

NOTES

CROSSING THE BORDER OR CROSSING THE LINE? WHY ALTERNATE DISPUTE RESOLUTION IS THE BEST ROUTE TO REUNITE FAMILIES OF IMMIGRANT CHILDREN SEPARATED AT THE U.S.-MEXICO BORDER

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I. INTRODUCTION

The issue of family separation at the U.S.-Mexico border has recently come to the forefront of politics and national media, as staggering statistics and individual stories tell the tale of inhumane atrocities committed against immigrants during their journeys. As a consequence of the Trump Administration's "Zero Tolerance" immigration policy, more families than ever before in American history¹ are being separated. The policy has intentionally shifted the focus of immigrant detention from prosecution of criminals, to prosecution of anyone attempting to cross the border.² In light of this new, stricter regime, the Immigration and Customs Enforcement (ICE), the Department of Homeland Security group responsible for border enforcement,³ expanded their vast network of detention centers,⁴ and proposed the addition of 9,000⁵ more beds in pursuit of mass detention.

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¹ Caitlin Dickerson, *Detention of Migrant Children Has Skyrocketed to Highest Levels Ever*, N.Y. TIMES (Sept. 12, 2018), <https://www.nytimes.com/2018/09/12/us/migrant-children-detention.html>.

² *Key Health Implications of Separation of Families at the Border (as of June 27, 2018)*, KAISER FAM. FOUND. (June 27, 2018), <https://www.kff.org/disparities-policy/fact-sheet/key-health-implications-of-separation-of-families-at-the-border/>.

³ Muzaffar Chishti, Sarah Pierce & Jessica Bolter, *The Obama Record on Deportations: Deporter in Chief or Not?*, MIGRATION POL'Y INST. (Jan. 26, 2017), <https://www.migrationpolicy.org/article/obama-record-deportations-deporter-chief-or-not>.

⁴ MICHELLE BRANE, WOMEN'S REFUGEE COMM'N, PRISON FOR SURVIVORS: THE DETENTION OF WOMEN SEEKING ASYLUM IN THE UNITED STATES 10 (2017).

The president enjoys broad discretionary powers with regard to immigration, as codified by the Immigration and Nationality Act §212(d)(5) and interpreted by *Arizona v. United States*.⁶ Authority aside, there currently exists no viable solution to effectively reunite separated families. Litigation has proven ineffective and incapable of properly addressing the problem of family separation, typically requiring months⁷ of prolonged proceedings before the probable fate of deportation can be reached.⁸ The psychological effects of these separations are irreversible.⁹

This Note will explore the problem of family separation at the U.S.-Mexico border and propose a solution through the use of mediation as a means to peacefully reunite families without lengthy, emotionally-draining, and expensive litigation. It will discuss case law addressing the problem, as well as the recent history of family separation under President Obama and President Trump. This Note will briefly examine methods used to maintain a tough stance on immigration while also alleviating family separation of immigrant populations, looking to other developed countries' tactics, as well as the United States' Family Case Management Program (which enjoyed success in the recent past), for guidance. Finally, it will analyze the effectiveness of mediation in this context and propose a solution to the problem, focusing on reinstating the Family Case Management Program and transferring the functions of current immigration litigation actors in pursuit of mediation that is neutral and fair to all parties.

⁵ Livia Luan, *Profiting from Enforcement: The Role of Private Prisons in U.S. Immigration Detention*, MIGRATION POL'Y INST. (May 2, 2018), <https://www.migrationpolicy.org/article/profitting-enforcement-role-private-prisons-us-immigration-detention>.

⁶ *Arizona v. United States*, 567 U.S. 387 (2012) (An Arizona law for immigration enforcement was deemed mostly repetitive in light of federal immigration law. The Court struck down most of the law, explaining that federal immigration law also includes the Executive branch's decisions about "human concerns.").

⁷ Carrie Cordero, *Legal Considerations for Separating Families at the Border*, LAWFARE (June 29, 2018, 11:50 AM), <https://www.lawfareblog.com/legal-considerations-separating-families-border>.

⁸ Christina Jewett & Shefali Luthra, *Infants Summoned for Deportation Under Family Separation, Federal Data Shows*, PBS (July 18, 2018, 4:58 PM), <https://www.pbs.org/newshour/nation/at-least-70-infants-summoned-for-deportation-under-family-separation-federal-data-shows> (explaining that immigration court proceedings virtually always end in deportation, not true proceedings).

⁹ *Family Separation's Psychological Impact on Children from Family Separation: Combating Child Abandonment*, SOS CHILD. VILLAGES (June 25, 2018), <https://www.sos-usa.org/news/topics/ptsd-in-children/statement-on-family-separation>.

II. BACKGROUND

A. *The Flores Settlement*

One of the main justifications for family separation is born out of government noncompliance with and misinterpretation of the *Flores* agreement.¹⁰ The settlement agreement, which imposes obligations on the government with regards to child detention, came out of a lawsuit from 1997. In the original case of *Reno v. Flores*,¹¹ the Supreme Court ruled on certain issues between the parties, leaving other issues to the resolution of the parties. The two sides, a class of alien minors detained by the Immigration and Naturalization Service (“INS”) and the government acting through the Attorney General, then reached a settlement that outlined a “general policy favoring release.”¹² The policy essentially dictated that minor immigrant children would not be detained so long as they did not pose a risk to themselves or others. Pursuant to such policy, INS would release all detained minors “without unnecessary delay”¹³ after a determination that detention is not needed in order to “secure his or her timely appearance before the INS or the immigration court, or to ensure the minor’s safety or that of others.”¹⁴ In the case of release to a: parent; guardian; adult relative; adult designated by a parent or guardian¹⁵ as “capable and willing to care for the minor’s wellbeing;”¹⁶ a licensed program willing to accept legal custody; or adult or entity seeking custody (in the absence of other alternatives) that the INS deems fit, the INS remains responsible for the wellbeing of the minors.¹⁷ This includes INS discretion to terminate custody agreements if the custodian fails to comply with the agreement, and upon an investigation into the living conditions of the minor.¹⁸ This “positive suitability assessment” is supposed to “take into consideration the wishes and concerns of

¹⁰ Dora Schriro, *Weeping In the Playtime of Others: The Obama Administration’s Failed Reform of ICE Family Detention Practices*, 5 J. MIGRATION AND HUM. SECURITY 452, 456 (2017).

¹¹ *Reno v. Flores*, 507 U.S. 292 (1993).

¹² Stipulated Settlement Agreement at 9, *Flores v. Reno* No. 85-4544 (C.D. Cal. Jan. 17, 1997), <https://www.aclu.org/legal-document/flores-v-meese-stipulated-settlement-agreement-plus-extension-settlement>.

¹³ *Id.* at 10.

¹⁴ *Id.* at 9–10.

¹⁵ *Id.* at 10.

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ Stipulated Settlement Agreement, *supra* note 12, at 11.

the minor.”¹⁹ Finally, minors may be held in juvenile detention or transferred therein upon determinations that the child “has been charged with, is chargeable, or has been convicted of a crime,”²⁰ has threatened to commit crimes while in INS custody, has engaged in “unacceptably disruptive”²¹ conduct, is an “escape-risk,”²² or must be held there for his or her own safety (such as “reason to believe that a smuggler would abduct or coerce the minor for purposes of securing smuggling fees”).²³

After the agreement in 2002, Congress transferred the authority over the care of unaccompanied children to the United States Department of Health and Human Services (“DHHS”) and the Office of Refugee Resettlement (“ORR”), and kept the authority over family detention within ICE.²⁴ One of the stipulations coming out of the *Flores* settlement included a 2001 provision that the settlement would “only remain in effect until 45 days following defendants’ publications of final regulations [governing the treatment of detained minors].”²⁵ This was revised from the original portion of the settlement that indicated, “[a]ll terms of this Agreement shall terminate the earlier of five years after the date of final court approval of this Agreement or three years after the court determines that the INS is in substantial compliance with this agreement,”²⁶ the 2001 revision intentionally and drastically decreasing the timeline. However, after twenty years since the original agreement and almost eighteen years since this stipulation, the government still has yet to comply with the provision or publish any rules.²⁷ As a consequence, the *Flores* settlement continues to govern and play a role in family separation that inevitably involves child detention. A major group of people affected by family separation, minor children, have not been afforded the redress that they deserve. Instead, the portion of family separation policy that affects children rests in limbo.

¹⁹ *Id.*

²⁰ *Id.* at 12.

²¹ *Id.* at 13.

²² *Id.*

²³ *Id.* at 13–14.

²⁴ Schriro, *supra* note 10, at 455.

²⁵ Stipulation Extending Settlement Agreement and for Other Purposes, *Flores v. Reno* No. 85-4544 (C.D. Cal. Jan. 17, 1997), <https://www.aclu.org/legal-document/flores-v-meese-stipulated-settlement-agreement-plus-extension-settlement>.

²⁶ *Id.*

²⁷ Schriro, *supra* note 10, at 459.

A more recent 2018 court order stemming from a class action lawsuit clarified the policy with respect to a certain class of immigrants affected by family separation.²⁸ In *Ms. L v. ICE*, children who were separated from their parents after DHHS apprehension at the border were given judicial redress when the court ordered ORR to reunite all of those in its care.²⁹ However, problems persist as the total number of separated children remains unknown and officials speculate it to be much higher than the 2,737 reported as the number does not recognize those separated in 2017 or 2018 prior to the June 2018 order.³⁰ Evidence also suggests that there may have been a “pilot” family separation program³¹ implemented in El Paso nine months prior to the Trump Administration’s announcement, further contributing to the problem of unknown separations and their consequences. As such, action still needs to be taken to account for and reunite all of the separated families and children in order to achieve full redress and a long-term solution.

B. *The Obama Administration*

The Obama Administration took a firm stance on immigration without the express goal of separating families. In an executive order on November 20, 2014, Obama specifically signaled his intent to decrease illegal immigration at the border by “deporting felons,

²⁸ In the case of *Ms. L v. U.S. Immigrations and Customs Enforcement (ICE)*, the United States District Court for the Southern District of California ultimately required the federal government to identify and reunite separated families. In granting the Plaintiffs’ motion for class certification, the court defined the class that the order would affect as: “All 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 ORR custody, ORR foster care, or DHS custody, absent a determination that the parent is unfit or presents a danger to the child.” *Ms. L v. U.S. Immigration and Customs Enforcement (ICE)*, No. 18cv0428 DMS (MDD), slip op. at 17 (S.D. Cal. June 26, 2018), <https://www.aclu.org/legal-document/ms-l-v-ice-order-granting-part-plaintiffs-motion-class-certification>.

²⁹ U.S. DEP’T OF HEALTH & HUMAN SERVICES OFFICE OF INSPECTOR GEN., SEPARATED CHILDREN PLACED IN OFFICE OF REFUGEE RESETTLEMENT CARE (Jan. 2019), <http://cdn.cnn.com/cnn/2019/images/01/17/oei-bl-18-00511.pdf>.

³⁰ *Id.*; see also Priscilla Alvarez & Geneva Sands, *Watchdog: Thousands More Children Were Separated Than Government Admitted, and It Doesn’t Know How Many*, CNN POL., <https://www.cnn.com/2019/01/17/politics/inspector-general-unaccompanied-children-immigration/index.html> (last updated Jan. 17, 2019).

³¹ Sarah Friedmann, ‘60 Minutes’ Investigated Trump’s Family Separation Policy - and the Main Takeaways Are Daunting, BUSTLE (Nov. 26, 2018), <https://www.bustle.com/p/60-minutes-investigated-trumps-family-separation-policy-the-main-takeaways-are-daunting-13193391>.

not families” all while working to reduce family separation.³² The administration further acted on these goals by working with the Department of Homeland Security and “expand[ing] an existing program that allows certain individuals to apply for a provisional waiver for certain violations before departing the United States to attend visa interviews.”³³ Jeh Johnson, former Secretary of Homeland Security, recently explained in an interview that the goal was never to separate families, and this was never asked of Border Patrol or ICE personnel.³⁴ The goal was to remove those who posed threats to the “national security, public safety, and border security.”³⁵

However, while the focus of deportations rested predominantly on unauthorized border crossers and criminals³⁶ rather than families, the Obama administration’s immigration policies had far-reaching effects on those immigrants at the country’s interior. Although 92% of total ICE interior removals consisted of convicted criminals,³⁷ only 45% of those removed at the border were of that status.³⁸ This discrepancy illustrates the immediate deportation of families at the border through summary removal processes³⁹ before entry and family separation could occur. Rather than denouncing family separation or striving to reduce it, the Obama administration saw an increase in noncitizen removals⁴⁰ as compared to previous administrations.

Further, the Obama era enforcement policies centered more on detention of children with their families in the limited circumstances in which child detention occurred. Nonetheless, this tactic stood in opposition to the *Flores* agreement. In a 2015 ruling, the

³² Office of the Press Secretary, *Weekly Address: Immigration Accountability Executive Action*, THE WHITE HOUSE: PRESIDENT BARACK OBAMA (Nov. 22, 2014), <https://obamawhitehouse.archives.gov/the-press-office/2014/11/22/weekly-address-immigration-accountability-executive-action>.

³³ Immigration, *Streamlining Legal Immigration*, THE WHITE HOUSE: PRESIDENT BARACK OBAMA (Nov. 21, 2014), <https://obamawhitehouse.archives.gov/issues/immigration/streamlining-immigration>.

³⁴ *Jeh Johnson on Immigration And Trump*, NPR (June 9, 2018 8:10 AM), <https://www.npr.org/2018/06/09/618496706/jeh-johnson-on-immigration-and-trump> [hereinafter *Jeh Johnson*].

³⁵ *FY 2016 ICE Immigration Removals*, U.S. IMMIGR. AND CUSTOMS ENFORCEMENT (Dec. 5, 2017), <https://www.ice.gov/removal-statistics/2016> [hereinafter *ICE Removals*].

³⁶ Chishti et al., *supra* note 3.

³⁷ *ICE Removals*, *supra* note 35.

³⁸ *Id.*

³⁹ Interview with Lindsay Nash, Assistant Clinical Professor of Law, Benjamin N. Cardozo School of Law, in New York, NY (Nov. 25, 2018).

⁴⁰ Chishti et al., *supra* note 3.

Federal District Court for the Central District of California held that the Obama administration's detention of mothers and children in ICE facilities run by private prison contractors violated the 1997 *Flores* agreement as a "material breach" of the requirements to place children in facilities that are licensed to care for children and do not resemble prisons.⁴¹ On appeal, the administration argued that the agreement applies only to children separated from their parents, not those detained together.⁴² The court disagreed.⁴³ It is crucial that the government learn the terms and requirements of the *Flores* settlement in order to fully comply with them, and this knowledge was clearly lacking during the Obama Administration. Compliance with the settlement is important to ensure the safety of those detained, so the miscomprehension of the settlement terms proved to be a blockade in the way of enforcing a fair and safe immigration policy with respect to family detention.

The overall approach in the Obama era was not deportation of every immigrant who illegally crossed the border,⁴⁴ but rather targeted efforts to use enforcement funds in a strategic way that would help eliminate illegal immigrant criminals while also deterring illegal border crossing. Family detention, rather than family separation, followed as a consequence in many cases.

C. *The Trump Administration*

Immigration under President Trump has taken a starkly different turn. As opposed to the Obama Administration's goals, the Trump Administration's aim is to prosecute all illegal immigrants, regardless of the reason for entry.⁴⁵ This includes asylum-seekers⁴⁶

⁴¹ Julia Preston, *Judge Orders Release of Immigrant Children Detained by U.S.*, N.Y. TIMES (July 25, 2015), <https://www.nytimes.com/2015/07/26/us/detained-immigrant-children-judge-dolly-gee-ruling.html?module=inline>.

⁴² *Id.*

⁴³ *Id.*

⁴⁴ Scott Horsley, *5 Things to Know About Obama's Enforcement of Immigration Laws*, NPR (Aug. 31, 2016, 5:00 AM), <https://www.npr.org/2016/08/31/491965912/5-things-to-know-about-obamas-enforcement-of-immigration-laws>.

⁴⁵ Suzanne Gamboa & Daniella Silva, *Anguish at Southwest Border as More Immigrant Children are Separated from Parents*, NBC NEWS (May 22, 2018, 9:19 AM), <https://www.nbcnews.com/news/latino/anguish-southwest-border-more-immigrant-children-are-separated-parents-n874821>.

⁴⁶ *Id.*; See also *The Truth About Asylum*, REFUGEE COUNCIL, https://www.refugeecouncil.org.uk/policy_research/the_truth_about_asylum/the_facts_about_asylum (last visited Feb. 5, 2019) ("Asylum Seekers" has been defined by the 1951 United Nations Convention Relating to

who cross the border in hopes of fleeing violence in their home countries.⁴⁷ While Trump defends the actions by calling this the enforcement of the deportation of those considered “priorities”—people who have been convicted of a crime or pose a threat to national security⁴⁸—the catch-22 lies in the fact that now “criminals” include those who simply attempt to cross the border altogether.⁴⁹ As long as an immigrant agent finds an act to be subject to deportation, proceedings can commence against the person who commits the act.⁵⁰ This highly subjective interpretation and expansion of those who can be categorized as criminals marks an abrupt change from past border enforcement strategy.

The recent prosecution of everyone who crosses the US-Mexico border, as part of the “zero tolerance” policies⁵¹ enacted by the administration, through the Department of Justice, has led to record levels of immigrant detention,⁵² and the President intends to keep it that way. Due to political pressure and a judicial determination that the policy was legally unacceptable, on June 20, 2018, President Trump issues an Executive Order to keep immigrant families together.⁵³ Despite this order, in the months following the zero-tolerance policy, the number of separated families has continued to rise with no plan to retroactively reunite the separated.⁵⁴ A new proposal by President Trump seeks to collect DNA samples from immigrants in custody, which will be entered into a national criminal database, sealing the fate of these newly categorized

the Status of Refugees as: “a person who owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.”).

⁴⁷ D’Vera Cohn, Jeffrey S. Passel & Ana Gonzalez-Barrera, *Rise in U.S. Immigrants from El Salvador, Guatemala and Honduras Outpaces Growth from Elsewhere*, PEW RES. CTR.: HISPANIC TRENDS (Dec. 7, 2017), <http://www.pewhispanic.org/2017/12/07/rise-in-u-s-immigrants-from-el-salvador-guatemala-and-honduras-outpaces-growth-from-elsewhere>.

⁴⁸ *What the Immigration Crackdown Means for the Undocumented*, PBS NEWS HOUR (Feb. 21, 2017, 7:27 PM), <https://www.pbs.org/newshour/show/immigration-crackdown-means-undocumented>.

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *Families Divided*, TEX. TRIB., <https://www.texastribune.org/series/separated-immigrant-families-zero-tolerance>.

⁵² Dickerson, *supra* note 1.

⁵³ Ross Ramsey, *Analysis: The Unfolding Story of the Newest Americans*, TEX. TRIB. (July 25, 2018), <https://www.texastribune.org/2018/07/25/analysis-newest-americans-immigration-separation-texas>.

⁵⁴ *Id.*

criminals.⁵⁵ Former Attorney General Sessions announced a clear intent to prosecute adults and separate families and children,⁵⁶ leaving America wondering where the administration currently stands on the question of family separation, as the mixed messages continue.

As of July 2018, just one week before the court-ordered deadline for family reunification, the majority of families remained separated.⁵⁷ Of the 917 adults in the category deemed ineligible for reunification, half of those people were no longer in the United States, even though more than 2,500 children remained detained.⁵⁸ The “ineligibility” title comes mainly from past criminal offenses or convictions, thus begging the question: Why does the U.S. government insist on keeping these people detained in the country where our tax dollars are supporting them behind bars, when the whole policy is predicated on putting an end to illegal immigration to the United States?⁵⁹ This criminalization is doing quite the opposite of ending the problem of illegal immigration; it is keeping illegal immigrants at the interior for longer and costing more money in the process, an inefficient process on all ends. A September 2019 spending examination shows that cities that are home to border patrol facilities have shelled out millions of taxpayer dollars to care for immigrants: a bill that is meant to be footed by the federal government and a burden that these cities did not willingly take on.⁶⁰ Further, Trump’s June 20, 2018 executive order to keep families together, still remains noncompliant with the *Flores* settlement,

⁵⁵ Caitlin Dickerson, *U.S. Government Plans to Collect DNA from Detained Immigrants*, N.Y. TIMES (Oct. 2, 2019), https://www.nytimes.com/2019/10/02/us/dna-testing-immigrants.html?te=1&nl=morning-briefing&emc=edit_NN_p_20191003§ion=topNews?campaign_id=9&instance_id=12803&segment_id=17539&user_id=d065f5f47fb5515872ce9d40872fb756®i_id=95936646tion=topNews.

⁵⁶ *Attorney General Sessions Delivers Remarks Discussing the Immigration Enforcement Actions of the Trump Administration*, U.S. DEP’T OF JUST. (May 7, 2018), <https://www.justice.gov/opa/speech/attorney-general-sessions-delivers-remarks-discussing-immigration-enforcement-actions> [hereinafter *Attorney General Sessions*].

⁵⁷ *Bulk of Families Separated at U.S.-Mexico Border Remain Apart*, REUTERS (July 19, 2018, 10:50 PM), <https://www.reuters.com/article/us-usa-immigration/bulk-of-families-separated-at-u-s-mexico-border-remain-apart-idUSKBN1KA06K>.

⁵⁸ See Ramsey, *supra* note 53.

⁵⁹ Claire Parker & Matthew Watkins, *Trump Administration Reunites “Eligible” Immigrant Children Under 5, But Lawyers Complain About Blunders*, TEX. TRIB. (July 12, 2018), <https://www.texastribune.org/2018/07/12/trump-administration-reunites-57-immigrant-children-under-5-declares-t>.

⁶⁰ Alan Gomez, *Local Governments Spend Millions Caring for Migrants Dumped by Trump’s Border Patrol*, USA TODAY (Sept. 24, 2019), <https://www.usatoday.com/in-depth/news/nation/2019/09/23/border-crisis-trump-administration-real-cost-tax-money/1739727001/>.

which limits child detentions, accompanied or unaccompanied by adults⁶¹ as determined by the Obama administration's *Flores v. Lynch* suit,⁶² to 20 days.⁶³ The same district court judge who ruled on an Obama-era detention center's noncompliance with *Flores* ruled the same way about the conditions of a detention center during the Trump-era.⁶⁴ This ruling perpetuates the underlying issue that the settlement is outdated, and new rules must be promulgated from it to promote compliance. Now, Trump is aiming to replace the *Flores* agreement altogether and allow for the indefinite detention of immigrant families.⁶⁵

The trials for reunification have been nothing short of corrupt and unfair, ranging from lacking representation for immigrants to procedural issues and beyond. Families have been required to line up after weeks of waiting, with judges in Texas hearing about 1,000 cases per day in "mass assembly-line prosecutions."⁶⁶ In doing so, adults are told their only chance to see their children again is to plead guilty, leading to time served, more tax money spent, and hopes plummeted.⁶⁷ Public defenders are facing impossible caseloads, at times representing more than 70 adults in one day.⁶⁸ Additionally, international human rights law, as codified in the In-

⁶¹ Mr. Obama's Dubious Detention Centers, N.Y. TIMES (July 18, 2016), <https://www.nytimes.com/2016/07/18/opinion/mr-obamas-dubious-detention-centers.html>.

⁶² *Flores v. Lynch*, 828 F.3d 898 (9th Cir. 2016) (ruling that the Obama administration's detention violated the *Flores* agreement, because it applies to both unaccompanied minor children and accompanied minor children).

⁶³ Richard Gonzalez, *Trump's Executive Order on Family Separation: What It Does and Doesn't Do*, NPR (June 20, 2018), <https://www.npr.org/2018/06/20/622095441/trump-executive-order-on-family-separation-what-it-does-and-doesnt-do> [hereinafter *Trump Impact*].

⁶⁴ Plaintiffs' Motion to Enforce Class Action Settlement, *Flores v. Sessions*, No. CV 85-4544-DMG (AGRx) (C.D. Cal. 2018), <https://www.aila.org/File/Related/14111359ae.pdf> (United States District Judge Dolly Gee found that the conditions of an immigrant detention center in Texas violated the *Flores* agreement.).

⁶⁵ Geneva Sands & Sam Fossum, *Trump Administration to Allow Longer Detention of Migrant Families*, CNN POL. (Aug. 22, 2019), <https://www.cnn.com/2019/08/21/politics/immigration-family-detention-flores/index.html>.

⁶⁶ Dara Lind, *The Trump Administration's Separation of Families at the Border, Explained*, VOX (June 15, 2018, 12:03 PM), <https://www.vox.com/2018/6/11/17443198/children-immigrant-families-separated-parents>.

⁶⁷ *Id.*

⁶⁸ Russell Berman, *85 Immigrants Sentenced Together Before One Judge*, ATLANTIC (June 19, 2018), <https://www.theatlantic.com/politics/archive/2018/06/zero-tolerance-inside-a-south-texas-courtroom/563135>; Michael E. Miller, 'They Just Took Them?' Frantic Parents Separated from Their Kids Fill Courts on the Border, WASHINGTON POST (June 9, 2018, 6:44 PM), https://www.washingtonpost.com/local/they-just-took-them-frantic-parents-separated-from-their-kids-fill-courts-on-the-border/2018/06/09/e3f5170c-6aa9-11e8-bea7-c8eb28bc52b1_story.html?utm_term=.6e2330cb77bf.

ternational Covenant on Civil and Political Rights,⁶⁹ provides immigrants the right to legal representation in deportation proceedings.⁷⁰ The United States ratified this document in 1992, so the country must accordingly change its practices to comply with it, as the current options for legal representation for immigrants do not comport with what is required by international law.⁷¹ Something must be done to solve this problem and provide immigrants with the representation that they need, deserve, and have a right to receive.

III. DISCUSSION

The current overarching goals of immigration policy and border security as articulated by the Trump Administration are “securing the border,” “closing legal loopholes that prevent the prompt removal of those who cross the border illegally,” “moving to a system of merit-based immigration” that would “admit people who can support our economy and actively contribute to society,” and “providing a responsible solution to Deferred Action for Childhood Arrivals (DACA).”⁷² The main way in which the administration seeks to secure the border comes in the form of a proposed physical wall, a multi-billion dollar initiative, the idea of which has led to major backlash and the longest government shutdown in the nation’s history.⁷³ President Trump continues to cite the dramatic growth in families and unaccompanied children crossing the border⁷⁴ as justification for new policies such as a border wall. However, the President has also outwardly recognized that “more than 30 percent of women are sexually assaulted on the trek to the bor-

⁶⁹ G.A. Res. 2200A (XXI), International Covenant on Civil and Political Rights (Mar. 23, 1976).

⁷⁰ *Id.* at Article 14.

⁷¹ *Judge Orders that Detainees Can Meet with Attorneys in Person or by Phone*, ACLU SOUTHERN CAL. (June 21, 2018), <https://www.aclusocal.org/en/press-releases/court-finds-immigration-detainees-held-incommunicado-victorville-prison-must-be>.

⁷² OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, H.R. 6136, BORDER SECURITY AND IMMIGRATION REFORM ACT OF 2018 (2018) https://www.whitehouse.gov/wp-content/uploads/2018/06/saphr6136h_20180627.pdf; *Immigration*, WHITE HOUSE, <https://www.whitehouse.gov/issues/immigration> (last visited Feb. 7, 2019).

⁷³ Kimberly Amadeo, *Government Shutdown 2019, 2018, and 2013 Explained*, BALANCE (Oct. 26, 2019), <https://www.thebalance.com/government-shutdown-3305683>.

⁷⁴ *President Donald J. Trump’s Plan to Reopen the Government and Fund Border Security*, WHITE HOUSE (Jan. 19, 2019), <https://www.whitehouse.gov/briefings-statements/president-donald-j-trumps-plan-reopen-government-fund-border-security/> [hereinafter *Trump’s Plan*].

der”⁷⁵ and that a permanent solution to immigration issues,⁷⁶ including “asylum reform”⁷⁷ is needed. The conflicting ideals of both creating a blanket policy preventing all illegal immigrants access to the country, and creating a lasting solution that will better aid women, asylum-seekers, and “skilled” workers, creates a tension that is all but impossible to address under the new policy of categorizing every immigrant as illegal. These underlying issues and conflicting objectives have resulted in family separation and suffering that must be addressed.

An international examination of methods utilized by other developed countries to address the issue of illegal immigration shows that America stands alone in separating families. Even in Europe—which just faced its largest migrant crisis—families are not separated,⁷⁸ but are instead held in reception centers as a family unit until their requests are processed.⁷⁹ This process is enacted pursuant to European law, which dictates that the best interests of children must be kept in mind when separation occurs.⁸⁰ The United Nations Convention on the Rights of the Child⁸¹ documents the standardization of the international goal of maintaining family unity, establishing key principles and rights of children immigrants and refugees. As the largest ratified international human rights treaty in history with 140 signing countries and 196 ratifying countries,⁸² with 140 signing countries and 196 ratifying countries, the UNCRC creates guidelines and goals that govern the detention and separation of immigrant children.⁸³ Although America signed the document, the country never signed on as a party to the UNCRC, which says that children cannot be separated against their will from their parents unless it is in the child’s best interest.⁸⁴ Chapter 1, Article 8 of the Receptions Conditions Directive specifies this intention by outlining that the member states of the treaty

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ Hugo Bachega, *Separation of Migrant Families: What Other Countries Do*, BBC News (June 7, 2018), <https://www.bbc.com/news/world-us-canada-44374756>.

⁷⁹ *Id.*

⁸⁰ U.N. Treaty Collection, Status of Treaties: Convention on the Rights of the Child (Nov. 20, 1989), https://treaties.un.org/pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-11&chapter=4&lang=en [hereinafter *UNCRC*].

⁸¹ *Id.*

⁸² *What is the Convention on the Rights of the Child?*, UNICEF (Nov. 4, 2014), https://www.unicef.org/crc/index_30160.html; *UNCRC*.

⁸³ U.N Treaty Collection, *supra* note 81.

⁸⁴ *Id.*

are to take all appropriate measures necessary to maintain family unity⁸⁵ and way of life, and even to provide education to children that mirrors the host member state's education as closely as possible.⁸⁶ The United States, conversely, has treated families and children in a fashion more reminiscent of prisoners. The closest prospect to a normal way of life for immigrants was the Family Case Management Program, which was shut down by the Trump Administration.

Former Attorney General Sessions inflated numbers to make it seem like the influx in illegal border activity is isolated to the United States, when in reality the U.S. is the only country that takes such a heavy hand at the problem. Sessions has called American laws “the most generous immigration laws in the world”⁸⁷ by emphasizing recent “trends”⁸⁸ that have seen three-fold increases in border apprehensions from the year before, when this is only the case because there is no longer a way to escape prosecution. Now, to be at the border is to be a criminal; in the past,⁸⁹ it was a way a mother and child could have a chance to escape the violence of their home country.⁹⁰

The United States has adopted a policy of general deterrence from entering the United States, despite judicial rulings on the inadmissibility of employing such a policy.⁹¹ *R.I.L-R. v. Johnson*, a case decided by the United States District Court for the District of Columbia, affirmed past Supreme Court holdings that deemed using detention of immigrants for the purpose of deterring others from coming as a violation⁹² of the Due Process Clause of the United States Constitution.⁹³ In *R.I.L-R v. Johnson*, the government contended that the recent increase in detentions is more than just a reflection of high levels of immigration, rather it is the prod-

⁸⁵ *Document 32003l0009* at Article 12, EUR-LEX (Jan. 27, 2003), <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A32003L0009>.

⁸⁶ *Id.* at Article 14.

⁸⁷ *Attorney General Sessions, supra* note 56.

⁸⁸ *Id.*

⁸⁹ Miriam Valverde, *What You Need to Know About the Trump Administration's Zero-Tolerance Immigration Policy*, POLITIFACT (June 6, 2018, 10:38 AM), <https://www.politifact.com/truth-o-meter/article/2018/jun/06/what-you-need-know-about-trump-administrations-zer>.

⁹⁰ *Asylum Basics: Elements of Asylum Law*, IMMIGR. EQUALITY, <https://www.immigrationequality.org/get-legal-help/our-legal-resources/immigration-equality-asylum-manual/asylum-basics-elements-of-asylum-law/#.W8QIOhNKjq0> (last visited Feb. 6, 2018).

⁹¹ *R.I.L-R v. Johnson*, 80 F. Supp. 3d 164, 188 (D.D.C. 2015).

⁹² *Id.* at 189.

⁹³ U.S. CONST. amend. V.

uct of a “design to deter such migration.”⁹⁴ In that case, the Court held that the immigrant plaintiffs were entitled to Due Process protection and that the policy of deterrence occurring was likely unlawful, granting the plaintiffs’ motion for a preliminary injunction.⁹⁵ It was further held that such a policy causes “irreparable harm to mothers and children seeking asylum.”⁹⁶

Currently the majority of prison centers used for the detention of immigrants are privately funded and operated.⁹⁷ The largest of these private prison contractors, CoreCivic Inc. and GEO Group, Inc., operate more than half of the country’s private prison contracts and gain large profits from the detention of immigrants, whether it be those awaiting removal, those awaiting proceedings, or those seeking asylum.⁹⁸ In fiscal year 2017 alone, their combined revenue was more than \$4 billion.⁹⁹ Although the federal Bureau of Prisons identified “serious or systemic safety and security deficiencies at private prisons”¹⁰⁰ and the Justice Department announced it would not renew its contracts with the private prisons,¹⁰¹ the Trump administration rescinded the decision and moved forward with the private prison contracts.

Investigations into these privately-owned prisons have shown large numbers of isolated prisoners, reduced medical staff, and withheld medical treatment.¹⁰² A March 2018 document reported “excessive use of force as punishment, unsafe and unsanitary conditions, and denial of religious accommodation, among other concerns”¹⁰³ at a detention center in west Texas. In a class action lawsuit¹⁰⁴ brought by detainees of a detention center in Colorado operated by private prison contractor, GEO group, the detainees alleged that they were forced to clean the facilities without pay or instead, face sanctions such as solitary confinement.¹⁰⁵ Child abuse occurring in these ICE detention prisons further sheds light on the

⁹⁴ *R.I.L.-R v. Johnson*, 80 F. Supp. 3d at 175.

⁹⁵ *Id.*

⁹⁶ *Id.* at 191.

⁹⁷ Livia Luan, *Profiting from Enforcement: The Role of Private Prisons in U.S. Immigration Detention*, MIGRATION POL’Y INST. (May 2, 2018), <https://www.migrationpolicy.org/article/profitting-enforcement-role-private-prisons-us-immigration-detention>.

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ Luan, *supra* note 97.

¹⁰⁴ *Menocal v. GEO Group, Inc.*, 882 F.3d 905 (10th Cir. 2018).

¹⁰⁵ *Id.* at 911.

problem. ACLU reports, based on extensive documentation obtained through the Freedom of Information Act, indicate widespread physical and mental abuse of children held in detention, from: running children over with vehicles; using stun guns on children; punching children; denying children free movement including standing upright; and threatened and performed sexual abuse.¹⁰⁶ The conditions at the private prisons currently used to house immigrants are inhumane, unsanitary, and unfair. Children and their families should not be abused, denied access to food, water, or medical care, or otherwise punished simply for seeking a safer life. Something must be done.

If the focus is on reducing illegal immigration, the solution lies in neither generally deterring immigrants, nor housing people in these detention centers just so that the private prison companies can turn a profit. Those seeking asylum—specifically families and children—need safer alternatives that can propel the president’s policy of cracking down on illegal immigration without stripping these people of their basic rights or denying blanket access to citizenship, with insufficient legal representation to properly address the problem. The legal system itself poses major obstacles, be they language barriers, access to attorneys, or delayed proceedings. An alternative to the traditional legal proceedings in immigration court is both highly preferable and highly necessary.

IV. PROPOSAL

A. *Reinstatement of the Family Case Management Program*

Alternative dispute resolution tactics can be utilized as an effective means of enforcing immigration policy while also providing a smoother route for access to fair hearings and, in effect, justice for families. The first step I propose is the implementation of the Family Case Management Program (“FCMP”) by ICE as a route to reunification of families. The program helps address and combat the problems of inhumane conditions, family separation, and consequential emotional damage that occurs in anticipation of deportation proceedings by organizing a system of access to

¹⁰⁶ *ACLU Obtains Documents Showing Widespread Abuse of Child Immigrants in U.S. Custody*, ACLU (May 22, 2018), <https://www.aclu.org/news/aclu-obtains-documents-showing-widespread-abuse-child-immigrants-us-custody>.

individualized assistance and supplemental opportunities for immigrants to remain in their home countries while waiting for the proceedings to ensue.¹⁰⁷ This program proved effective in cities in which it was tested, which include New York, Baltimore, Miami, Washington D.C., Newark, NJ, Los Angeles, and Chicago.¹⁰⁸

Operating from January 2016 to June 2017 when the Trump administration ended the Program, the FCMP was created in response to international research on the efficacy of individualized case management.¹⁰⁹ The FCMP, a counseling service¹¹⁰ that informed and aided immigrants in navigating the legal system surrounding deportation proceedings, consisted of social workers and assisted 630 families¹¹¹ during its operation. The FCMP helped immigrants in many aspects of life pending deportation proceedings, including getting them housing, healthcare, and schooling¹¹² in anticipation of a decision about whether or not the family would be permitted to remain in the United States. Premised on the idea that developing a comprehensive understanding of the immigration process promotes the highest levels of compliance with the government's requirements,¹¹³ the program realized a 99% success rate enjoyed by vast decreases in expenses.¹¹⁴ For approximately \$38 per day per family, as opposed to ICE's \$320 per person per day detention costs,¹¹⁵ this "alternative to detention" resulted in virtually every family enrolled attending their immigration court hearings and ICE appointments.¹¹⁶ The FCMP also helped ensure compliance with final removal orders and provided guidance to families navigating the removal process.¹¹⁷

¹⁰⁷ U.S. DEP'T OF HOMELAND SEC., U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT'S AWARD OF THE FAMILY CASE MANAGEMENT PROGRAM CONTRACT (REDACTED) (2017), <https://www.oig.dhs.gov/sites/default/files/assets/2017-12/OIG-18-22-Nov17.pdf> [hereinafter *Award of the FCMP*].

¹⁰⁸ *Id.* at 2.

¹⁰⁹ WOMEN'S REFUGEE COMM'N, FAMILY CASE MANAGEMENT PROGRAM (2018) <https://www.womensrefugeecommission.org/rights/resources/1653-family-case-management-program> [hereinafter *FCMP*].

¹¹⁰ Frank Bajak, *ICE Shuttles Helpful Family Management Program Amid Budget Cuts*, CHRISTIAN SCI. MONITOR (June 9, 2017), <https://www.csmonitor.com/USA/Foreign-Policy/2017/0609/ICE-shuttles-helpful-family-management-program-amid-budget-cuts>.

¹¹¹ *Id.*

¹¹² *Id.*

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ Bajak, *supra* note 110.

¹¹⁷ *Id.*

The Program’s holistic approach to case management in providing legal assistance, medical assistance, access to social services, and educational enrollment for children helped ensure its success.¹¹⁸ The FCMP directly impacted the populations of asylum-seekers—those who were deemed “good candidates” for less-secure release¹¹⁹—which resulted in compliance with removal orders after the fact, since families felt they had been informed of their rights and given a fair chance.¹²⁰ When immigrants feel as though they have been treated humanely and fairly by the United States government in making a case for remaining in the interior, they will be less likely to disobey removal orders, a correlation realized by this program.

Because of its goals, initiatives, and actors involved, the FCMP was particularly effective in both keeping families together and keeping them organized. One of the major underlying problems with the “zero tolerance” policy was in regard to its abrupt enactment,¹²¹ which precluded proper recordkeeping¹²² by the Office of Civil Rights and Civil Liberties’ Homeland Security Headquarters.¹²³ If it were reenacted, a group of the Family Case Management Program’s social workers could shift their duties from the original goal of helping the previously-identified families, to identifying those who were never properly identified or recorded. This shift in resources would help retroactively reunite families who were adversely impacted by the unexpected passage of the new policy. Scott Shuchart, a former employee at the Department of Homeland Security, explained in a CBS News interview that the executive order to separate families was “so abrupt it bypassed the usual review,”¹²⁴ a process that would have included providing advice¹²⁵ on what should be done and what recordkeeping should have been employed to ensure that everyone was accounted for.¹²⁶

¹¹⁸ *Id.*

¹¹⁹ Jane C. Timm, *This Obama-Era Pilot Program Kept Asylum-Seeking Migrant Families Together. Trump Canceled It*, NBC NEWS (June 24, 2018, 8:02 AM), <https://www.nbcnews.com/storyline/immigration-border-crisis/obama-era-pilot-program-kept-asylum-seeking-migrant-families-together-n885896>.

¹²⁰ *Id.*

¹²¹ Scott Pelley, *The Chaos Behind Donald Trump’s Policy of Family Separation at the Border*, CBS NEWS (Nov. 26, 2018), <https://www.cbsnews.com/news/trump-family-separation-policy-mexican-border-60-minutes-investigation-greater-in-number-than-trump-administration-admits/>.

¹²² *Id.*

¹²³ *Id.*

¹²⁴ *Id.*

¹²⁵ *Id.*

¹²⁶ *Id.*

Because of the lacking—and oftentimes nonexistent—advice and review process, families and children were consequentially separated without records to keep track of their locations for later reunification.¹²⁷ The interview explains that a Homeland Security internal investigation on the matter outlined these subpar standards, with one border station making “no effort to identify and reunite families prior to [their] removal [from the United States].”¹²⁸ Further, the lack of preparation on the DHS’ end resulted in “incompatible computer systems” that “erased data [connecting] children with their families.”¹²⁹ The poor recordkeeping resulted in threats to the health of already-compromised immigrant populations, as well. Children and adults in custody were given the wrong doses of vaccines in mass immunization episodes¹³⁰ and psychiatrists tasked with investigating the government detention facilities expressed “concerns about the trauma the children could experience . . . that could lead [to] delays in developmental milestones, difficulties with their [future] memory or thinking, [and] difficulty forming relationships and regulating their emotions.”¹³¹ These concerns unfortunately transpired and proved well-founded in the case of a three-year-old boy who was separated from his mother for 73 days, appearing “withdrawn and moody,”¹³² and emotionally detached from his mother. This proliferation of problems resulted simply from a lack of organization and consultation with the appropriate entities before the sweeping policy was enacted. The FCMP should be reenacted as a means to combat and resolve these problems, ultimately helping reunite families.

B. *Shifting FCMP Functions and Resources*

Rather than using the FCMP as a means to prepare for litigation, it can be used as a means to achieve the Trump Administration’s goal of curtailing illegal immigration while also lessening the hardships and emotional turmoil imposed by prolonged, costly litigation. By reinstating the FCMP, we can shift away from demonizing asylum-seekers and back to focusing on those who could pose a

¹²⁷ Pelley, *supra* note 121.

¹²⁸ *Id.*

¹²⁹ *Id.*

¹³⁰ *Id.*

¹³¹ *Id.*

¹³² *Id.*

real danger to the country by providing the former with safe housing to encompass both individuals and family units in anticipation of mediation proceedings. This will create a snowball effect of satisfying the terms of the *Flores* agreement, keeping families together, educating immigrants on their rights, and in turn enforcing compliance with the immigration laws President Trump seeks to enforce. Further, it will eliminate the health and safety concerns of the current detention options, helping immigrants live safely and humanely while awaiting deportation proceedings.

The Trump Administration has already indicated its support in allocating \$800 million towards “humanitarian assistance, medical support, and new temporary housing”¹³³ and \$563 million to “support our immigration court system”¹³⁴ in hiring “75 new immigration judge teams to reduce the immigration backlog of 800,000 cases.”¹³⁵ Adding these costs into what the Administration deems “responsible government funding”¹³⁶ for the proposed “bipartisan and common sense legislation,”¹³⁷ it is evident that the Administration’s goals align with those of the FCMP despite the Administration’s canceling the Program. If the apparently-stigmatized dialogue behind the Program can be changed, or even if a new name can be given to the FCMP’s strategy as an integration into Trump’s immigration and border security goals, it is sure to enjoy even greater success as greater funds are reallocated to it. It is important to note that reinstating the FCMP does not equate with a higher interior immigrant population, nor does it create automatically-granted asylum. Instead, it translates to informed immigrant populations who can be treated humanely and kept together with their families before an ultimate decision is rendered on the legality of their stay. By recrafting the Program into one on which the Trump Administration is happy to stamp their approval, we can satisfy the goals and concerns of all involved, especially the families and children who are directly impacted.

The detention centers currently in use¹³⁸ can instead be used as temporary housing for those anticipating mediation, or as a home to FCMP case managers, ICE personnel, and neutral arbiters, shifting the functions of the centers to be put to a use that

¹³³ *Trump’s Plan*, *supra* note 74.

¹³⁴ *Id.*

¹³⁵ *Id.*

¹³⁶ *Id.*

¹³⁷ *Id.*

¹³⁸ *Detention Facility Locator*, U.S. IMMIGR. & CUSTOMS ENFORCEMENT, <https://www.ice.gov/detention-facilities> (last visited Jan. 20, 2020).

could benefit all parties rather than creating more beds¹³⁹ in preparation for costly detention procedures. The requisite funds to complete this functional conversion of the spaces can be taken from those that the Trump Administration seeks to release to achieve their immigration goals, as outlined above.

C. *Mediation as a Means to Address Underlying Problems*

Jeh Johnson, former Secretary of Homeland Security, admitted that illegal immigration will never be fully addressed without addressing and understanding its underlying causes.¹⁴⁰ By giving a voice to detained people, we can address not only the impacts of family separation and draining litigation, but we can also start to understand the underlying reasons for which they are attempting to cross the border. In this way, we invest in both the health and safety of our neighboring immigrant population and the future of the U.S. economy and national security by learning how to proactively address the problem at its core to decrease the negative effects on the country for the future.

Alternative dispute resolution helps get all sides heard before any deportations take place. Mediation, in particular, is an effective way to remedy the problem of family separation occurring as a consequence of Trump's zero tolerance enforcement policy. This tactic can help keep families together without separating them in the first place by immediately addressing the wrongdoing of illegally entering the U.S. without the threat of criminal prosecution. Compared with mass trials and long waiting periods leading up to proceedings, mediation is a personalized and short process that is sure to benefit immigrants, specifically families and children.

Using alternative dispute resolution, the government can differentiate between classes of immigrants so that solutions can be better crafted. Keeping with the goal of ultimately reducing illegal border immigration as an investment for the future requires broadly examining and understanding the phenomenon's occurrence. Statistics show that the biggest reason behind the increasing immigration numbers comes chiefly from rising violence in the

¹³⁹ *FCMP*, *supra* note 109.

¹⁴⁰ *Jeh Johnson*, *supra* note 34.

“Northern Triangle countries.”¹⁴¹ Evidence from border agents supports this phenomenon, with people from Guatemala, El Salvador, and Honduras making up the majority of border arrests¹⁴² under the Trump administration. Vice President Mike Pence acknowledges this correlation, explaining that the “vicious gangs and vast criminal organizations [in Central America] drive illegal immigration . . . to the United States.”¹⁴³ Violence considered, it makes sense that “150 million people around the world want to immigrate to the United States”¹⁴⁴ and we are experiencing an influx of children and families. Coming from the most violent countries with the highest homicide rates in the world,¹⁴⁵ most of these asylum-seekers are simply searching for a way to keep their children safe. If these stories can be told, it will directly help the government to understand the problem in order to effectively and properly resolve it. By giving a designated space to children and families to mediate with the government upon entry into the country, their reasons for fleeing can be heard, evaluated, and decided on accordingly. Public policy will benefit from this in the long run as the government will understand the motivations of immigrants, in turn becoming better suited to handle influxes of immigrants at the southern border.

One of the main benefits to this approach is that families participating in mediation have the opportunity to tell their personalized stories with full confidentiality.¹⁴⁶ One of the greatest problems with current solutions stems not from the physical border barrier, but from the language barrier between those crossing the border and those within the border tasked with enforcing immigra-

¹⁴¹ Maureen Meyer & Elyssa Pachico, *Fact Sheet: U.S. Immigration and Central American Asylum Seekers*, WOLA (Feb. 1, 2018), <https://www.wola.org/analysis/fact-sheet-united-states-immigration-central-american-asylum-seekers>.

¹⁴² Associated Press, *ICE Deportation Arrests Soar Under Trump Administration, Drop in Border Arrests*, NBC NEWS (Dec. 5, 2017, 1:37 PM), <https://www.nbcnews.com/news/latino/ice-deportation-arrests-soar-under-trump-administration-drop-border-arrests-n826596>.

¹⁴³ *Remarks by Vice President Mike Pence at the Northern Triangle Conference on Prosperity and Security in Central America*, U.S. DEP'T OF HOMELAND SECURITY (June 15, 2017, 1:18 PM), <https://www.dhs.gov/news/2017/06/15/remarks-vice-president-mike-pence-northern-triangle-conference>.

¹⁴⁴ *Attorney General Sessions*, *supra* note 56 (citing a Gallup poll).

¹⁴⁵ Cohn et al., *supra* note 47.

¹⁴⁶ Paul Fisher, *All You Need To Know About Mediation But Didn't Know to Ask-A Parachute for Parties in Litigation!*, *MEDIATE.COM* (Nov. 2000), <https://www.mediate.com/articles/fisher2.cfm>.

tion policy. Because there are many indigenous languages¹⁴⁷ spoken in Central and South America, a major obstacle lies in finding translators and interpreters for oral and written translation.¹⁴⁸ Because the goal and greatest obstacle of mediation is associated with reaching an agreement that is fair to both sides, this is vastly more difficult when there is a language barrier to overcome. The “cultural minority” is at a disadvantage in mediation proceedings, even when the mediator him or herself does their best to remove biases and ensure fairness.¹⁴⁹ However, this impediment is more easily tackled¹⁵⁰ through individualized, fact-specific, and non-adversarial mediation procedures than through litigation. One way to combat the inherent bias is to employ both translators and Spanish-speaking mediators, particularly those who originate from the Northern Triangle countries that are currently experiencing influxes of immigrants into the United States.

Federal agencies are required by law to provide assistance to those with limited English proficiency skills, as outlined in Executive Order 13166, which was signed into law in 2000.¹⁵¹ As the agents tasked with enforcing a policy to those from outside of the United States, the federal immigration services are particularly susceptible to interactions with non-English-speaking individuals, which creates a need for more translators who speak both Spanish and a variety of indigenous languages in order to comply with this longstanding Executive Order. This also helps comply with Title VI of the Civil Rights Act of 1964,¹⁵² which bars discrimination on the basis of national origin. The United States Citizenship and Immigration Services already lays out the requirements for individu-

¹⁴⁷ Norman A. McQuown, *The Indigenous Languages of Latin America*, 57 AM. ANTHROPOLOGIST 501 (1955), <https://anthrosource.onlinelibrary.wiley.com/doi/pdf/10.1525/aa.1955.57.3.02a00080>.

¹⁴⁸ *Immigrant Rights and Services*, OFF. OF N.Y.C. COMPTROLLER SCOTT M. STRINGER, <https://comptroller.nyc.gov/services/for-the-public/immigrant-rights-and-services> (last visited Feb. 2, 2019).

¹⁴⁹ Robert A. Baruch Bush & Joseph P. Folger, *Mediation and Social Justice: Risks and Opportunities*, 27 OHIO ST. J. ON DISP. RESOL. 1 (2012).

¹⁵⁰ *The Advantages of Mediation Cases Over Traditional Lawsuits*, FINDLAW, <https://adr.findlaw.com/mediation/the-advantages-of-mediation-cases-over-traditional-lawsuits.html> (last visited Oct. 11, 2019).

¹⁵¹ Improving Access to Services for Persons With Limited English Proficiency, 65 Fed. Reg. 50,121 (Aug. 14, 2000); *Frequently Asked Questions on Legal Requirements to Provide Language Access Services*, MIGRATION POL’Y INST., <https://www.migrationpolicy.org/programs/language%20A0access-translation-and-interpretation-policies-and-practices/frequently-asked> (last visited Feb. 2, 2019).

¹⁵² *Id.*

als seeking to serve as interpreters in immigration interviews,¹⁵³ so these same standards can be adopted to create requirements for mediators and translators in immigration mediation sessions.

In *The Mediation Process: Practical Strategies for Resolving Conflict*, renowned mediation expert Christopher Moore explains that a “primary task” of a mediator is to “manage the power relationship of the disputants.”¹⁵⁴ Because unequal power relationships can easily lead to an unequal outcome, the mediator is there to give the weaker party the power it needs to assert its position and develop negotiation strategy.¹⁵⁵ Moore explains that the mediator can help the weaker party “obtain, organize, and analyze data,” “educat[e] the party in planning an effective negotiation strategy,” “continue to negotiate,” and “encourag[e] the party to make realistic concessions.”¹⁵⁶ Many tend to think of a mediator as a neutral party that helps other parties render a fair decision, but the mediator’s purpose is also to help eliminate any institutional bias that may be preventing the sides from reaching a fair agreement.¹⁵⁷ The mediator can—and should—empower the weaker party in coming to the terms of an agreement.¹⁵⁸ Putting this theory into the context of family separation under the current immigration policy, immigrant families as the weaker party can be empowered to assert their reasons for being in the United States, such as the persecution or violence they are escaping. Ultimately, this will help bring justice to these families by providing them with a fair chance to negotiate their entry. Adding in a new group of mediators who speak the language of these immigrant families also helps manage the power relationships by ensuring effective, accurate communication. This, in turn, will lead to higher rates of compliance with the program. Just like the government experienced in the results of the Family Case Management Program’s original implementation, information and a fair chance to explain your position are key in helping the immigrant population comply, whether it leads to entry or removal from the United States.

¹⁵³ *15.7 The Role and Use of Interpreters in Domestic Field Office Interviews Without USCIS-Provided Interpretation*, U.S. CITIZENSHIP & IMMIGR. SERVS., <https://www.uscis.gov/ilink/docView/AFM/HTML/AFM/0-0-0-1/0-0-0-2449/0-0-0-2798.html> (last visited Feb. 2, 2019).

¹⁵⁴ CHRISTOPHER W. MOORE, *THE MEDIATION PROCESS: PRACTICAL STRATEGIES FOR RESOLVING CONFLICT* 391 (3d ed. 2003).

¹⁵⁵ *Id.*

¹⁵⁶ *Id.*

¹⁵⁷ *Id.*

¹⁵⁸ *Id.*

Another key aspect of a successful approach to mediation is forming a trusting relationship among the participants and the mediator. A hurdle to this lies in the implicit biases of both interpreters and immigrants. For interpreters, there may be a lack of full understanding of the particular dialect that an immigrant speaks,¹⁵⁹ leading to misinterpretation of the story that could mean the difference between remaining in the United States and deportation. For immigrants—particularly those who do not speak English—the bias may be against the United States legal system due to the perceived inability to present their case.¹⁶⁰ Trust must be formed to overcome this and craft comprehensive agreements for the parties, so participants to the mediation session must fully trust the impartiality and abilities of the mediator, which can be achieved through gaining an appreciation for the cultural backgrounds, heritages, and insights of the participants prior to the start of mediation.¹⁶¹ All cultural and experiential situations should be accounted for by the mediator¹⁶² so each side can be fully understood in the context of their unique circumstances, as well as the circumstances of immigrants on a macro level.

D. *Reducing Family Separation at the Outset*

Mediation on average takes a few days,¹⁶³ rather than a few weeks or months, helping to both keep families together from the start and to reunite those who have been separated more quickly and seamlessly with less negative emotional impact. This can directly help achieve the Trump Administration's main goal of quickly removing illegal immigrants from the U.S., while still making the statement that the U.S. takes a strict stance on the matter. A more rapid approach can also help combat adverse impacts on immigrants' health and wellbeing. Multiple deaths of young chil-

¹⁵⁹ Chief Justice Randall T. Shepard, *Access to Justice for People Who Do Not Speak English*, 40 *IND. L. REV.* 643, 646–47 (2007).

¹⁶⁰ *Id.*

¹⁶¹ Morgan Brigg, *Mediation, Power, and Cultural Difference*, 20 *CONFLICT RES. QUARTERLY* 287 (2003), <https://onlinelibrary.wiley.com/doi/abs/10.1002/crq.26>.

¹⁶² *Id.*

¹⁶³ *Common Mediation Questions*, *FINDLAW*, <https://adr.findlaw.com/mediation/common-mediation-questions.html> (last visited Jan. 5, 2020).

dren¹⁶⁴ while in custody of DHS agents have been reported since the “zero tolerance” immigration policy’s enactment, purportedly linked to the inhumane conditions at the detention centers. The less time that needs to be spent in custody, the better for the health of the immigrant population. Mediation also helps alleviate the pressure of funding and housing immigrants¹⁶⁵ during detention periods. This is done by eliminating a large sector of detention through shorter, immediate mediation procedures for families and those seeking asylum. Instead of detention, the current ICE centers can be re-transitioned into FCMP housing. This theoretically lowers costs back down to the \$38 per day range and keeps conditions humane.

E. *Shifting Attorney Functions to Promote Collaboration*

By employing a collaborative effort between ICE attorneys and personnel, and public defenders or volunteer attorneys who represent immigrants, the immigration process at the southern border can be easily streamlined and focused to recreate classes of immigrants and prioritize the criminal offenders. One step in doing this is shifting the function of ICE’s current Office of the Principal Legal Advisor (“OPLA”),¹⁶⁶ the representative agency of the Department of Homeland Security that employs more than 1,100 attorneys for legal services in immigration proceedings, from representing the DHS in litigation proceedings to representing the DHS in mediation for family separation and family asylum cases. Rather than using this legal arm of the DHS to litigate removal cases,¹⁶⁷ the attorneys can join the mediation as the representative of the government. Because the DHS and ICE already have legal counsel in this respect, this shift of roles is feasible and realistic. Since litigation will be reduced as mediation will increase, the need will subsequently shift and the OPLA attorneys will fulfill that need. The 900 OPLA attorneys who took cases in Immigration Court in

¹⁶⁴ Nick Valencia & Chris Boyette, *7-Year-Old Guatemalan Girl Died in Border Patrol Custody*, CNN (Dec. 14, 2018), <https://www.cnn.com/2018/12/13/us/guatemalan-girl-death-ice/index.html>.

¹⁶⁵ See generally, *Trump Impact*, *supra* note 63.

¹⁶⁶ *Office of the Principal Legal Advisor*, U.S. IMMIGR. & CUSTOMS ENFORCEMENT, <https://www.ice.gov/opla> (last visited Jan. 4, 2020).

¹⁶⁷ *Id.*

2017 had about 1,000 hearings¹⁶⁸ each, illuminating the prospect for a substantial increase in attorneys to serve in representative roles during the mediation proceedings.

To help bring families back together and give those seeking asylum a fair chance to do so, a combination of volunteer attorneys from Immigration Advocate Network's Pro Bono Asylum Representation Project¹⁶⁹ and the ACLU can assist as legal counsel for immigrant families to help prepare their cases pending mediation. This will ensure that those facing possible removal are kept informed of their rights and are knowledgeable about the legal aspects of the mediation process. Current judges rendering decisions in removal cases can serve as the mediators, a move that will likely be greeted with enthusiasm as the National Association of Immigration Judges is currently seeking emancipation from the Justice Department¹⁷⁰ as a result of the current immigration policy. The concern lies in the fact that so long as the judges must report to the Attorney General, immigrants will face major hurdles to their rights to fair hearings as Jeff Sessions's legacy continues to impose major limitations on judges' authority to postpone and terminate immigrants' cases¹⁷¹ while setting impossible quotas of cases to decide.

A policy deterring all immigrants in general from crossing the border is unconstitutional.¹⁷² On the other side, the end goal is evidently to curtail illegal immigration for the future. Thus, by maintaining a barrier to the country through mediation rather than inhumane detention, the U.S. can keep a heavy hand with the violent or offending people and help provide a safe haven for asylum-seeking families and children. The solution lessens costs while promoting compliance by eliminating the barrier to information, a current hurdle impeding on recidivism rates at the border. Finally, the physical and emotional health consequences of current detention

¹⁶⁸ *10 Facts about OPLA*, U.S. IMMIGR. & CUSTOMS ENFORCEMENT, <https://www.ice.gov/features/opla-week-2017> (last updated Apr. 5, 2018).

¹⁶⁹ *Working on the Border*, IMMIGR. ADVOC. NETWORK, https://www.immigrationadvocates.org/probono/newsletter/item.3532-Working_on_the_Border (last visited Oct. 14, 2019).

¹⁷⁰ Maria Sacchetti, *Immigration Judges' Union Calls for Immigration Court Independent from Justice Department*, WASHINGTON POST (Sept. 21, 2018, 6:46 PM), https://www.washingtonpost.com/local/immigration/immigration-judges-union-calls-for-immigration-courts-independent-from-justice-department/2018/09/21/268e06f0-bd1b-11e8-8792-78719177250f_story.html?utm_term=.abfb3e160f77.

¹⁷¹ *Id.*

¹⁷² *R.I.L.-R v. Johnson*, 80 F. Supp 3d 164 (2015).

and family separation problems will be properly addressed, ensuring humane treatment for the immigrant populations at risk.

V. CONCLUSION

The “zero tolerance” immigration policy enacted by the Trump Administration in June of 2018 marked a sudden departure from longstanding policy norms and controlling judicial opinions rendering family separation in the context of immigration proceedings legally inadmissible. Met with a top-down approach prioritizing the family separation initiative while providing less weight to humanitarian concerns of immigrants, the Department of Homeland Security consequently maintained poor records of those who had entered, of where their children were located, and of provisions for future reunification. Without advice or organization tactics from those overseeing the programs that ultimately became responsible for separating families, more and more immigrants became separated. When coupled with the canceled Family Case Management Program, immigrants have faced futile burdens in the way of seeking asylum, including lack of knowledge for the legal system and an inability to advocate for remaining in the United States.

Immigration policy as it affects children and family units consisting of children has waded through murky waters since the *Flores* settlement of the late 1990’s. Despite the general policy favoring release outlined in the settlement, no guidelines or legislation regarding the permissibility of detaining children at the U.S.-Mexico border have ever gone into effect. This has run completely afoul to the parties’ post-factum stipulation of the temporary nature of the settlement. Consequently, authority over family detention remains within the discretion of ICE, and the Trump Administration was able to impose a sweeping zero-tolerance policy that criminalized families and children for attempting to cross the border, causing family separation. A recent case, *Ms. L. v. ICE*, facially addressed this challenge with a court order for reunification of separated children and parents. However, the Trump Administration’s precipitous decisions surrounding the enactment of the zero-tolerance policy have highlighted considerable complications with the court-imposed solution, chiefly the difficulties in accounting for and reuniting families who have no records or documentation of their presence. As a result, reunification of fam-

ilies continues to pose significant hardships for the U.S. government.

The Trump Administration does not signify the first time the Executive Branch of the United States has taken a firm stance on immigration, but it does mark a significant departure from the facial goals of his predecessor's administration in the realm of family separation. The "zero tolerance" policy prioritizes prosecution of immigrants regardless of the reason, leaving no distinction between asylum-seeking families and children and violent offenders. Until the June 20, 2018 Executive Order to keep families together, thousands of individuals were torn from the arms of their parent or child to face unsanitary, medically ill-equipped detention facilities until the chance of reunification presented itself, if ever.

Border security and family separation are not mutually exclusive. Other countries, as well as past administrations, have exhibited successful immigration strategy while respecting family units. The solution to a secure border is respecting the rights and health of immigrants, which cannot be achieved using prison-like conditions that cost hundreds of dollars per person per day in anticipation of litigation. The solution lies in mediation as a route to reuniting families through the vehicle of the Family Case Management Program, which exhibited immense success during its lifespan in terms of cost-effectiveness, recidivism rates, compliance, and respect for human rights.

The reinstatement of the Family Case Management Program for purposes of mediation would directly help address each of the problems associated with family separation while facilitating the Trump Administration's overarching goals of maintaining a strict immigration policy. First, it helps comply with *Flores, Ms. L*, and *R.I.L.-R* by keeping families together in safe, humane facilities with the resources to properly care for children while awaiting mediation. Second, it dramatically lowers costs by canceling the need for private prison contracts and shifting the function of detention centers to be used as temporary housing. This alternative would have a directly positive impact on immigrant populations by tackling emotional, cognitive, and health concerns associated with the deficient conditions and insufficient medical care in detention facilities. Third, the FCMP can help retroactively identify those individuals affected by the unsatisfactory record-keeping that came as consequence of the zero-tolerance policy. Social workers working with the FCMP can serve this function to fix the problem that was overlooked when the policy was first enacted. Finally, the FCMP

accomplished nearly perfect rates of compliance with immigrant removal orders, the precise aim of the Trump Administration.

Alternative dispute resolution is a proven, effective way to get both sides heard without the time, money, physical detention, emotional stress, and comprehension of the U.S. legal system that stand as barriers behind immigration and deportation litigation. Reinstatement of the Family Case Management Program with the focus on mediation combats both the language and general deterrence issues behind current immigration policy and provides a designated space to get personalized stories told before a neutral mediator working against the bias in the power dynamic of the parties. Mediation is a shorter, less intimidating procedure that is easier for immigrants to comprehend than litigation, making it perfect for both reuniting previously-separated families and ensuring separation does not continue in the future.

Family separation in immigration today is a situation in which it is of the utmost importance to hear both sides of the dispute. Doing this will help officials evaluate viable long-term solutions that can be fit to achieve the overarching objective of maintaining a firm immigration policy while also respecting human rights. The Family Case Management Program has shown immense promise, and if restarted with the focus on mediation, it will decrease the timeline of proceedings and help determine immigrants' status in the United States efficiently. If approached properly and with appropriate parties, mediation can help reunite families in the present and prevent atrocities in the future.

