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Protecting the *Flores* and *Hutto* Settlements: A Look at the History of Migrant Children
Detention and Where Immigration Policies are Headed

Megan Kauffman¹

Prior to the Obama administration, when discussing immigration policies, the average American focused very little on the minor migrant population as media outlets barely covered the conditions of detained migrant children. An influx of migrants, adults and children, under the Obama administration brought to light the government's difficulties in dealing with the amount of individuals entering and being detained in the United States. With the coverage of President Trump's immigration policies in the media, especially those targeting asylum seekers and migrant children, the public began recognizing that migrant children have long suffered in inadequate detention centers while awaiting their immigration proceedings. However, behind the scenes, immigration organizations and legal centers have fought for the last thirty-five years to improve the conditions in detention centers housing migrant children (both unaccompanied minors and minors with parents or guardians). The *Flores* and *Hutto* settlement agreements established basic standards the government must meet when detaining minor children.

This comment discusses the history and importance of the *Flores* and *Hutto* agreement and the current administration's attempt to limit and circumvent both agreements. Section I provides background information on the *Flores* case and the 1997 settlement agreement. Section II details the plight of migrant children following the *Flores* agreement (including the government's non-compliance with the agreement) the *Hutto* agreement during Bush's administration, and the challenges faced with an influx of migrants under Obama's administration. Section III discusses the Trump administration's attempts to derail and circumvent the *Flores* and *Hutto* agreements

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with a reinterpretation of *Flores* and multiple asylum limiting policies. Section IV looks at where immigration law involving migrant children could be potentially heading and how these policies could have long term effects on immigration law.

I. The *Flores* Case and the 1997 Settlement

The first major legal fight for the protection of migrant children in the government's custody began in 1985 with the *Flores* case. Immigration advocates brought suit against the government for inadequate detainment in federal court; the plight of the detained migrant children made national news, prompting the government to settle with the immigration attorneys and establish the *Flores* settlement agreement. The *Flores* settlement is a set of ongoing terms the government must meet when housing unaccompanied, migrant children during their immigration proceedings. This section discusses the history of the *Flores* case and the settlement agreement in detail.

A. The Case

Jenny Flores, a fifteen-year-old El Salvadoran immigrant, became the center of the minor immigrants' plight in 1985 when two immigration attorneys brought a case against her detention in California, starting a thirty-five-year battle to ensure migrant children rights.² Flores fled the civil war in El Salvador and crossed the border from Mexico to California.³ Her mother lived in California but was also an undocumented immigrant.⁴ At the time of Flores's detention, if a child had a parent or legal guardian in the United States, the Immigration and Naturalization Service (hereafter "INS") would release the child into their custody until their immigration case was

² PHILIP G. SCHRAG, *BABY JAILS: THE FIGHT TO END THE INCARCERATION OF REFUGEE CHILDREN IN AMERICA* 11 (2020).

³ *Id.* at 11.

⁴ *Id.*

settled.⁵ Although the INS's general policy was to release the child, the INS's Western Region had implemented markedly different policies for these migrant children.⁶ Instead of releasing children to other relatives or responsible parties, the Western Region would only release children to a parent or guardian unless there were extenuating circumstances.⁷ If a parent or guardian did not come forward for the child, the INS would hold the child until an immigration hearing could be held and a decision could be made on asylum or removal.⁸

The INS's Western Region was notorious for using children as bait to capture any undocumented parents or guardians in the States.⁹ When the parent or guardian came forward to have the child released, the INS would arrest them and initiate immigration proceedings against the parent as well.¹⁰ Since Flores's mother was an undocumented immigrant, she feared her own deportation back to El Salvador and did not report to the INS for Jenny's release.¹¹ However, Flores did have an aunt and uncle who were in the United States lawfully and were willing to look after her during the pendency of her immigration case.¹²

The INS would not release Flores to anyone but a parent and Jenny was sent to a private for-profit center that housed male and female adult and minor migrants.¹³ The facility, a motel transformed into a makeshift jail, was surrounded by a chain-link fence and barbed wire.¹⁴ The children at the facility were not provided with any educational or recreational activities.¹⁵ Children

⁵ *Id.* at 12.

⁶ *Id.*

⁷ *Id.*

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.* at 13.

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.* at 14.

at other immigration facilities in the Western Region dealt with the lack of activities along with having to endure daily strip-searches and stricter policies.¹⁶ At the time of Flores's detention, around 5,000 children had been detained and were being housed by the INS, most without lawyers or a basic understanding of the law since they were underage and many did not speak English.¹⁷

Flores and the thousands of migrant children in detention became the focus in a class action brought against the government with the help of several activist groups.¹⁸ The lawsuit sought changes regarding the migrant children's detention and asked for standards eliminating strip-searches, separate detained children from adults of the opposite sex, and allow for the release of minors to non-guardian adults.¹⁹

The immigration attorneys leading the case were able to pressure the government into devising an "Alien Minors Shelter Care Program," which anticipated that children would not be detained in INS facilities for more than thirty days before being placed within facilities that met "applicable state child welfare licensing requirements."²⁰ The issue of strip-searches was not addressed in the new policy so the matter went before the court.²¹ In 1988, the U.S. District Court for the Central District of California ruled strip-searches of the migrant children were unconstitutional because the government was unable to provide a compelling need to routinely strip-search children.²² The court also removed the restrictions on the release of children and held minors could be released to responsible non-guardian adults.²³

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ Matthew Sussis, *The History of the Flores Settlement: How a 1997 Agreement Cracked Open our Detention Laws*, Center for Immigration Studies (Feb. 11, 2019), <https://cis.org/Report/History-Flores-Settlement>.

¹⁹ *Id.*

²⁰ *Supra* note 2, at 24.

²¹ *Id.* at 26.

²² *Supra* note 18.

²³ *Id.*

The government appealed the district court’s decision and two years later, a three-panel judge in the Ninth Circuit Court of Appeals overturned the holding.²⁴ Flores’s lawyers immediately requested an *en banc* review of the case and in 1991, an *en banc* panel of the Ninth Circuit upheld the district court’s initial decision.²⁵ The Flores case headed to the Supreme Court, with the Justices focused primarily on the issue of the migrant children’s release to non-guardian adults.²⁶ The Court decided in favor of the government and held the migrant children had no constitutional right to be released to other adults besides close relatives and the government could detain the children in detention centers if they lacked a close relative or guardian in the States.²⁷ The Court acknowledged the detention must be “decent and humane,” which the government had demonstrated through its new policy, although many facilities were not following it.²⁸

B. The Settlement

Although the government used the implementation of the “Alien Minors Shelter Care Program” as evidence of its “decent and humane” conditions in migrant children’s facilities, several non-profit legal and social organizations took note that the facilities were not up to the standards of the policy following the resolution of the Supreme Court case.²⁹

When children arrived at the facilities, their possessions were taken away and educational and recreational materials were not provided in many detention facilities.³⁰ Throughout the States, migrant children were treated like juvenile delinquents, wearing the same delinquent-standard clothing and subjected to the same procedures such as daily roll call and transportation to and from

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Supra* note 2, at 50-56 (highlighting the atrocities of immigration facilities in detail).

³⁰ *Id.* at 51.

immigration hearings in handcuffs.³¹ Both the immigration community and the government, now under President Clinton’s administration, wanted to address the humanitarian concerns involving the detainment of children and avoid another lengthy legal battle.³² From 1993 to 1997, immigration lawyers negotiated with the Department of Justice for a new settlement agreement enforcing the previous agreement and add additional details.³³

The new agreement also provided that children could be held by the Department of Justice in a safe and sanitary environment for up to five days, but then they must be placed in the “least restrictive setting appropriate to the minor’s age and special needs.”³⁴ If the children were moved to a detention facility, it had to be “non-secure as required under state law” and licensed by “an appropriate state agency to provide residential, group, or foster care services.”³⁵ In these facilities, the children had to receive academic classroom education five days a week, daily outdoor recreation, individual and group counseling, and information about free legal services along with other legal and comfort conditions.³⁶ Both parties agreed to a clause being added in the settlement that if there was an emergency or influx of minors into the United States, the INS could take longer than five days to place the child with a guardian or relative or in a licensed facility.³⁷ Even with an influx of migrants, however, the agency still had to place the child “as expeditiously as possible.”³⁸

II. Aftermath of *Flores*

The *Flores* agreement was the first major legal win for unaccompanied minors in the United States. The government, however, continued to struggle to meet the standards set in the

³¹ *Id.*

³² *Id.* at 57.

³³ *Id.*

³⁴ *Id.* at 58.

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.*

agreement and did not apply the same standards found in *Flores* to migrant children that were housed with family members who had also crossed the border. These inconsistencies led to further action taken by immigration lawyers and organizations to represent children living in subpar housing during their immigration proceedings. This section studies the conditions and judicial, legislative, and executive actions taken in the beginning of the 2000s. Section A discusses the immigration situation under President Bush, the *Hutto* agreement for accompanied minors, and the legislation enacted to protect migrant children. Section B focuses on President Obama's actions during an influx of migrant children due to increasing violence in the Northern Triangle.³⁹

A. Detention under Bush, the *Hutto* Agreement, and the TVPRA

Following the terrorist attacks on 9/11, Congress under the Bush administration issued the Homeland Security Act which abolished INS and shifted immigration responsibilities to new federal agencies.⁴⁰ Unaccompanied minor children were initially detained by the Department of Homeland Security ("DHS"), using Immigration and Customs Enforcement ("ICE") and Customs and Border Protection ("CBP") to make the arrests, and then transferred to the Department of Health and Human Services ("DHHS") under the care of the Office of Refugee and Resettlement ("ORR").⁴¹ The Northern Triangle in Central America met an increase of gang violence in 2004-2005 which led to a mass influx of immigrants leaving their home countries and attempting to seek asylum in the United States.⁴² In 2004, 65,911 non-Mexican immigrants and in 2005, 154,995 non-Mexican immigrants were arrested by ICE and CBP.⁴³ Nearly 19,000 children were included in that number and almost 7,000 of them were unaccompanied.⁴⁴ The government knew what to

³⁹ The Northern Triangle consists of El Salvador, Guatemala, and Honduras.

⁴⁰ *Supra* note 18.

⁴¹ *Id.*

⁴² *Supra* note 2, at 84.

⁴³ *Id.*

⁴⁴ *Id.*

do with the unaccompanied minors due to the new placement with the ORR, but the question of how to detain children who arrived in the country with their parents had yet to be answered.⁴⁵

The initial solution was to house families in detention centers that were primarily used for unaccompanied minors.⁴⁶ Children were also separated from their parents at the DHS level without any communication to the ORR that the children initially arrived in the States with a guardian.⁴⁷ After these separations garnered attention from immigration advocates, the House of Representatives pressured DHS into ceasing separations and keeping families together, whether through detainment in safe and secure facilities or supervised release.⁴⁸ The Bush administration ceased separations but instead of continuing a supervised “catch and release” policy, the administration began building and renting hundreds of jail cells to detain parents and children together while waiting for their immigration hearings.⁴⁹

One of the converted private prisons, the T. Don Hutto Family Detention Center, became the target of immigration advocates as the conditions of the center became public knowledge.⁵⁰ At the Hutto facility, children were detained with their parents in prison-like conditions.⁵¹ Not only did the facility house recently arrested families, the facility also housed families in which a credible fear screening had been conducted and passed for asylum and the case was awaiting a hearing.⁵² Children over the age of six were separated from their parents in the facility while children under that age stayed in their parent’s cells, which were the same size as the original prison cells. Parents and children were confined to their cells for as much as twelve hours a day and the children were

⁴⁵ *Id.* at 85.

⁴⁶ *Id.* at 85-86.

⁴⁷ *Id.* at 86.

⁴⁸ *Id.* at 86-87.

⁴⁹ *Id.* at 87.

⁵⁰ *Id.* at 90.

⁵¹ *Id.*

⁵² *Id.* at 92.

provided only one hour of schooling a day, which consisted of coloring for the younger children and lessons on childhood development for the older.⁵³ Children were not allowed to have any outside materials in their cells including books, pictures, or writing equipment, and were forced to wear prison garb.⁵⁴

Further, the facility did not provide enough food for the families to eat and many children lost weight or developed medical issues.⁵⁵ The facility had nurses but no doctor on staff, so the families had to wait days for illnesses to be treated and were often given water as a solution to their medical needs.⁵⁶ These issues, along with a number of others, resulted in a lawsuit in the Western District of Texas in which ten incarcerated children, whose parents had already passed the credible fear screening and had been detained for months, sought to enforce the protections under the *Flores* settlement agreement.⁵⁷

The immigration attorneys representing ten children in the *Hutto* case and the government came to an agreement in 2007 about the conditions at the Hutto facility.⁵⁸ The agreement provided basic comfort needs to the migrant children, such as privacy in the restrooms, outdoor recreation, the ability to decorate the cells, better furniture, access to toys, the ability to move around the facility, a variety of meals overseen by dieticians, and the ability to wear their own clothes, along with many other basic conditions.⁵⁹ The agreement also provided better access to medical and dental services, including medications, and included a provision about providing mental health

⁵³ *Id.* at 90-91.

⁵⁴ *Id.*

⁵⁵ *Id.* at 91.

⁵⁶ *Id.* at 92.

⁵⁷ *Id.* at 92-93.

⁵⁸ *In re Hutto Family Detention Center*, Case No. A-07-CA-164-SS, Settlement Agreement (W.D. Tex. 2007).

⁵⁹ *Id.* at Exhibit B.

care.⁶⁰ The parties agreed a Texas magistrate would provide external oversight of the facility to ensure the agreement was implemented and maintained.⁶¹

In 2008, Congress passed the William Wilberforce Trafficking Victims Protection Reauthorization Act (TVPRA), which furthered protections for unaccompanied migrant children.⁶² The main purpose of the TVPRA was to ensure children were not being trafficked and unaccompanied minors were receiving appropriate care from the ORR instead of being housed under an agency primarily focused on immigration policy.⁶³ The TVPRA created a stricter timeframe for the holding of children by ICE and the CBP, requiring that a child generally must be transferred to ORR's care within seventy-two hours of arrest.⁶⁴ The children must be placed in the "least restrictive setting possible" while awaiting a hearing and an undocumented minor is eligible for a special immigrant juvenile status if reunification is not possible with a parent or parents due to abuse, neglect, or abandonment.⁶⁵ The TVPRA also provided special legal procedures for minors seeking asylum, including access to counsel and immigration advocates.⁶⁶ When a child is removed from the States for lack of credible fear, the State Department must ensure the child is safely repatriated back into their home country.⁶⁷

B. An Influx of Migrant Children Under the Obama Administration

In the years prior to Obama's inauguration, the situation in Central America continued to worsen due to government corruption and gang violence.⁶⁸ These conditions led to an influx of

⁶⁰ *Id.*

⁶¹ *Id.* at 6.

⁶² *Trafficking Victims Protection Reauthorization Act Safeguards Children*, National Immigration Forum (May 23, 2018), <https://immigrationforum.org/article/trafficking-victims-protection-reauthorization-act-safeguards-children/>.

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ *See supra* note 2, at 117-123.

immigrants in the United States with a large increase in unaccompanied minors and families.⁶⁹ In 2011, 20,000 parents and children from Central America sought protection in the United States.⁷⁰ In 2014, 140,000 parents and children who came across the border were from Central America.⁷¹ The number of unaccompanied minors also increased with 13,625 children sent to ORR in 2012, 24,668 in 2013, and 57,496 in 2014.⁷² Due to the lack of resources and facilities to house migrant families and children, detention facilities were found to not be in compliance with either the *Flores* or *Hutto* agreements.⁷³ In order to prevent the separation of families, the Obama administration housed immigrant families in prison-like detention facilities.⁷⁴

Neither DHS nor the ORR could keep up with the influx of immigrant children crossing the border. While in CBP care, unaccompanied minors were forced to stay in fenced cells with 40 to 50 children sleeping on concrete floors.⁷⁵ Since the influx created a backlog in ORR shelters, fewer than thirty percent of the children were transferred to ORR care as required by law.⁷⁶ Due to the number of children the ORR began to use military facilities, including Lackland Air Force Base, Fort Sill, and Naval Base Ventura County to house unaccompanied minors.⁷⁷ In order to handle the number of children, the ORR loosened the eligibility standards for fostering and placement of children in private homes.⁷⁸ This loosening of standards led to placement errors with the Department of Justice indicting human traffickers who were using migrant children for labor.⁷⁹

⁶⁹ *Id.* at 123.

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² *Id.* at 124.

⁷³ *Id.* at 125.

⁷⁴ *Id.*

⁷⁵ *Id.* at 126.

⁷⁶ *Id.*

⁷⁷ *Id.* at 128.

⁷⁸ *Id.*

⁷⁹ *Id.*

The indictment led to Congressional action which determined that ORR had not taken “sufficient steps” in screening to determine relationships between the children and alleged relatives which led to the placement of children with individuals who had “serious trafficking indicators.”⁸⁰

The influx of migrants also led to housing of migrant mothers and children in Artesia Family Residential Center.⁸¹ Although the conditions at Artesia were not as bad as those in Hutto, immigration non-profits found children in Artesia were not provided educational services, were given water rather than medication, and were not given adequate portions of food.⁸² The average age of children detained at Artesia was six years and the facility was large enough to house 600 people with two barbed wire and razor wire fences.⁸³ The Artesia facility was closed in 2014, not because of immigration advocates’ fight to close the facility, but because the Obama administration moved the immigrant families to a different location—Karnes and Dilley—a privately owned location large enough to house 3,600 mothers and their children.

The conditions at Karnes and Dilley were as abysmal as conditions at other facilities which led to a suit brought in federal court asking the government be required to enforce the *Flores* agreement.⁸⁴ The court held that the *Flores* agreement should be enforced, that children be released to family members or parents, that the government should not detain children in unlicensed or secure facilities except as permitted under *Flores*, and that accompanying parents be released along with the children.⁸⁵ The court also held that CBP detention facilities also had to meet safe and sanitary condition standards.⁸⁶ With the implementation of the court order, Karnes and Dilley

⁸⁰ *Id.*

⁸¹ *Id.* at 132.

⁸² *Id.* at 133.

⁸³ *Id.* at 132.

⁸⁴ *Id.* at 141-147.

⁸⁵ *Id.* at 162.

⁸⁶ *Id.*

could not house migrant families because they were unable to get the required license and even if they did, the children had to be released within days of being housed there under the *Flores* agreement.⁸⁷

Throughout Obama’s administration, DHS and immigration agencies attempted to house migrant children, with and without families, in different facilities but to no legal avail. At every point, immigration advocates challenged the administration’s attempts to circumvent the *Flores* agreement and federal courts continuously found the government was not abiding by the standards required under *Flores*.⁸⁸

III. Recent Attacks on the *Flores* Settlement and Circumventing the Agreement

While the Obama administration struggled to house migrant children—accompanied and unaccompanied—due to the influx of immigrants at the southern border, the administration continued its attempts to keep migrant children with their parents and, although not successful, attempted to comply with precedential standards. The opposite could be said about President Trump’s administration. Even before his inauguration, Trump promised his constituents he would be tough on immigration, enacting strict policies to deter and deport immigrants. This section focuses on the policies the Trump administration has tried to implement in an attempt to unilaterally withdraw or circumvent the *Flores* and *Hutto* agreements. Section A discusses Trump’s attempt to judicially withdraw from the *Flores* settlement. Section B examines Trump’s executive attempts to circumvent the *Flores* agreement through regulations. Section C reviews Trump’s policy of separating children from their parents and guardians at the border in an attempt to deter immigration. Section D focuses on Trump’s “Remain in Mexico” policy that forces

⁸⁷ *Id.*

⁸⁸ *See id.* at 163-212 for further information on judicial holdings enforcing enactment of the *Flores* and *Hutto* agreements during the Obama administration.

families, including children, to wait in Mexico while their asylum claims are adjudicated in the United States. Finally, Section E examines Trump’s policy of refusing asylum claims if migrants, including children, did not request asylum in third party countries through which they traveled to the United States.

A. Seeking Judicial Amendments to *Flores*

In an outright attack on the *Flores* settlement, the Trump administration went back to the federal court judge that handled the Karnes and Dilley case requesting the government be allowed to house migrant families in Karnes and Dilley and other facilities of its type in the future, notwithstanding state licensing.⁸⁹ The government attempted to argue the judge’s decision was partly to blame for the influx of migrant families, which the court quickly shot down stating the decision had no effect in the increase of immigration and the court had barred repeated attempts by the government seeking the same relief.⁹⁰ The judge concluded her decision by stating the government’s effort was “a cynical attempt . . . to shift responsibility to the Judiciary for over 20 years of Congressional inaction and ill-considered Executive action” that led to the current situation.⁹¹

B. Overturning *Flores* through Regulation

After the district court’s holding of using the judiciary to overturn *Flores*, the Trump administration attempted to overturn the settlement agreement by drafting a new regulation that would “parallel the relevant and substantive terms of the Flores Settlement Agreement [and therefore] terminate [it].”⁹² In August 2019, the government attempted to enact a new regulation doing away with the requirement of state licensing by permitting DHS to employ outside entities

⁸⁹ *Id.* at 236.

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² *Id.* at 242.

to audit detention facilities.⁹³ With this new auditing source, the requirement that children could not be held for more than twenty days in a “state-licensed” facility was neutralized.⁹⁴ The new regulation also provided that facilities would not be secured, but families would be warned that leaving the premises would result in “significant immigration consequences.”⁹⁵ The new regulation did not address the required medical, educational, recreational, and other requirements that the *Flores* agreement mandated.⁹⁶ While the *Flores* agreement’s main purpose was to prevent the indefinite detention of migrant children, the government stated the regulation’s purpose was to allow detention of migrant children throughout the entirety of their immigration proceedings.⁹⁷ Immigration advocates quickly challenged the regulation in federal court where it was permanently enjoined.⁹⁸

C. Separation of Children Policy

Shortly after Trump’s inauguration in 2017, Trump issued an executive order focused on ending the “catch and release” policy implemented in previous administrations.⁹⁹ One aspect of the order, clarified by a memorandum from John Kelly, then-Secretary of Homeland Security, provided that unaccompanied minors who entered the United States were only protected under the TVPRA if they remained “unaccompanied” and were placed with ORR.¹⁰⁰ If a child was released to a parent or guardian in the United States, the protections provided under TVPRA were revoked

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ *Id.* at 243.

⁹⁶ *Id.*

⁹⁷ *Id.* at 244.

⁹⁸ *Id.*

⁹⁹ U.S. DEP’T OF HEALTH AND HUMAN SERVICES, OFFICE OF INSPECTOR GENERAL, COMMUNICATION AND MANAGEMENT CHALLENGES IMPEDED HHS’S RESPONSE TO THE ZERO-TOLERANCE POLICY 45 (2020).

¹⁰⁰ *Supra* note 2, at 216.

and the rights provided to them (such as the right to have their asylum claims heard by an immigration officer rather than a judge) no longer applied.¹⁰¹

Within three months of Trump's order, Jeff Sessions, then-United States Attorney General, issued two memorandums focused on the tightening of immigration policies and the prioritizing of federal prosecution of certain immigration offenses.¹⁰² In July 2017, under these new directions, the CBP began expediting prosecution resulting in the separation of families.¹⁰³ These prosecutions included cases in which the families crossed the border unlawfully and the government pursued criminal charges against the parents, forcibly separating the children from the parents and placing the children in ORR custody as unaccompanied minors.¹⁰⁴ By the time Ms. L and Ms. C filed lawsuits with the Southern District of California on February 26, 2018, hundreds of children had been separated from their parents and placed in detention facilities as unaccompanied minors.¹⁰⁵ Even in instances of immigrant families surrendering at a port of entry and requesting asylum, the children were taken from their parents and separately detained.¹⁰⁶

The separation of children continued to occur during the pendency of the case with Trump and Sessions issuing memorandums that further restricted immigration policies and directed prosecutors to accept all referrals of improper entry offenses for criminal prosecution.¹⁰⁷ Due to national outcry and protests concerning the separation, on June 20, 2018, Trump issued "Executive Order: Affording Congress an Opportunity to Address Family Separation," which directed DHS to detain families together through the immigration process when possible.¹⁰⁸ When the Southern

¹⁰¹ *Id.* at 216-217.

¹⁰² *Supra* note 99.

¹⁰³ *Id.*

¹⁰⁴ *L. v. United States Immigration & Customs Enf't ("ICE")*, 310 F. Supp. 3d 1133, 1138 (S.D. Cal. 2018).

¹⁰⁵ *Id.* at 1139.

¹⁰⁶ *Id.* at 1143.

¹⁰⁷ *Supra* note 99.

¹⁰⁸ *Id.* at 46.

District Court of California ruled on the Ms. L case on June 26, 2018, over two-thousand children had been separated from their parents.¹⁰⁹

In the Ms. L case, the court recognized that although the executive branch has the power to determine who enters the country and how criminal defendants are detained and prosecuted, “the right to family integrity still applies”¹¹⁰ The court further explained that the executive branch’s power does not make the separation of children constitutional or render it non-judicial. ¹¹¹ The government’s lack of an effective procedure or system to track the children once separated, to allow communication amongst the family members, and to reunite families after the criminal or immigration hearings shocked the court.¹¹² The government stated the parents could contact ORR to discover where their children were being detained but the court stated that placing the burden on the parents was “backwards” and the government had “an affirmative obligation to track and promptly reunify [. . .] family members.”¹¹³ In its Order, the court implemented a class-wide preliminary injunction halting the separation of children from parents unless the parents are unfit or present a danger to the child, parents are not to be released without the child also being released from detention, and that the children must be reunified with their parents based on the court’s schedule.¹¹⁴ The court gave the government one month to reunite all children with their parents.¹¹⁵ At the time of the ruling, the plaintiff class consisted of parents who were separated from their children prior to July 1, 2017. On March 8, 2019, the court expanded that class to include parents who entered the United States on or after that date.¹¹⁶

¹⁰⁹ *L v. ICE*, 310 F. Supp. 3d at 1139.

¹¹⁰ *Id.* at 1143.

¹¹¹ *Id.*

¹¹² *Id.* at 1144.

¹¹³ *Id.* at 1145.

¹¹⁴ *Id.* at 1149.

¹¹⁵ *Id.*

¹¹⁶ *Supra* note 99, at 46.

Due to the government’s lack of oversight in tracking the families, the government was not able to meet the one month deadline the court implemented and in April 2019, the administration said it might take another two years for the separated families to be reunited.¹¹⁷ Since the government did not initially track the children as they were being placed with ORR, the government must apply a statistical analysis on the 47,000 children who were handed over to ORR during that time frame and were already discharged from custody.¹¹⁸ The government must then manually review the children’s cases who were most highly probable to have been separated to determine if they were.¹¹⁹ The government is not able to review all cases involving migrant children who were under the ORR’s care due to a lack of resources.¹²⁰

From February 2018 to September 2019, the Office of the Inspector General released thirteen reports on unaccompanied children, ten of which were based on the noncompliance of detention facilities for minor children.¹²¹ The other reports addressed the challenges of mental health needs of children in custody, the lack of hiring, screening, and retaining employees at facilities, and the separation of children in ORR care.¹²² In March 2020, the OIG released the “Communication and Management Challenges Impeded HHS’s Response to the Zero-Tolerance Policy” Report, which discussed the OIG’s findings with regards to the issues surrounding the separation and reunification of children and made recommendations on how the HHS can improve going forward.¹²³

¹¹⁷ Julia Jacobs, *U.S. Says It Could Take 2 Years to Identify Up to Thousands of Separated Families*, NY Times (Apr. 6, 2019), <https://www.nytimes.com/2019/04/06/us/family-separation-trump-administration.html?auth=login-email&login=email>.

¹¹⁸ *Id.*

¹¹⁹ *Id.*

¹²⁰ *Id.*

¹²¹ *Supra* note 99, at 47.

¹²² *Id.*

¹²³ *See generally supra* note 99.

D. Remain in Mexico Policy

In January 2019, DHS implemented the Migrant Protection Protocols (“MPP”), an executive action whereby foreign individuals entering or seeking to enter the United States from Mexico may be returned to Mexico and made to wait outside of the United States during their immigration proceedings.¹²⁴ At the time of implementation, DHS stated over 60% of undocumented immigrants are family units and unaccompanied children from Honduras, Guatemala, and El Salvador.¹²⁵ The Department claimed “[m]isguided court decisions and outdated laws” made it easier for adults who arrived to the border with children, unaccompanied minors, and individuals with fraudulent asylum claims to enter and remain in the United States.¹²⁶ The guidance documents to implement the MPP stated that migrants had to affirmatively state they had a fear of persecution in order to remain in the United States and officers were instructed not to inquire whether there was a credible fear.¹²⁷ If the migrant can demonstrate they have a credible fear of persecution in Mexico, the migrant is not returned to Mexico under the MPP.¹²⁸ While DHS stated the MPP would not apply to unaccompanied minors, it still applied to children who crossed the border with their parents or guardian.¹²⁹

By October 2019, more than 40,000 asylum seekers were forced back across the Mexican border, joining another 26,000 asylum seekers who were currently awaiting entry in the United States.¹³⁰ These migrants included more than 16,000 children with nearly 500 infants under the

¹²⁴ DEP’T OF HOMELAND SECURITY, MIGRANT PROTECTION PROTOCOLS (Jan. 24, 2019), <https://www.dhs.gov/news/2019/01/24/migrant-protection-protocols>

¹²⁵ *Id.*

¹²⁶ *Id.*

¹²⁷ *Innovation Law Lab v. Wolf*, 2020 U.S. App. LEXIS 6344 at *14 (9th Cir. 2020)

¹²⁸ *Id.*

¹²⁹ *Supra* note 124.

¹³⁰ *Supra* note 2, at 261-262.

age of one.¹³¹ Migrants were told they would have to wait months or years in Mexico until their immigration proceedings were heard in court.¹³² Because they are being forced to wait in Mexico for their immigration proceedings, many of these asylum seekers have no legal representation, which significantly lowers their chance of success in their proceedings.¹³³ Although the government was aware of the horrendous and dangerous treatment migrants face in Mexico, in its MPP order, it stated Mexico would take humanitarian efforts to provide health care and education to migrants who remained in Mexico.¹³⁴ In a brief from the American Civil Liberties Union, the organization stated “the U.S. State Department itself has recognized the ‘victimization of migrants’ in Mexico ‘by criminal groups and in some cases by police, immigration officers and customs officials,’ including kidnapping, extortion and sexual violence.”¹³⁵ Several human rights organizations have visited migrants in Mexico to determine the migrants’ conditions, including Human Rights First, which discovered “more than a hundred and ten reported cases of rape, kidnapping, sexual exploitation, assault, and other violent crimes” against interviewed asylum seekers.¹³⁶

The MPP was challenged in federal court quickly after its implementation.¹³⁷ The district court issued a preliminary injunction setting aside the MPP because the plaintiffs would be likely to win on the merits of their claim that the MPP was inconsistent with statutory legislation.¹³⁸

Under 8 U.S.C. § 1225(b)(1), asylum seekers are granted the right to enter the United States and

¹³¹ *Id.* at 262.

¹³² *Id.*

¹³³ *Id.*

¹³⁴ *Id.* at 262-263.

¹³⁵ Adam Liptak and Zolan Kanno-Youngs, *Supreme Court Revives ‘Remain in Mexico’ Policy for Asylum Seekers*, New York Times (Mar. 11, 2020), <https://www.nytimes.com/2020/03/11/us/supreme-court-mexico-asylum-seekers.html>.

¹³⁶ *Supra* note 2, at 263.

¹³⁷ *Innovation Law Lab v. Wolf*, 2020 U.S. App. LEXIS 6344 at *17.

¹³⁸ *Id.*

remain in the country, whether under supervised release or detention, until their claim is decided.¹³⁹ Further, the court held the plaintiffs would likely win on an argument under 8 U.S.C. § 1231(b), a statutory implementation of the United States’ non-refoulement obligations.¹⁴⁰ The government filed an appeal requesting a stay of the preliminary injunction, which was granted by the Ninth Circuit’s motions panel.¹⁴¹ The case, however, continued on to the Ninth Circuit for a decision, which was issued in February 2020.¹⁴² The Ninth Circuit upheld the district court’s preliminary injunction to set aside the MPP due to statutory violations and stated there is a “significant likelihood” individuals being returned to Mexico would “suffer irreparable harm if the MPP [was] not enjoined.”¹⁴³ The government did not contest the evidence that “non-Mexicans returned to Mexico under the MPP risk substantial harm, even death, while they await adjudication of their applications for asylum.”¹⁴⁴ The Ninth Circuit explained in a March 2020 order that the preliminary injunction would operate only within the Circuit’s jurisdiction, leaving two border states, Texas and New Mexico, excluded.¹⁴⁵ The Supreme Court granted certiorari and the case is set to be heard in the Court’s next term.¹⁴⁶ The Supreme Court also granted a stay to the preliminary injunction allowing DHS to continue with the MPP while the case is pending.¹⁴⁷

E. Applying for Asylum in Mexico

¹³⁹ 8 U.S.C.S. § 1225(b)(1) (LexisNexis, Lexis Advance through Public Law 116-128, approved March 21, 2020, with gaps of P.L. 116-109 through P.L. 116-122 and P.L. 116-124 through P.L. 116-126).

¹⁴⁰ 8 U.S.C.S. § 1231(b) (LexisNexis, Lexis Advance through Public Law 116-128, approved March 21, 2020, with gaps of P.L. 116-109 through P.L. 116-122 and P.L. 116-124 through P.L. 116-126).

¹⁴¹ *Innovation Law Lab v. Wolf*, 2020 U.S. App. LEXIS 6344 at *19.

¹⁴² *Id.*

¹⁴³ *Id.* at 56.

¹⁴⁴ *Id.*

¹⁴⁵ *Innovation Law Lab v. Wolf*, 2020 U.S. App. LEXIS 7238 at *13 (9th Cir. 2020).

¹⁴⁶ *Supra* note 135.

¹⁴⁷ *Id.*

In July 2019, the Trump administration issued yet another order barring asylum seekers that traveled through Mexico asylum unless they applied for asylum in Mexico and were denied.¹⁴⁸ This new order applied not only to families and single adults but also to unaccompanied minors.¹⁴⁹ Congress had already enacted legislation that barred asylum seekers from asylum in the United States if the migrant had “firmly resettled” in the country of transit.¹⁵⁰ However, Congress’s legislation did not address asylum seekers that were trekking through a third country on the way to the United States instead of resettling in a third country.¹⁵¹

The American Civil Liberties Union filed suit against the government arguing that Congress’s legislation fundamentally conflicted with the administration’s order with which the federal district court agreed.¹⁵² After the district court issued a preliminary injunction preventing the administration from implementing the order, the Ninth Circuit upheld the preliminary injunction. The government sought intervention from the Supreme Court who stayed the injunction during the pendency of the Ninth Circuit case and a potential Supreme Court certiorari.¹⁵³

IV. The Future of Migrant Children

While the Trump administration has sought to implement strict immigration policies across the board, the federal judiciary has, for the most part, pushed back against the executive branch. Claims brought in more liberal-leaning district courts have resulted in injunctions against Trump’s policies, including the separation of children and the MPP. Further, federal courts have

¹⁴⁸ *Supra* note 2, at 257.

¹⁴⁹ *Id.*

¹⁵⁰ *Id.* at 258.

¹⁵¹ *Id.*

¹⁵² *Id.*

¹⁵³ Amy Howe, *Court Allows Government to Enforce Restrictive Asylum Rule Nationwide*, SCOTUSblog (Sept. 11, 2019), <https://www.scotusblog.com/2019/09/court-allows-government-to-enforce-restrictive-asylum-rule-nationwide/>.

consistently followed precedent regarding the housing of migrant children under *Flores* and *Hutto*, holding the government must uphold the agreements and meet the standards provided under the settlements. Challenges made to the conditions of detention centers under both the Obama and Trump administrations have resulted in decisions finding the government was not meeting the requirements. Under Trump, policies that have been enjoined in the district and circuit courts are slowly finding their way to the Supreme Court. The Supreme Court is set to hear the MPP claim in its next term and stayed the preliminary injunction involving asylum in third party countries. With the inclusion of Justice Gorsuch and Justice Kavanaugh, two conservative justices appointed by Trump, on the bench, the Supreme Court's holdings in future immigration cases are not entirely clear.

When Justice Kavanaugh, a strict textualist, joined the bench, he had only written three opinions on immigration cases.¹⁵⁴ In each of those three cases, Kavanaugh dissented and held against the immigrants.¹⁵⁵ Since joining the Supreme Court, Kavanaugh has indicated that he is not in favor of lenient immigration practices. In his first Supreme Court immigration case, involving an immigrant who was facing deportation for a minor crime committed more than ten years prior, Kavanaugh declared that a 1996 federal law required the deportation of immigrants who commit crimes no matter the length of time between the crime and the deportation and without the opportunity for a bail hearing.¹⁵⁶ Kavanaugh stated that when Congress enacted the bill, they intended to take a harsh stance on immigration, ensuring that immigrants who committed crimes

¹⁵⁴ Aaron Reichlin-Melnick, *Brett Kavanaugh's Record on Immigration Raises Questions*, Immigration Impact (Sept. 5, 2018), <https://immigrationimpact.com/2018/09/05/brett-kavanaugh-record-immigration-raises-questions/#.XqeM50BFxyw>.

¹⁵⁵ *Id.*

¹⁵⁶ Adam Liptak, *An Immigration Argument, Justice Kavanaugh Takes Hard Line*, The New York Times (Oct. 10, 2018), <https://www.nytimes.com/2018/10/10/us/politics/kavanaugh-immigration-supreme-court-case.html>.

were not only prosecuted but also deported, even years later.¹⁵⁷ Kavanaugh authored the decision, joined by the four other conservative justices, in the case holding that regardless of the timeframe between the criminal charges or conviction and the order of removal by ICE, the 1996 statute requires an immigrant be removed when they commit a crime of “moral turpitude.”¹⁵⁸

Unlike Kavanaugh, Justice Gorsuch has shown in his short time on the bench that he is willing to vote against his conservative peers in matters of immigration. While Gorsuch joined the conservative majority in the *Barton* case, in his first Supreme Court immigration case, Gorsuch joined the liberal justices in upholding a Ninth Circuit decision to cancel removal proceedings of an immigrant who had been previously convicted of first-degree burglary and was being deported under the INA’s “aggravated felony” policy.¹⁵⁹ When a residual clause in the Armed Career Criminal Act was found to be unconstitutionally vague, the Supreme Court held the similar residual clause under the INA was also unconstitutionally vague.¹⁶⁰ Gorsuch’s decision to join his liberal peers was a surprising move especially since President Trump, his appointer, is vocal about his anti-immigration stances. Further, during *Barton*’s oral arguments, Gorsuch appeared to waver against a hardline reading of the 1996 statute, offering that mandatory detention and removal of immigrants years after a criminal conviction could be problematic.¹⁶¹ Ultimately, Gorsuch found against *Barton* and joined the conservative majority, but his line of questioning suggests Gorsuch could be less likely to uphold Trump’s policies than conservative pundits believe.

With these two recently appointed justices on the bench, it is difficult to determine how the upcoming immigration cases in the Supreme Court might be decided. Trump’s judicial and

¹⁵⁷ *Id.*

¹⁵⁸ *Barton v. Barr*, 590 U.S. ____ 17 (2020).

¹⁵⁹ *Sessions v. Dimaya*, 138 S. Ct. 1204, 1207 (2018).

¹⁶⁰ *Id.*

¹⁶¹ *Supra* note 156.

executive attempts to abolish or withdraw from the *Flores* and *Hutto* agreements have failed in federal courts and are unlikely to be granted certiorari. The government's decision to settle in these two cases, rather than chance a claim in court, along with federal precedent would make a direct challenge unlikely to succeed. Trump's policy to separate children at the border also appears to be highly unlikely to reach the Supreme Court. Besides the district court's permanent injunction, the public backlash from both sides of the aisle make a government challenge to the court's decision improbable.

Trump's other policies, which circumvent the agreements and force children to seek asylum in Mexico or wait in Mexico during their immigration proceedings, face an unsteady future as they rise to the Supreme Court's level. It appears Kavanaugh would likely side with the three long-standing conservative justices in upholding Trump's policies. The wildcard in these cases is Gorsuch. His history on the bench, albeit a very short history at that, has shown he is willing to swing with the liberal justices in immigration cases instead of outright favoring the government. The future of immigration policies implemented and enforced by Trump are really dependent on if Trump is successful in his 2020 reelection campaign and whether Gorsuch will continue to be a surprising swing vote. If Trump succeeds in the November 2020 primary election, he will likely be able to replace Justice Ginsburg in his final four years, creating an entrenched right-leaning Supreme Court that could favor the executive branch in the immigration arena. However, if Trump is unseated by a Democratic candidate, a liberal replacement on the bench could result in a more lenient immigration outlook if Gorsuch continues to waver.

V. Conclusion

Throughout the history of the United States, the government has consistently shown its discontent with migrant populations attempting to enter and remain in the United States. The

Flores and *Hutto* settlement agreements were the products of two adversaries, the United States government and the immigration legal community, which were implemented in order to ensure migrant children were not forgotten or mistreated at the southern border. For the last thirty-five years, the legal community and non-profit organizations have fought to provide migrant children, unaccompanied or with a parent, from losing basic human rights, such as education and the right to simply be a child. Even under more liberal administrations, the INS and DHS have repeatedly not complied with both agreements. While most administrations attempted to comply, the influx of migrant children, due to horrendous conditions in Central America, caused a situation that spiraled out of control. The implementation of new policies under the Trump administration, which show a clear disdain of Central American migrants, have led to the separation of thousands of migrant children from their parents and placement in detention camps in which children are treated worse than the prison population. The Trump administration's policies have been met with legal challenges at every step. With *Flores* and *Hutto* unlikely to be directly overturned, policies circumventing the two agreements could be decided in favor of the executive by the current majority of conservative Supreme Court justices, changing the landscape of today's immigration laws and policies ensuring the protection of migrant children. Previous administrations have shown that regardless of political ideologies, migrant children, one of the most vulnerable populations in the United States, are mistreated and mishandled at the hands of the federal government. At this point in time, immigration advocates need to be adamant in ensuring that migrant children, both accompanied and unaccompanied, are being detained under the standards required by *Flores* and *Hutto*, if at all.