

# CURRENT DEVELOPMENTS

## REUNITE SEPARATED FAMILIES: A CALL TO THE BIDEN ADMINISTRATION TO RECTIFY THE IMPACT OF TRUMP'S ZERO-TOLERANCE IMMIGRATION POLICY

ASMITA DESWAL\*

This current development notes how the Trump administration violated the law by implementing a zero-tolerance immigration policy and urges the Biden administration to rectify the harm caused by the separation of families.

In 1997, a twelve-year class-action lawsuit concluded with the United States government reaching a settlement agreement (the “*Flores Settlement*”) with child welfare and legal advocates.<sup>1</sup> The agreement required the government to adhere to a number of minimum standards in their treatment and processing of children and to set limits on the length of time children can be incarcerated in immigration detention. A key clause in the agreement dictates that the government cannot detain children for longer than twenty days.<sup>2</sup>

In 2016, the United States Court of Appeals for the Ninth Circuit interpreted the above clause to apply to minors accompanied or unaccompanied by their parents.<sup>3</sup> The Trump administration claimed that this interpretation led to a surge of migrant families and minors from Central America requesting asylum and an increase in child smuggling.<sup>4</sup> To counter the court ruling

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\* Asmita Deswal, J.D. Candidate, 2021, Georgetown University Law Center; B.A. Philosophy, magna cum laude, 2014, California State University, Long Beach. © 2021, Asmita Deswal.

1. *7 Things to Know About the Flores Settlement Agreement*, LUTHERAN IMMIGR. & REFUGEE SERV. (Sept. 26, 2018), [https://www.lirs.org/flores-settlement-agreement/?gclid=CjwKCAiAirb\\_BRBNEiWA LHlnD1wpNo\\_VNU-WIAo3q6Bsn1bN24hdQBOXD\\_rCOPfjtbAPeYpwwQX9fRoC\\_ogQAvD\\_BwE](https://www.lirs.org/flores-settlement-agreement/?gclid=CjwKCAiAirb_BRBNEiWA LHlnD1wpNo_VNU-WIAo3q6Bsn1bN24hdQBOXD_rCOPfjtbAPeYpwwQX9fRoC_ogQAvD_BwE).

2. *The Flores Settlement and Family Incarceration: A Brief History and Next Steps*, HUM. RTS. FIRST (October 30, 2018), <https://www.humanrightsfirst.org/resource/flores-settlement-and-family-incarceration-brief-history-and-next-steps>.

3. *Flores v. Lynch*, 828 F.3d 898, 901 (9th Cir. 2016).

4. *President Donald J. Trump is Taking Action to Close the Loopholes That Fuel the Humanitarian Crisis On Our Border*, TRUMP WHITE HOUSE ARCHIVES (August 21, 2019), <https://trumpwhitehouse.archives.gov/briefings-statements/president-donald-j-trump-taking-action-close-loopholes-fuel->

and deter such migration, President Trump ordered the detention and criminal prosecution of all those crossing the border illegally.<sup>5</sup> The children, including babies and toddlers, were then taken from their parents and placed into protective custody with the Department of Health and Human Security, separate from their parents.<sup>6</sup>

On April 6, 2018, President Trump issued a memo<sup>7</sup> directing all agencies to end the “catch and release” program, which allowed migrants to be released from detention, on bond or otherwise, while awaiting their court hearing.<sup>8</sup> And, one month later, the Administration officially implemented the “zero-tolerance” policy, which resulted in the immediate separation of parents from their children and dictated “that all migrants who cross the border without permission, including those seeking asylum, be referred to the Department of Justice for prosecution.”<sup>9</sup>

This zero-tolerance policy violated domestic U.S. law, human rights law, and international law. First, it violated domestic law by breaching the *Flores Settlement* and its twenty-day release rule. Second, it violated human rights law by breaching the Convention Relating to the Status of Refugees<sup>10</sup> and the Protocol Relating to the Status of Refugees,<sup>11</sup> both of which the United States is bound to constitutionally.<sup>12</sup> These treaties make clear that refugees<sup>13</sup> have the human right to request asylum. They also “prohibit countries from punishing refugees for entering illegally if their life or freedom is threatened at

humanitarian-crisis-border/?utm\_source=link (“The *Flores* loophole has been exploited by human smugglers and others who use children as pawns to bring illegal aliens into the country.”).

5. *Family Separation Under the Trump Administration – A Timeline*, S. POVERTY L. CTR. (June 17, 2020), <https://www.splcenter.org/news/2020/06/17/family-separation-under-trump-administration-timeline>. (“By late 2017, the government was separating families along the length of the U.S.-Mexico border, including families arriving through official ports of entry.”).

6. Julia Edwards Ainsley, *Exclusive: Trump administration considering separating women, children at Mexico border*, REUTERS (March 3, 2017, 3:13 PM), <https://www.reuters.com/article/us-usa-immigration-children-idUSKBN16A2ES>; Lisa Riordan Seville & Hannah Rappleye, *Trump admin ran ‘pilot program’ for separating migrant families in 2017*, NBC NEWS (June 29, 2019, 4:30 AM), <https://www.nbcnews.com/storyline/immigration-border-crisis/trump-admin-ran-pilot-program-separating-migrant-families-2017-n887616>.

7. Memorandum from the President to Sec’y of State et al., Ending “Catch and Release” at the Border of the U.S. and Directing Other Enhancements to Immigration Enforcement, 83 Fed. Reg. 16179 (April 13, 2018), <https://www.govinfo.gov/content/pkg/FR-2018-04-13/pdf/2018-07962.pdf>.

8. Julie Hirschfeld Davis, *Trump Signs Memo Ordering End to ‘Catch and Release’ Immigration Policy*, N.Y. TIMES (April 6, 2018), <https://www.nytimes.com/2018/04/06/us/politics/trump-immigration-policy.html>.

9. S. POVERTY L. CTR., *supra* note 5 (noting that undocumented asylum seekers were imprisoned and any other accompanying child under the age of eighteen was handed over to DHHS and scattered across among 100 ORR shelters).

10. Convention relating to the Status of Refugees, *adopted* July 28, 1951, art. 1, 19 U.S.T. 6259, 189 U.N.T.S. 137, 150 (entered into force Apr. 22, 1954) [hereinafter Refugee Convention].

11. Protocol Relating to the Status of Refugees, Jan. 31, 1967, 19 U.N.T.S. 267 [hereinafter Refugee Protocol].

12. U.S. CONST. art. VI. cl. 2 (noting that all treaties made under the authority of the United States “shall be the Supreme law of the land”).

13. Refugee Convention, *supra* note 10 (defining refugee as a “[p]erson fleeing her or his country of origin because of a well-founded fear of persecution on the basis of race, religion, nationality, membership in a particular social group or political opinion”).

home.”<sup>14</sup> Thus, the Trump administration infringed on human rights by denying refugees their right to seek asylum and imprisoning them instead. Lastly, the policy violated international law by defying the International Covenant on Civil and Political Rights<sup>15</sup> (“ICCPR”), which the United States ratified in 1992. The ICCPR mandates that the government treat persons humanely and respect the “inherent dignity of the human person” when arresting, detaining, or imprisoning someone.<sup>16</sup> It also recognizes the right to “security of person,” “the right to liberty,” and a right to challenge detention “before a court . . . without delay.”<sup>17</sup> Forcing children to sleep on cement floors with constant light exposure, insufficient food and water, no bathing facilities, lack of toiletries, portable restrooms, and freezing temperatures is not humane. It is blatant harm to one’s dignity.<sup>18</sup> The government acted with an awareness of its culpability as Senators were denied entry into children’s shelters, and U.S. Customs and Immigration Enforcement (ICE) agents forbade reporters from interviewing any of the detainees or taking photos.<sup>19</sup> Through its zero-tolerance policy, the government detained families arbitrarily and indefinitely without any recourse, interfered with family unity, and stripped children from their parents.

Reacting to public pressure and social unrest, President Trump issued an executive order to end the policy on June 20, 2018.<sup>20</sup> However, by this time, more than 2,500 children had been separated from their families.<sup>21</sup>

On June 26, 2018, in response to a class-action lawsuit by the American Civil Liberties Union (“ACLU”), Federal Judge Dana Sabrow issued a preliminary injunction requiring nearly all separated children younger than five to be returned to their parents within fourteen days and older children to be returned within thirty days.<sup>22</sup>

The government’s reactive and haphazard response to an increase in migration from Central America and the implementation of a cruel policy

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14. Jeffery Davis, *U.S. ‘Zero-Tolerance’ Immigration Policy Still Violating Fundamental Human Rights Laws*, UPI (June 27, 2018, 9:11 AM), [https://www.upi.com/Top\\_News/Voices/2018/06/27/US-zero-tolerance-immigration-policy-still-violating-fundamental-human-rights-laws/2171530104203/](https://www.upi.com/Top_News/Voices/2018/06/27/US-zero-tolerance-immigration-policy-still-violating-fundamental-human-rights-laws/2171530104203/).

15. International Covenant on Civil and Political Rights, GA Res 2200A (XXI), 21 U.N. GAOR Supp. (No. 16), UN Doc. A/6316 (1966), 999 U.N.T.S. 171 (entered into force Mar. 23, 1976) Art. 9(1) [hereinafter ICCPR].

16. *Id.* at pmb1.

17. *Id.* at art. 9.

18. Devin Miller, *Pediatricians Speak Out: Detention Is Not the Answer to Family Separation*, AAP NEWS (July 24, 2018), <https://www.aapublications.org/news/2018/07/24/washington072418>.

19. Nomaan Merchant, *Hundreds of children wait in Border Patrol facility in Texas*, AP NEWS (June 18, 2018), <https://apnews.com/article/9794de32d39d4c6f89fbefaea3780769>.

20. Exec. Order No. 13841, *Affording Congress an Opportunity to Address Family Separation*, 83 Fed. Reg. 29435 (June 20, 2018), <https://www.whitehouse.gov/presidential-actions/affording-congress-opportunity-address-family-separation>.

21. John Burnett, *How the Trump Administration’s ‘Zero Tolerance’ Policy Changed the Immigration Debate*, NPR (June 20, 2019, 4:21 PM), <https://www.npr.org/2019/06/20/734496862/how-the-trump-administrations-zero-tolerance-policy-changed-the-immigration-deba>.

22. Josh Gerstein & Ted Hesson, *Federal judge orders Trump administration to reunite migrant families*, POLITICO (June 27, 2018, 7:58 AM), <https://www.politico.com/f/?id=00000164-3f39-d1bc-afef-7fbbdf010001>.

created long-lasting effects that have yet to be rectified. Its inefficient record-keeping of separated families was clear when the Department of Homeland Security (DHS) sent an email to U.S. Customs and Border Protection noting the incompleteness of records. For instance, DHS reported missing Alien numbers of family members on Form I-213, which provides a record of deportable or inadmissible aliens and is helpful for identification of persons.<sup>23</sup> The email illustrates the unfortunate product of inadequate planning but also a lack of intent by the Administration to reunite families in a timely manner. The government routinely maintains records of belongings and personal property of detainees in immigration proceedings,<sup>24</sup> yet the government failed to keep track of or provide effective communication between migrants and their families. The difficulty of reuniting thousands who were, without regard, separated from each other emphasizes the Trump administration's lack of discernment and decency towards migrants.

More than five months after the effective date of the judicial order requiring children to be returned to their families, the list of families entitled to reunification was still being revised.<sup>25</sup> And, with no coordinated formal tracking system between the agencies involved, the exact number of children separated was unknown.<sup>26</sup> Unquestionably, the longer these children are separated from their parents, the more psychological trauma they endure.<sup>27</sup> To make matters worse, instead of focusing its energy on reuniting families, the Trump administration continued a variation of its family separation policy by telling immigration agents to give parents that crossed the border illegally "two options: leave the country with your kids—or leave the country without them."<sup>28</sup>

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23. *A Timeline of the Trump Administration's Family-Separation Policy*, AM. OVERSIGHT, <https://www.americanoversight.org/a-timeline-of-the-trump-administrations-family-separation-policy> (last visited Jan. 28, 2021); Email from Deborah T. Fleischaker, Deputy Dir., Compliance Branch, to Cameron Quinn, Officer, C.R.C.L. (June 25, 2018, 2:33:20 PM), <https://www.documentcloud.org/documents/6257038-DHS-Records-Regarding-Communications-with.html#document/p13/a562446>.

24. PERFORMANCE-BASED NATIONAL DETENTION STANDARDS, Funds and Personal Property, § 2.5 (2011) (revised 2016) (I. & N. Dec.), <https://www.ice.gov/doctlib/detention-standards/2011/pbnds2011r2016.pdf> (providing the detention standard which ensures detainees' personal property is safeguarded and controlled at a detention facility).

25. Off. of Inspector Gen., *HHS OIG: Many Children Separated from Parents, Guardians Before Ms. L. v. Ice Court Order and Some Separations Continue*, U.S. DEP'T OF HEALTH & HUM. SERVS. (Jan. 17, 2019), <https://oig.hhs.gov/newsroom/news-releases/2019/uac.asp> (noting the lack of an existing, integrated data system to track separated families across HHS and DHS and the complexity of determining which children should be considered separated); Julia Jacobs, *U.S. Says It Could Take 2 Years to Identify Up to Thousands of Separated Immigrant Families*, N.Y. TIMES (April 6, 2019), <https://www.nytimes.com/2019/04/06/us/family-separation-trump-administration.html> (noting that the government would take at least one to two years to go through a list of about 47,000 children who were referred to the ORR and subsequently discharged, and the US CBP did not collect specific data on migrant family separations before April 2018).

26. Off. of Inspector Gen., *Separated Children Placed in Office of Refugee Resettlement Care*, U.S. DEP'T OF HEALTH & HUMAN SERVS., (Jan. 2019), <https://oig.hhs.gov/oei/reports/oei-BL-18-00511.pdf>.

27. Jessica Henderson Daniel, *Statement of APA President Regarding the Traumatic Effects of Separating Immigrant Families*, AM. PSYCH. ASS'N (May 29, 2018), <https://www.apa.org/news/press/releases/2018/05/separating-immigrant-families>.

28. Julia Ainsley & Jacob Soboroff, *New Trump Admin Order for Separated Parents: Leave U.S. With Kids Or Without Them*, NBC NEWS (July 3, 2018, 1:36 PM), <https://www.nbcnews.com/politics/>

By June 2019, not only did the Trump administration fail to follow through with the court-ordered nationwide injunction placed over a year prior, but more than 1,100 additional families had been separated since the executive order and injunction—“bringing the total number of children impacted to at least 5,446.”<sup>29</sup> Additionally, lawyers visiting a Border Patrol station in Texas found that detained youth were suffering through inhumane conditions; about 250 infants, children, and teens were locked up for up to twenty-seven days without adequate food, water, or sanitation.<sup>30</sup> Some migrant children held in a Texas CBP facility had not bathed since crossing the border, had soiled clothes, and did not have access to soap, toothbrushes, or toothpaste.<sup>31</sup>

The Department of Homeland Security’s inadequate standard of care at detention facilities was even more evident at the onset of the COVID-19 global pandemic. This is when, on June 26, 2020, Federal Judge Dolly Gee ordered that all children detained for more than twenty days be released within three weeks because of the pandemic.<sup>32</sup> Though a victory for detainees, over 500 children remained separated from their families per the zero-tolerance policy.<sup>33</sup> Exacerbating the difficulty of the search process, strict curfews, and other COVID-19 containment measures halted volunteer attorneys and nonprofit staff from continuing to physically track families on the ground in Honduras, Guatemala, El Salvador, and Mexico.<sup>34</sup>

On December 4, 2020, the Trump administration finally provided phone numbers and other previously withheld information to legal advocates for the

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immigration/new-trump-admin-order-separated-parents-leave-u-s-kids-n888631 (“[T]he form U.S. Immigration and Customs Enforcement (ICE) agents are directed to read to detained parents instructs them to sign next to one of two lines: ‘I am requesting to reunite with my child(ren) for the purpose of repatriation to my country of citizenship,’ or ‘I am affirmatively, knowingly, and voluntarily requesting to return to my country of citizenship without my minor child(ren) who I understand will remain in the United States to pursue available claims of relief.’”).

29. John Washington, *The Government Has Taken At Least 1,100 Children from Their Parents Since Family Separations Officially Ended*, THE INTERCEPT (Dec. 9, 2019), <https://theintercept.com/2019/12/09/family-separation-policy-lawsuit/> (noting that Border Patrol agents, untrained in child welfare, make decisions regarding parents being unfit to stay with their children based solely on brief interactions).

30. Cedar Attanasio, Garance Burke, & Martha Mendoza, *Lawyers: 250 Children Held in Bad Conditions at Texas Border*, AP NEWS (June 20, 2019), <https://apnews.com/article/a074f375e643408cb9b8d1a5fc5acf6a>.

31. Caitlin Dickerson, *‘There Is a Stench’: Soiled Clothes and No Baths for Migrant Children at a Texas Center*, N.Y. TIMES (June 21, 2019), <https://www.nytimes.com/2019/06/21/us/migrant-children-border-soap.html>.

32. Vanessa Romo, *Judge Orders ICT to Free Detained Immigrant Children Because of COVID-19*, NPR (June 26, 2020) <https://www.npr.org/sections/coronavirus-live-updates/2020/06/26/884186168/judge-orders-ice-to-free-detained-immigrant-children-because-of-covid-19>.

33. Teo Armus & Maria Sacchetti, *The Parents Of 545 Children Separated at the Border Still Haven’t Been Found. The Pandemic Isn’t Helping*, WASH. POST (Oct. 21, 2020), <https://www.washingtonpost.com/nation/2020/10/21/family-separation-parents-border-covid/>.

34. *Id.*; see also Rick Jervis, *Biden’s Effort to Reunite Trump-era Separated Families is Trickiest Immigration Challenge*, USA TODAY (Jan. 23, 2020), <https://www.usatoday.com/story/news/nation/2021/01/23/family-separations-trump-biden-administration-immigration-rules/6672057002/> (“The task of finding parents who were separated then deported without their children has fallen mostly to advocacy groups . . . The efforts, which include enlisting local human rights attorneys to venture to remote villages and track down parents using scant information, were halted for months as the coronavirus pandemic roiled through the hemisphere and have only recently picked back up . . .”).

remaining children.<sup>35</sup> However, due to the difficulty of tracking and lack of government help, the search may continue for years.<sup>36</sup>

Although a vast majority of undocumented migrants and asylum seekers return to court for their immigration appointments after release, the government implemented a horrific policy unmoored from American values.<sup>37</sup> People expect the United States government not to violate human rights. Basic human civility demands that the government be certain there is a great risk of harm *before* it tears a family apart. Without question, using fear of indefinite detention or family separation is a deplorable way to deter migration.

Under our new Administration, President Biden has correctly referred to the zero-tolerance policy as a “moral failing.”<sup>38</sup> He has promised to reform the asylum system, assured an immediate end to the prosecution of parents for minor immigration violations that led to the separation of parents and children, and formed a task force to reunify the remaining 600 parents with their children.<sup>39</sup> The task force will identify all children separated and then make appropriate recommendations to President Biden and federal agencies on steps needed to reunify families.<sup>40</sup> This process will likely occur on a case-by-case basis.<sup>41</sup>

Although establishing a task force is the right first step, the executive order mostly calls for planning and providing recommendations on the next steps rather than new policies to implement immediately. In addition to the delay in reunification caused by the global pandemic, separated families must wait another 120 days for the task force to make recommendations.<sup>42</sup> Hopefully, the task force will act with urgency and provide these families the justice they deserve.

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35. Anagha Srikanth, *Trump Administration Finally Hands Over Information Crucial to Reuniting Separated Migrant Families*, THE HILL (Dec. 4, 2020), <https://thehill.com/changing-america/resilience/refugees/528804-trump-administration-finally-hands-over-information>.

36. *Id.*

37. Ingrid Eagly, Steven Shafer, & Jana Whalley, *Detaining Families: A Study of Asylum Adjudication in Family Detention*, AM. IMMGR. COUNCIL (Aug. 16, 2018), [https://www.americanimmigrationcouncil.org/sites/default/files/research/detaining\\_families\\_a\\_study\\_of\\_asylum\\_adjudication\\_in\\_family\\_detention\\_final.pdf](https://www.americanimmigrationcouncil.org/sites/default/files/research/detaining_families_a_study_of_asylum_adjudication_in_family_detention_final.pdf) (noting a report that detailed a fifteen-year study on the experience of families in the immigration adjudication and deportation system finding that families released from detention were more likely to have legal representation, 86% of family members released from detention had attended all of their court hearings, and that 96% of asylum seekers had attended all their immigration court hearings).

38. Rick Jervis, *Biden's Effort to Reunite Trump-era Separated Families is Trickiest Immigration Challenge*, USA TODAY (Jan. 23, 2020), <https://www.usatoday.com/story/news/nation/2021/01/23/family-separations-trump-biden-administration-immigration-rules/6672057002/>.

39. *Id.*; see *Executive Order on the Establishment of Interagency Task Force on the Reunification of Families*, THE WHITE HOUSE (Feb. 02, 2021), <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/02/02/executive-order-the-establishment-of-interagency-task-force-on-the-reunification-of-families/>.

40. Sabrina Rodriguez, *Biden signs executive orders on family separation and asylum*, POLITICO (Feb. 2, 2021, 5:00 AM), <https://www.politico.com/news/2021/02/02/biden-executive-orders-family-separation-464816>.

41. *Id.*

42. *Id.*

A bigger issue is that the task force will only look at families still separated.<sup>43</sup> This means that those already reunited will not receive the same funding and mental health care recommendations despite suffering great physical, emotional, mental, and likely financial harm. Others also not included are those who, regardless of having an asylum case, chose to be deported back to the country they fled instead of being separated from their families. It is disappointing that these persons were denied a legal right to asylum and now have no recourse to challenge that denial. Although tracking these families in their country of origin is a cumbersome task, the Administration could work with nonprofit agencies and advocates already searching for separated family members to also search for those deported without a choice.

It is possible that we are not seeing the task force take more aggressive action due to the Administration's caution around potential political setbacks. For instance, providing care and resources to those already reunified or providing a grant of "parole"—which would allow noncitizens to enter or remain in the United States for specific reasons or issuing visas—may cause political pushback from the Republican party. However, we must recognize the harsh immorality our nation has been a part of and urgently correct our wrongs in the most empathetic and compassionate way possible.

Not only is allowing asylum applicants to settle in the United States the morally right thing to do, but it is also legally required under the international treaties ratified by the United States. Families, both united and still separated, should be allowed to settle in the United States with legal status and access to funds for basic needs, mental health resources, and medical care. At the least, the current Administration must continue to search for those separated, provide them with meaningful sources of redress, and prohibit future separation of families. After all, who knows what the 2024 Administration will prioritize?

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43. Julia Ainsley, Jacob Soboroff & Geoff Bennett, *Biden effort to reunite migrant families separated under Trump is not enough, say advocates*, NBC NEWS (Feb. 2, 2021, 10:44 AM), <https://www.nbcnews.com/politics/immigration/biden-effort-reunite-migrant-families-separated-under-trump-not-enough-n1256495>.