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## The Separation of Migrant Families at the Border under the Trump Administration's Zero-Tolerance Policy: A Critical Analysis of the Mistreatment of Immigrant Children Held in U.S. Custody

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**The Separation of Migrant Families at the Border under  
the Trump Administration’s Zero-Tolerance Policy: A Critical  
Analysis of the Mistreatment of Immigrant Children Held in  
U.S. Custody**

*Dhillon Ramkhelawan\**

*“We cannot allow all of these people to invade our Country.  
When somebody comes in, we must immediately, with no Judges or  
Court Cases, bring them back from where they came. Our system is  
a mockery to good immigration policy and Law and Order...”*

Donald J. Trump, President of the United States<sup>1</sup>

**I. INTRODUCTION**

The quote above from the President of the United States on his Twitter account is essentially the grounds for which his Administration would pass their ‘zero-tolerance policy’ in April 2018, that would lead to the separation of countless migrant families at the U.S. border.<sup>2</sup> This practice by the Trump Administration brought issues of human rights, immigration, and child custody of

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<sup>1</sup>Donald J. Trump (@realDonaldTrump), Twitter (June 24, 2018, 8:02 AM). [https://twitter.com/realDonaldTrump/status/1010900865602019329?ref\\_src=twsrc%5Etfw%7Ctwcamp%5Etweetembed%7Ctwtterm%5E1010900865602019329&ref\\_url=https%3A%2F%2Fwww.usatoday.com%2Fstory%2Fnews%2F2018%2F06%2F27%2Fimmigrant-children-family-separation-border-timeline%2F734014002%2F](https://twitter.com/realDonaldTrump/status/1010900865602019329?ref_src=twsrc%5Etfw%7Ctwcamp%5Etweetembed%7Ctwtterm%5E1010900865602019329&ref_url=https%3A%2F%2Fwww.usatoday.com%2Fstory%2Fnews%2F2018%2F06%2F27%2Fimmigrant-children-family-separation-border-timeline%2F734014002%2F) (Last visited November 18, 2018).

<sup>2</sup>Aaron Hegarty, *Timeline: Immigrant children separated from families at the border*, USA Today, (June 27, 2018), <https://www.usatoday.com/story/news/2018/06/27/immigrant-children-family-separation-border-timeline/734014002/> (Last visited March 22, 2019).

migrant children to the forefront of the media, not just in the United States, but globally as well.<sup>3</sup> This zero-tolerance policy initiated by the Trump Administration was designed to criminally prosecute all adult migrants trying to enter the country illegally at the Southwest border.<sup>4</sup> This practice inherently led to the separation of families because children could not be held in the same detention facilities as their parents.<sup>5</sup> Then Attorney General Jeff Sessions made it clear that separating migrant children from their parents who were trying to enter the United States illegally was necessary to enforce the law, “which was to prosecute any and all adult migrants who were crossing the border illegally.”<sup>6</sup> He also made the point that if migrant parents did not want to be separated from their children, “then they shouldn’t try to smuggle their children over the United States border.”<sup>7</sup> The separation of migrant children from their parents caused a media uproar, as many political commentators and activists started claiming that the actions of the Trump Administration under its zero-tolerance policy were a human rights violation, and simply cruel and unusual punishment toward innocent migrant children.<sup>8</sup> This negative backlash from the media forced President Trump to pass an Executive Order on June 20<sup>th</sup>, 2018, that was designed to keep migrant families together at the United States and Mexico border, as it temporarily halted criminal prosecution of parents and guardians unless they had a criminal history or the child’s welfare was in question.<sup>9</sup> Six days later, a federal judge in California ordered United States immigration authorities to reunite separated families at the border within 30 days, and that children under five had to be reunited with their parents within 14 days.<sup>10</sup>

This article first examines the history of the separation of migrant families at the United States border before the Trump Administrations zero-tolerance policy was even considered. It will first take a look at the landmark *Flores* and *Hutto* settlement cases that set out standards and procedures that immigration officials must follow before they separate migrant families at the border, as well

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<sup>3</sup>Stephanie Murray, *Foreign Media Spotlight U.S. Family Separations*, Politico (June 19, 2018), <https://www.politico.com/story/2018/06/19/family-separations-foreign-media-653644> (Last Visited March 22, 2019).

<sup>4</sup>Hegarty, *supra* note 2.

<sup>5</sup>*Id.*

<sup>6</sup>*Id.*

<sup>7</sup>*Id.*

<sup>8</sup>*Id.*

<sup>9</sup>*Id.*

<sup>10</sup>*Id.*

as the standards and procedures that they must follow to ensure the health and general welfare of these migrant children once they are separated from their parents. The article will discuss the United States' tumultuous history of separating migrant families at the border which led to the standards and procedures set out in *Flores*. It will then discuss how the Department of Homeland Security (DHS) failed to meet the standards set forth in *Flores*, which then led to the *Hutto* Settlement Agreement. After the analysis of the two pinnacle cases of *Flores* and *Hutto*, this article will then discuss the 1951 United Nations Refugee Convention, which set out its own standards and procedures as to how the contracting Nation-States should treat refugee families trying to cross into their borders according to international law.

Second, this article will take a look at how the Obama Administration handled the issue of migrant families trying to cross the border illegally. It will examine how the Obama Administration attempted to comply with the rules set out in *Flores* after a few initial violations, demonstrating why they were not faced with the same accusations of committing human rights violations or mistreating migrant children at the border. Moreover, this article will compare and contrast the practices of the Obama Administration with the zero-tolerance policy initiated by the Trump Administration that followed it. It will also provide a statistical analysis about the number of families that were separated during the two months from when the zero-tolerance policy was enacted, up until President Trump issued his Executive Order that was supposed to reunite migrant children with their parents. Additionally, it will outline the inhumane living conditions that migrant children were subjected to that were in direct contrast to the standards set out in *Flores* once they were separated from their parents under the zero-tolerance policy, which in turn caused uproar in the media.

Finally, this article will propose two possible solutions that would ensure that the mass separation of migrant families, and the gross mistreatment of migrant children held in U.S. custody at the border under the Trump Administration's zero-tolerance policy would never occur again. The first of which would be for Congress to pass legislation that would specifically state that migrant families should not be separated at the border unless absolutely necessary, or in the best interest of the child. However, if separation is required, then the minimum standards described in the *Flores* and *Hutto* cases are to be codified and followed by immigration authorities to ensure that migrant children held in custody are not subjected to inhumane

living conditions. The second solution would be for the United States Supreme Court to rule that the separation of migrant families held in U.S. custody is a violation of the Due Process Clause under the Fourteenth Amendment, and is thus unconstitutional. This article will explain that aliens held in U.S. custody should be afforded the same constitutional protections as U.S. citizens while on American soil, and that the separation of migrant families at the border is infringing upon the parents' fundamental right to custody over their children. Hence, this would mean that practices similar to what occurred under the Trump Administration's zero-tolerance policy would violate migrant parents' substantive Due Process rights.

## II. BACKGROUND

Even though it was the Trump Administration's zero-tolerance policy that brought the separation of migrant families and the mistreatment of migrant children from Central America held in U.S. custody to the forefront of media outlets, these issues have been addressed various times throughout U.S. history and case law.<sup>11</sup>

### A. THE HISTORY OF THE DETENTION OF MIGRANT CHILDREN HELD IN U.S. CUSTODY

In the late 1980's and early 1990's, waves of unaccompanied minors began to migrate to the United States from Central America in order to escape conflict in their home countries, to be reunited with separated relatives and to seek economic opportunities.<sup>12</sup> However, due to the backlogs caused by the increasing number of migrants trying to enter the United States along with processing requirements, it took weeks, months, or even years for the federal government to resolve the immigration status of migrant adults and children alike.<sup>13</sup> Hence, since a determination regarding the status of migrants could not be made immediately, the U.S. government began to detain these undocumented immigrants while their immigration status was being resolved.<sup>14</sup>

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<sup>11</sup>Rebeca M. López, *Codifying the Flores Settlement Agreement: Seeking to Protect Immigrant Children in U.S. Custody*, 95 Marq. L. Rev. 1635, 1647 (2012). (Last visited March 4, 2019).

<sup>12</sup>*Id.*

<sup>13</sup>*Id.*

<sup>14</sup>*Id.*

Initially, it was the Department of Justice (DOJ) that was the agency in charge of taking care of the unaccompanied migrant children from Central America.<sup>15</sup> However, due to the increasing number of migrant children trying to enter to the United States from Central America in the late 1980's, the Immigration and Naturalization Service (INS) assumed responsibility for taking care of these children.<sup>16</sup> The INS was the agency responsible for the enforcement of the immigration laws, which allowed them to assume guardianship of the unaccompanied children coming from Central America.<sup>17</sup> Many commentators believe that the INS took a dictatorship and inhumane approach to caring for these children as they detained them in what can only be described as “prison-like settings.”<sup>18</sup> These migrant children were vulnerable, and the INS detained them for extremely long periods of time in these inhumane living conditions, and it “applied the same model of punitive detention to children as it did to adults.”<sup>19</sup> Unaccompanied migrant children from Central America detained at the border were subject to various forms of mistreatment for years while they were under the care of the INS, as they “were placed in cells with unrelated adults of both sexes, detained in penal-like settings, and were subjected to abuse by guards and other prisoners.”<sup>20</sup> The mistreatment of these migrant children held in U.S. custody led to the American Civil Liberties Union (ACLU) filing a class action lawsuit that exposed the lack of standards for detaining immigrant children and the inhumane conditions they were subjected to live in.<sup>21</sup>

#### B. THE STANDARDS SET OUT IN THE *FLORES* SETTLEMENT AGREEMENT

The *Flores* Settlement Agreement was the first time the courts set out standards and procedures that the INS had to follow when it detained migrant children at the border. This agreement came from the case *Flores v. Meese*, where a fifteen-year-old girl fled war-torn

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<sup>15</sup>*Id.*

<sup>16</sup>*Id.*

<sup>17</sup>*Id.*

<sup>18</sup>*Id.*

<sup>19</sup>*Id.*

<sup>20</sup>*See, e.g.,* Amnesty Int'l, United States of America: Human Rights Concerns in Border Region with Mexico (1998), *available at* <https://www.refworld.org/docid/3ae6a9ac4.html>. (Last visited October 20, 2019).

<sup>21</sup>López, *supra* note 11.

El Salvador to be reunited with her aunt in the United States. However, she was instead detained by the INS at the border where she was handcuffed, strip-searched, and placed into a juvenile detention center for two months that did not have any recreational or educational activities and where she had to share bathroom facilities with adults.<sup>22</sup> As a result, the ACLU filed a lawsuit on behalf of Flores and other migrant children in similar situations. The results of the litigation set out standards and procedures that the INS had to follow when they detained migrant children, in what would be known as the *Flores* Settlement Agreement.<sup>23</sup>

The *Flores* Settlement Agreement established a nationwide policy for the detention, release, and treatment of minors held in U.S. custody.<sup>24</sup> The agreement required that immigration officials detaining migrant children provide (1) food and drinking water; (2) medical assistance in the event of emergencies; (3) toilets and sinks; (4) adequate temperature control and ventilation; (5) adequate supervision to protect minors from others; and (6) the separation of children from unrelated adults whenever possible.<sup>25</sup> The agreement also required that the INS (1) ensure the prompt release of children from immigration detention; (2) place children for whom release is pending, or for whom no release option is available, in the least restrictive setting appropriate to the age and special needs of minors; and (3) implement standards relating to care and treatment of children in U.S. immigration detention.<sup>26</sup> Hence, the 1997 consent decree known as the *Flores* Settlement not only set out the minimum standards and procedures that immigration officials had to follow when detaining unaccompanied migrant children, but it also held that these unaccompanied children could be held in immigration detention for only a short period of time.<sup>27</sup> Additionally, in 2016 a federal judge ruled that the *Flores* Settlement agreement applied to families as well, which effectively required that the families be kept together in detainment and released within 20 days.<sup>28</sup>

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<sup>22</sup>*Flores v. Meese*, 681 F. Supp. 665, 666 (C.D. Cal. 1988).

<sup>23</sup>*Id.*

<sup>24</sup>López, *supra* note 11.

<sup>25</sup>*Id.*

<sup>26</sup>*Id.*

<sup>27</sup>Julie Hirschfeld Davis and Michael D. Shear, *How Trump Came to Enforce a Practice of Separating Migrant Families*, THE NEW YORK TIMES, (June 16, 2018), <https://www.nytimes.com/2018/06/16/us/politics/family-separation-trump.html> (Last visited March 4, 2019).

<sup>28</sup>*Id.*

C. THE STANDARDS SET OUT IN THE *HUTTO* SETTLEMENT AGREEMENT

Although the *Flores* Settlement Agreement set out standards and procedures that immigration officials had to follow when it came to the treatment of migrant children held in U.S. custody, there were still concerns about these children being separated from their family members.<sup>29</sup> This led to the Bush Administration creating family detention centers to detain families that were caught in the United States or at the border. One of these facilities was known as the Don. T. Hutto Facility that held hundreds of migrant families, most of whom were women and their children, who were seeking asylum to the United States away from the abusive conditions of their domestic countries.<sup>30</sup> However, families were housed under prison-like conditions in the Hutto facility, as children were forced to wear prison uniforms; threatened with separation from their parents as a disciplinary tool; they received little to no recreational or educational opportunities; and were detained for months.<sup>31</sup>

These conditions in the Hutto facility were in direct contrast to the standards set out in the *Flores* Settlement Agreement, and as a result, the ACLU once again filed a class-action lawsuit.<sup>32</sup> This lawsuit led to the creation of the *Hutto* Settlement Agreement which required immigration officials to (1) allow children twelve and older to move freely about the facility; (2) provide a full time, on-site pediatrician; (3) eliminate the count system which forces families to stay in their cells twelve hours a day; (4) install privacy curtains around toilets; (5) offer field trip opportunities to children; (6) supply toys and age-appropriate books to children; (7) improve the nutritional value of food; (8) give children more time outdoors and more educational programming; (9) no longer require children to wear prison uniforms; and (10) be subject to external oversight to ensure their performance.<sup>33</sup>

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<sup>29</sup>*ACLU Challenges Prison-Like Conditions at Hutto Detention Center*, ACLU (Mar. 6, 2007), <https://www.aclu.org/aclu-challenges-prison-conditions-hutto-detention-center> (Last Visited October 20, 2019).

<sup>30</sup>*Id.*

<sup>31</sup>*Id.*

<sup>32</sup>*Id.*

<sup>33</sup>*Id.*

D. THE STANDARDS SET OUT IN THE 1951 UNITED NATIONS  
REFUGEE CONVENTION

The United Nations 1951 Refugee Convention was ratified by 145 Nation-States, and it is an essential legal document to examine when it comes to this issue of the separation of migrant children from their parents at the border as it defines what the term ‘refugee’ means, and it outlines the rights of displaced individuals as well as the contracting Nation-States obligations to protect them.<sup>34</sup> One key term that came out of the 1951 United Nations Refugee Convention and is now considered to be a rule of customary international law is the principle of non-refoulement.<sup>35</sup> The principle of non-refoulement states that a refugee should not be returned to their home country if doing so would cause them to face serious threats to their lives or freedom.<sup>36</sup> The most relevant provision of the 1951 United Nations Refugee Convention in relation to the Trump Administration’s zero-tolerance policy is Article 31, which deals with refugees who are unlawfully in the country of the refugee.<sup>37</sup> Article 31 of the United Nations Refugees Convention deals with refugees who are unlawfully in the country of the refugee and it reads:

- 1) The Contracting States shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened in the sense of article 1, enter or are present in their territory without authorization, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence.<sup>38</sup>
- 2) The Contracting States shall not apply to the movements of such refugees restrictions other than those which are necessary and such restrictions shall only be applied until their status in the country is regularized or they obtain

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<sup>34</sup>The United Nations Refugee Agency, *Convention and Protocol Relating to the Status of Refugees: Text of the 1951 Convention Relating to the Status of Refugees* 3 <https://www.unhcr.org/en-us/3b66c2aa10> (Last visited Mar. 4, 2019).

<sup>35</sup>The United Nations Refugee Agency, *Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol* 7 (Jan. 26, 2007), <https://www.unhcr.org/4d9486929.pdf>

<sup>36</sup>*Id.* at 3.

<sup>37</sup>The United Nations Refugee Agency, *supra* note 34, at 29.

<sup>38</sup>*Id.*

admission into another country. The Contracting States shall allow such refugees a reasonable period and all the necessary facilities to obtain admission into another country.<sup>39</sup>

Thus, according to Article 31 of the 1951 United Nations Refugee Convention, the separation of migrant families at the border would undoubtedly be a violation of international law as it would breach both of the above provisions by penalizing refugees who were fleeing countries where their freedom was threatened, and it would unnecessarily restrict the movement of those refugees as well.<sup>40</sup>

#### E. HOW THE OBAMA ADMINISTRATION HANDLED MIGRANT FAMILIES AT THE BORDER

Now that the standards and procedures for the separation of migrant families and the detention of migrant children at the border have been defined under the *Flores* and *Hutto* Settlement Agreements, and before the Trump Administration's zero-tolerance policy is analyzed, it is important to look at how the preceding administration dealt with these issues.

In sharp contrast to the Trump Administration's zero-tolerance policy that will be analyzed below, the Obama Administration at least attempted to comply with the standards and procedures set out in the *Flores* and *Hutto* Settlement Agreements by establishing Family Detention Centers that kept migrant families together at the border while their cases were being processed.<sup>41</sup> However, the Obama Administration came under fire for keeping families in detention even when they had family members in the U.S., as they argued that the prompt release of children from detention at the border only applied to unaccompanied minors.<sup>42</sup>

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<sup>39</sup>*Id.*

<sup>40</sup>Justin Rivera, *The Impact of the "Zero Tolerance" Policy on Asylum Seekers*, Reddy and Neuman Complex Immigration (June 25, 2018), <https://www.rnlawgroup.com/immigration-news/617-the-impact-of-the-zero-tolerance-policy-on-asylum-seekers> (Last visited Nov. 18, 2018).

<sup>41</sup>Camilla Domonoske & Richard Gonzales, *What We Know: Family Separation And 'Zero Tolerance' at the Border*, NPR (June 19, 2018), <https://www.npr.org/2018/06/19/621065383/what-we-know-family-separation-and-zero-tolerance-at-the-border> (Last visited Mar. 22, 2019).

<sup>42</sup>Alexandra Starr, *After Court Ruling, 3 Immigration Detention Centers Could Close*, NPR (July 27, 2015), <https://www.npr.org/2015/07/27/426674309/after-court-ruling-3-immigration-detention-centers-could-clos>

As a result a federal judge ruled that these Family Detention Centers did not meet the standards of *Flores*, and ordered the Obama Administration to release the detainees to their family members in the U.S. within 90 days of the ruling.<sup>43</sup> The Obama Administration responded to this ruling by halting family detention of migrants trying to enter the U.S., and instead enacted a policy of releasing families through a program called Alternatives to Detention that still allowed migrant families to be closely supervised through the use of ankle monitors being put on migrant mothers before they were released.<sup>44</sup> John Sandweg, the former head of U.S. Immigration & Customs Enforcement (ICE) under the Obama Administration, stated that the separation of migrant families fleeing Central America rarely happened during their tenure under the Alternatives to Detention Program, as their policy was to ultimately keep families unified.<sup>45</sup> The only real problem they faced was when parents would intentionally separate themselves from their children before they got to the border, as it was very difficult to reunite the parents and children in those situations.<sup>46</sup> This Alternative to Detention Program was supported by the ACLU, and the Obama Administration faced no more legal consequences under the *Flores* and *Hutto* Settlement Agreements.<sup>47</sup>

#### F. THE TRUMP ADMINISTRATIONS ZERO-TOLERANCE POLICY AT THE BORDER

The Trump Administration immediately opposed and denounced the Obama Administrations Alternative to Detention Program as what they referred to as ‘catch and release.’<sup>48</sup> The Trump Administration instead enacted a zero-tolerance policy on illegal immigration that was designed to criminally prosecute any and all adults who tried to enter the United States illegally at the Southwest border.<sup>49</sup> A description of the Zero-Tolerance Policy from the

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<sup>43</sup>*Id.*

<sup>44</sup>Domonoske, *supra* note 41.

<sup>45</sup>Rebecca Joseph, *Separations of children, parents at U.S. border could be permanent: Former Immigration Director*, Global News (June 19, 2018), [https://globalnews.ca/news/4284138/separation-children-parents-us-border-permanent/?fbclid=IwAR2\\_jdY6GMv2PUyj4TP7Zi6aoZwsti3Lnjj7zPExHjY\\_5OqtVAh-fi3wBqI](https://globalnews.ca/news/4284138/separation-children-parents-us-border-permanent/?fbclid=IwAR2_jdY6GMv2PUyj4TP7Zi6aoZwsti3Lnjj7zPExHjY_5OqtVAh-fi3wBqI) (Last visited Mar. 4, 2019).

<sup>46</sup>*Id.*

<sup>47</sup>Domonoske, *supra* note 41.

<sup>48</sup>*Id.*

<sup>49</sup>Hegarty, *supra* note 2.

Department of Homeland Security's (DHS) website in June 2018 can be found below:

(1) Individuals who are apprehended by Border Patrol are taken to stations for processing; (2) All individuals, including both adults and children, provide biographical information and, in many cases, fingerprints; (3) Border Patrol agents enter information into appropriate electronic systems of records, including information about the claimed or confirmed family relationship; (4) Individuals who are believed to have committed any crime, including illegal entry, will be referred to the Department of Justice and presented before a federal judge; (5) After the conclusion of any criminal case, individuals will be transferred to U.S. Immigration and Customs Enforcement (ICE) for appropriate immigration proceedings; (6) Any individual processed for removal, including those who are criminally prosecuted for illegal entry, may seek asylum or other protection available under law.<sup>50</sup>

This policy began to be enforced in April 2018, and it inherently led to the separation of migrant families at the border because children could not be held in the same detention centers as their parents while their cases were being decided.<sup>51</sup> This zero-tolerance policy on illegal border crossings included parents attempting to cross the border with their children, as well as people who subsequently tried to request asylum.<sup>52</sup> As a result of this zero-tolerance policy, over 2,342 migrant children were separated from their parents between May and June 2018.<sup>53</sup> The Trump Administration openly acknowledged that this practice was leading to the separation of migrant families at the border, as then Attorney General Jeff Sessions justified and described the zero-tolerance policy as deterrence against illegal immigration.<sup>54</sup>

According to migrant parents who were separated from their children under the zero-tolerance policy, their children were taken away from under the false pretense that they were going to take a bath, and they were given no information on as to where their

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<sup>50</sup>U.S. Department of Homeland Security, *Fact Sheet: Zero Tolerance Immigration Prosecutions- Families*, (June 15, 2018), <https://www.dhs.gov/news/2018/06/15/fact-sheet-zero-tolerance-immigration-prosecutions-families?fbclid=IwAR1oBZet7aQktCV0rbWivj9gFLyLqz66RvASSA9GHmHep0F2URG1wrru4Q> (Last visited March 22, 2019).

<sup>51</sup>Hegarty, *supra* note 2.

<sup>52</sup>*Id.*

<sup>53</sup>Domonoske, *supra* note 41.

<sup>54</sup>*Id.*

children were actually going.<sup>55</sup> However, in reality these migrant children were actually placed in holding cells at Customs and Border Protections facilities for three days where they were placed in holding cells.<sup>56</sup> These holding cells were criticized for their dark, poor conditions, that included cages with more than 20 children inside, as well as several reports of abuse and inhumane treatment.<sup>57</sup> After the three day period at these holding cells was over, the migrant children were then transferred to a child immigration shelter under the Office of Refugee Resettlement (ORR).<sup>58</sup> These shelters that the migrant children were transferred to include a former Wal-Mart Supercenter that was converted into a housing center that roomed 1,500 boys aged 10 to 17.<sup>59</sup> Migrant children spent an average of 57 days at these shelters, which were only a slight upgrade from the cages at the Border Protections facilities as the children slept on beds instead of mats, in rooms instead of cages, and had accesses to classes and games.<sup>60</sup> More than 10,000 migrant children were kept in shelters like these under the Trump Administration's zero-tolerance policy. However, these shelters were not the end of it, as the Trump Administration also set up a temporary tent camp facility in the middle of the desert in Tornillo, Texas, that was designed to house 4,000 detained minors.<sup>61</sup> Reporters were not allowed into this tent camp facility, but photos were released of bunk beds packed tightly into tents.<sup>62</sup> The ultimate goal was to eventually get these migrant children out of these facilities and reunited with their parents, but the sad reality of the situation was that it was not possible for children whose parents were still in detention, so they had to settle for finding them other family members, foster care, or sponsors.<sup>63</sup>

This zero-tolerance policy initiated by the Trump Administration undoubtedly violated several provisions of both the *Flores* and *Hutto* Settlement Agreements. The Trump Administration even took issue with and tried to get a federal judge to change particular provisions in the *Flores* Agreement.<sup>64</sup> One

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<sup>55</sup>*Id.*

<sup>56</sup>*Id.*

<sup>57</sup>*Id.*

<sup>58</sup>*Id.*

<sup>59</sup>*Id.*

<sup>60</sup>*Id.*

<sup>61</sup>*Id.*

<sup>62</sup>*Id.*

<sup>63</sup>*Id.*

<sup>64</sup>Hegarty, *supra* note 2.

particular provision they wanted changed was the requirement that migrant children be released promptly within 20 days of detainment, as they found it problematic since the criminal cases of the parents of these migrant children took more than 20 days.<sup>65</sup> In addition to violating the *Flores* and *Hutto* Settlement Agreements, it is pretty clear that the Trump Administration's zero-tolerance policy also violated both of the provisions Article 31 of the 1951 United Nations Refugee Convention.<sup>66</sup> The zero-tolerance policy violated the first provision of Article 31 of the Convention because it penalized refugees who were fleeing their home countries where their freedoms were being jeopardized by separating migrant children from their parents when they attempted to cross the Southwest border of the United States.<sup>67</sup> The zero-tolerance policy also violated the second provision of Article 31 of the Convention because it provided restrictions on the movements of refugees by placing migrant children in cages initially and then in less than ideal detainment facilities while their parents immigration cases were being decided. The United Nations High Commissioner for Human Rights Zeid Ra'ad commented on the Trump Administration's zero-tolerance policy by stating, "the thought that any state would seek to deter parents by inflicting such abuse on children is unconscionable," and that the "High Commissioner's office condemned the practice of separating children from their parents, calling it serious violation of children's rights and international law."<sup>68</sup>

However, not only did this zero-tolerance policy that separated migrant families at border and subjected migrant children to inhumane living conditions violate the *Flores* and *Hutto* Settlement Agreements as well as international human rights law according to the United Nations, it also caused a media uproar that caused many political activists and commentators to speak out against the Trump Administration. They stated that what the Trump Administration was doing was both a human rights violation, and cruel and unusual punishment towards migrant children.<sup>69</sup> Even the former head of ICE under the Obama Administration John Sandweg criticized the

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<sup>65</sup>*Id.*

<sup>66</sup>Rivera, *supra* note 40.

<sup>67</sup>*Id.*

<sup>68</sup>Nick Cumming-Bruce, *U.N. Rights Chief Tells U.S. to Stop Taking Migrant Children From Parents*, The New York Times, (June 18, 2018), <https://www.nytimes.com/2018/06/18/world/europe/trump-migrant-children-un.html> (Last Visited March 4, 2019).

<sup>69</sup>Murray, *supra* note 3.

Trump Administration's zero-tolerance policy as he stated, "why this administration would intentionally adopt a policy to increase that problem is beyond me."<sup>70</sup>

As a result of this negative backlash President Trump issued an Executive Order that that was designed to keep migrant families together at the United States and Mexico border.<sup>71</sup> This Executive Order temporarily halted criminal prosecution of parents and guardians unless they had a criminal history or the child's welfare was in question.<sup>72</sup> However, the courts did not believe that Trump's Executive Order was enough to stop the egregious practice of separating migrant children from their parents at the border under the zero-tolerance policy as six days later a federal judge in California ordered United States immigration authorities to reunite separated families at the border within thirty days, and that children under five had to be reunited with their parents within fourteen days.<sup>73</sup> The courts passed this preliminary injunction in the case *Ms. L v. U.S. Immigration and Customs Enforcement*, on June 26<sup>th</sup>, 2018 where it was ruled that the Trump Administration must "(1) stop the practice of separately detaining alien parents and minor children who had lacked authorization for admission to the United States and who were apprehended by immigration authorities at or between designated ports of entry along the border, and (2) reunite within weeks all separated alien parents and their minor children."<sup>74</sup> In addition, the court in *Ms. L* "later issued a temporary restraining order blocking the government from deporting alien parents until they have been reunified with their children for at least one week so that parents can make an informed, non-coerced decision if they are going to leave their children behind pending the child's separate immigration proceedings"<sup>75</sup>.

The court in *Ms. L*, also certified a class of migrant families trying to enter the U.S., which they defined as: "[a]ll adult parents who enter the United States at or between designated ports of entry who (1) have been, are, or will be detained in immigration custody by the DHS, and (2) have a minor child who is or will be separated from them by DHS and detained in the Office of Refugee

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<sup>70</sup>Joseph, *supra*, note 45.

<sup>71</sup>Hegarty, *supra* note 2.

<sup>72</sup>*Id.*

<sup>73</sup>*Id.*

<sup>74</sup>Sarah Herman Peck, *Family Separation at the Border and the Ms. L. Litigation*, Congressional Legal Service, (July 31, 2018). (Last visited March 4, 2019).

<sup>75</sup>*Id.*

Resettlement (ORR) custody, ORR foster care, or DHS custody, absent a determination that the parent is unfit or presents a danger to the child.”<sup>76</sup> Additionally, the preliminary injunction ordered immigration officials under the Trump Administration to “take the following actions with respect to class members who have neither been deemed unfit or a danger to the child, nor have affirmatively, knowingly, and voluntarily declined to be reunited with a child in DHS custody:”<sup>77</sup>

(1) refrain from detaining in DHS custody class members without their minor children; (2) release detained minor children to the custody of parent class members who have been discharged from DHS custody; (3) reunite all class members with their minor children within fourteen days for children under age five, and within thirty days for older children; and (4) take all necessary steps to facilitate regular communication between class members and their children in ORR custody, ORR foster care, or DHS custody but, at a minimum, arrange a telephone call within ten days.<sup>78</sup>

This preliminary injunction was passed by U.S. District Judge Dana Sabraw in San Diego, who described the Trump Administration’s handling of the crisis as attempts “to address a chaotic circumstance of the government’s own making.”<sup>79</sup>

### III. ISSUE

This comment is going to address the very important problems of the separation of migrant families, and the mistreatment of migrant children held in U.S. custody at the border. This is a prevalent issue in today’s society with the current Administration in power under President Donald Trump being so focused on cracking down on illegal immigration. This issue is also a longstanding one that has been around since the 1980’s, when migrant children were subjected to inhumane living conditions and various forms of abuse while attempting to cross the U.S. border after fleeing their war-torn countries in Central America. Both the courts and legislators have attempted to try and address these issues before, with both the *Flores* and *Hutto* Settlement Agreements, and the Obama Administration’s Alternative to Detention Program. Even the United Nations anticipated and tried to forecast a solution to refugee families trying

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<sup>76</sup>*Id.*

<sup>77</sup>*Id.*

<sup>78</sup>*Id.*

<sup>79</sup>Hegarty, *supra* note 2.

to cross the border of developed countries with the Refugee Convention of 1951. However, none of these options were sufficient in and of themselves, nor were they able to prevent the Trump Administration from enacting its zero-tolerance policy that led to the separation of migrant families at the border and the mistreatment of migrant children at detention facilities from April to June in 2018. Therefore, this comment is going to provide two possible solutions that would prevent any administration in the future from separating migrant families at the border unless absolutely necessary, or ever subjecting migrant children to abusive conditions in detention facilities ever again.

#### IV. SOLUTIONS

In this case, there are two possible ways to address the issue of making sure that policies such as the Trump Administration's zero-tolerance policy could never be implemented and lead to the mass separation of migrant families at the border ever again. First, Congress could introduce legislation to add clarity to the issue. Second, the United States Supreme Court could create precedent whereby separating migrant children from their parents at the border by immigration officials would be deemed unconstitutional. This comment takes on both approaches.

A. CONGRESS NEEDS TO PASS LEGISLATION INDICATING THAT SEPARATION OF FAMILIES AT THE BORDER SHOULD ONLY BE DONE WHEN ABSOLUTELY NECESSARY, AND THAT IF SEPARATION IS REQUIRED, THE STANDARDS OUTLINED IN *FLORES* AND *HUTTO* NEED TO BE CODIFIED IN A FEDERAL STATUTE

A legislative solution to resolving the issue of the separation of migrant families trying to cross the Southwest border that was present under the Trump Administration's zero-tolerance policy is a default option. Congress could pass a few simple provisions that would solidify uniformity in rulings throughout all jurisdictions. This article outlines legislative guidelines that legislators can follow to ensure that migrant families are not unnecessarily separated at the border, and that migrant children are not subjected to inhumane living conditions under future administrations.

The first provision would be for Congress to pass a law indicating that migrant families are to be kept together at all times

while their immigration cases are being decided, unless it would be in the best interest of the child to be separated from their parents under some very limited circumstances. This provision could be accomplished by codifying and improving the Obama Administration's Alternative to Detention Programs as the absolute law for migrant families attempting to cross the border unless one of the exceptions that will be discussed below exist.

By codifying and improving the Obama Administrations Alternative to Detention Program, it would prevent migrant families from being separated at the border and children from being kept in inhumane detention centers, as migrant mothers would be allowed to enter the U.S. and be monitored via an ankle bracelet. The improvements to the Alternative to Detention Program would include releasing migrant families into public housing until their immigration cases have been decided. This solution has many similarities to the proposed Senate bill known as the Keep Families Together Act (S. 3036) which would create a "strong presumption in favor of family unity" and "that detention is not in the best interests of families and children."<sup>80</sup> Both solution A in this article and the proposed Keep Families Together Act would prevent future administrations from removing a migrant child from their parents or legal guardians at the U.S. border unless immigration authorities can prove that the parents are involved in criminal activity, that it would be in the best interest of the child to be removed from their parents or legal guardians, or that the child is a victim of, or at risk of becoming a victim of, human trafficking.<sup>81</sup>

If it is determined that migrant families are allowed to stay, then Congress should make it clear that they should be afforded the same privileges as asylum seekers and be allowed to stay in public housing until they can get an education and find a job that would allow them to sustain themselves and their children. Seeking asylum is a legitimate legal process as many asylum seekers are in similar positions as the migrant parents who had their children stripped away from them under the Trump Administration's zero-tolerance policy. The majority of both groups were fleeing from criminal activities and fear of persecution in their home countries and as such are not breaking the law.<sup>82</sup> The U.S. is obligated to accept asylum

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<sup>80</sup>Peck, *supra* note 74.

<sup>81</sup>*Id.*

<sup>82</sup>*Questions & Answers Credible Fear Screening Individuals Seeking Asylum*, USCIS, <https://www.uscis.gov/humanitarian/refugees-asylum/asylum/questions-answers-credible-fear-screening> (Last Visited February 23, 2019).

seekers under U.S. and international law if they can show a “credible fear” of persecution or torture.<sup>83</sup> This means that migrant families who are fleeing the same situations as asylum seekers are not breaking the law. Instead these migrant families are following legal channels, which means that they should not be punished by having their children separated from them, but instead be afforded the same opportunities as asylum seekers under the law.

However, if immigration officials or the courts do deem that separation of migrant families at the border is necessary because it would be in the best interest of the child since their parents are either involved in criminal activity, or there is a high risk that the children would become victims of human trafficking, then the standards of *Flores* and *Hutto* should be codified into federal law via statute. This would ensure that the facilities that migrant children are placed into are safe, humane, and provide the same recreational and educational activities that American children have access to on a daily basis.

Ultimately, this solution of getting Congress to pass a bill that keeps migrant families together unless separation would be in the best interest of the child by codifying the Alternative to Detention Program and releasing these migrant families into public housing while their immigration cases are being decided, would align with both the standards set out in the *Flores* and *Hutto* Settlement Agreements along with the principle of non-refoulement set out in Article 31 of the 1951 United Nations Refugee Convention. Additionally, the solution of codifying the standards and procedures of the *Flores* and *Hutto* Settlement Agreement into the statute would ensure that the egregious and inhumane mistreatment of migrant children that took place under the Trump Administration’s zero-tolerance policy would not be repeated if immigration officials and/or the courts do in fact deem that separation from their parents would be in the best interest of the child.

B. THE UNITED STATES SUPREME COURT SHOULD RULE THAT THE SEPARATION OF MIGRANT FAMILIES HELD IN U.S. CUSTODY IS A VIOLATION OF THE DUE PROCESS CLAUSE UNDER THE FOURTEENTH AMENDMENT, AND IS THUS UNCONSTITUTIONAL

Solution A described above would have to deal with the difficulties of the partisan differences on the outlook of immigration

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<sup>83</sup>*Id.*

when it comes to passing a bill and creating a statute in the United States' bicameral legislature. However, Solution B would allow the courts to unilaterally determine that the separation of migrant children from their parents at the border would be unconstitutional because it violates the Due Process Clause of the Fourteenth Amendment unless immigration officials can prove that separation would be in the best interest of the child.

Although many commentators may try to argue that the protections of the U.S. Constitution only apply to U.S. citizens, the Supreme Court has already ruled in the past that the "Due Process Clause applies to all persons within the United States, including aliens, whether their presence here is lawful, unlawful, temporary, or permanent."<sup>84</sup> Thus, when taking that ruling into consideration, it can be argued that the separation of migrant children from their parents violates the Due Process Clause of the Fourteenth Amendment, specifically the parents' Substantive Due Process rights.<sup>85</sup>

When coming to the conclusion that the separation of migrant children at the U.S. border violates their parents' Substantive Due Process rights, one must first determine whether the parents have a fundamental interest that is being violated by the government.<sup>86</sup> Here in this case, migrant parents have a fundamental right and liberty interest in having custody over their child, as it is in the best interest of the migrant child to be in the custody of and be raised by his/her actual parents.<sup>87</sup> In fact, the Supreme Court has already recognized that "the interest of parents in the care, custody, and control of their children is a constitutionally recognized liberty interest."<sup>88</sup> Since migrant families have a fundamental right in having custody over their children that is constitutionally protected, the Supreme Court should undertake a Substantive Due Process analysis and conduct a strict scrutiny test on any laws that a future administration would try to pass that would try to separate migrant families at the border and place migrant children into detention facilities.<sup>89</sup> Thus, any law that the government tries to pass that is not narrowly tailored to a compelling government interest would be

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<sup>84</sup>*Zadvydas v. Davis*, 533 U.S. 678, 693 (2001); see also *Plyler v. Doe*, 457 U.S. 202, 210 (1982).

<sup>85</sup>*Id.*

<sup>86</sup>Natalie Lakosil, *The Flores Settlement: Ripping Families Apart Under the Law*, 48 Golden Gate U. L. Rev. 31, 55 (2018). (Last Visited March 22, 2019).

<sup>87</sup>*Id.*

<sup>88</sup>Peck, *supra* note 72.

<sup>89</sup>Lakosil, *supra* note 86.

deemed unconstitutional.<sup>90</sup> Hence, the Supreme Court should rule that any law that a future administration would try to pass that would separate migrant families violates the Due Process Clause of the Fourteenth Amendment and is thus unconstitutional unless it is narrowly tailored by the least restrictive means to a compelling government interest.<sup>91</sup> Additionally, the Supreme Court should make it clear in their ruling that not only should migrant families be kept together, but they should be released into public housing while their immigration statuses are being determined as well as to avoid placing them inhumane detention centers just as described in Solution A above.

However, just like Solution A described above, there is the issue of cases when separation is in the best interest of migrant children because their parents are involved in criminal activity or there is a high risk that could become victims of human trafficking. Well in cases like these, the government would be allowed to pass laws that separate migrant children from their parents as any such laws would be narrowly tailored to the compelling state interests of protecting these migrant children from being hurt as a result of their parents' criminal activity and preventing them from becoming victims of human trafficking. Thus, the Supreme Court should then mitigate this possible issue by setting out its own standards and procedures that are similar to those described in the *Flores* and *Hutto* Settlement Agreements for when it is in the best interest for migrant children to be separated from their parents. This would ensure that migrant children are never subjected to the inhumane and barbaric conditions that were present in the Trump Administration's zero-tolerance policy.

Ultimately, this solution of the Supreme Court ruling that the separation of migrant families at the border is unconstitutional because it violates the Due Process Clause of the Fourteenth Amendment would prevent any further administration from engaging in the mass separation of migrant children from their parents that occurred in the Trump Administration's zero-tolerance policy. This solution would once again adhere with the standards and procedures set out in the *Flores* and *Hutto* Settlement Agreements, as well as the principle of non-refoulement set out in the 1951 United Nations Refugee Convention. Thus, by ruling that the separation of families violates the Substantive Due Process

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<sup>90</sup>*Id.*

<sup>91</sup>*Id.*

rights of the parents means that any law or procedure trying to separate migrant children from their parents would have to survive the extremely high burden of strict scrutiny. This would only be possible in the very limited circumstances where separation is in the best interest of the child when their parents are involved in criminal activity or there is a high probability that they would become victims of human trafficking.

## V. CONCLUSION

The gross mistreatment of migrant children trying to enter the U.S. border after fleeing conflicts from their war-torn countries in Central America has been occurring since the late 1980's.<sup>92</sup> And while there have been many attempts to prevent this type of abuse toward migrant children from occurring by both domestic and international laws in both the *Flores* and *Hutto* Settlement Agreements as well as the 1951 United Nations Refugee Convention, none of these attempts were able to prevent the Trump Administration from enacting its zero-tolerance policy that led to the mass separation of migrant families and thousands of further instances of abuse toward migrant children in inhumane detention facilities.<sup>93</sup> Ironically, it was the very cruel nature of the zero-tolerance policy itself along with the inadequate legal procedures to prevent it from occurring that led to it being hotly contested in the mainstream media and by countless legal scholars.<sup>94</sup> Thus, new solutions are needed in order to ensure that the mass separation of migrant families and the gross mistreatment of migrant children would never occur under another administration again.

Solution A in this article suggesting that Congress should pass a statute making it illegal to separate migrant families at the border unless absolutely necessary, and even if separation is necessary, that the standards of *Flores* and *Hutto* should be codified, would help reach the goals of preventing migrant families from being separated on a mass scale and preventing migrant children from being subjected to inhumane living conditions in the few instances where separation is in the best interest of the child. Additionally, Solution A would prevent detention altogether as migrant families who attempt to cross the U.S. would be given the same privileges as

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<sup>92</sup>López, *supra* note 11.

<sup>93</sup>Hegarty, *supra* note 2.

<sup>94</sup>*Id.*

asylum seekers and be allowed to stay in public housing while their cases are being decided.<sup>95</sup>

Solution B on the other hand, avoids the problem of possible gridlock that would occur in Solution A due to the polarizing opinions on immigration between the right and the left. Solution B would avoid this gridlock altogether as it would allow the Supreme Court to rule that the separation of migrant families violates the Substantive Due Process rights of migrant parents since parents have a fundamental right/liberty interest in having custody of their children and it is in best interest of the child to be raised by his/her actual parents.<sup>96</sup> Moreover, just like Solution A, the Supreme Court in Solution B would rule that migrant families must stay in public housing while their immigration cases are being determined, and in the few instances where separation is in the best interest of the child, they would rule that the minimum requirements set out in *Flores* and *Hutto* must be followed by all immigration officials who are in charge of taking care of migrant children. Thus, if one of the two proposed solutions above is followed, then the atrocities that migrant families faced under the Trump Administration's zero-tolerance policy will never be repeated again.

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<sup>95</sup>Peck, *supra* note 74.

<sup>96</sup>Lakosil, *supra* note 86.