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## Mistreating Central American Refugees: Repeating History in Response to Humanitarian Challenges

BILL ONG HING\*

### Abstract

*In the 1980s, tens of thousands of Central Americans fled to the United States seeking refuge from civil unrest that ravaged their countries. In a largely geopolitical response, the Reagan administration labeled those fleeing Guatemala and El Salvador as “economic migrants,” detained them, and largely denied their asylum claims. The illegal discrimination against these refugees was exposed in a series of lawsuits and through congressional investigations. This led to the reconsideration of thousands of cases, the enlistment of a corps of asylum officers, and an agreement on the conditions under which migrant children could be detained.*

*Unfortunately, the lessons of the 1980s have been forgotten, or intentionally neglected. Beginning in 2014, once again large numbers of Central American asylum seekers—including women and children—are being detained. Asylum denial rates for migrants fleeing extreme violence are high. The mixed refugee flow continues to be mischaracterized as an illegal immigration problem. Many of the tactics used in the 1980s are the same today, including hampering the ability to obtain counsel. President Trump has taken the cruelty to the next level, by invoking claims of national security in attempting to shut down asylum by forcing applicants to remain in Mexico or apply for asylum in a third country. We should remember the lessons of the past. Spending billions on harsh border enforcement that preys on human beings seeking refuge is wrongheaded. We should be implementing policies and procedures that are cognizant of the reasons migrants are fleeing today, while working on sensible, regional solutions.*

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## I. INTRODUCTION AND SUMMARY

Violence and unrest force thousands of residents from El Salvador, Guatemala, and other regions of Central America to flee from their homes, seeking safety in the United States. Upon arrival, they are detained. Asylum is denied at high rates. Migrant children are held for long periods of time, while their parents are arrested. Enforcement policies are implemented to deter asylum seekers, while legal challenges are filed to restore due process and to challenge detention conditions. This picture describes the circumstances facing Central American migrants today, but the images aptly describe what took place in the 1980s as well.

Then, as now, the United States' approach to what is essentially a mixed refugee flow has been mischaracterized as an illegal immigration problem. As a result, U.S. strategy has predominately been motivated by a desire to deter people from coming. Many of the tactics used in the 1980s are the same today—although President Trump has taken the cruelty to the next level. What we should have learned then, and what should be clear to us now, is that deterrence is not only wrong, but given the challenge, deterrence policy simply will not work. In the process, refugees are forced to endure more unnecessary hardship. In order to really move forward, we have to learn from the lessons of the past. We have refused to treat mixed refugee flows in our hemisphere—principally from Central America, and additionally Haiti—as humanitarian challenges rather than illegal immigration challenges.

In this piece, I first lay out the misdeeds of the 1980s implemented to discourage and punish asylum seekers. In some parts, I use the lens of litigation to highlight the wrong-headedness of those efforts. I also highlight some corrective policies that resulted from the litigation and from congressional oversight. I then focus on enforcement efforts responding to the current crisis beginning in 2014, pointing out parallels to the 1980s. The similarities illustrate how we have forgotten the lessons of the 1980s. However, the story gets worse, because the Trump administration has implemented and proposed greater restrictions that reach new heights of cruelty.

## II. DISCOURAGING GUATEMALANS AND EL SALVADORANS IN THE 1980s

An honest assessment of the United States' reputation as a world leader in protecting refugees would acknowledge that such a view is based principally on the treatment of groups crossing the Atlantic and Pacific oceans. Think only of U.S. actions following the two World Wars and the Vietnam War. Today, our humanitarian commitments are largely through

the United States Refugee Admissions Program (USRAP),<sup>1</sup> established by the 1980 law,<sup>2</sup> where the president determines the number of refugees to be admitted and from what regions of the world. Usually the totals are in the high tens of thousands, however, only a few thousand each year are designated for Latin America and the Caribbean.<sup>3</sup> In short, the United States has never been good at Western Hemisphere asylum flows.<sup>4</sup> The major exception is for Cubans who sought refuge after Fidel Castro's 1959 coup—a reflection of geopolitics and the nation's anti-communist views.

The United States' reluctance to treat Central American migration as a mixed refugee flow rather than an illegal immigration was evident when Guatemala, El Salvador, and Nicaragua were in the midst of civil turmoil in the 1980s. The repression and violence compelled thousands of migrants from those countries to flee and seek refuge in the United States. Cold war politics affected the treatment that these refugees received here. After the left-leaning Sandinistas (led by Daniel Ortega) took control in Nicaragua, the United States supported rebels (known as the *contras*) who were trying to regain power.<sup>5</sup> Reagan administration officials commonly referred to these rebels as *freedom fighters*.<sup>6</sup> Nicaraguans who fled their country during that period were given asylum at a higher rate than most, and deportation was not enforced against Nicaraguans who were denied asylum or who simply wanted to remain in the United States.<sup>7</sup> On the other hand, the United States supported the right-wing governments of Guatemala and El Salvador.<sup>8</sup> The rebels in those countries were labelled *guerrillas* who engaged in “terrorist”

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1. See *The United States Refugee Admissions Program (USRAP) Consultation and Worldwide Processing Priorities*, U.S. CITIZENSHIP AND IMMIGRATION SERV., <https://www.uscis.gov/humanitarian/refugees-and-asylum/refugees/united-states-refugee-admissions-program-usrap-consultation-and-worldwide-processing-priorities>.

2. Refugee Act of 1980, 94 Stat. 102.

3. President Trump's cap of 18,000 refugee slots for fiscal year 2020 is the lowest such designation since the enactment of the Refugee Act of 1980. See Nicole Narea, *The US will admit just 18,000 refugees in the next year*, VOX (Sept. 26, 2019), <https://www.vox.com/policy-and-politics/2019/9/26/20886038/trump-refugee-cap-executive-order>.

4. BILL ONG HING, *DEFINING AMERICA THROUGH IMMIGRATION POLICY* 145-7 (2004).

5. *Profile: Nicaraguan President Daniel Ortega, from Revolutionary Leader to Opposition Hate Leader*, BBC NEWS (July 19, 2018), <https://www.bbc.com/news/world-latin-america-15544315>.

6. *The “Reagan Doctrine” is Announced*, HISTORY, <https://www.history.com/this-day-in-history/the-reagan-doctrine-is-announced> (last updated Feb. 4, 2020).

7. Anthony Jensen, *Fleeing North: An Examination of U.S. Refugee and Asylum Policy Towards Nicaragua*, POL. SCI. STUDENT WORK 1, 18 (2012), [https://digitalcommons.csbsju.edu/cgi/viewcontent.cgi?article=1000&context=polsci\\_students](https://digitalcommons.csbsju.edu/cgi/viewcontent.cgi?article=1000&context=polsci_students).

8. James Gerstenzang & Juanita Darling, *Clinton Gives Apology for U.S. Role in Guatemala*, L.A. TIMES (Mar. 11, 1999), <https://www.latimes.com/archives/la-xpm-1999-mar-11-mn-16261-story.html>.

tactics.<sup>9</sup> Refugees fleeing the civil strife in Guatemala and El Salvador were quickly labeled “economic migrants” and were generally denied asylum and deported.<sup>10</sup>

### III. KEY LITIGATION ON TREATMENT OF ASYLUM SEEKERS IN THE 1980S

The Reagan administration sought to discourage asylum seekers from Guatemala and El Salvador through an Immigration and Naturalization Service (INS) strategy implemented in the 1980s. The strategy was direct: deny asylum except in the most extreme cases. Thus, while thousands of Guatemalans and Salvadorans applied for asylum, only about 2 percent of their applications were granted due to the discriminatory order.<sup>11</sup> That discrimination is highlighted in two federal court cases: *Orantes-Hernandez v. Smith*<sup>12</sup> and *American Baptist Churches v. Thornburgh*.<sup>13</sup> Simultaneously, unaccompanied minors were detained and held as bait to lure their parents into INS hands, resulting in a landmark court case and the *Flores* settlement agreement.

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9. See Raymond Bonner, *Guatemalan Army and Leftist Rebels Locked in War*, N.Y. TIMES (Dec. 4, 1981), <https://www.nytimes.com/1981/12/04/world/guatemalan-army-and-leftist-rebels-locked-in-war.html> (describing Guatemalan rebels a “guerrilla” operation threatening the Guatemalan government); James Lemoine, *Salvador Revels: Where Do They Get The Arms?*, N.Y. TIMES (Nov. 24, 1988), <https://www.nytimes.com/1988/11/24/world/salvador-rebels-where-do-they-get-the-arms.html> (describing Salvadoran rebels as launching “guerilla attacks”).

10. See Jensen, *supra* note 7, at 16, 17.

11. Sarah Gammage, *El Salvador: Despite End to Civil War, Emigration Continues*, MIGRATION POL’Y INST. (July 26, 2007) <https://www.migrationpolicy.org/article/el-salvador-despite-end-civil-war-emigration-continues/>.

According to some, the asylum approval rate for El Salvadorans was “fewer than 3%,” and “1% or less” for Guatemalans. See Carolyn Patty Blum, *The Settlement of American Baptist Churches v. Thornburgh: Landmark Victory for Central American Asylum-Seekers*, 3 INT’L J. REFUGEE L. 347, 349 (1991) (stating that fewer than 3% of Salvadoran and 1% Guatemalan asylum claims were granted), available at [https://heinonline.org/HOL/Page?collection=journals&handle=hein.journals/intjrl3&id=359&men\\_tab=srchresults](https://heinonline.org/HOL/Page?collection=journals&handle=hein.journals/intjrl3&id=359&men_tab=srchresults).

12. *Orantes-Hernandez v. Smith*, 541 F. Supp. 351 (C.D. Cal.1982), *aff’d sub nom*, *Orantes-Hernandez v. Thornburgh*, 919 F.2d 549 (9th Cir. 1990).

13. *Id.* at 386.

### A. *Orantes-Hernandez v. Smith* Lawsuit Highlighted Abuse in Detention

A lawsuit filed against the INS in the 1980s, *Orantes-Hernandez v. Smith* (1990),<sup>14</sup> unveiled the government's strategy to prevent Salvadorans from applying for asylum. In the 1980s, most INS apprehensions were at the border and the vast majority of those apprehended were Mexican nationals. For example, in 1986, of the 1.8 million undocumented aliens apprehended by INS, 94 percent were Mexicans stopped at the border. Only 1.1 percent of the total apprehensions were Salvadorans.<sup>15</sup>

Generally, after migrants were apprehended, either Border Patrol agents or INS officers conducted the processing. INS procedures consisted of an interrogation combined with the completion of various forms, including Form I-274, "Request for Voluntary Departure." Although the arrested Salvadorans were legally eligible to apply for asylum and to request a deportation hearing prior to their departure from the United States, the vast majority of Salvadorans apprehended signed voluntary departure agreements.<sup>16</sup> Once the voluntary departure was signed, the person could be removed from the United States as soon as transportation could be arranged—in other words, without a deportation hearing. A person who signed for administrative voluntary departure never had a deportation hearing, which was the only forum in which a detained person could seek asylum at the time. The *Orantes-Hernandez* court found that the widespread acceptance of voluntary departure was due in large part to the coercive practices and procedures employed by INS and Border Patrol agents.<sup>17</sup>

The court also found that INS officers engaged in a pattern and practice of misrepresenting the meaning of asylum.<sup>18</sup> Officers told detainees that asylum would probably be denied.<sup>19</sup> They said asylum was only for guerrillas or soldiers.<sup>20</sup> They routinely advised Salvadorans that if they applied for asylum, they would remain in custody for a long time, without mentioning the possibility of release on bond.<sup>21</sup> Officers threatened to transfer detainees

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14. *Id.* at 351.

15. See U.S. DEP'T OF JUSTICE IMMIGRATION AND NATURALIZATION SERV., 1986 STATISTICAL YEARBOOK OF THE IMMIGRATION AND NATURALIZATION SERVICE (1986), <https://eosfweb01.eosfc-intl.net/U95007/OPAC/Details/Record.aspx?BibCode=9027432>.

16. *Orantes-Hernandez v. Thornburgh*, 919 F.2d 549, 559 (9th Cir. 1990) ("Numerous class members testified of being forced or tricked into signing for voluntary departure.").

17. *Id.* at 559.

18. *Id.* at 562.

19. *Id.*

20. *Id.* at 559 (describing an agent telling an asylum seeker "that asylum was only for people who were fleeing their country because they were an enemy of the government or an assassin").

21. *Id.* at 562.

to remote locations in order to discourage asylum claims.<sup>22</sup> Salvadorans were not allowed to consult with counsel prior to making decisions.<sup>23</sup>

The court also highlighted misconceptions of INS officers as to the merits of Salvadoran asylum claims and the motives of those fleeing El Salvador.<sup>24</sup> So the court ordered INS and Border Patrol officers to stop their threatening and misleading behavior.<sup>25</sup> Authorities were required to notify all apprehended El Salvadorans of their right to apply for asylum and to provide them with a list of free legal services providers.<sup>26</sup>

### **B. Worsening Political Environment and Increasing Violence Defined Central America in the 1980s**

In March 1980, news of the assassination of Archbishop Oscar Romero in El Salvador reached the front pages. After the assassination of a Jesuit priest who was his friend, Romero became an outspoken social activist who railed against poverty, social injustice and torture.<sup>27</sup> In 1979, the Revolutionary Government Junta came to power in El Salvador through a wave of human rights abuses by paramilitary right-wing groups and the government; civil war ensued.<sup>28</sup> Romero criticized the United States for providing military and financial aid to the new government that was known for its human rights abuse.<sup>29</sup> Romero's assassination was ultimately attributed to orders from an extreme right-wing politician, and the circumstances epitomized the dangers faced by anyone critical of the government.<sup>30</sup>

If Romero's assassination was not enough to focus attention on El Salvador among those of us in the United States who might care, on December 2, 1980, four Catholic missionaries from the United States working in El Salvador were raped and murdered.<sup>31</sup> Five members of the El

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22. *Id.*

23. *Id.* at 565.

24. *Id.* at 562.

25. *Orantes-Hernandez v. Smith*, 541 F. Supp 351, 386–387 (C.D. Cal. 1982), *aff'd*, 919 F.2d 549 (9th Cir. 1990).

26. *Id.* at 386.

27. The Greatness of Oscar Romero, JESUITS IN IRELAND, <https://www.jesuit.ie/news/greatness-of-oscar-romero/> (last visited Feb. 20, 2020).

28. *El Salvador*, THE CENTER FOR JUSTICE & ACCOUNTABILITY, <https://cja.org/where-we-work/el-salvador/> (last visited Feb. 20, 2020).

29. Patsy McGarry, *Oscar Romero: One-Time Conservative Who Became a Nation's Social Martyr*, THE IRISH TIMES (Oct. 10, 2018), <https://www.irishtimes.com/news/social-affairs/religion-and-beliefs/oscar-romero-one-time-conservative-who-became-a-nation-s-social-martyr-1.3657423>.

30. *El Salvador*, *supra* note 28.

31. Steve Dobransky, *Memorialization and Social Justice Transformation: A Case Study*

Salvador National Guard were arrested and convicted for the crimes a few years later.<sup>32</sup> However, 17 years passed before they admitted acting under orders from above.<sup>33</sup> In fact, a U.S. congressional investigation revealed that the massacre was committed by the right wing militia supported by the U.S. government.<sup>34</sup>

The high-profile tragedies of 1980 were signals of what was already happening in the region and warned of what was to come. Driven by the turbulence of civil war, thousands of migrants fled El Salvador, Guatemala, and Nicaragua in the 1980s. In El Salvador, between 1979 and 1985, an estimated 50,000 people were killed in political violence; most were murdered by government forces who publicly dumped mutilated corpses in an effort to intimidate the population.<sup>35</sup> One group of 70 victims, half of whom were children, had been tortured; others were burned alive. The Salvadoran government employed a fierce counterinsurgency campaign of “draining the sea,”<sup>36</sup> or depopulating civilian conflict zones and guerrilla-controlled strongholds.<sup>37</sup> The displacement was carried out by aerial bombing, strafing, mortaring, and military ground operations that terrorized the civilian population and deprived residents of basic foods. Families were forcibly relocated to areas far away, upon threat of death if they returned.

In Guatemala, 38,000 casualties were recorded between 1980 and 1985. By 1987, the U.S. State Department counted more than 300 deaths per month as a result of the war. Most of those deaths were attributed to the Guatemalan Army’s brutal counterinsurgency campaign whose victims were primarily unarmed civilians in the countryside. Massive attacks on indigenous villages, resulting in massacres of families and the destruction of homes were common. According to Amnesty International, Guatemalan forces

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*of the Four Missionaries Martyred in El Salvador in 1980 and How their Mission Continues*, IACM 23RD ANNUAL CONFERENCE PAPER 1 (2010), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1612489](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1612489).

32. *Id.* at 16.

33. Larry Rohter, *4 Salvadorans Say They Killed U.S. Nuns on Orders of Military*, N.Y. TIMES (Apr. 3, 1998), <https://www.nytimes.com/1998/04/03/world/4-salvadorans-say-they-killed-us-nuns-on-orders-of-military.html?pagewanted=1&login=smartlock&auth=login-smartlock>.

34. *El Salvador*, *supra* note 28.

35. Amnesty Int’l, *Extrajudicial Executions in El Salvador: Report of an Amnesty International Mission to Examine Post-Mortem and Investigative Procedures in Political Killings 1-6 July 1983*, (Amnesty International Publications, 1984), [https://www.ai-el-salvador.de/files/ai\\_el\\_salvador/PDFs/29-14-1984-El-Salvador-Extrajudicial-Executions.pdf](https://www.ai-el-salvador.de/files/ai_el_salvador/PDFs/29-14-1984-El-Salvador-Extrajudicial-Executions.pdf); Amnesty Int’l, *Amnesty International Report 1985*, (Amnesty International Publications, 1985), <https://www.amnesty.org/download/Documents/200000/pol100021985eng.pdf>.

36. Brian D’Haeseleer, *The Salvadoran Crucible: American Counterinsurgency in El Salvador, 1979-1992*, at 264 (2015), <https://uislandora.wrlc.org/islandora/object/uislandora%3A12413/datastream/PDF/view>.

37. *Id.* at 356.

massacred more than 2,600 indigenous residents and campesino farm workers in March of 1982 when the counterinsurgency program was launched.<sup>38</sup> In September 1984, about a thousand people were arrested in raids, tortured, and executed extrajudicially.<sup>39</sup> As a result, tens of thousands of Guatemalans also fled to the United States seeking refuge.

### C. *American Baptist Churches v. Thornburgh* Revealed Bias of INS Against Guatemalan and Salvadoran Asylum Seekers

The political bias of INS officials against Guatemalan and Salvadoran asylum applicants was exposed more fully in *American Baptist Churches v. Thornburgh* (1991),<sup>40</sup> an extraordinary case brought by more than eighty religious and refugee rights programs.<sup>41</sup> The federal court allowed the case to proceed on the issue of discriminatory treatment of the asylum seekers, citing the low approval rates for applicants from El Salvador and Guatemala.<sup>42</sup> The political nature of the discrimination was evident: El Salvadoran and Guatemalan applications presented an “embarrassing choice,” because every approval amounted to an “admission that the United States is aiding governments that violate the civil rights of their own citizens.”<sup>43</sup>

Little wonder that the United States denied 97 percent of applications for political asylum by El Salvadorans and 99 percent of those by Guatemalans; by comparison, 76 percent of applications by those fleeing the Soviet Union were approved, as were 64 percent of those from China.<sup>44</sup>

The immediate impact of the case was clear. While the case was pending, the government announced the establishment of a new asylum officer corps (now known as the Asylum Office) that would begin handling affirmative asylum applications beginning in April 1991.<sup>45</sup> Furthermore, in legislation enacted by Congress in 1990 (discussed in the following section), a new category of protection—Temporary Protected Status—was created that eventually proved beneficial to many asylum seekers,<sup>46</sup> including significant

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38. OFF. DE DER. HUM. DEL ARZOBISPADO DE GUAT. (ODHAG), RECUPERACIÓN DE LA MEMORIA HIST. (REHMI), VOL 3, 132.

39. *Id.*

40. *Am. Baptist Churches v. Thornburgh*, 760 F. Supp. 796 (N.D. Cal. 1991).

41. Blum, *supra* note 11 at 351.

42. Katherine Bishop, *U.S. Adopts New Policy for Hearings on Political Asylum for Some Aliens*, N.Y. TIMES (Dec. 20, 1990), <https://www.nytimes.com/1990/12/20/us/us-adopts-new-policy-for-hearings-on-political-asylum-for-some-aliens.html>.

43. *Id.* at B18.

44. *Id.*

45. Blum, *supra* note 11, at 353.

46. *Id.*

numbers from El Salvador, Haiti, and of course, Nicaragua.

The parties in the *American Baptist Churches* case reached a settlement, providing that all Guatemalans and El Salvadorans who had been denied asylum, withholding or extended voluntary departure would have the right to a new asylum application before an asylum officer.<sup>47</sup> They also would be provided with a list of free legal services providers.<sup>48</sup> Limitations on detention were established, and employment authorization was granted to class members.<sup>49</sup>

Although INS officials may have been forced to provide some procedural safeguards to applicants, many potential asylum applicants were thwarted in other ways. Requiring detained asylum applicants to post high bonds (or any bond for some indigents) discouraged many applicants. Beyond that, INS instituted a policy of transferring detainees to remote areas of the country where little, if any, pro bono legal assistance was available. The *Orantes-Hernandez* court was critical of that procedure when an attorney-client privilege had already been established.<sup>50</sup> But in *Committee of Central American Refugees v. INS*,<sup>51</sup> a federal court refused to stop transfers of Guatemalan and Salvadoran refugees to detention facilities in remote areas of the Southwest, mindlessly assuming the availability of free legal services in those areas. The problem was that legal services in El Centro and Florence were very limited. Both facilities were located in remote parts of California and Arizona.<sup>52</sup>

So in spite of the rehearings ordered in the *American Baptist Churches* case, the evidentiary burden required for asylum was still beyond reach for many Guatemalans and El Salvadorans. For example, Julia, one of my clients at the time, had fled a rural village in El Salvador. Her village was bombed by the army who suspected that guerrilla sympathizers were among its residents. Both of Julia's parents and two siblings were killed. Their home was destroyed. Julia was never approached by the guerrillas, but she believed that some village residents had provided them with food. Julia knew about other villages that were destroyed by government forces; she knew that rebel forces would be returning for help. Fearing for her life, she fled to the United States seeking refuge, at least until the dust settled and it was safe for her to return home. Julia was one of the tens of thousands who fled El Salvador in the 1980s, fleeing the repression that targeted peasants, teachers, students, trade unionists, relatives of those supporting the opposition, persons who

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47. *American Baptist Churches v. Thornburgh*, 760 F. Supp. 796, 799 (N.D. Cal. 1991).

48. *Id.* at 803.

49. *Id.* at 804-805.

50. *Orantes-Hernandez v. Thornburgh*, 919 F.2d 549, 566 (9th Cir. 1990).

51. *Committee of Central American Refugees v. INS*, 682 F. Supp. 1055, 1065 (N.D. Cal. 1988).

52. *Id.* at 1060.

participated in demonstrations, and Catholics working in lay communities. Even in a case like Julia's, whose parents and siblings were killed by Salvadoran forces, the U.S. government still strenuously opposed her asylum application, arguing that she needed evidence that she had political views of which Salvadoran forces were aware and a specific threat directed at her. She was denied asylum, but ultimately benefited from TPS.

#### **D. Flores Settlement that Changed the Terms of Children in Detention**

Jenny Lisette Flores, was an unaccompanied 15-year-old girl who fled the violence of El Salvador in 1985, seeking to be reunited with her parents in the United States.<sup>53</sup> She was apprehended at the border and was told she would only be released to her parents, who INS suspected, were in the United States illegally.<sup>54</sup> It was clear to her attorneys that the detained children were essentially being used as "bait" to capture undocumented parents.<sup>55</sup> In fact, her detention arose "out of the INS's efforts to deal with the growing number of alien children entering the United States in the 1980s by themselves or with other relatives (unaccompanied alien minors)."<sup>56</sup> Flores became the lead plaintiff in a class action lawsuit of alien minors who were being detained without bail pending deportation proceedings. Unfortunately, the case reached an unsympathetic Supreme Court. Without considering the conditions under which the children were detained, the Court upheld the regulation that required detained juvenile aliens be released only to their parents, close relatives, or legal guardians, except in unusual and compelling circumstances.<sup>57</sup> The conditions under which migrant children could be detained was left for the lower courts to determine.<sup>58</sup>

After the Supreme Court decision, an agreement was reached between the plaintiffs and the government in 1997 relating to the treatment of migrant children in detention. The *Flores* settlement agreement set national standards regarding the detention, release, and treatment of all children in INS custody. The guidelines require that juveniles be held in the "least restrictive setting

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53. Lisa Rodriguez Navarro, Comment, *An Analysis of Treatment of Unaccompanied Immigrant and Refugee Children in INS Detention and Other Forms of Institutionalized Custody*, 19 CHICANO-LATINO L. REV. 589, 596 (1998).

54. *Id.* at 597.

55. *Id.*

56. *Flores by Galvez-Maldonado v. Meese*, 934 F.2d 991, 993 (9th Cir. 1990), *vacated and superseded on reh'g*, 942 F.2d 1352 (9th Cir. 1991), *rev'd sub nom. Reno v. Flores*, 507 U.S. 292 (1993).

57. *Reno v. Flores*, 507 U.S. 292, 302-303 (1993).

58. *Id.* at 301 ("The settlement agreement entitles respondents to enforce compliance with those requirements in the District Court . . .").

appropriate to their age and special needs, generally in a non-secure facility licensed to care for dependent, as opposed to delinquent, minors.”<sup>59</sup> The government also must report semiannually to the plaintiffs on its compliance and provide data about the juveniles in immigration custody longer than 72 hours.<sup>60</sup>

Aside from conditions of the facilities, the *Flores* agreement also provides that federal authorities can release children to certain other adults if a parent is not available. Juveniles must be released from “custody without unnecessary delay” to a parent, legal guardian, adult relative, individual specifically designated by the parent, licensed program, or alternatively, an adult seeking custody deemed appropriate by the responsible government agency.<sup>61</sup> Today, the settlement extends to migrant children held by ICE or by the Office of Refugee Resettlement (ORR) of the Department of Health and Human Services, and as discussed below, remains a hot button issue.

### **E. Congress was Forced to Respond Central American Refugee Crisis in the 1980s**

Given the bedlam in Guatemala and El Salvador, the number of migrants forced to flee the crossfire of civil war was staggering. By the mid-1980s, more than a half million displaced El Salvadorans were living in refugee camps within El Salvador. More than 300,000 fled to other Central American countries, while an estimated 500,000 to 800,000 El Salvadorans fled to the United States.<sup>62</sup>

The political and legal hurdles to asylum left few options for refugees from Guatemala and El Salvador who made it to the United States. The Attorney General could have granted extended voluntary departure (EVD)

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59. Stipulated Settlement Agreement, *Flores v. Reno*, No. CV 85-4544-RJK(Px) (C.D. Cal. Jan. 17, 1997), available at [https://www.aclu.org/sites/default/files/assets/flores\\_settlement\\_final\\_plus\\_extension\\_of\\_settlement011797.pdf](https://www.aclu.org/sites/default/files/assets/flores_settlement_final_plus_extension_of_settlement011797.pdf) [hereinafter *Flores Settlement Agreement*]. Some of the agreement’s terms have been codified at 8 C.F.R. § § 236.3, 1236.3. For cases culminating in the settlement agreement, see *Flores v. Meese*, No. 85-4544-RJK(Px) (C.D. Cal. Nov. 30, 1987); *Flores v. Meese*, No. 85-4544-RJK(Px) (C.D. Cal. May 25, 1988); *Flores v. Meese*, 934 F.2d 991 (1990); *Flores v. Meese*, 942 F.2d 1352 (1991); *Reno v. Flores*, 507 U.S. 292 (1993). In response to the lawsuit and criticism over the restrictive settings at Berks and Hutto, ICE agreed to utilize Hutto as a placement of last resort, improve the physical plant and its policies and procedures so it was less like a prison, professionalize the workforce, regularly review detainees’ eligibility for reassignment to less restrictive settings, and adopt transparent operating standards.

60. Stipulated Settlement Agreement at 16–17, *Flores v. Reno*, No. CV 85-4544-RJK(Px) (C.D. Cal. Jan. 17, 1997).

61. *Flores Settlement Agreement*, *supra* note 59, at 10.

62. THE ANTHROPOLOGY OF THE STATE: A READER 313 (Aradhana Sharma & Akhil Gupta eds., Blackwell Publishing Ltd. 2006).

but refused to do so.<sup>63</sup>

The disorder in Central America contributed to the statutory creation of Temporary Protected Status (TPS) and its inclusion in the Immigration Act of 1990.<sup>64</sup> Under the new provision, TPS could be given to certain noncitizens in the United States who would face a threat to life or liberty if they were required to return to their home countries.<sup>65</sup> In addition to establishing a generic TPS procedure, the new law also designated El Salvador as the first country whose nationals were able to seek TPS while their country was rebuilt.<sup>66</sup> At the time, more than half million undocumented El Salvadorans resided in the United States, having fled the civil strife. Senator Dennis DeConcini of Arizona acknowledged: “[o]ne of [our] responsibilities [in offering TPS] is humanitarian concern toward the Salvadorans whose lives have been violently disrupted and endangered by war.”<sup>67</sup>

Under the new law, TPS could now be granted to immigrants in the United States who were temporarily unable to safely return to their home country because of ongoing armed conflict, an environmental disaster, or other extraordinary and temporary conditions.<sup>68</sup> By 1991, TPS was extended to individuals fleeing war in Lebanon, war in Liberia, and the Iraqi invasion of Kuwait.<sup>69</sup>

Thus, when civil unrest, violence, or natural disasters erupt in countries around the world, the Secretary of Homeland Security has the discretion in consultation with other government agencies (most notably the Department of State) to grant TPS to foreign nationals of such countries for periods of 6

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63. In consultation with the State Department, the Attorney General had the discretion to grant EVD to nationals of any country in response to emergency situations. This authority had typically been exercised for humanitarian purposes on behalf of noncitizens in the United States from countries experiencing civil war. The idea was to allow individuals from areas of conflict to remain out of harm’s way until things had settled down in their war-torn homelands. In the 1980s, blanket EVD had been granted for nationals of Afghanistan, Ethiopia, Poland, and Uganda. Years earlier, EVD was available to nationals of Cuba, Nicaragua, and Iran. The Attorney General’s refusal to grant EVD to El Salvadorans in the United States in the 1980s was unsuccessfully challenged. *Hotel & Restaurant Emp. Union v. Smith*, 594 F. Supp. 502 (D.D.C. 1984).

64. 8 U.S.C.A. § 1254a.

65. Immigration Act of 1990, Pub. L. 101-649, §303, 104 Stat. 4978 (1990).

66. See Eli Coffino, *Note, A Long Road to Residency: The Legal History of Salvadoran & Guatemalan Immigration to the United States with a Focus on NACARA*, 14 *CARDOZO J. INT’L & COMP. L.* 177, 184-91 (2006) (for a detailed history of the struggle of Salvadoran immigrants, including their TPS designation).

67. 136 CONG. REC. S17,108 (1990) (statement of Sen. DeConcini).

68. 8 U.S.C.A. § 1254a(b)(1).

69. *Temporary Protected Status*, THE U.S. DEP’T OF JUST., <https://www.justice.gov/eoir/temporary-protected-status>.

to 18 months; the time can be extended if the poor conditions persist.<sup>70</sup> A person granted TPS receives a registration document and employment authorization.<sup>71</sup> TPS is a blanket form of humanitarian relief. It is the statutory embodiment of safe haven for foreign nationals within the United States who may not meet the legal definition of refugee required of asylum applicants but are nonetheless fleeing—or reluctant to return to—potentially dangerous situations.

By the time Donald Trump became president, TPS was in place for about 330,000 from 10 countries who would otherwise be subjected to disease, violence, starvation, the aftermath of natural disasters, and other life-threatening conditions.<sup>72</sup> The largest group of TPS recipients is from El Salvador (195,000 people) followed by Honduras (57,000 people) and Haiti (50,000 people).<sup>73</sup> Although, Trump announced the termination of TPS for most of the groups, TPS holders from Sudan, Nicaragua, Haiti, El Salvador, Nepal, and Honduras won preliminary injunctions, requiring the Trump administration to extend their immigration protections and work authorizations while the cases are ongoing.<sup>74</sup> On November 1, 2019, TPS was formally extended to those from El Salvador, Haiti, Nicaragua, Honduras, Nepal and Sudan to January 2021 pending litigation.<sup>75</sup>

Related legislation was also enacted in 1997. The Nicaraguan Adjustment and Central American Relief Act (NACARA) provides lawful permanent resident status to certain Nicaraguans, Salvadorans, Guatemalans, Cubans, and nationals of former Soviet bloc countries and their dependents.<sup>76</sup> Nicaraguan and Cuban nationals unlawfully present in the United States were eligible if they had been physically present in the United States for a continuous period beginning no later than December 1, 1995, through the date of the application for relief and applied for adjustment of status before April 1, 2000. For Guatemalans and Salvadorans, the following were required: (1) a Guatemalan who first entered the United States on or before October 1, 1990 (*American Baptist Church* class member); registered for

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70. 8 U.S.C.A. § 1254a(b)(2).

71. 8 U.S.C.A. § 1254a(a)(1).

72. Kathryn Johnson & Peniel Ibe, *Trump Has Ended Temporary Protected Status for Hundreds of Thousands of Immigrants. Here's What You Need to Know*, AM. FRIENDS SERV., <https://www.afsc.org/blogs/news-and-commentary/trump-has-ended-temporary-protected-status-hundreds-thousands-immigrants> (last updated Jan. 8, 2020).

73. *Id.*

74. *Id.*

75. KEVIN A. MCALEENAN, CONTINUATION OF DOCUMENTATION FOR BENEFICIARIES OF TEMPORARY PROTECTED STATUS DESIGNATIONS FOR EL SALVADOR, HAITI, HONDURAS, NEPAL, NICARAGUA, AND SUDAN, FED. REG. VOL. 84 NO. 213, 59403-59406 (NOV. 4, 2019), available at <https://www.federalregister.gov/documents/2019/11/04/2019-24047/continuation-of-documentation-for-beneficiaries-of-temporary-protected-status-designations-for-el>.

76. D.C. Appropriations Act, 92 U.S.C. § 699-706 (1978).

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*ABC* benefits on or before December 31, 1991; applied for asylum on or before January 3, 1995; and was not apprehended at time of entry after December 19, 1990; (2) a Salvadoran who first entered the United States on or before September 19, 1990 (*ABC* class member); registered for *ABC* benefits on or before October 31, 1991 (either directly or by applying for TPS); applied for asylum on or before February 16, 1996; and was not apprehended at time of entry after December 19, 1990; or (3) a Guatemalan or Salvadoran who filed an application for asylum on or before April 1, 1990 and had not received a final decision on the asylum application.<sup>77</sup> By 2007, almost 130,000 Salvadorans alone benefited from NACARA.<sup>78</sup>

#### **IV. THE UNITED STATES RESPONSE TO THE CONTEMPORARY CRISIS AT THE SOUTHERN BORDER MIMICS HISTORY**

The U.S. experience with the influx of Central Americans in the 1980s demands comparisons with the contemporary challenge that caught the nation's attention in 2014 when over 60,000 unaccompanied minors arrived at the southern border, along with a similar number of women with children traveling as "family units." Through the early 2000s, relative calm took hold in Central America. For example, a democratically elected civilian government in Guatemala in the late 1980s and U.N. backed peace negotiations in El Salvador led to cease fires. But by 2014, things had changed. The influx of 2014 was no longer about conventional political violence and attempts to overthrow governments. Now the migrants were mostly fleeing other types of violence: gang, cartel, and even domestic violence.

As the influx in 2014 hit the headlines across the country, two images stood out: migrant children in crowded Border Patrol stations covered in silver mylar blankets and public protests over buses of children being transported to new ORR facilities over the objections of local residents.

##### **A. The Obama Years**

Although the Obama administration initially labelled the situation a "humanitarian crisis," its response was deterrence and enforcement heavy. President Obama implemented a hardline enforcement posture, believing the approach would open a space for immigration reform with Republicans—a

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77. *Id.*

78. Sarah Gammage, *El Salvador: Despite End to Civil War, Emigration Continues*, MIGRATION POL'Y INST. (July 26, 2007) <https://www.migrationpolicy.org/article/el-salvador-despite-end-civil-war-emigration-continues/>.

strategy he used in 2010 with the Dream Act and then throughout 2013 with comprehensive immigration reform.<sup>79</sup> In response to the surge, DHS opened family detention centers first in New Mexico then in Texas.<sup>80</sup> DHS and the Department of Justice responded by sending their own “surge” of immigration judges and ICE attorneys to the border to start deportation hearings immediately.<sup>81</sup> Many were held in the despicable cold jail cells notoriously known as *hieleras* (“freezer”) for a couple days before being moved to detention centers.<sup>82</sup> Immigration courts around the country were ordered to expedite removal proceedings—through “rocket dockets”—of children and family units who were no longer in custody.<sup>83</sup> The Obama administration did attempt to get at root causes by engaging in the Alliance for Prosperity, for example seeking investments in Central America of \$1 billion in 2016 alone,<sup>84</sup> but its unnecessarily harsh enforcement efforts cannot be ignored.

President Obama’s immigration enforcement record is enigmatic. His interior enforcement priorities—memorialized in ICE enforcement memoranda—focused on noncitizens convicted of crimes, leaving room for the compassionate exercise of prosecutorial discretion for non-criminal, long-time undocumented residents. At the border, priorities were little different from other administrations, but the 2014 Central American influx caused an enforcement shift reminiscent of the 1980s: attempts to deter

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79. For example, in a speech at the U.S.-Mexico border in May 2011, Obama acknowledged that he had “gone above and beyond what was requested by the very Republicans who said they supported broader reform as long as we got serious about enforcement. . . . But even though we answered these concerns, there are still some who are trying to move the goal posts on us one more time.” Devin Dwyer, *President Obama Calls Immigration Reform ‘Economic Imperative,’ Despite Republican Opposition*, ABC NEWS (May 10, 2011) <https://abcnews.go.com/Politics/president-obama-calls-immigration-reform-economic-imperative-republican/story?id=13571582>.

80. HING, *supra* note 4, at 8.

81. Alan Gomez, *Obama Orders ‘Surge’ to Border to Speed up Deportations*, USA TODAY (June 20, 2014), <https://www.usatoday.com/story/news/nation/2014/06/20/obama-immigration-unaccompanied-minors-deportations/11070531/>.

82. *See e.g.*, Molly Redden, *Why Are Immigration Detention Facilities So Cold?*, MOTHER JONES (July 16, 2014), <https://www.motherjones.com/politics/2014/07/why-are-immigration-ice-detention-facilities-so-cold/>.

83. Safia Samee Ali, *Obama’s ‘Rocket Docket’ Immigration Hearings Violate Due Process, Experts Say*, NBC NEWS (Oct. 27, 2016), <https://www.nbcnews.com/news/us-news/obama-s-rocket-docket-immigration-hearings-violate-due-process-experts-n672636>.

84. While the U.S. had been providing aid to Central America for decades, the new program, dubbed the Alliance for Prosperity, or A4P, was designed in conjunction with the Inter-American Development Bank and was aimed at giving Northern Triangle governments a stake in its success by requiring their own monetary contributions aimed at four main areas: strengthening state institutions, increasing citizen security, investing in human capital, and energizing the private sector. From 2016 to 2017, Northern Triangle governments committed \$5.4 billion of their own money toward the program, according to the State Department.

asylum seekers represented by the increased detention of migrants—including children—and expediting procedures impinging on due process. Those efforts were reprehensible and cast a dark shadow on Obama's legacy, even though he took some remarkably courageous steps on behalf of other noncitizens. On the positive side, most notably, he responded to Congress's failure to pass comprehensive immigration reform by taking executive action on behalf of Dreamers—young, undocumented immigrants who grew up here—through the Deferred Action for Childhood Arrivals program (DACA).<sup>85</sup> Those who qualified were granted permission to stay and work without the threat of deportation. Some 800,000 Dreamers benefited. However, on the negative side, Obama's policy toward women and children fleeing Central America visited great and unnecessary hardship and trauma on migrants victimized by violence in their home countries.

### B. Background on Family Detention

For years, migrant children accompanied by a parent were not deemed to be within the *Flores* settlement by immigration officials. They were considered part of a family unit. In March of 2001, immigration authorities opened the Berks County Family Residential Center (“Berks”) in Pennsylvania. The post 9/11 creation of the Department of Homeland Security (DHS) placed ICE in charge of immigration enforcement, and family detention of asylum seekers expanded. In 2005, the George W. Bush administration maintained the position that *Flores* applied only to unaccompanied migrant children. Instead of adhering to the general policy favoring release, the administration incarcerated hundreds of families for months at a time at a new facility, the T. Don Hutto Family Detention Center near Austin, Texas.<sup>86</sup> Young children were forced to wear prison jumpsuits, live in housing with no privacy, use toilets exposed to public view, and sleep with the lights on. No schooling was provided.<sup>87</sup> In response to an ACLU lawsuit challenging these conditions, a federal judge in Texas denounced the administration's actions.<sup>88</sup> The Bush administration avoided a final ruling in

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85. Memorandum from Janet Napolitano to David V. Aguilar, Alejandro Mayorkas & John Morton (June 15, 2012) <https://www.dhs.gov/xlibrary/assets/s1-exercising-prosecutorial-discretion-individuals-who-came-to-us-as-children.pdf>.

86. Wil S. Hylton, *The Sham of America's Family Detention Camps*, N.Y. TIMES (Feb. 4, 2015), <https://www.nytimes.com/2015/02/08/magazine/the-shame-of-americas-family-detention-camps.html>. See also *Case Summary in the ACLU's Challenge to the Hutto Detention Center*, ACLU, <https://www.aclu.org/other/case-summary-aclus-challenge-hutto-detention-center>.

87. *Id.*

88. *Id.*; *Case Summary in the ACLU's Challenge to the Hutto Detention Center*, ACLU, <https://www.aclu.org/other/case-summary-aclus-challenge-hutto-detention-center>.

the case by promising to improve conditions at Hutto, but maintained its position that children in the family detention were not entitled to the *Flores* protections.<sup>89</sup>

Soon after President Barack Obama took office in 2009, his administration discontinued family detention at Hutto, leaving only the Berks facility to house refugee families in exceptional circumstances. For other refugee families, the Obama administration returned to a policy of “catch and release” while awaiting removal proceedings. Concern that families would abscond was not significant, because the data showed that nearly all those released with some form of monitoring reported for their hearings. Taking further steps to reduce reliance on detention and make ICE more effective, DHS conducted a comprehensive assessment of detention policy and practices in early 2009.<sup>90</sup>

However, in 2014, just five years later, all this changed, and the goal of reducing reliance on detention largely disappeared. When the number of refugees from Central America spiked in the summer of 2014, the Obama administration abruptly announced plans to resume family detention and terminate “catch and release” with harsh results.<sup>91</sup> Family units entering (usually a mother and a child) represented much of the surge, and they landed in immigration detention facilities—in New Mexico and Texas—or deported.<sup>92</sup> Treated like prisoners, they were confined to barracks, subjected to room checks, provided with substandard access to medical care, inadequate nutrition, and no psychological counseling.<sup>93</sup>

In order to quickly achieve the massive expansion of family detention in 2014-15, the Obama administration turned to private prison companies that have an enormous foothold in the business of immigration detention. The South Texas Detention facility in Dilley was set up in just a few weeks.

All the while, statutory and constitutional rights were hampered, given the fast-track removal process in the environment of detention. Coupling immediate removal procedures with detention was misguided given the vulnerabilities of the detainees who often suffered from PTSD and other mental health challenges. The vast majority were deported without ever bringing them before the immigration court. Then and now,

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89. Hylton, *supra* note 86.

90. *Id.*

91. Dara Lind, *The 2014 Central American Migrant Crisis*, VOX (Oct. 10, 2014), <https://www.vox.com/2014/10/10/18088638/child-migrant-crisis-unaccompanied-alien-child-ren-rio-grande-valley-obama-immigration>.

92. *Id.*

93. BILL ONG HING, *AMERICAN PRESIDENTS, DEPORTATIONS, AND HUMAN RIGHTS VIOLATIONS: FROM CARTER TO TRUMP 98–99* (Cambridge, Nov. 15, 2018)

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fast-track removal processes, like “expedited removal” and “reinstatement of removal,” put deportation decisions directly in the hands of enforcement agents and often deny asylum seekers the chance to present valid claims in court.<sup>94</sup>

### 1. Why Children and Women Flee the Northern Triangle

The sharp increase in Central American migration generated tremendous media coverage and speculation by elected officials and others about the reasons for the surge. However, many of the explanations were overly simplistic. Some Obama critics claimed the influx resulted from promises of immigration reform or administrative reforms in enforcement that sent encouraging signals to Central Americans; the migrants were said to be hoping to enjoy a “de facto amnesty” if they got across the U.S.-Mexico border.<sup>95</sup> Others thought the children were being drawn by rumors about special protections for migrant children by the Obama Administration, and pointed to the wholly unrelated DACA program announced in 2012.<sup>96</sup>

In reality, the migration has little due to pull factors. The migration of youth arose out of longstanding, complex problems in their home countries—that is, the growing influence of youth gangs and drug cartels, plus targeting of youth by police. The gangs have come to wield terrifying power with impunity, and weak governments struggle to respond. The violence is a legacy of the civil wars of the 1980s, subsequent migrations to the United States, and the deportation of gang members back to their home countries in the 1990s. Women are fleeing because of gender based violence, rising poverty, and continuing unemployment as well as the gang and drug violence.

#### a. The Prevalence of Violence is Apparent in What is Termed the Northern Triangle of Honduras, El Salvador, and Guatemala.

El Salvador and Honduras, from where large numbers of unaccompanied minors have fled, have become two of the most dangerous countries in the world. In 2020, El Salvador was ranked first with the highest homicide rate in the world.<sup>97</sup> Honduras was ranked third, while Guatemala

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94. Sharita Gruberg & Tom Jawetz, *How the U.S. Department of Homeland Security Can End Its Reliance on Private Prisons*, CENTER FOR AMERICAN PROGRESS (Sept. 14, 2016), <https://www.americanprogress.org/issues/immigration/news/2016/09/14/144160/how-the-u-s-department-of-homeland-security-can-end-its-reliance-on-private-prisons/>.

95. HING, *supra* note 4, at 5–6.

96. *Id.* at 6.

97. *Murder Rate by Country 2020*, WORLD POPULATION REVIEW (Feb. 17, 2020), <http://worldpopulationreview.com/countries/murder-rate-by-country/>.

was ninth.<sup>98</sup> Besides that, gender-based violence is at epidemic levels in Guatemala and the country ranks third in the killings of women worldwide.<sup>99</sup> According to the United Nations, two women are killed there every day.<sup>100</sup> Between January 2000 and May 2018 more than eleven thousand women and girls were murdered in Guatemala.<sup>101</sup>

b. Children in the Region are at a Greater Risk of Gang Violence.

Collaboration between drug cartels and gangs has led to a significant increase in violence, with children and teens being the primary targets. Central American children are 10 times more likely to be murdered than children in the United States.<sup>102</sup> Kids aged 15 to 17 face the highest risk of death by homicide.<sup>103</sup> In El Salvador, gangs have increasingly targeted children at their schools, resulting in El Salvador having one of the lowest school attendance rates in Latin America.<sup>104</sup>

c. Human and Drug Trafficking also are Rampant.

The influence of cartels in Mexico and at the border connects the current migratory experience with human and drug trafficking. The United States Department of the State reported that organized criminal groups coerce children into prostitution or to work as hit men, lookouts, and drug mules.<sup>105</sup> Drug traffickers may target minors in their home country and force them to traffic drugs across the border and once they are in the United States.

Gang and drug trafficking in Central America are increasingly recruiting

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98. *Id.*

99. Candace Piette, *Where Women Are Killed by Their Own Families*, BBC NEWS (DEC. 5, 2015), <https://www.bbc.com/news/magazine-34978330>.

100. Julie Guinan, *Nearly 20 years after peace pact, Guatemala's women relive violence*, CNN (Apr. 7, 2015), <https://www.cnn.com/2015/04/02/world/iyw-guatemala-gender-violence/>.

101. M. Gabriela Torres, *Gender-Based Violence and the Plight of Guatemalan Refugees*, SOC'Y FOR CULTURAL ANTHROPOLOGY (Jan. 23, 2019), <https://culanth.org/fieldsights/gender-based-violence-and-the-plight-of-guatemalan-refugees>.

102. Julio Ernesto Acuna Garcia, Central American kids come to the US fleeing record-high youth murder rates at home, THE CONVERSATION (July 13, 2018), <http://theconversation.com/central-american-kids-come-to-the-us-fleeing-record-high-youth-murder-rates-at-home-99132>.

103. *Id.*

104. Edgardo Ayala, *Schoolchildren and Teachers Under Fire in El Salvador*, INTER PRESS SERVICE NEWS AGENCY (Mar. 13, 2012), <http://www.ipsnews.net/2012/03/school-children-and-teachers-under-fire-in-el-salvador/>.

105. U.S. DEP'T. OF ST., 2012 TRAFFICKING IN PERSONS REPORT – MEXICO, THE U.N. REFUGEE AGENCY (June 19, 2012), <http://www.refworld.org/docid/4fe30cac27.html> (last visited Dec. 15, 2014).

girls to smuggle and sell drugs in their home countries, using gang rape as a means of forcing them into compliance. Many gangs are targeting younger girls, some as young as nine-years-old.

### C. Detention of Unaccompanied Migrant Children

The Office of Refugee Resettlement (ORR), a branch of the Department of Health and Human Services, is the federal agency responsible for the care and custody of unaccompanied migrant children. Under the William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, unaccompanied, non-Mexican, migrant children must be transferred to ORR custody within 72 hours of their arrest.<sup>106</sup> For several years, ORR operated temporary shelters throughout the United States to house children while ORR caseworkers sought to reunify them with family members or family friends in the United States. In response to the dramatic increase in numbers of children apprehended by Customs and Border Patrol in 2014, ORR opened three large facilities housed on military bases: Joint Base San Antonio – Lackland in San Antonio, TX; Fort Sill Army Base in Oklahoma and Port Hueneme Naval Base in Ventura, California.<sup>107</sup> Advocates soon unearthed significant concerns about the conditions in which children were held and the difficulty in gaining access by attorneys and legal workers due to security procedures at these military facilities.

More than 250,000 migrant kids traveling without their parents were detained at the U.S.-Mexico border from 2012 to 2018.<sup>108</sup> Most were part of the wave of Central American children fleeing the violence of criminal gangs and cartels in the Northern Triangle. When adults are picked up at the border, DHS has jurisdiction. But unaccompanied children are turned over to ORR. As the number of migrant kids has multiplied, ORR's job has grown. In 2011, the agency took custody of 7,000 children.<sup>109</sup> In 2014 it was 57,496. While 59,170 were detained in 2016, by 2018 the number dropped somewhat to 49,100.<sup>110</sup>

The vast majority of the children spend about a month in a licensed ORR-funded shelter, and then they are placed with a relative or another

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106. 8 U.S.C. § 1232 (b) (3).

107. HING, *supra* note 4, at 7.

108. See OFF. OF REFUGEE RESETTLEMENT, FACTS AND DATA, U.S. DEP'T OF HUM SERV., (JAN. 8, 2020), <https://www.acf.hhs.gov/orr/about/ucs/facts-and-data>.

109. Hannah Rapple, *Undocumented and Unaccompanied: Facts, Figures on Children at the Border*, NBC NEWS (July 9, 2014), <https://www.nbcnews.com/storyline/immigration-border-crisis/undocumented-unaccompanied-facts-figures-children-border-n152221>.

110. OFF. OF REFUGEE RESETTLEMENT, ORR FACT SHEET ON UNACCOMPANIED ALIEN CHILDREN'S SERVICES (2019), <https://www.acf.hhs.gov/orr/resource/orr-fact-sheet-on-unaccompanied-alien-childrens-services>.

sponsor while they await their day in immigration court.<sup>111</sup> A small fraction—roughly 500 to 700 in any given year who are considered public safety problems—are placed in jail-like settings: locked group homes or juvenile detention facilities.<sup>112</sup> Those children are held for two to three months, on average, but some are detained much longer.<sup>113</sup>

#### D. Detention of Families

In a 2014 change in policy, Obama's ICE began detaining families apprehended at the border, rather than releasing them from custody to appear for removal proceedings at a later date.<sup>114</sup> ICE opened a family detention center in Artesia, New Mexico, in July 2014 and opened another in Karnes City, Texas, in August.<sup>115</sup> Due process problems surfaced immediately. For example, the manner and standards used to screen asylum seekers through credible fear asylum interviews were improper.<sup>116</sup> Hearings were conducted awkwardly via remote video teleconferencing. Access to legal representation was virtually impossible.<sup>117</sup> Beyond procedural problems, sanitation, health care, and inadequate nutritional needs arose.<sup>118</sup>

After great uproar over the deplorable conditions at Artesia, ICE closed the New Mexico facilities, but opened new barracks in Dilley, Texas. Meanwhile, the Karnes, Texas facility was expanded.<sup>119</sup> To no one's surprise, the conditions at Dilley and Karnes were no improvement over Artesia.

A major part problem with Dilley and Karnes is that ICE contracted private prison companies to run the facilities. So since 2015, GEO Group and CoreCivic (formerly Corrections Corporation of America or CCA) are responsible for detaining families—mostly women and children—in prison-like conditions.<sup>120</sup>

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111. Tyche Hendricks, *Hundreds of Migrant Teens Are Being Held Indefinitely in Locked Detention*, KQED (Apr. 11, 2016), <https://www.kqed.org/news/10923059/hundreds-of-migrant-teens-are-being-held-indefinitely-in-locked-detention>.

112. *Id.*

113. Tyche Hendricks, *Hundreds of Migrant Teens Are Being Held Indefinitely in Locked Detention*, KQED, (Apr. 11, 2016) <https://www.kqed.org/news/10923059/hundreds-of-migrant-teens-are-being-held-indefinitely-in-locked-detention>.

114. HING, *supra* note 4, at 8.

115. *Id.*

116. *Id.*

117. *Id.*

118. *Id.*

119. Bill Ong Hing, *Deporter-in-Chief: Obama v. Trump* 12 (U. of S.F. Sch. Of L., Working Paper No. 2019-03).

120. Denise Gilman & Luis A. Romero, *Immigration Detention Inc*, J. OF MIGRATION & HUM. SEC. 1, 8 (2018).

These are the same companies whose operations are so bad, that complaints against them are difficult to keep track of:

- In 2013, the Texas Observer called the state's CCA-run Dawson State Jail for nonviolent offenders in Dallas "the worst state jail in Texas."<sup>121</sup> Seven inmates have died in Dawson since 2004, generally due to medical neglect and malpractice.<sup>122</sup> One prisoner gave birth to a premature baby at 26 weeks after CCA guards refused her cries for medical attention, she claims.<sup>123</sup> The baby was delivered in a prison toilet with no medical assistance and died four days later.<sup>124</sup>
- CCA's Don Hutto facility, a "family residential facility" for immigrant detainees and their children, was found to be violating nearly every standard for minors in ICE custody.<sup>125</sup> Families were crammed into small cells with no privacy, children were dressed in prison scrubs, and conditions were appalling.<sup>126</sup> In 2011, two federal sexual abuse investigations and a class action lawsuit were filed on behalf of immigrant women who alleged they were sexually assaulted by guards in the facility.<sup>127</sup> One CCA guard was sentenced to 10 months in federal prison.<sup>128</sup>
- A former employee of GEO Group revealed that at the Adelanto, California, Immigration Detention Center, Muslim men were put into solitary confinement simply for quietly saying their daily prayers.<sup>129</sup> A government report found that GEO Group's medical mismanagement led to the death of at least one detainee in March 2012.<sup>130</sup> Another Adelanto detainee was denied treatment for his severe hip infection because "it was too expensive."<sup>131</sup> The infection ultimately developed into a life-threatening condition that required a 6-week hospitalization at an outside hospital.<sup>132</sup>

121. HING, *supra* note 4, at 9.

122. *Id.*

123. *Id.*

124. *Id.*

125. *Id.* at 10.

126. *Id.*

127. *Id.*

128. *Id.*

129. *Id.*

130. *Id.*

131. *Id.*

132. *Id.*

Immigration detention is big business for the companies. CoreCivic, the largest private prison corporation, reported \$1.65 billion in revenue in 2014; 44% was from federal contracts: 20% U.S. Marshals, 12% Bureau of Prisons, and 12% from ICE.<sup>133</sup> Despite GEO Group's embattled reputation, ICE expanded the available bed space at GEO Group's San Bernadino County, California facility (Adelanto) by 640 beds a few years ago.<sup>134</sup> According to their annual report, GEO Group expects to generate \$21 million in additional annualized revenue from this expansion.<sup>135</sup> Both companies have significantly augmented their profits since the implementation of an immigration bed quota that was inserted into federal law in 2007.<sup>136</sup> CoreCivic's net sales reached \$1.65 billion in 2014 and increased to \$1.84 billion in 2018.<sup>137</sup> GEO experienced a dramatic profit increase from \$41,845,000 in 2007 to \$143,840,000 in 2014, a 244 percent increase.<sup>138</sup> GEO reported 2017 net income of \$146.2 million, but expected future earnings to jump because of the Trump administration increased enforcement efforts.<sup>139</sup> The company donated more than \$500,000 to President Trump's campaign and inaugural committee.<sup>140</sup>

In spite of the problems and criticism, CoreCivic and GEO Group were selected to run the family detention centers housing women and children fleeing violence from Central America. The CoreCivic-operated South

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133. Bill Ong Hing, *Deporter-in-Chief: Obama v. Trump* 13, available at [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3254680&download=yes](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3254680&download=yes).

134. Geo Group/Geo Care, *Overdose Deaths Spark Changes at ADAPPT Halfway House is Reading: From Priv. Corr. Working Grp.* (Dec. 20, 2017), [https://www.privateci.org/rap\\_geo.html](https://www.privateci.org/rap_geo.html).

135. *Id.*

136. NAT'L IMMGR. JUST. CTR., *Immigration Detention Bed Quota Timeline*, (Jan. 2017) [https://www.immigrantjustice.org/sites/default/files/content-type/commentary-item/documents/2017-01/Immigration%20Detention%20Bed%20Quota%20Timeline%202017\\_01\\_05.pdf](https://www.immigrantjustice.org/sites/default/files/content-type/commentary-item/documents/2017-01/Immigration%20Detention%20Bed%20Quota%20Timeline%202017_01_05.pdf).

137. Income Statement: From CoreCivic (Dec. 2018), [http://ir.corecivic.com/stock-information/fundamentals/income-statement?c0d1e7f3-8f46-4783-ade5-b98ab8d68869%5Btimeframe\\_display%5D=annual&c0d1e7f3-8f46-4783-ade5-b98ab8d68869%5Bperiod%5D=compare&c0d1e7f3-8f46-4783-ade5-b98ab8d68869%5Bcompare%5D%5Bperiod\\_compare\\_one%5D=P6&c0d1e7f3-8f46-4783-ade5-b98ab8d68869%5Bcompare%5D%5Bperiod\\_compare\\_two%5D=P2&url=](http://ir.corecivic.com/stock-information/fundamentals/income-statement?c0d1e7f3-8f46-4783-ade5-b98ab8d68869%5Btimeframe_display%5D=annual&c0d1e7f3-8f46-4783-ade5-b98ab8d68869%5Bperiod%5D=compare&c0d1e7f3-8f46-4783-ade5-b98ab8d68869%5Bcompare%5D%5Bperiod_compare_one%5D=P6&c0d1e7f3-8f46-4783-ade5-b98ab8d68869%5Bcompare%5D%5Bperiod_compare_two%5D=P2&url=).

138. Bethany Carson and Eleana Diaz, *Payoff: How Congress Ensures Private Prison Profit with an Immigrant Detention Quota*, Grassroots, Grassroots Leadership (Apr. 2015) <https://grassrootsleadership.org/reports/payoff-how-congress-ensures-private-prison-profit-immigrant-detention-quota>.

139. Marcia Heroux, *Boca-Based Prison Operator Geo's 2017 Revenues Up 4 Percent, Earnings Dip*, S. FLA. SUN SENTINEL (Feb. 14, 2018), <https://www.sun-sentinel.com/business/fl-bz-geo-2017-earnings-20180214-story.html>.

140. Keith Larsen, *GEO Group Expects to Boost Revenue in 2019 After ICE Budget Grows*, REAL DEAL (Feb. 14, 2019), <https://therealdeal.com/miami/2019/02/14/geo-group-expects-to-boost-revenue-in-2019-after-ice-budget-grows/>.

Texas Family Residential Center in Dilley opened in December 2014 to hold 480 women and children.<sup>141</sup> But capacity was increased to 2,400 by May 2015—making Dilley the largest immigrant detention center in the country.<sup>142</sup> The GEO-run Karnes County Residential Center opened in June 2014 and by 2017 held 1,200 women and children.<sup>143</sup>

In short time, horrible conditions at both facilities were exposed. Detainees rioted over poor medical care, as well as overflowing sewage and overcrowding.<sup>144</sup> The facilities have been plagued with allegations of sexual and physical abuse, maggots in detainees' food, and clothing wash loads mixed with mops and cleaning equipment.<sup>145</sup> By the summer of 2015, a federal judge called the detention centers and temporary holding cells along the border “deplorable” and ruled that they “failed to meet even the minimal standard” for “safe and sanitary” conditions. The judge ordered that children not be held for more than 72 hours unless they are a significant flight risk or a danger to themselves and others.<sup>146</sup>

### E. The Use of “Rocket Dockets”

The Obama administration also implemented expedited removal proceedings, so-called “rocket dockets,” for unaccompanied children and families who were released from custody and transferred to immigration courts near relatives or family friends. In San Francisco where I volunteered, children and families were provided as few as three days' notice of their court hearing, severely limiting their ability to find counsel. Continuances (extensions of time in between hearings) were granted for very short periods of time—in some instances as little as a week—to find representation.

The expedited hearings for children and families gained some national attention. On July 22, 2014, Dana Leigh Marks, President of the National Association of Immigration Judges, sent a letter to Sen. Harry Reid, U.S. Senate Majority Leader, and Sen. Mitch McConnell, U.S. Senate Minority Leader, expressing serious concerns about immigration judges' caseloads and the use of expedited procedures in children's cases.<sup>147</sup> Coordinated

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141. Carson & Diaz, *supra* note 138.

142. *Id.*

143. *Id.*

144. Bill Ong Hing, *Deporter-in-Chief: Obama v. Trump* 13, available at [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3254680&download=yes](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3254680&download=yes).

145. Cindy Carcamo, *Judge Orders Prompt Release of Immigrant Children from Detention*, L.A. TIMES (Aug. 22, 2015), <https://www.latimes.com/nation/la-na-family-detention-children-20150821-story.html>.

146. *Id.*

147. Sarah Bronstein, *Update on Unaccompanied Children and Families*, CLINIC (Aug. 2014), (on file with author).

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efforts by service providers to respond to the rocket docket in many parts of the country helped, but the stress and pressure on these providers was immense. Some jurisdictions, including New York City and San Francisco County, tried to help by appropriating funds for community legal services providers to hire additional staff.<sup>148</sup>

### F. Faces of the Children

In spite of the criticism, family detention, rocket docket, and other enforcement efforts flourished on Obama's watch. On August 3, 2016, DHS Secretary Jeh Johnson announced that deportations of Guatemalans, Hondurans, and El Salvadorans would continue at the rate of 15 to 18 flights per week.<sup>149</sup> While acknowledging that those countries have among the highest homicide rates in the world, he insisted that the United States had to continue sending the message that "our borders are not open borders."<sup>150</sup>

The implementation of these policies was hard for me to believe. One need only spend a little time with the migrants—especially the children—to understand that prioritizing their removal was wrong-headed. These efforts were echoes of the past—the Obama administration did not listen to the lessons of the 1980s when Reagan administration essentially took the same, harsh action. Consider what one of our child clients, Marlon, told us about why he fled to the United States from El Salvador:

My uncle had been killed in his own home, just a few doors from our house, by a stray bullet shot by gang members. . . . I was beaten with a baseball bat by one of the [MS-13] gang members when they accused me of "tagging" a wall because they were afraid it would draw police attention to the area. My mother was in constant fear for my safety and future. She told me to stay away from the gangs, but there was nothing that she could do to protect me. If she went to the police to complain about the threats, recruitment activity or assaults, the police would do nothing to help.

And this typical reflection was offered from one of my students, Brooke Longuevan, after she labored to piece together the story of one of our child clients from Honduras:

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148. *Id.*

149. Franco Ordonez, *Despite Danger, U.S. to Continue Deportations to Central America*, MCCLATCHY WASH. BUREAU (Aug. 3, 2016), <https://www.mcclatchydc.com/news/nation-world/national/article93508402.html>.

150. *Id.*

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[He] fled to the U.S. after gang members killed multiple family members and threatened to do the same to him. Three of his immediate family members were killed over a span of 2 years. At the time my client was 11 years old and his mother sought to shield him from details of his family member's deaths. . . . The effect of PTSD on memory also was an issue in discerning when my client entered the U.S. and how he traveled here. [It] was obvious that his PTSD had blurred his memory of his journey. . . . The only thing he remembers from his journey was taking the train through Mexico to the border. I asked him why he thought he remembered that and not the other parts of his journey and he replied that it was because he had to stay awake the whole time, if you fell asleep you could fall off the top of the train. He said that he had seen kids that fell asleep fall off the train and die.

On the eve of his final state of the union address, President Obama faced embarrassing criticism from more than 140 fellow Democrats accusing the administration of wrongfully deporting women and children from Central America who had come here seeking refuge. To mollify those critics, administration officials announced a new program that would seek United Nations help to screen migrants fleeing violence from the region to set up processing centers in several Latin American countries in the hopes of stemming a flood of families crossing our southern border illegally.<sup>151</sup>

Sadly, Obama's Department of Justice and DHS strongly defended their misguided deportation efforts in court.<sup>152</sup> They emphatically resisted challenges to the conditions at the detention centers.<sup>153</sup> They battled against the right to appointed counsel in cases involving children facing deportation on their own.<sup>154</sup> Unbelievably, the Department of Justice offered incredible testimony in defense of its refusal to appoint counsel to unrepresented children: Jack H. Weil, a longtime immigration judge who was responsible for training other judges, testified for the government that toddlers can learn immigration law well enough to represent themselves in court, "I've taught immigration law literally to 3-year-olds and 4-year-olds," Weil said.<sup>155</sup> "It

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151. Julia Preston, David M. Herszenhorn & Michael D. Shear, *U.N. to Help U.S. Screen Central American Migrants*, N.Y. TIMES (Jan. 12, 2016), <https://www.nytimes.com/2016/01/13/us/politics/un-to-help-us-screen-central-american-migrants.html>.

152. Jerry Markon, *Can a 3-Year-Old Represent Herself in Immigration Court? This Judge Thinks So*, WASH. POST (Mar. 5, 2016), [https://www.washingtonpost.com/world/national-security/can-a-3-year-old-represent-herself-in-immigration-court-this-judge-thinks-so/2016/03/03/5be59a32-db25-11e5-925f-1d10062cc82d\\_story.html](https://www.washingtonpost.com/world/national-security/can-a-3-year-old-represent-herself-in-immigration-court-this-judge-thinks-so/2016/03/03/5be59a32-db25-11e5-925f-1d10062cc82d_story.html).

153. *Id.*

154. *Id.*

155. *Id.*

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takes a lot of time. It takes a lot of patience. They get it. It's not the most efficient, but it can be done."<sup>156</sup>

## V. THE TRUMP ICE AGE

Since taking office, Donald Trump's immigration enforcement strategies and proposals have constantly taken center stage. From the Muslim ban and the Wall to his attempts to terminate DACA and TPS, freeze federal funding for sanctuary cities, demand social media history of visa applicants, and remove individuals previously granted permission to remain by the Obama administration, Trump's efforts have been incessant. At the border, he appears to want to end any opportunity for asylum to the flow of refugees from Central America. Not only has he repeated the mistakes of the past, he is doubling down on deterrence while ignoring the nature of the flow.

### A. Attempts to Disrupt the Flores Settlement Agreement

Although the Obama administration laid the groundwork for much of the Trump administration's actions, the current regime has gone far beyond the actions of its predecessor. The expansion of family detention is one example. While ICE generally has been limited to detaining families for 20 days under restrictions of the *Flores* settlement, in September 2018, DHS proposed regulations to terminate the 1997 settlement to deter future asylum seekers.<sup>157</sup> But for federal court intervention, ICE would have been able to detain families indefinitely.<sup>158</sup>

The Trump administration abused the *Flores* settlement in other ways. As we saw when the *Flores* litigation began, detained children were used as bait to arrest undocumented parents. To minimize that possibility, the settlement agreement established procedures to allow other responsible adults to take responsibility for the children.<sup>159</sup> But beginning in 2017, Trump's ICE officials once again began looking into the immigration status of parents and caretakers coming forward to take custody of children in detention.<sup>160</sup> DHS required ORR to provide ICE

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156. *Id.*

157. Muzaffar Chishti & Sarah Pierce, *Trump Administration's New Indefinite Family Detention Policy: Deterrence Not Guaranteed*, MIGRATION INFO. SOURCE (Sept. 26, 2018), <https://www.migrationpolicy.org/article/trump-administration-new-indefinite-family-detention-policy>.

158. Miriam Jordan & Manny Fernandez, *Judge Rejects Long Detentions of Migrant Families, Dealing Trump Another Setback*, N.Y. TIMES (July 9, 2018), <https://www.nytimes.com/2018/07/09/us/migrants-family-separation-reunification.html>.

159. See Part III, Section D.

160. Samantha Michaels, *The Trump Administration Is Using Immigrant Children as*

with names, fingerprints, and immigration status of potential sponsors for UACs, as well as all adult members of a potential sponsor's household.<sup>161</sup> In a five-month period in 2018 alone, 170 undocumented adults were arrested by ICE in the process. The vast majority had no criminal record.<sup>162</sup> Fortunately, a provision in the budget compromise of February 2019 barred ICE from using ORR information to detain or remove sponsors.<sup>163</sup>

Abuse of the *Flores* agreement received national attention in June 2019 when an inspection team I was a part of revealed that children separated from family members were being held in deplorable conditions at the Clint, Texas CBP facility for up to two or three weeks.<sup>164</sup> Under the *Flores* agreement, children must be released or turned over to ORR officials by the border patrol within 72 hours.<sup>165</sup> More than 350 children were being detained on the day we arrived, including a two-year-old girl taken from her aunt, and several teen mothers nursing infants. Several of the younger children I interviewed were unbathed and wore dirty clothes. Some did not have socks. Their hair was dirty. I came to realize that the younger children were dirtier than the older children because the smaller ones were hesitant to bathe by themselves; there was also no one who helped them wash their clothes. The children were detained in cramped rooms that slept 20-50 persons, depending on the size of the room. Some had beds, others had mats to sleep on. Still others had no mats to sleep on. The children are confined to their rooms all day long, except when the room is cleaned, when they are out to eat, or when they must go the bathroom. All—including the nursing teen mothers—were given the same three meals every day: for breakfast, an oatmeal mix with a juicy pouch drink and a cookie or bar; lunch was an instant cup of noodles or ramen-type “soup” with another juicy drink; and dinner was a microwaved frozen burrito. Fresh fruits and vegetables were never provided. The prolonged

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*Bait to Deport Their Parents*, MOTHER JONES (June 30, 2017), <https://www.motherjones.com/politics/2017/06/the-trump-administration-is-using-immigrant-children-as-bait-to-deport-their-parents/>.

161. Caitlin Dickson, *Congress Passed a Mixed-Bag of Immigration Policy While Trump Was Focused on the Wall*, YAHOO NEWS (Feb. 18, 2019), <https://news.yahoo.com/weighing-budget-bill-immigration-advocates-opponents-win-lose-005220447.html>.

162. Tal Koban, *ICE Arrested Undocumented Adults Who Sought to Take in Immigrant Children*, S.F. CHRON. (Dec. 10, 2018), <https://www.sfchronicle.com/politics/article/ICE-arrested-undocumented-adults-who-sought-to-13455142.php>.

163. Dickson, *supra* note 161.

164. Dahlia Lithwick, “Some Did Not Have Socks. Their Hair Was Dirty.” *An Interview with an Immigration Lawyer Who Visited the Detained Children in Clint, Texas*, SLATE (July 1, 2019), <https://slate.com/news-and-politics/2019/07/kids-at-clint-border-crisis-immigration-lawyer-weighs-in.html>.

165. See Part III, Section D.

CBP detention did not end until we went to the press, and members of Congress followed up with their own inspection.<sup>166</sup>

### B. Family Separation Intensifies Under Trump

“All I hear is my daughter, crying. All I can see is her face when they took her—she was terrified,” lamented Arnovis Guidos Portillo.<sup>167</sup> Portillo, a single parent, fled El Salvador on May 18, 2018, after two death threats from a local gang.<sup>168</sup> He paid a smuggler to bring him and his six-year-old daughter, Meybelin, to the United States.<sup>169</sup> After a harrowing nine-day trip, they reached the US border near McAllen, Texas, crossed under the international bridge, and approached U.S. border patrol agents to turn themselves in and request asylum.<sup>170</sup> Agents took them into custody, but within a day, the pair was forcibly separated.<sup>171</sup> Portillo was taken to a detention center and criminally charged with misdemeanor illegal entry.<sup>172</sup> He never had a chance to apply for asylum and was deported back to El Salvador five weeks later without knowing Mabelin’s whereabouts.<sup>173</sup>

Portillo and Meybelin were not the only child and parent separated on arrival to the U.S.-Mexico border. While estimates varied, about three thousand migrant children were taken from their parents at the border and detained soon after April 6, 2018. That day, Attorney General Jeff Sessions notified all U.S. Attorney’s Offices along the Southwest Border of a new “zero-tolerance policy” for offenses under 8 U.S.C. § 1325(a), which prohibits both illegal entry and attempted illegal entry into the United States by an alien.<sup>174</sup> The administration’s rationale for separating families was that children cannot be prosecuted with their parents, so the children must be separated.<sup>175</sup> However, no law or court ruling mandates family separation.

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166. Priscilla Alvarez, *Lawmakers, Including Ocasio-Cortez, Lash Out Over Conditions Following Border Facility Tours*, CNN (July 2, 2019), available at [https://www.fox10tv.com/news/us\\_world\\_news/alexandria-ocasio-cortez-decries-conditions-amid-border-facility-tour/article\\_13073a77-b602-5def-9dfa-1856eef07c62.html](https://www.fox10tv.com/news/us_world_news/alexandria-ocasio-cortez-decries-conditions-amid-border-facility-tour/article_13073a77-b602-5def-9dfa-1856eef07c62.html).

167. Sarah Kinoshian, *‘All I Hear Is My Daughter, Crying’: A Salvadoran Father’s Plight After Separation at Border*, GUARDIAN (June 24, 2018), <https://www.theguardian.com/us-news/2018/jun/24/all-i-hear-is-my-daughter-crying-salvadoran-father-yearns-to-see-his-child-again>.

168. *Id.*

169. *Id.*

170. *Id.*

171. *Id.*

172. *Id.*

173. *Id.*

174. Press Release, DEP’T OF JUST., Attorney General Announces Zero-Tolerance Policy for Criminal Illegal Entry (Apr. 6, 2018), <https://www.justice.gov/opa/pr/attorney-general-announces-zero-tolerance-policy-criminal-illegal-entry>.

175. *Id.*

In fact, during its first 15 months, the Trump administration released nearly 100,000 immigrants who were apprehended at the US-Mexico border, a total that included more than 37,500 unaccompanied minors and more than 61,000 family members.<sup>176</sup> One of the sinister tactics agents at the U.S.-Mexico border used to separate children from their parents was to tell them that children were being taken to get a bath. But then the children were kept detained away from their parents.<sup>177</sup>

Once the policy of taking children away from their parents was revealed, the public protest was fast and widespread. Congresswoman Pramila Jayapal (D-Wash.) called the family separation policy “cruel and barbaric.”<sup>178</sup> Senator Rob Portman (R-Ohio) called the practice “counter to our values.”<sup>179</sup> Religious leaders of all faiths condemned the action. CEOs from major companies denounced the practice.<sup>180</sup> Former first lady Michelle Obama condemned the policy, and Laura Bush labelled it “cruel” and “immoral.”<sup>181</sup> Physicians for Human Rights concluded that the actions violated “fundamental human rights.”<sup>182</sup> Political leaders from abroad expressed their outrage, and private citizens donated money to cover the bond fees for detained parents.<sup>183</sup>

In response to the volume and breadth of criticism, on June 20, 2018, Trump signed an executive order ending his administration’s policy of

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176. Salvador Rizzo, *The Facts About Trump’s Policy of Separating Families at the Border*, WASH. POST (June 19, 2018), <https://www.washingtonpost.com/news/fact-checker/wp/2018/06/19/the-facts-about-trumps-policy-of-separating-families-at-the-border/>.

177. Ellen Cranley, *Border Agents Telling Migrant Parents They’re Taking Their Kids to Get Baths Illustrates How Trump’s ‘Zero Tolerance’ Policy is Being Carried Out on the Ground*, BUS. INSIDER (June 18, 2018), <http://www.businessinsider.com/border-agents-use-baths-to-separate-kids-from-parents-2018-6>.

178. Jake Johnson, *After Visiting Immigrant Mothers Detained by Trump, Pramila Jayapal Demands End to ‘Cruel and Barbaric’ Family Separation Policy*, COMMON DREAMS (June 10, 2018), [www.commondreams.org/news/2018/06/10/after-visiting-immigrant-mothers-detained-trump-pramila-jayapal-demands-end-cruel](http://www.commondreams.org/news/2018/06/10/after-visiting-immigrant-mothers-detained-trump-pramila-jayapal-demands-end-cruel).

179. Marilyn Icsman, *Sen. Portman Calls Trump Administration’s Family Separation Policy ‘Counter to Our Values’*, CIN. ENQUIRER (June 18, 2018), <https://www.cincinnati.com/story/news/2018/06/18/heres-where-ohio-lawmakers-stand-families-being-separated-border/709656002/>.

180. Gerrit De Vynck, *Tech CEOs Voice Opposition to Family Separations at Border*, BLOOMBERG (June 19, 2018), <https://www.bloomberg.com/news/articles/2018-06-19/tech-ceos-voice-opposition-to-family-separations-at-the-border>.

181. Sarah McCammon, *First Ladies Unite Against Separating Children at Border*, NPR (June 19, 2018), <https://www.npr.org/2018/06/19/621349853/first-ladies-unite-against-separating-children-at-border>.

182. *Sign the Letter Opposing Separation of Families*, PHYSICIANS FOR HUM. RTS. (MAR. 1, 2020 9:06 AM) <https://secure.phr.org/secure/family-separation-sign-letter>.

183. Jessica Guynn, *Facebook Fundraiser to Help Immigrant Children Tops \$20 Million with Global Donations*, USA TODAY (June 18, 2018), <https://www.usatoday.com/story/tech/2018/06/18/facebook-campaign-raising-millions-reunite-immigrants-children/712502002/>.

separating migrant children from their parents who were detained as they attempted to enter the United States. However, in the process, Trump complained about the *Flores* settlement.<sup>184</sup>

In the meantime, separate court actions were brought on behalf of parents and children who were separated. In *Ms. L. v. ICE*,<sup>185</sup> filed in February 2018, allegations of family separation were made even before the Sessions April 6, 2018 zero-policy directive. When the separation policy expanded, the federal judge in that case ordered the reunification of the separated children and parents.<sup>186</sup> In the process, ORR revealed that it was not prepared to handle so many new children into its care, and ICE and ORR did not track the whereabouts of separated children in any systemic manner.<sup>187</sup> Many children were “languishing for months in foster families or government facilities.”<sup>188</sup>

On March 8, 2019, the federal judge found that the “most significant facts to come out of the [Health and Human Services Inspector General] Report are . . . that [as early as] the summer of 2017, DOJ and DHS were separating parents and children at the border pursuant to the Administration’s new policy . . .,” long before the May 2018 public announcement of zero tolerance.<sup>189</sup> The court, therefore, ordered that the class action family separation lawsuit be expanded to include the “thousands” of other separated families identified to the court.<sup>190</sup> In the hearing leading up to its decision, the court reminded the Trump administration, “It’s important to recognize that we’re talking about human beings . . . . Every person needs to be accounted for . . . . The hallmark of a civilized society is measured by how it treats its people and those within its borders.”<sup>191</sup> Furthermore, the court stated that the Trump administration’s “argument overlooks the profound importance of the reunification effort, which entailed a search for parents who had been separated from their minor children under questionable

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184. See Richard Gonzales, *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>.

185. *Ms. L. v. U.S. Immigr. & Customs Enf’t* (“ICE”), 330 F.R.D. 284, 286 (2019).

186. Laura Jarrett, *Federal Judge Orders Reunification of Parents and Children, End to Most Family Separations at Border*, CNN (June 27, 2018), <https://www.cnn.com/2018/06/26/politics/federal-court-order-family-separations/index.html>.

187. Michelle Brané & Margo Schlanger, *This Is What’s Really Happening to Kids at the Border*, WASH. POST (May 30, 2018), <https://www.washingtonpost.com/news/monkey-cage/wp/2018/05/30/this-is-whats-really-happening-to-kids-at-the-border/>.

188. Adolfo Flores, *The U.S. Isn’t Just Separating Children from Their Parents. It Also Has No Plan to Reunite Them*, BUZZFEED (June 18, 2018), <https://www.buzzfeednews.com/article/adolfoflores/dhs-border-patrol-ice-orr-no-reunification-children-parents#.gkyOYX6oaB>.

189. *Ms. L.*, 330 F.R.D. at 288.

190. *Id.* at 292.

191. *Id.*

circumstances . . . .”<sup>192</sup> The court also noted that the “difficulty in identifying proposed class members is the result of Defendants’ own record keeping practices, or lack thereof.”<sup>193</sup>

In spite of the fact that the federal judge in *Ms. L v. ICE* ordered the government to stop separating families except in cases where a parent is unfit or presents a danger to the child, between June 2018 and July 2019, more than 900 children were separated from their parents based on minor offenses like traffic violations.<sup>194</sup>

### C. Remain in Mexico Policy and Metering System

Beginning in January 2019, the Trump administration instituted a “Migrant Protection Protocol,” commonly referred to as the Remain in Mexico Policy.<sup>195</sup> Under the policy, first implemented in Tijuana, non-Mexican asylum seekers who presented themselves at the border were processed at returned to Mexico where they were told to wait.<sup>196</sup> The policy was quickly extended to the Mexico-U.S. border in Texas, and finally to the border in Arizona.<sup>197</sup> By the end of 2019, more than 57,000 asylum seekers have been subject to the policy.<sup>198</sup> They must wait until backlogged immigration courts can schedule their hearings, and that can take weeks or months.<sup>199</sup>

The problem is that the asylum seekers are forced to remain in Mexican shelters in cities like Ciudad Juarez and Tijuana that are extremely dangerous. They are practically prisoners in shelters, because cartels prey on migrants who venture out into the streets. The shelters, including churches, homes, and other facilities are crowded and have little to no furniture. The migrants sleep on cots or on the floor. And the surrounding neighborhoods are so dangerous, that walking outside the shelter could result in kidnapping or death. Over a period of several months, the Human Rights First advocacy group tracked at least 110 publicly reported assaults, rapes, kidnappings and

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192. *Id.*

193. *Id.*

194. Priscilla Alvarez, *ACLU Says Over 900 Children Separated from Families at U.S. Border Since Last Summer*, CNN (July 30, 2019), <https://www.cnn.com/2019/07/30/politics/900-children-separated-border/index.html>.

195. Max Rivlin-Nadler, *A Year of Trump’s ‘Remain-in-Mexico’ Policy Leaves Migrants Desperate, Vulnerable*, KPBS (Feb. 14, 2020), <https://www.kpbs.org/news/2020/feb/14/border-has-descended-darkness-year-remain-mexico/>.

196. *Id.*

197. Rafael Carranza, *Trump’s ‘Remain in Mexico’ Migrant Program Expanding to Entire Arizona Border*, AZ CENT. (Nov. 22, 2019), <https://www.azcentral.com/story/news/politics/border-issues/2019/11/22/remain-in-mexico-expanding-tucson-border-migrant-protection-protocols/4272371002>.

198. *Id.*

199. *Id.*

other violent crimes committed against asylum seekers in Mexico, which it said was “likely only the tip of the iceberg.”<sup>200</sup> In addition to ignoring the personal safety and economic challenges of the individuals, the process makes it near impossible to find legal assistance.

Even before the Remain in Mexico Policy was implemented, CBP implemented a metering, or waitlist, system which limits the number of people who can request asylum at a port of entry at a U.S.-Mexico border crossing each day.<sup>201</sup> When asylum seekers present themselves at the border, they are told by CBP officers that they have to turn around and put their name on a waitlist, basically, back in Mexico and wait for their turn to request asylum.<sup>202</sup> The lists have been implemented at California, Arizona, and Texas ports of entry. People are waiting weeks or sometimes months for their opportunity to request asylum.<sup>203</sup> Tens of thousands of asylum seekers, including Mexicans, are waiting on the Mexican side of the border for their chance to request asylum in the United States.<sup>204</sup>

In June 2019, the metering system received attention when a photo of a migrant father and his daughter lying dead in the reeds at the edge of the Rio Grande River elicited shocked reactions around the world.<sup>205</sup> The photo of the two—Oscar Alberto Martinez Ramirez and his almost 2-year-old daughter Valeria—became a symbol of the humanitarian crisis at the border and, for some, highlighted some of the restrictive immigration policies that have led to that crisis.<sup>206</sup> It was reported that the father grew impatient with the waitlist and tried to forge the river.<sup>207</sup>

To make matters worse, the metering system now intersects with another policy—the third country requirement—to make the hurdles for asylum even more impossible to surmount.

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200. Scott Martelle, Opinion, *The Evidence Is In: Trump's 'Remain in Mexico' Policy Puts Asylum-Seekers' Lives at Risk*, L.A. TIMES (Aug. 30, 2019), <https://www.latimes.com/opinion/story/2019-08-30/remain-in-mexico-dangerous-conditions-asylum-trump-immigration-border>.

201. *Metering' at the Border*, NPR (June 29, 2019), <https://www.npr.org/2019/06/29/737268856/metering-at-the-border>.

202. *Id.*

203. *Id.*

204. *Id.*

205. *Id.*

206. *Id.*

207. Astrid Galvan, *Asylum Seekers Band Together at Border City*, HOUS. CHRON. (July 21, 2019), available at <https://www.pressreader.com/usa/houston-chronicle-sunday/20190721/281822875387944>.

#### D. Third Country Transit Bar

The Trump administration has issued new regulations that add a new bar to eligibility for asylum for an alien who enters or attempts to enter the United States across the southern border, but who did not apply for asylum in a third country through which the person passed en route to the United States. The person could not apply for asylum in the United States without proof that he or she applied for asylum in the third country first and was denied. For example, anyone from the Northern Triangle has likely traveled through Mexico, and must first apply for asylum in Mexico.

The Trump administration has signed agreements with Mexico and Guatemala as part of the new regulations, indicating that those country would process asylum claims from individuals passing through their territories.<sup>208</sup> Beginning in November 2019, DHS began deporting Central Americans to countries that have entered into agreements with the United States.<sup>209</sup> For example, if migrants from El Salvador or Honduras pass through Guatemala on their way to the United States without claiming asylum, they would be deported to Guatemala. The insanity of the Third Country Transit Bar is that countries like Mexico and Guatemala are not only dangerous themselves, but are ill-equipped to process asylum claims.<sup>210</sup>

Although legal challenges have been filed against the new bar, the courts have thus far ruled that individuals who entered the United States on or after July 16, 2019, (even those metered prior to that date) are subject to the Third Country Transit Bar.<sup>211</sup>

#### E. Ending Special Immigrant Juvenile Status

Since 2008, special immigrant juvenile status (SIJS) has served as a legal pathway for unaccompanied minors under the age of 21, who have been abused, abandoned, or neglected by one or both parents, to obtain lawful permanent residency and a pathway to citizenship.<sup>212</sup> Many unaccompanied

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208. See generally *Groups File Federal Lawsuit Challenging Trump Administration's So-Called 'Safe Third Country' Asylum Policy*, ACLU (Jan. 15, 2020), <https://www.aclu.org/press-releases/groups-file-federal-lawsuit-challenging-trump-administrations-so-called-safe-third>.

209. Geneva Sands, Priscilla Alvarez, and Michelle Mendoza, *Trump Administration Begins Deporting Asylum Seekers to Guatemala*, CNN POL. (Nov. 21, 2019), <https://www.cnn.com/2019/11/21/politics/guatemala-asylum-agreement/index.html>.

210. ACLU, *supra* note 208.

211. *Asylum Ban Part 2: Third Country Transit Regulations FAQs*, CLINIC (July 16, 2019), <https://cliniclegal.org/resources/asylum-and-refugee-law/asylum-ban-part-2-third-country-transit-regulations-faqs>.

212. *Legal Aid & Latham Champion Rights of Immigrant Youth*, THE LEGAL AID SOC. (Dec. 9, 2018), <https://legalaidnyc.org/news/legal-aid-latham-champion-rights-of-immigrant>.

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minors from the Northern Triangle have benefited from SIJS, averting the need to meet asylum requirements. However, in 2017, USCIS unilaterally reinterpreted the law in a manner that effectively precludes minors between the ages of 18 and 21 from qualifying for SIJS.<sup>213</sup> This is a sharp departure from a decade of consistent policy, where SIJS applications filed by young immigrants between 18 and 21 years of age can qualify.

This new policy has the practical effect of depriving older immigrant youth of the opportunity to regularize their immigration status even though it is not in their best interest to be sent back to a country of violence. The policy change has been challenged, and a federal court in New York thus far has held that Trump administration's position in abeyance.<sup>214</sup>

#### **F. Tightening Restrictions on Asylum Applicants Fleeing Gang Violence and Domestic Violence**

In the midst of the family separation controversy, the Trump team struck another blow to asylum seekers. In June 2018, then-Attorney General Sessions made asylum much more difficult for a large proportion of migrants fleeing for their lives from the Honduras, Guatemala, and El Salvador. As we know, most of the refugees from the Northern Triangle are escaping gang and/or domestic violence. In order to qualify for asylum, these individuals often must establish that they are a member of what asylum law labels a "particular social group," such as boys or girls who have been beaten or raped after spurning gang recruitment, or women fleeing deadly abuse by partners whose conduct is ignored by local police. However, on June 11, 2018, Sessions issued an administrative precedent decision, *Matter of A-B-*,<sup>215</sup> that set a high bar for victims of domestic or gang violence.

The facts in *Matter of A-B-* involved a woman who suffered domestic abuse in El Salvador. The BIA had recognized the applicant's particular social group of "El Salvadoran women who are unable to leave their domestic relationship where they have children in common" as at least one central reason that the ex-husband abused her. However, Sessions rebuked the BIA saying there was no evidence that the husband mistreated the applicant "on account of" her membership in the social group; Sessions found no evidence that her husband knew any such social group existed; he simply abused her because of their relationship.<sup>216</sup>

Sessions also overruled the BIA on the grounds that the applicant failed

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213. *Id.*

214. *R.F.M. v. Nielsen*, 365 F. Supp. 3d 350 (S.D.N.Y. 2019).

215. 27 I&N Dec. 316 (A.G. 2018).

216. *Id.* at 343.

to demonstrate that the government of El Salvador was unable or unwilling to protect her from her ex-husband. Sessions argued that “[n]o country provides its citizens with complete security from private criminal activity, and perfect protection is not required.”<sup>217</sup> In fact, the applicant reached out to police, received various restraining orders, and had him arrested at least once. But ignoring the ongoing violence against the applicant, Sessions declined to hold that the government was unable or unwilling to protect her: “The persistence of domestic violence in El Salvador . . . does not establish that El Salvador was unable or unwilling to protect A-B- from her husband, any more than the persistence of domestic violence in the United States means that our government is unwilling or unable to protect victims of domestic violence.”<sup>218</sup>

Sessions’ decision in *Matter of A-B-* has impacted the border situation. Given its negative approach toward gang and domestic violence, on July 11, 2018, border agents were given new instructions. Now when officers interview asylum seekers at the border to evaluate applications initially through credible fear interviews, claims based on fear of gang and domestic violence will be immediately rejected.<sup>219</sup>

Not to be outdone, Sessions’ successor, Attorney General William Barr, issued his own precedent decision also dealing with “particular social group” asylum claims. For purposes of asylum, “family” has long been recognized as the “quintessential particular social group.”<sup>220</sup> In other words, it’s very likely that because your father has refused to pay protection money to a gang, the gang will come after you or other members of the family in retaliation. However, in *Matter of L-E-A-*,<sup>221</sup> Barr wrote that some family relationships are “too vague and amorphous” to qualify as a particular social group. The family must also be “socially distinct”, and unless an immediate family carries “greater societal import,” it is unlikely that a proposed family-based group will be “distinct” in the way required by the law for purposes of asylum.<sup>222</sup> Unless Barr’s decision is reversed by federal courts, the case will further limit asylum claims.

Barr has taken other harsh steps against asylum seekers. In *Matter of*

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217. *Id.*

218. *Id.* at 344.

219. *Asylum Seekers Claiming Fear of Gang, Domestic Violence to Be Immediately Rejected Under New Guidance*, KLTA: CNN WIRE (July 11, 2018), available at [kltla.com/2018/07/11/asylum-seekers-claiming-fear-of-gang-domestic-violence-to-be-immediately-rejected-at-border-under-new-guidance/](http://kltla.com/2018/07/11/asylum-seekers-claiming-fear-of-gang-domestic-violence-to-be-immediately-rejected-at-border-under-new-guidance/).

220. *Flores-Rios v. Lynch*, 807 F.3d 1123, 1128 (9th Cir. 2015); *Matter of L-E-A-*, 27 I&N Dec. 40 (BIA 2017).

221. 27 I&N Dec. 581 (A.G. 2019).

222. *Id.* at 593, 595.

*M-S-*,<sup>223</sup> the Attorney General unilaterally overturned a 2005 decision of the BIA and stripped immigration judges of the authority to grant bond to asylum seekers who entered the United States without being inspected at a port of entry but passed their threshold credible fear asylum screening interviews (CFI). These asylum seekers will now be subject to detention without bond for the duration of their asylum proceedings, separated from their loved ones and community. The constitutionality of this decision to indefinitely detain asylum seekers is currently being challenged in the case *Padilla v. ICE*.<sup>224</sup>

### G. Other Trump Administration Efforts to Thwart Asylum

The Trump administration's never-ending focus on the southern border has resulted in a number of other proposals such as deploying the U.S. military and declaring a national emergency in an attempt to come up with billions to pay for The Wall. CBP has admitted using tear gas to turn back asylum seekers trying to cross illegally.<sup>225</sup> Border officers conducting credible fear interviews have been instructed to consider whether an immigrant crossed the border illegally and weigh that against their claim, potentially rejecting even legitimate fears of persecution if the immigrant crossed illegally.<sup>226</sup> In another attempt to dissuade asylum seekers, in November 2019, the officials announced that asylum seekers who entered illegally would have to wait a year to apply for work permits; the general rule had allowed work permits after 150 days.<sup>227</sup> And in late December 2019, the Justice Department and the Department of Homeland Security proposed expanding the list of crimes that bar migrants from asylum to include misdemeanor offenses, including driving under the influence and possession of fake identification.<sup>228</sup>

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223. 27 I&N Dec. 509 (A.G. 2019).

224. *Padilla v. ICE*, AMERICAN CIVIL LIBERTIES UNION (2019), <https://www.aclu.org/cases/padilla-v-ice> (last visited Mar 27, 2020).

225. Alan Yuhas, *U.S. Agents Fire Tear Gas Across Mexican Border*, N.Y. TIMES (Jan. 1, 2019), <https://www.nytimes.com/2019/01/01/world/americas/migrants-border-tear-gas.html>.

226. KLTA: CNN WIRE, *supra* note 219.

227. Hamed Aleaziz, *The Trump Administration Is Planning to Ban Many Asylum-Seekers from Working in the U.S.*, BUZZFEED (Nov. 13, 2019), <https://www.buzzfeednews.com/article/hamedaleaziz/trump-admin-deny-work-permits-asylum-seekers>.

228. Zolan Kanno-Youngs, *Trump Administration Proposes Adding Minor Crimes to List of Offenses That Bar Asylum*, N.Y. TIMES (Dec. 18, 2019), <https://www.nytimes.com/2019/12/18/us/politics/trump-asylum-misdemeanors.html>.

## H. Ending Temporary Protected Status Across the Board

Not only has the Trump administration ignored the lessons of the past, a key solution to the problems of the past has now been cast aside. A major lesson learned from the 1980s was manifested in the establishment of TPS, recognizing that the challenges of asylum may be difficult to meet for large numbers of migrants who have been forced to flee. At the end of the Obama administration, the United States provided TPS to approximately 437,000 foreign nationals from 10 countries: El Salvador, Haiti, Honduras, Nepal, Nicaragua, Somalia, South Sudan, Sudan, Syria, and Yemen.<sup>229</sup> TPS for Guinea, Liberia, and Sierra Leone expired in May 2017, but certain Liberians maintained relief under an administrative mechanism known as Deferred Enforced Departure (DED).<sup>230</sup> However, the Trump administration has forsaken the lesson embodied in TPS. In 2017, the Trump administration announced plans to terminate TPS for six countries—El Salvador, Haiti, Honduras, Nepal, Nicaragua, and Sudan—and extended TPS for Somalia, South Sudan, Syria, and Yemen.<sup>231</sup> In March 2018, President Trump announced an end to DED for Liberia.<sup>232</sup> Lawsuits have been filed challenging the TPS terminations.<sup>233</sup> Because a preliminary injunction has been issued in one of the cases, protection has been extended to January 2021 for TPS holders from Sudan, Nicaragua, Haiti, El Salvador, Nepal, and Honduras pending the litigation.<sup>234</sup> In late December 2019, 4000 Liberians on DED benefited by being included in a national defense authorization deal that grants them lawful permanent residence status after their temporary immigration status had been renewed for 28 consecutive years.<sup>235</sup>

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229. Temporary Protected Status: Overview and Current Issues: From EveryCRSReport.com (Oct. 10, 2018), [https://www.everycrsreport.com/files/20181010\\_RS20844\\_651f56dfcc30a65e56a35274084068189dbcbdea.html#Content](https://www.everycrsreport.com/files/20181010_RS20844_651f56dfcc30a65e56a35274084068189dbcbdea.html#Content).

230. *Id.*

231. *Id.*

232. *Id.*

233. *USCIS Publishes an FRN Automatically Extending TPS for Terminated Countries under Litigation*, CLINIC (Nov. 4, 2019), <https://cliniclegal.org/resources/humanitarian-relief/temporary-protected-status-and-deferred-enforced-departure/uscis-0>.

234. *Id.*

235. Chidinma Irene Nwoye, *A Surprise Provision in a Trump Defense Bill Has Granted a Path to Citizenship for 4,000 Liberians*, QUARTZ AFRICA (Jan. 3, 2020), <https://qz.com/africa/1779248/trump-defense-bill-grants-path-to-citizenship-for-4000-liberians/>.

## VI. MOVING BEYOND THE PAST MISTAKES TO FIND HUMANE AND SUSTAINABLE SOLUTIONS

Our mistreatment of Central American refugees today not only mirrors our mistakes of the 1980s, but are more reprehensible. We failed to learn from that history, and as such “are condemned to repeat it.”<sup>236</sup> When migrants are fleeing horrific violence, treating their displacement through an illegal immigration framework makes little sense. After the policy and enforcement abuses of the 1980s were exposed as mistaken—socially and legally, we implemented TPS, the *Flores* settlement agreement, the asylum officer corps, and new hearings for Guatemalan and El Salvadoran asylum seekers. Yet, the lessons of the past are ignored, as immigration policy makers and enforcement officials today consciously seek to thwart legitimate asylum seekers from Central America as a general function of an anti-immigrant agenda. TPS is cancelled, the *Flores* agreement is under siege, and hearings for asylum seekers are blocked. The function of asylum officers are so threatened, that they have joined legal challenges against the Trump administration arguing that the Remain in Mexico Policy is “fundamentally contrary to the moral fabric of our Nation” and thwarts their duty “to protect vulnerable asylum seekers from persecution.”<sup>237</sup> The Trump administration even took advantage of the COVID-19 crisis, announcing on March 17, 2020, that all asylum seekers at the border would be immediately turned back without any due process opportunity to express their fear of persecution.<sup>238</sup> We are responding to the problem poorly, inviting litigation, ignoring and causing human suffering, and creating more problems.

There is a better way than simply repeating our mistakes of the past. The solution begins with recognizing the challenge for what it is—tens of thousands of human beings—fleeing serious violence. We need to invest in a fair and efficient adjudicatory process and get serious about working with partners in the region to increase citizen security, and reduce poverty. Yes, we should demand more from the governments we support, but the demand

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236. Winston Churchill submitted before the House of Commons in 1948, “Those who fail to learn from history are condemned to repeat it” and George Santayana warned in 1905: “Those who cannot remember the past are condemned to repeat it.” Laurence Geller, *Folger Library – Churchill’s Shakespeare*, INT’L CHURCHILL SOC’Y, <https://winstonchurchill.org/resources/in-the-media/churchill-in-the-news/folger-library-churchills-shakespeare/> (last visited Mar. 1, 2020); *George Santayana*, INTERNET ENCY. PHIL., <https://www.iep.utm.edu/santayan/> (last visited Mar. 1, 2020).

237. Bobby Allyn, *Asylum Officers: Trump’s ‘Remain in Mexico’ Policy is Against ‘Moral Fabric’ of U.S.*, NPR (June 27, 2019), <https://www.npr.org/2019/06/27/736461700/asylum-officers-trumps-remain-in-mexico-policy-is-against-moral-fabric-of-u-s>.

238. Zolan Kanno-Youngs, Michael D. Shear & Maggie Haberman, *Citing Coronavirus, Trump Will Announce Strict New Border Controls*, N.Y. TIMES (Mar. 17, 2020).

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should not be a mindless “stop your people” from leaving or forcing displaced persons from seeking protection in other violent states. The demand should be about security and investment for citizens of the region.

Spending billions on harsh border enforcement that preys on human beings seeking refuge is wrongheaded. Rather, we should focus on reducing the need for people to migrate while ensuring we have fair and humane procedures in place domestically, regionally, and internationally to handle those who flee and have claims for protection. We also should be re-thinking refugee definitions themselves—criteria fixed in a period of time long past that are overly restrictive, inadequate to deal with the gang and gender-based violence that we are increasingly seeing. At the same time, we need to re-think our commitment to fair legal process. For decades, the process has been entirely inadequate, further contributing to the pressures on our system. Relying on the goodwill of pro bono attorneys and under-funded legal services programs is a severely deficient approach that I have witnessed and participated in since the 1970s.

In short, let’s learn from and acknowledge our past and current mistakes. Then let’s implement policies and procedures that are cognizant of the reasons migrants are fleeing today, while working on sensible, regional solutions.