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In the Courts:
**The Trump Administration's War on the Flores Settlement Agreement
Renewed Amid COVID-19 Pandemic**

*Richard Vadasy**

I. INTRODUCTION

It is no secret that President Trump and his administration came under global scrutiny due to their handling of immigrants attempting to enter the United States. The administration repeatedly attacked the rights of immigrant families, parents and children alike, in an attempt to limit the influx of immigrants entering the United States illegally. One safeguard that was a longtime target of the Trump administration was the Flores Settlement Agreement (“Flores Agreement”). Despite those efforts, the administration was largely unsuccessful at circumventing the protections provided by the Flores Agreement. The Court that oversees the Flores Agreement, the United States District for the Southern District of California, consistently upheld the safeguards provided under the agreement and forced the Trump administration to abide by them. However, the COVID-19 pandemic afforded the administration a new avenue for undermining the agreement.

This article will explore how the Trump administration’s efforts to undermine the legal rights of immigrant children entering the United States were thwarted by the court overseeing the Flores Agreement. The court’s decisions reinforced the protections offered under the agreement, but efforts to circumvent the agreement were renewed amidst the COVID-19 pandemic.

II. WHAT IS THE FLORES SETTLEMENT AGREEMENT?

The Flores Agreement stems from a series of lawsuits against the former Naturalization Service that accused it of mistreating immigrant children. The lawsuits were eventually settled, and the Flores Agreement was signed and went into effect in 1997. While the Flores Agreement originally applied only to unaccompanied minors crossing the U.S. border, it has since been expanded to apply to accompanied minors as well.

The Flores Agreement provides a number of protections for minors who are detained in the custody of the federal government. For example, the Flores Agreement requires facilities to meet certain health and safety standards. It also mandates that minors be released “without unnecessary delay” to a sponsor or a state-licensed facility that meets the health and safety standards set by the Flores Agreement. The “without unnecessary delay” requirement has been interpreted as requiring the government to release detained immigrant children within twenty days. This helps protect children from the proven

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harmful psychological effects of being detained and separated from their families for long periods of time.

III. TRUMP ADMINISTRATION'S HISTORY WITH THE FLORES AGREEMENT

During his presidential campaign, Donald Trump made it clear that if he was elected, immigration would be a top priority for his administration. After his election, this was one promise that President Trump kept. His war on immigration has been the subject of national debate as he gutted many protections aimed at safeguarding immigrants attempting to enter the country. The Flores Agreement is one of the few safeguards protecting immigrant children that has managed to, at least in principle, withstand the Trump administration's attacks. This was not due to a lack of trying by the administration. It waged a much smaller, less publicized war against the Flores Agreement in an attempt to fully implement its zero-tolerance immigration policy.

The Trump administration's policies were at odds with the Flores Agreement since its "zero-tolerance policy" was quietly rolled out in July 2017 and then later publicly announced by the Attorney General in April 2018. Under this policy, any immigrant who was caught attempting to enter the country illegally would be criminally prosecuted for illegal entry and held in a detention facility for the duration of the proceeding, or until they were granted asylum, which parents with minor children are typically seeking. This was the case even for immigrant parents who attempted to enter the country with their minor children, regardless of whether or not the parents are seeking asylum. Under the Flores Agreement, however, children may not be detained in unlicensed facilities for longer than twenty days. Most immigration proceedings take much longer than twenty days. To comply with the Flores Agreement, the Trump administration automatically separated parents from their children so the parents could remain in detention facilities for extended periods of time. The children were then put under the care of the Office of Refugee Resettlement (ORR), where they were typically held for months at a time instead of being released to sponsors or licensed child welfare facilities.

The separation of families received nationwide backlash and was the subject of numerous legal disputes. Many studies examining the harmful impact that family separations have on children, especially minority children, were conducted and brought to the public's attention. In June 2018, the United States District Court for the Southern District of California held that the family separation policy was in violation of the Due Process Clause because children were being removed from their parents without the parents first being deemed unfit. The court issued an injunction mandating that separated families be reunited and unaccompanied minors be released to sponsors in *Ms. L. v. U.S. Immigration and Customs Enforcement*. The injunction also instructed the Trump administration that children may only be removed from their parents if there is first a determination that the parent is unfit. This decision required immigration judges to make individualized determinations of parents' fitness before removing their children, thereby affording protections under the Due Process Clause to immigrant parents. In response to the backlash, one day after the injunction was issued, President Trump signed an executive

order putting an end to the separation of families. Despite formally ending the practice of family separations, the zero-tolerance policy continued on, as did family separations.

In the same month, the Trump administration asked the court overseeing the Flores Agreement to amend the agreement to allow maximum flexibility for handling family units. However, Judge Gee rejected this request, describing it as “Kafkaesque.” Nevertheless, family separations continued through arbitrary proceedings in which parents were deemed to be unfit. Parents were often deemed unfit because they were arrested for illegal entry or illegal reentry into the United States. Legal advocates eventually challenged this practice. But it was upheld by the United States District Court of the Southern District of California in January 2020, marking a win for the administration. The court held that government officials were “generally exercising their discretion to separate families at the border” in a manner that was consistent with the rights of migrant families.

In August 2019, the Trump administration introduced a proposal that would replace the Flores Agreement all together. This new proposal sought to remove the twenty-day limitation on detaining children and alter the licensing requirements for family detention facilities. Instead of meeting state standards, family detention facilities would be licensed under standards determined by Immigration and Customs Enforcement (ICE). The proposal was quickly shot down by Judge Gee one month later in *Flores v. Barr*.

These series of challenges launched by the Trump administration against the Flores Agreement were largely unsuccessful. The decisions of the court overseeing the agreement reinforced due process protections for immigrant parents attempting to enter the country with their minor children. As a result, the Trump administration’s policy of automatic separation of parents crossing the border with their minor children was legally nullified. However, the administration continued their family separations through arbitrary proceedings where they deemed parents unfit due to convictions for illegal entry or reentry. With this backdrop, the administration again attempted to circumvent the Flores Agreement.

IV. COVID-19 AND THE FLORES AGREEMENT

The COVID-19 pandemic provided yet another opportunity for the Trump administration to undermine the obligations owed to minors under the Flores Agreement. Immigrant detention facilities and shelters for minor children have been hotbeds for COVID-19. One facility that shelters minor immigrant children in Chicago had forty-two children test positive for COVID-19 as of April 21, 2020. In response to the pandemic, Judge Gee held in *Flores v. Barr* that the Flores Agreement was being violated by the government’s slow release of minor immigrant children in its custody. ICE was previously ordered to expeditiously make individualized determinations of flight risk for minors in custody. However, ICE failed to make these determinations in accordance with the order. In response, Judge Gee ordered the administration to expedite the release of minors who have a sponsor and are not a flight risk in order to comply with the Flores Agreement and protect detainees from the ongoing COVID-19 pandemic.

The intent behind this court order was to have the families be released together. Instead, lawyers for ICE started circulating what are known as binary choice forms. These

forms give parents the option to either have their child remain with them in a detention facility indefinitely, or have their child released to a sponsor without the parent. The forms have been distributed to parents held in detention facilities with their children, and lawyers representing the detainees were not present or informed. Many parents interpreted this form as waiving their parental rights to their children, so not a single parent in ICE custody consented to having their child released.

More recently, the Trump administration began housing detained unaccompanied children in privately run hotels, which it argued was necessary to prevent the spread of COVID-19. Housing children in hotels instead of licensed facilities also conveniently removed them from the supervision of Judge Gee and the Flores Agreement entirely. However, in September 2020, Judge Gee issued a ruling that required the Trump administration to cease housing children in hotels and return them to licensed facilities under her supervision. The administration then sought an extension on the time remaining before all children must be removed from hotels and returned to licensed facilities.

V. CONCLUSION

The Trump administration faced push back for its failure to comply with the recent court order to expedite the release of detained children. However, the administration managed to give itself a defense against criticism and legal challenges: they could not release detained children if the parents were withholding consent to their release and expressly choosing to have children remain in detention. Time will tell whether the use of these binary choice forms and reliance on parental consent to keep children detained for extended periods of time will survive legal challenges, or less unlikely, a new administration. One thing is clear—even amidst a global pandemic, the Trump administration's war on the Flores Agreement waged on.

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