criminality or at the discretion of CBP officers who face little accountability for decision-making that has no basis in child protection.

KEY FINDINGS IN GOVERNMENT REPORTS ABOUT THE ZERO TOLERANCE POLICY

The Office of the Inspector General of the Department of Homeland Security (DHS OIG) has released two damning reports since the end of the Trump administration's Zero Tolerance policy. The first of these concluded that even though Customs and Border Protection (CBP) knew since November 2017 that their methods to record and track family separations led to widespread errors, it made no effort to fix these before the implementation of the policy in May 2018.¹¹ As a result, the DHS OIG could not confirm the total number of families DHS separated during the Zero Tolerance period. The most recent DHS estimates suggest that CBP agents separated 3,014 children from their families while the policy was in place.

In a broader analysis of DHS data between the dates of October 1, 2017 to February 14, 2019, the DHS OIG identified an additional 1,233 children with potential family relationships that CBP failed to accurately record.¹² It then released a second report on May 20, 2020 showing that even more families had been separated than previously reported as a number were separated at points of entry, which were supposed to be excluded from the Zero Tolerance policy.¹³ This second report reiterated a devastating conclusion:

Because of concerns over CBP data reliability, we cannot be certain our analysis of separations occurring between May and June 2018 captures all family separations during that period, and it is even less certain that we have a clear picture of the separations occurring before 2018.

The Office of the Inspector General of the Department of Health and Human Services (HHS OIG) has also released two reports, requested by Congress, analyzing the agency's strengths and shortcomings during the implementation of the Zero Tolerance policy. According to the reports, many problems flowed from the failure of senior leadership to take any action to protect children's interests in response to the concerns raised by ORR staff.¹⁴ The reports concluded that not only did this lead to substantial challenges in reunifying children with their parents, but shelter staff were under-prepared to meet the acute mental health needs of the separated children in their care.¹⁵

The OIG recommended that HHS take steps to ensure that children's interests are prioritized and represented in decisions affecting the unaccompanied immigrant children's program, both internally and when engaging with interagency partners.¹⁶

THE PHASES OF FAMILY SEPARATION



PILOT

The Trump administration ran a pilot program testing the Zero Tolerance program in El Paso, Texas from October 2017 until the official policy was announced in April 2018. During this phase, the Young Center noticed a substantial uptick in referrals for Child Advocates, including for very young children. Data suggests that nearly 1,500 children were separated during this pilot phase.

ZERO TOLERANCE

In April 2018, the Trump administration announced it would criminally prosecute all adults if it believed they were attempting to enter unlawfully, even though most were approaching the border to exercise their lawful right to seek protection. As a result, children were forcibly removed from their parents. While the government claimed there was never a “family separation” policy, the Trump administration had already publicly discussed separating families to deter them from entering the country. In just two months, nearly 3,000 children were taken from their parents before a court ordered an end to the policy just after the President bowed to public pressure.

NEW SEPARATIONS

When the court ended parent-child separation, it allowed the government to exercise discretion to separate if the child would be unsafe based on a parent’s criminal history (not including immigration offenses). The Trump administration blew this exception wide open, separating an additional 1,100 children, including nearly 200 children under the age of five, based on flimsy allegations of criminal history, misdemeanor offenses, and charges that have nothing to do with the ability of the parent to care for the child.

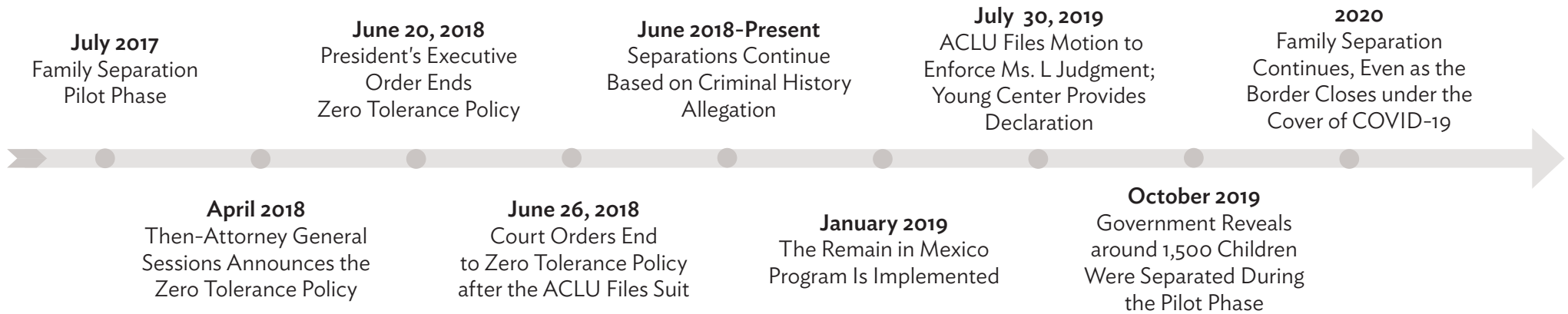
MIGRANT “PROTECTION” PROTOCOLS (REMAIN IN MEXICO)

The government’s so-called Migrant Protection Protocols has caused more children to become separated from their parents. When families seek help at the border, they are sent back to Mexico to wait for their court hearings. Some children return to the border to escape danger in the Mexico encampments and are designated “unaccompanied” while their parents stay in Mexico. It is extremely difficult for children to maintain communication with parents in MPP, and separated children can be completely cut off from contact with family support or information critical to their legal case.

YOUNG CENTER'S WORK

The Young Center applies its unique model to reunite children separated from parents and legal guardians with their families, or when they cannot be reunified, to secure alternative solutions that protect the children’s rights. Created in 2004 as a pilot project of the Office of Refugee Resettlement, the Young Center advocates for the rights and best interests of immigrant children in federal custody applying federal, state, and international law. Under the William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008 (TVPRA), the Young Center’s independent Child Advocates are appointed as guardian ad litem to vulnerable children in federal custody. Volunteer advocates meet with the children each week to learn their stories, needs, and wishes so that our staff of attorneys and social workers can advocate with decision-makers throughout the immigration process to advance the child’s best interests in every decision made about them.

A TIMELINE OF FAMILY SEPARATION



YOUNG CENTER'S BEST INTERESTS PARADIGM

Young Center attorneys and social workers supported by trained, bilingual volunteers, identify a child's best interests by considering the child's expressed wishes, safety, and right to family integrity, liberty, development, and identity. These best interests factors are well-established in the child welfare laws of all 50 states, Puerto Rico, and the District of Columbia, and in international law, including in the Convention on the Rights of the Child. Through this paradigm, the Young Center aims to minimize the risks of implicit bias, stereotypes, and other subjective biases that might improperly influence recommendations.



A PARALLEL FAMILY SEPARATION CRISIS

The Convention on the Rights of the Child guarantees that all children have the right to know and be cared for by their parents.¹⁷ The United States Supreme Court has declared that the Due Process Clause of the Fourteenth Amendment “protects the fundamental right of parents to make decisions concerning the care, custody, and control of their children.”¹⁸ Indeed, the right to care for one’s child is “perhaps the oldest of the fundamental liberty interests recognized by [the] Court.”¹⁹ But throughout U.S. history, the government has sanctioned the separation of children from their parents. Black children were sold into slavery away from their parents. Indigenous children were forcibly separated from their families and sent to “Indian schools.”²⁰ Newly arrived immigrant children were sent on “orphan trains” to families in the west.²¹ These racist practices persist today. Black people are over-represented in every legal system in the United States, whether immigration, school suspensions, arrest and incarceration, or in child welfare proceedings. While the child welfare system is in theory dedicated to ensuring the safety of children, racial disparities exist at every stage of decision-making, inflicting untold harm on families. As renowned scholar Dorothy Roberts writes:

The child welfare system claims to be a non-adversarial legal system dedicated to ensuring the well-being and safety of children. This claim obscures the oppressive political role it plays in monitoring, regulating, and punishing poor families and Black, brown, and indigenous families. The mass removal of Black children from their families in some ways parallels the U.S. criminal legal system’s mass removal of Black men and women from their communities.²²

While efforts have been made to correct for racial bias in state child welfare systems, children of color, and poor children continue to be disproportionately removed from their parents. Too often these separations become permanent. Federal law says that any parent whose child spends 15 out of 22 months in foster care can lose their parental rights.²³ Enforcement of these laws ignores the reality of mass incarceration in the United States and disproportionate sentencing. In New York, for instance, a woman’s median sentence is 36 months.²⁴ Loss of parental rights can strip parents of any opportunity to stay in touch and play a role in their children’s lives.

New laws may help reverse some of these trends and limit the damage caused by incarceration and the child welfare system. Primary caretaker laws seek to expand the use of community-based alternatives to incarceration for parents, enabling them to care for their families while serving a sentence. The Families First Prevention Services Act offers funding for a range of services to be delivered to parents in their homes, seeking to reduce the use of foster care whenever possible.²⁵

But more needs to be done. Across the country systemic bias and deeply embedded racism ensures that Black and Brown people, including children, are policed, monitored, judged, and prosecuted for a range of issues that do not affect white peers similarly. Just as we raise the alarm about separating children from immigrant parents, the Young Center is committed to working with advocates across social systems to ensure that no child faces the trauma and lifelong consequences of family separation.

THE YOUNG CENTER'S EFFORTS DURING ZERO TOLERANCE

Once the Trump administration's Zero Tolerance policy was officially in effect, referrals for Child Advocates increased exponentially at all eight of the Young Center's program sites. In most cases ORR had little to no information about the parent and other family members from whom each child was separated; the separation was done by another federal agency. Nor was there information about why a child was separated from a parent, where the parent was detained, or how to contact the parent to learn more about the child. With such limited information, Young Center attorneys and social workers faced substantial hurdles to reunify families. Staff repeatedly called CBP and ICE detention centers, looking for parents. When parents were located, Young Center advocates pressured ICE officials to allow them to communicate with their children. In some cases, that communication was denied, but even when it was approved, there were no systems in place to ensure ICE facilitated regular contact between children and parents. Most parents had no idea where their children were or why they had been separated from them. They didn't know when they would see their children again. Young Center staff often fought to get parents released from detention to be reunited with their children—in many cases, successfully.

Nursing Baby Taken from Mom's Arms

Maria arrived at the border during the height of the Zero Tolerance policy with her four sons, ages 6 months to 12 years old. They were fleeing persecution in their home country. At the border, Maria's sons, including the nursing baby, were taken from her and placed in ORR custody. She was sent to ICE detention. Alone with his brothers, the 12-year-old became a surrogate parent, waiting for weeks to be released to his grandmother who was already living in the United States. With substantial advocacy by the Young Center and the help of two other organizations, The Florence Immigrant and Refugee Rights Project and the Together Rising Community, Maria was reunited with her children. The trauma inflicted on this family may have lifelong consequences.*

**Name changed to protect family's privacy.*

Once parents were located, Young Center staff worked with both children and parents to determine the family's wishes. In almost every case, the children simply wanted to reunify with their parents. Parents faced much more complicated decisions. They did not know how long they would be detained, if they would be returned to their home country, or if the government would permit reunification with their children in the United States. In many instances, parents were deported without knowing where their child was. Countless others were forced to relinquish valid asylum claims because they were told that doing so would help their children or allow them to be reunified.

Tragically, in some cases, children believed their parents willingly abandoned them by returning home. In these cases, the Young Center either advocated for the child to be granted voluntary departure to return to their family; or, if a parent believed it was not safe for their child to return to their country, the Young Center worked with the child and child's family to identify safe placements within the United States so the child could be released from government custody. Although the Young Center successfully reunified many children with parents—in the United States or in their home countries—the harm perpetrated against these children and families was extraordinary. Some children regressed. Some were angry at their parents. Family relationships were damaged in untold ways.

Unlawful Separation of a Child

The Young Center considers all separations under Zero Tolerance to be arbitrary and unlawful. In most cases, within 48 hours the Young Center sent a Best Interests Recommendation to every stakeholder (CBP/ICE, Federal Public Defenders, ORR) and to the court indicating that the separation was pursuant to the Zero Tolerance policy and unwarranted. The first recommendation in these cases was to reunite the child with the parent.

The Zero Tolerance policy created logistical chaos in addition to the untold damage done to families. In July, in the wake of the decision in the Ms. L litigation ordering the reunification of separated families, hundreds of parents were summarily released from government custody without notice to Child Advocates, attorneys, or others working with their children. In many cases, Young Center staff received frantic phone calls from parents or other family members, indicating that the parent was at a bus stop, had just been unexpectedly reunified with their child and had no resources or information about why they were released, what the status of their immigration cases were, or what would or should happen next. Together with a range of non-governmental organization (NGO) partners, the Young Center worked to get families access to shelter, legal counsel, and information about their cases whenever possible.

SEPARATIONS CONTINUE OUTSIDE OF PUBLIC VIEW

When a federal court halted the Zero Tolerance program, it included in its judgment three instances in which family separation might still be permissible: danger to the child, communicable disease, and criminal history of the parent. Unfortunately, these factors were left vague and undefined, leaving wide room for interpretation. Shortly after the court's decision, the Young Center saw new cases of family separation, the vast majority of which were based on a parent's alleged criminal history. From the date of the court's decision in June 2018 through November 2019, an additional 1,100 children were separated from their parents. In the rare instance that there was some clear indication that the parent was a danger to their child, such separations may have been warranted, after a review by a qualified judge. CBP officers, however, were separating children from parents for a range of minor criminal offenses which have no impact on a parent's ability to care for the child. Teenagers and babies alike were removed from parents with decades old charges such as "breaching the peace" or marijuana possession. After spending months in federal custody, these children were reunited with their parents for the sole purpose of joint repatriation (deportation), undercutting any claims that the separations were meant to protect children.

In July 2019, the Young Center submitted a declaration as a part of the ACLU's ongoing litigation against the government, which provided numerous examples of children who were taken from parents for everything from traffic violations to a diaper rash. Even more disturbing was the fact that the average age of children taken from parents was very young, around seven years old, and these children were spending a longer time in custody than most separated under the Zero Tolerance program.²⁶ Prolonged custody was often due to difficulties finding and communicating with children's parents and determining whether the stated reason for separation was valid.

Today, when a child is separated from her parents due to a parent's alleged criminal history, Young Center staff begin coordinating with ORR to learn everything possible about the child and her relationship with the parent. After we locate the parent, our staff work with the Federal Public Defenders who represent

the parent in their criminal case. The Young Center provides the parent's counsel with a Best Interests Recommendation about what actions would be in the best interest of their client's children. This is almost always family reunification. Once Federal Defenders have the Young Center's recommendation, they can argue for lower sentences, time served, release into the community or, if it is the only option, to family detention—any steps that would expedite the family's reunification. If the parent is returned to DHS custody following the criminal case, we will often work with the parent's immigration attorney—or directly with the parent for the many who are unrepresented—to ensure the family's joint repatriation whenever that is in the child's best interests.

In addition to fighting for the release of parents, the Young Center will also make a Best Interests Recommendation to ORR regarding the child's reunification with their parent. As with all Best Interests Recommendations, no stakeholders are required to follow a suggested course of action, but most of them rely on the information we provide as part of their decision-making.²⁸

When it is in the best interest of the child to be reunified with their parent so they can return to home country together, Young Center staff will also work with ICE to expedite the parent's case or advocate for the cancellation of the parent's case. Since the separated child has their own legal case, the Young Center must also try and get the child's immigration case canceled, or advocate in support of a grant of voluntary departure (return without penalty) from the immigration court. Our goal is to find the quickest and safest route to reunify the parent and child, barring any concerns about the child's safety. Staff will also coordinate repatriation services for the family, relying on a number of in-country partnerships. The Young Center will follow up with repatriated children according to its safe repatriation protocols.

When can a child be taken from parents under U.S. Law?

Every state and territory in the United States has laws governing the circumstances under which a child can be taken from a parent or legal guardian. To be separated, all child welfare laws specify that the child must be in imminent danger of harm, such that the situation requires immediate action. Unless state child welfare authorities believe that a child is in immediate jeopardy, emergency separation without a court order is not warranted. When the government does remove a child in imminent danger, it must provide evidence to justify that decision to a court within days of the separation.

By contrast, under the Zero Tolerance policy, the federal government attempted to use parent-child separation as a deterrent to reduce migration, prioritizing political interests over children's well-being.²⁷ Even now, children are being separated from parents who have a "criminal history," with no consideration of the impact of that history on a parent's ability to care for a child.

WHAT IS A BEST INTERESTS RECOMMENDATION?

Child Advocate supervisors, who are attorneys or social workers overseeing Child Advocate volunteers, submit Best Interests Recommendations to various agencies and officials based on their knowledge of a child's story, wishes, and protection needs. Best Interests Recommendations are:

- Submitted on all issues relevant to a child's care, custody, release, ability to remain in United States or to safely repatriate;
- Directed at any entity with authority to make decisions that affect the safety and well-being of the child;
- Presented in writing as a best interests brief; or orally, during case hearing or staffing.

BEYOND ZERO TOLERANCE: THE YOUNG CENTER'S UNIQUE ROLE IN HELPING UNACCOMPANIED CHILDREN

Since its founding in 2004, the Young Center has been helping children who arrive at the border alone, whether in times of crisis, such as during Zero Tolerance, or whenever a vulnerable child is in need. The Young Center does not provide direct representation to children in their immigration cases. Instead, Child Advocates are appointed to argue for whatever is in the best interests of the child, on every decision from safe placement and prompt release to family, to access to critical services, from access to counsel and access to foster care for children without families, to the child's request for legal relief, and, where applicable, whether it is against the child's best interests to be repatriated. Child Advocates are independent; they do not play any other role in the system for unaccompanied children, such as offering direct legal representation, residential services, or traditional post-release social services. Child Advocates' sole responsibility is to advocate for the best interests of the child in each decision made about that child. Child Advocates are not decision-makers, but rather make reasoned, fact-based recommendations grounded in best interests law.

The role of a Child Advocate is different from that of legal service providers, which are often non-profit organizations contracted by ORR to assist unaccompanied children. Legal service providers are required to give each child a "Know Your Rights" presentation and an initial screening to determine eligibility for legal relief from deportation. Legal service providers can decide to represent children in their immigration proceedings, but this service is usually not government-funded. When legal service providers, pro bono counsel, or private attorneys take on a child's immigration case, their mandate is to represent a child's expressed wishes to the court. Beyond the case for legal relief, legal service providers do not typically engage in representation related to conditions of custody or release and may or may not be in touch with the child's parents.

Any legal service provider, private attorney, or pro bono attorney who takes up a child's substantive case is obligated to argue for the child's expressed wishes, even if those wishes might put that child in harm's way. For example, a teenager frustrated with conditions of detention who has been denied release to a family member in the United States, may ask to return to home country, despite the likelihood of persecution, trafficking or abuse on return—and before the decision denying release to family has been challenged. This is one way in which a Child Advocate serves a critical role; as the guardian ad litem, the Child Advocate can provide information to the court that could argue against a child's expressed wishes, but only if those wishes would endanger the child. The Child Advocate might also be able to successfully argue for the child's release to sponsor and thus remove the barrier preventing the child from continuing with her case. This balance of expressed wishes and best interests allows for counsel to represent the child's expressed wishes while ensuring the Child Advocate provides the court with information about threats to the child's safety.³⁰

SPECIAL CONCERNS FOR BABIES AND TODDLERS

ORR's protocols for finding sponsors for unaccompanied children in its care were designed primarily for teenagers, who comprise the majority of children in custody. As a result of the Zero Tolerance program and separations that continued after the program was ended, however, ORR had significant numbers of very young children in custody but often lacked the expertise or tools to locate parents. For the youngest children, separation is particularly traumatizing and the longer the exposure to serious stress, the more damage done to a child's health. Separation of young children from their parents, and placement in government custody can impact their attachment, putting their long-term development at risk.²⁹ If there is ever a need to separate a baby or toddler from a parent or loving caregiver, protocols must be put in place for expediting reunification or finding an appropriate sponsor for that child with the goal of minimizing time in custody. Facility staff must also receive specialized training to work with young children who have unique developmental and mental health needs.

A New Horror: Parents Charged with Smuggling for Trying to Protect Their Children

The Young Center was appointed to a toddler who arrived at the border with his father. His father brought documents confirming his legal status as the child's father but was separated after a rapid DNA test indicated he was not the child's biological father. Worse yet, the father was charged with smuggling. The smuggling charge was dropped after a review of the father's documents confirmed his legal status as the child's parent. However, other parents are still at risk of criminal charges, which could preclude their ability to seek protection, especially if they plead guilty in the hope of being reunified more quickly. The result: many parents and families will be excluded from seeking protection, in violation of U.S. law and despite having done nothing wrong.

NEW SEPARATIONS AS A RESULT OF THE REMAIN IN MEXICO PROGRAM (MPP)

Children are also being separated from parents as a result of the Remain in Mexico program, which the government ironically calls the Migrant Protection Protocols (MPP). As a result of the program, which forces families seeking protection at the U.S. border to wait for their immigration proceedings in Mexico, nearly 60,000 people are trapped in appalling conditions on the U.S.-Mexico border. While the numbers of people waiting have decreased since the outbreak of COVID-19 and the lengthy suspension of court hearings, there are still thousands of people living on the border without access to basic services or protection.

In mid-January, a Young Center team visited Matamoros, a city just over the U.S. border in Mexico, where nearly 3,000 people are living in makeshift camps to await immigration hearings in the United States. The situation there is bleak, with little access to sanitation, health care, or food other than what is being generously provided by volunteers. Few lawyers are available in the bordering U.S. towns to take cases. As a result, almost 95 percent of migrants file cases on their own. Even when legal counsel is available, many immigrant families lose their cases as a result of other policies put in place by the Trump administration.

Most significantly, under the government's "transit ban," anyone who has traveled through another country en route to the United States must first apply for asylum in that country; if they have not, they will not be permitted to ask for asylum in the United States (a barrier that was created by agency action, not federal law). The transit ban effectively prohibits the vast majority of migrants from applying for asylum. People may still apply for withholding of removal under the Convention Against Torture, but obtaining this protection is even more difficult than winning asylum and recipients (such as parents) cannot use their status to help family members (like children). In mid-2020, the Trump administration released yet another proposed rule that would bar even more, if not almost all, people from applying for asylum.³¹

For parents in Matamoros and other refugee encampments created by U.S. policy, their primary concern is the safety of their children. They are worried about their children's health in the dangerous conditions in the camps. They are worried about their children's future given that so many doors for protection are closing. They are worried that even if they have a strong claim, they will be unable to fill out the paperwork without the benefit of a lawyer or will be unable to make their case to a judge who appears only by video monitor in a tent "court." They also worry about those children who decide to cross into the U.S. by themselves, either with their parents' knowledge or on their own. While in Mexico, our team met with parents to help them understand what happens to children once they are determined to be "unaccompanied." Since our visit, Young Center staff across the country have provided consultations for families identified by our nonprofit partners in Matamoros and Brownsville.

Across the country, the Young Center is appointed to cases of children separated from parents trapped in Mexico as a result of the Remain in Mexico program. As with other separations, the government has again failed to track family relationships or parents' contact information, making communication and reunification nearly impossible. The Young Center is working with allies in Congress to push for the immediate end of the Remain in Mexico program and to this gross abuse of asylum laws.

DEPORTING UNACCOMPANIED CHILDREN WITH MPP REMOVAL ORDERS

Prior to the shutdown of the southern border on March 20, 2020, hundreds of families were faced with a torturous decision: risk their children's health and safety waiting indefinitely in dangerous tent camps in Mexico—where they were sent under MPP—or send their children across the border alone to seek protection. Many of these families have removal orders from tent court “hearings”—proceedings where they did not have attorneys and where they testified over video without an in-person interpreter. Several hundred children have come into ORR custody having been separated from their parents. Designated as unaccompanied children, they have been placed in protective custody, met with lawyers, been appointed independent Child Advocates, and began the process of seeking protection. Rather than allowing these child-appropriate procedures to take their course, DHS has been rushing to implement the “removal orders” imposed against the children in the tent courts while they were trapped in Mexico.

In one case, a child to whom the Young Center was appointed was taken from an ORR shelter in the middle of the night, put on a flight with unknown adults, and returned to the country where she had received death threats for reporting her father's sexual abuse.

In the middle of a pandemic, ICE deported this child and many others to known danger. The Young Center is calling on Congress to demand an end to these deportations.

USING COVID-19 AS COVER TO DENY CHILDREN SAFETY

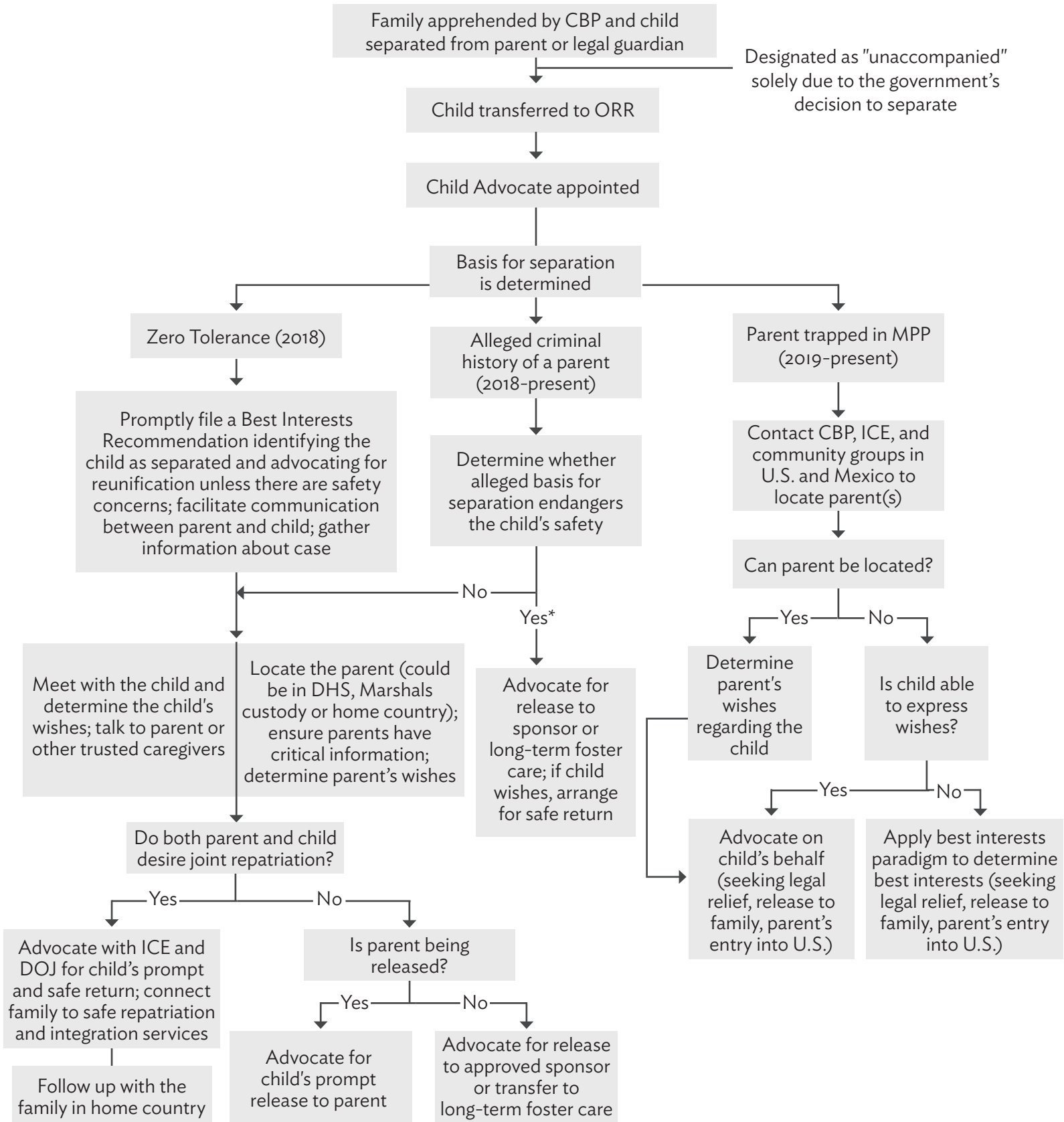
In 2020, under the guise of protecting public health, the Trump administration furthered its goal of shutting down the southern border to those seeking safety. On March 20, 2020 the Centers for Disease Control and Prevention (CDC) released an order suspending the entry of some people into the country during the COVID-19 pandemic.³² The CDC order was immediately followed by an announcement from DHS that it would turn back migrants without travel documents at the border.³³ As a result, CBP is rapidly turning back people, including unaccompanied children.³⁴ More than 2,000 children have already been expelled, either to Mexico or via ICE flights back to the countries they fled.³⁵ These actions are in clear violation of federal law which has long recognized the right to asylum and the vulnerability of unaccompanied children arriving at our border.

Leading health experts agree there is no public health rationale for shutting the border to asylum-seekers and unaccompanied children.³⁶ DHS can screen people for signs of infection and refer them to health facilities as needed. ORR has ample space for social distancing and quarantine.³⁷ Several organizations have filed suit against the government demanding that the border be reopened.³⁸

The Young Center will continue to advocate for the rights of immigrant children and their families, and for laws and policies that prioritize children's best interests in any decisions made about them. Ultimately, the United States must reimagine its immigration policy and create a new system that recognizes the particular needs and capabilities of children.

ANATOMY OF A CHILD ADVOCATE'S ROLE IN FAMILY SEPARATION CASES

In almost every case to which the Young Center was appointed, separation was contrary to the child's best interests and had no relation to the parent's fitness or the child's safety. Our role was to find parents, establish missing parent-child communication, fight for the parent's and child's release, and help ensure their safe reunification.



RECOMMENDATIONS

At the Young Center for Immigrant Children's Rights, we are working towards the creation of an immigration system that is tailored to the needs and vulnerabilities of children. Even before substantial legislative reform, however, there are many steps decision-makers can take to ensure that whenever possible, families remain together, and that children's needs do not come as an afterthought.

Every government agency must make the best interests of the child a primary consideration in every decision about a child. All federal agencies must be required to consider children's best interests in every decision, regardless of immigration status or opportunity for legal relief. The Office of Refugee Resettlement is required by law to place children in the least restrictive setting in their best interests. This statutory obligation to consider the best interests of unaccompanied children aligns with the laws of all 50 states for cases in which children are separated from their families by government action. Every federal agency involved in an immigrant child's case, from the time of the child's apprehension through the final resolution of the child's immigration case, should consider the best interests of the child—the child's expressed wishes, and rights to safety, liberty, family integrity, development and identity—in every decision.

Congress and agency policy must prohibit family separation in all but the most exceptional cases. Children must not be separated from their parents or legal guardians unless there is verifiable evidence that the parent poses an immediate threat to the child's safety or is otherwise unfit to care for the child.

Every decision to temporarily separate a child from a parent must be subject to prompt review by a court with expertise in child protection and parental rights—not immigration enforcement officials. Decisions to separate an immigrant child from a parent should only be made by an independent professional who is culturally sensitive, trained in child welfare, child development, immigration law, and trafficking concerns.

Federal agencies (DHS, DOJ, and HHS) should ensure that every child separated from a parent has an attorney and an independent Child Advocate. If DHS separates a child from a parent, the child should be referred for the appointment of an independent Child Advocate to champion the child's best interests in all relevant decisions, from reunification with parents and other family members to whether the child can safely repatriate. The government should provide an attorney to both the parent and the child if they do not have counsel. Unless the child expresses a contrary desire, the government should ensure consistent, age-appropriate video and phone contact between the parent and child and facilitate regular in-person visits.

Congress must protect the Flores Settlement Agreement and the Trafficking Victims Protection Reauthorization Act (TVPRA) which provide critical protections for children. Congress should reject any effort to dismantle or otherwise narrow the Flores Settlement Agreement or the Trafficking Victims Protection Reauthorization Act (TVPRA), which provide critical protections for children, including the right to placement in the least restrictive settings in their best interests and the appointment of independent Child Advocates to identify and advocate for the best interests of the child.

The Executive Branch must end the Remain in Mexico program/Migrant Protection Protocols and restore access to asylum. The Young Center has been appointed to multiple cases of parent-child separation resulting from Remain in Mexico. The government fails to track family relationships or parents' contact information, making communication and reunification nearly impossible. The Remain in Mexico program must end immediately, and access to asylum for all seeking protection must be restored. At the very least, children who cannot safely remain in Mexico should be admitted in the custody of their parents, not separated from them.

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We thank the following organizations and individuals who provided dedicated funding for Young Center staff to work exclusively on parent-child separation cases, and the many donors, both large and small, who supported our work with separated children in all eight offices across the nation:

Clooney Foundation for Justice

Landry Charitable Fund

The Bay & Paul Foundations

Together Rising

Michael Becker, Tee Scatuorchio, and supporters of the 2018 New York Benefit

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Family Separation Is Not Over: How the Trump Administration Continues to Separate Children from Their Parents to Serve its Political Ends

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