

COMMENT

THE INTERSECTION OF DETENTION AND AMERICAN POLICY: DETENTION AS DETERRENCE HAS ITS DAY IN COURT

DANIEL A. BARRERA†

I. INTRODUCTION

Beginning in 2014, the United States began to experience a dramatic increase in the number of Central Americans seeking to enter along its southwest border.¹ In response to the volume of Central American families arriving at the border, additional resources were either mobilized or funded, including more Border Patrol personnel and the creation of thousands of additional spaces in detention facilities.² In addition to responding to the logistical challenges posed by the surge of migrants, the Department of Homeland Security (“DHS”) decided to focus on implementing policies that would dissuade Central American families from seeking refuge in the United States by attempting to disprove the rumors circulating around Central America that families would be welcomed.³ By July 2014, these concurrent

† Daniel A. Barrera is a third-year student at Wake Forest University School of Law. He is a graduate of the University of Notre Dame. He would like to thank Professor Margaret Taylor and the *Journal's* editorial staff for their assistance throughout the writing and editing process. Most of all, he would like to thank his family for their unconditional love and support.

1. DEP'T OF HOMELAND SEC., U.S. BORDER PATROL SOUTHWEST BORDER FAMILY UNIT AND UAC APPREHENSIONS (FY 2013–FY 2014), <http://www.cbp.gov/sites/default/files/documents/BP%20Southwest%20Border%20Family%20Units%20and%20UAC%20App%20FY13%20-%20FY14.pdf> (finding a 300% increase in the number of families for the fiscal year starting October 2013 and ending October 2014).

2. Press Release, Dep't of Homeland Sec., Statement by Secretary of Homeland Security Jeh Johnson Before the House Committee on Homeland Security (June 24, 2014), <https://www.dhs.gov/news/2014/06/24/statement-secretary-homeland-security-jeh-johnson-house-committee-homeland-security>.

3. Press Release, Dep't of Homeland Sec., Statement by Secretary of Homeland Security Jeh Johnson Before the Senate Committee on Appropriations (July 10, 2014), <http://www.dhs.gov/news/2014/07/10/statement-secretary-homeland-security-jeh-johnson-senate-committee-appropriations>.

efforts merged, and a reality for Central American families trying to enter the United States emerged when DHS Secretary Jeh Johnson announced an aggressive deterrence strategy, whereby the detention of families and minors would be used as a means of deterrence.⁴ No longer would families be released on bond pending removal proceedings; instead, they would be detained pending removal or some other immigration resolution, such as asylum.⁵

These families of “aliens” massing at the gates were mostly mothers with their minor children in tow.⁶ Stephen Manning writes that the crisis in the summer of 2014 was rooted in the worsening of conditions in Central America over the last several years. By May 2014, the crisis “had fueled a notable migration of women and children . . . literally fleeing for their very lives.”⁷ According to Manning⁸ and print media in both the United States and abroad,⁹ the 2014 immigration crisis was directly related to rising murder rates fueled by the ever-expanding presence of gangs like MS-13 (Mara Salvatrucha), violence against women rising to epidemic proportions, and the reality that the “rule of law that would ordinarily be expected to constrain the violence and protect civilians disintegrated.”¹⁰ Central American families

ps://www.dhs.gov/news/2014/07/10/statement-secretary-homeland-security-jeh-johnson-senate-committee-appropriations.

4. *Id.*; see also Julia Preston, *Detention Center Presented as Deterrent to Border Crossings*, N.Y. TIMES (Dec. 15, 2014), <http://www.nytimes.com/2014/12/16/us/homeland-security-chief-opens-largest-immigration-detention-center-in-us.html>.

5. R.I.L-R v. Johnson, 80 F. Supp. 3d 164, 175 (D.D.C. 2015) (finding that, prior to June 2014 and the accompanying shift in DHS policy, Customs and Border Protection (“CBP”) routinely released families).

6. See Stephen Dinan, *Immigration Agency: Single Hispanic Females Deserve Asylum in U.S.*, WASH. TIMES (Apr. 23, 2015), <http://www.washingtontimes.com/news/2015/apr/23/fed-agency-single-hispanic-females-deserve-asylum>; see also DEP’T OF HOMELAND SEC., *supra* note 1.

7. Stephen Manning, *Ending Artesia*, INNOVATION L. LAB, <https://innovationlawlab.org/the-artesia-report/> (last visited Feb. 23, 2016).

8. *Id.*

9. See Julia Preston & Randal C. Archibold, *U.S. Moves to Stop Surge in Illegal Immigration*, N.Y. TIMES (June 20, 2014), <http://www.nytimes.com/2014/06/21/us/us-plans-to-step-up-detention-and-deportation-of-migrants.html>; *Stemming the Migrant Tide*, THE ECONOMIST (Apr. 18, 2015), <http://www.economist.com/news/americas/21648669-governments-take-new-approach-ending-exodus-children-stemming-migrant-tide>.

10. JOHNATHAN T. HISKEY ET AL., AM. IMMIGRATION COUNCIL, UNDERSTANDING THE CENTRAL AMERICAN REFUGEE CRISIS: WHY THEY ARE FLEEING AND HOW THE U.S. POLICIES ARE FAILING TO DETER THEM 3 (2016), <https://www.americanimmigrationcouncil.org/sit>

made the journey to the United States' borders, fleeing gang violence and its accompanying lawlessness,¹¹ hoping for a better future, and relying on rumors of easy admittance being available to mothers and their children¹²—rumors that the government worked to dispel almost as quickly as it moved to incarcerate mothers and their minor children.¹³ In the end, however, the data on the government's attempts to deter Central American families from attempting to gain entry is mixed.¹⁴ Furthermore, the legacy of this policy objective is easily gleaned from literature regarding the detention facilities developed to house the families in the case of the various detention initiatives,¹⁵ or in the continued instability and violence in Central America in the case of the United States' deterrence-motivated press campaign.¹⁶

This Comment focuses specifically on the aforementioned families, their attempts to enter the United States, and their court battles with the federal government whose sole goal has remained stopping the flow of Central American families to the border. The government's stated policy objective of deterring migration through detention continues to have its day in court.¹⁷ Building upon this objective, and in the absence of regulatory or statutory guidance, detention as deterrence came into being through various subregulatory policies and procedures.¹⁸ The purpose of this Comment is to discuss how, in fact, the courts are now

es/default/files/research/understanding_the_central_american_refugee_crisis.pdf; Manning, *supra* note 7.

11. HISKEY ET AL., *supra* note 10, at 3.

12. Cindy Carcamo, *Rumors of U.S. Haven for Families Spur Rise in Illegal Immigration*, L.A. TIMES (June 6, 2014), <http://www.latimes.com/nation/la-na-ff-immigration-families-20140606-story.html>.

13. *Id.*; see also Press Release, Dep't of Homeland Sec., *supra* note 3.

14. Compare DEP'T OF HOMELAND SEC., *supra* note 1, with DEP'T OF HOMELAND SEC., U.S. BORDER PATROL SOUTHWEST BORDER FAMILY UNIT AND UAC APPREHENSIONS (FY 2014–FY 2015), <https://www.cbp.gov/sites/default/files/documents/BP%20Southwest%20Border%20Family%20Units%20and%20UAC%20Apps%20-%20FY14-FY15.pdf> (showing that from 2014 to 2015, family unit apprehensions declined approximately forty percent, but still remained 200% higher than in 2013).

15. Margaret H. Taylor & Kit Johnson, "Vast Hordes . . . Crowding in Upon Us": The Executive Branch's Response to Mass Migration and the Legacy of Chae Chan Ping, 68 OKLA. L. REV. 185, 193 (2015); see Manning, *supra* note 7.

16. *Cf.* HISKEY ET AL., *supra* note 10, at 2 (discussing the continuing issues in Central America that are in contrast with the deterrence-focused United States press campaigns being undertaken in Central America).

17. See *infra* Parts III–V.

18. See *infra* notes 19–21.

responding to the changes that have occurred in DHS's subregulatory practice since the influx of Central Americans began in the summer of 2014. Focusing on the intersection of detainment and deterrence, this Comment will focus on DHS's principle case in support of its subregulatory practices, *In re D-J*;¹⁹ two responses to the policies DHS wished to implement contained in *R.I.L-R v. Johnson*²⁰ and *Flores v. Lynch*;²¹ and the ramifications of the judiciary's invalidation of various DHS subregulatory policies and procedures.²²

II. FOUNDATION OF DETERRENCE THROUGH DETENTION

A. *Factual Realities*

The official word from the White House was that the influx that began in May 2014 was a humanitarian crisis.²³ The response, in fact, showed it was anything but, as President Obama requested \$3.7 billion to further expand Immigration and Customs Enforcement ("ICE")—previously known as Immigration and Naturalization Service ("INS")—and DHS's ability to protect the border and deal with the women and children who comprised most of those who were the cause of the influx.²⁴ Meanwhile, DHS

19. *In re D-J*, 23 I. & N. Dec. 572 (2003); see also César Cuauhtémoc García Hernández, *Naturalizing Immigration Imprisonment*, 103 CALIF. L. REV. 1449, 1468 (2015) (positing that *In re D-J* is the foundational case law for the assertion of deterrence as a reason for requiring that an alien be detained until removal); see *infra* Part II.

20. See *infra* Part III. See generally *R.I.L-R v. Johnson*, 80 F. Supp. 3d 164 (D.D.C. 2015) (granting injunctive relief to mothers who wanted to see deterrence removed from the list of admissible factors for determining whether they were eligible for pre-removal release).

21. *Flores v. Lynch*, No. CV 85-04544 DMG (Ex), 2015 WL 9915880, at *1 (C.D. Cal. Aug. 21, 2015) (holding that the Flores Settlement Agreement ("FSA") governs all detained minors in that accompanied minors should be given the same rights and privileges as those given to unaccompanied minors), *aff'd in part, rev'd in part and remanded*, 828 F.3d 898 (9th Cir. 2016); see *infra* Part IV. The litigation surrounding the FSA has resulted in a myriad of different case names because in each instance the case name has been changed to reflect the current Attorney General. See generally Rebeca M. López, *Codifying the Flores Settlement Agreement: Seeking to Protect Immigrant Children in U.S. Custody*, 95 MARQ. L. REV. 1635, 1648–49 (2012).

22. See *infra* Part V.

23. Michael D. Dhear & Jeremy W. Peters, *Obama Asks for \$3.7 Billion to Aid Border*, N.Y. TIMES (July 8, 2014), <http://www.nytimes.com/2014/07/09/us/obama-seeks-billions-for-children-immigration-crisis.html>.

24. *Id.*

made clear its stance that the ongoing and expansive nature of the influx was a national security threat.²⁵

In response, DHS initiated a practice of detaining all arriving families that consisted of a mother as the head of the household along with her minor children.²⁶ On its face, detention is a startling proposition for families.²⁷ In the immigration context, detention entails being held without access to a reasonable bond until the conclusion of removal proceedings or the granting of asylum.²⁸ However, due to the influx that triggered this new policy, the aforementioned timeline has morphed into an indeterminable mess.²⁹ Families resided, and continue to reside, in civil detention facilities operated by government contractors that more closely resemble American criminal institutions than family shelters.³⁰ Moreover, residing in these family detention centers was, and continues to be, a traumatic and unnecessary experience for minor children.³¹

B. Legal Precedent

The previously mentioned state of affairs creates a reality that both factually and legally differs from precedent. Historically, as discussed in the Supreme Court case *Zadvydas v. Davis*, there are generally only two reasons to detain an alien prior to conclusion of removal proceedings.³² The Court wrote, “[G]overnment detention violates [the Due Process] Clause unless the detention is ordered in a criminal proceeding with adequate procedural protections . . . or, in certain special and ‘narrow’ nonpunitive ‘circumstances.’”³³ In the aforementioned case, the Court held that “a special justification, such as harm-threatening mental illness, outweighs the individual’s constitutionally protected interest in avoiding physical restraint,” making

25. See Press Release, Dep’t of Homeland Sec., *supra* note 2; Press Release, Dep’t of Homeland Sec., *supra* note 3.

26. See Taylor & Johnson, *supra* note 15, at 194.

27. See Manning, *supra* note 7; Preston & Archibold, *supra* note 9.

28. See Taylor & Johnson, *supra* note 15, at 190–91.

29. See Manning, *supra* note 7.

30. *Id.*

31. *Id.*

32. *Zadvydas v. Davis*, 533 U.S. 678, 690 (2001).

33. *Id.*

detention necessary.³⁴ Accordingly, the Court held that detention outside of the criminal context generally only has two regulatory goals that will support detention: “ensuring the appearance of aliens at future immigration proceedings” and “[p]reventing danger to the community.”³⁵

However, in 2003, Attorney General John Ashcroft promulgated *In re D-J*,³⁶ in which he declared that as a matter of law, a third regulatory goal could satisfy the special justification requirement for the detention of non-criminals.³⁷ Beyond the two regulatory goals mentioned in the prior jurisprudence on the issue, Attorney General Ashcroft stated in *In re D-J* that “it is appropriate to consider national security interests implicated by the encouragement of further unlawful mass migrations and the release of undocumented alien migrants into the United States.”³⁸

In re D-J was the response to numerous Haitians trying to reach the United States by boat; the respondent and a number of others were among those detained.³⁹ INS argued that the release of respondent and other members of the undocumented migrant group would stimulate further surges of similar illegal migration by sea and threaten important national security interests.⁴⁰ Initially, the Immigration Judge (“IJ”) and the Board of Immigration Appeals (“BIA”) did not agree with INS, and each recommended the release on bond of respondent and his peers in lieu of detention.⁴¹ The BIA, however, opened the door for Attorney General Ashcroft. The BIA concluded in dismissing the appeal “that the broad national interests invoked by INS were not appropriate considerations for the IJ or the BIA in making the bond determination, ‘[a]bsent contrary direction from the Attorney General.’”⁴²

As a matter of right, Attorney General Ashcroft heard the case on appeal and “determined that the release of respondent on bond was and is unwarranted due to considerations of sound

34. *Id.*

35. *Id.*

36. *In re D-J*, 23 I. & N. Dec. 572, 572 (2003).

37. Hernández, *supra* note 19.

38. *In re D-J*, 23 I. & N. Dec. at 572.

39. *Id.* at 573.

40. *Id.*

41. *Id.*

42. *Id.* at 581.

immigration policy and national security that would be undercut by the release of respondent.”⁴³ He reasoned, “[T]here is a substantial prospect that the release of such aliens into the United States would come to the attention of others in Haiti and encourage future surges in illegal migration by sea.”⁴⁴ His reasoning was informed by evidence provided by the INS, including a State Department memorandum detailing the “relationship between perceptions in Haiti of successful U.S. entry by seagoing migrants and the likelihood of further mass migrations,” and “declarations submitted from the Coast Guard and the Defense Department express[ly] corroborating statements regarding this concern.”⁴⁵ Accordingly, the INS was empowered to invoke a national security interest in deterring future unlawful migrants when seeking to justify the detention of noncriminal migrants who posed no danger to the community.⁴⁶ IJs rarely applied *In re D-J* for the ten years following its announcement.⁴⁷ In the summer of 2014, however, the case “played an important role in the federal government’s decision to detain children and mothers who began appearing in unusually large numbers.”⁴⁸

C. Implementation

On July 10, 2014, DHS Secretary Johnson testified before Congress and described the functional reality of detention as deterrence, stating, “[DHS is] building additional space to detain these groups and hold them until their expedited removal orders are effectuated.”⁴⁹ The demand was so great at that juncture for bed space that deplorable facilities were opened, for-profit firms were contracted, and unacceptable detention conditions were allowed to remain.⁵⁰ Furthermore, ICE relied on, and continues to utilize, an expedited removal process that regularly bypasses the rights of aliens by arranging for the removal of individuals who

43. *Id.* at 574.

44. *Id.* at 579.

45. *Id.* at 578.

46. *Id.*

47. Hernández, *supra* note 19.

48. *Id.*

49. Press Release, Dep’t of Homeland Sec., *supra* note 3.

50. Antony Loewenstein, *Private Prisons Are Cashing in on Refugees’ Desperation*, N.Y. TIMES (Feb. 25, 2016), <http://www.nytimes.com/2016/02/25/opinion/private-prisons-are-cashing-in-on-refugees-desperation.html>.

have a case for asylum.⁵¹ Just as detention deterrence was born in *In re D-J* in the name of national security,⁵² subregulatory policies and procedures are formulated with *In re D-J* as the backbone.⁵³ Meanwhile, the only conversation before Congress was how to further militarize the border and detain families.⁵⁴ What has followed is the uncomfortable reality that the federal government, either implicitly or explicitly, has tried to remediate the influx of Central American families by throwing minor children and their mothers in jails and holding them, consistent with numerous newly implemented subregulatory policies and procedures, with the end goal of deterring other Central American mothers and minor children from fleeing persecution and violence in their respective countries.⁵⁵

III. *R.I.L-R v. JOHNSON*

R.I.L-R v. Johnson is the first successful challenge to the expansion of subregulatory procedures that required the detention of all Central American families—consisting of mothers and their minor children—detained at the southwest border.⁵⁶ ICE found Plaintiffs, all mothers from Central America who made the trek to the United States with their minor children, after they entered the United States unlawfully and subsequently apprehended and detained them.⁵⁷ Plaintiffs were found to have a credible fear of persecution, the first step to asylum,⁵⁸ which in the past would have permitted their release on bond while their asylum claims were processed. Instead, ICE detained the mothers with the aim of deterring future immigrants from coming.⁵⁹

51. See Mark Noferi & Robert Koulish, *The Immigration Detention Risk Assessment*, 29 GEO. IMMIGR. L.J. 45, 83 n.285 (2014); Alvaro Peralta, Note, *Bordering Prosecution: Why Asylum Seekers Should Not Be Subject to Expedited Removal*, 64 AM. U. L. REV. 1303, 1304–05 (2015).

52. Hernández, *supra* note 19.

53. *Id.*

54. Press Release, Dep't of Homeland Sec., *supra* note 2; Press Release, Dep't of Homeland Sec., *supra* note 3.

55. See Manning, *supra* note 7.

56. *R.I.L-R v. Johnson*, 80 F. Supp. 3d 164, 170 (D.D.C. 2015).

57. *Id.*

58. *Id.*

59. *Id.*

The District Court for the District of Columbia heard *R.I.L.-R v. Johnson*; however, the case was not resolved on its merits.⁶⁰ Instead, Plaintiffs sought and obtained a preliminary injunction against the federal government, enjoining it from using deterrence as a justification for detention pending removal.⁶¹ A preliminary injunction requires that the moving party have a strong likelihood of succeeding on its merits, that it is likely to suffer irreparable harm in the absence of the sought injunctive relief, “that the balance of equities tips in his favor, and that an injunction is in the public interest.”⁶² The Court found that Plaintiffs’ motion satisfied all four requirements.⁶³

A. *The Legal Landscape Around and Within the Case*

In considering Plaintiffs’ likelihood of success on its merits, the D.C. District Court found that the jurisprudence regarding the detention of aliens was clear: “The justifications for detention previously contemplated by the Court relate wholly to characteristics inherent in the alien himself or in the category of aliens being detained.”⁶⁴ Echoing *Zadvydas v. Davis*, the D.C. District Court highlighted that traditionally, “detention of an alien or category of aliens [has only occurred] on the basis of those aliens’ risk of flight or danger to the community.”⁶⁵

However, the D.C. District Court found that the government advanced an interest wholly unrelated to the aforementioned examples.⁶⁶ The government, in its response to the preliminary injunction, argued “in determining whether an individual claiming asylum should be released, ICE can consider the effect of release on others not present in the United States.”⁶⁷ The government relied on *In re D-J* and maintained that ICE’s decision regarding the detention of the Central American families implicates a national security interest because “such migrations force ICE to ‘divert resources from other important security

60. See *R.I.L.-R v. Johnson*, ACLU (July 31, 2015), <https://www.aclu.org/cases/rilr-v-johnson> [hereinafter ACLU].

61. *Id.*

62. *R.I.L.-R*, 80 F. Supp. 3d at 173.

63. *Id.* at 190–91.

64. *Id.* at 188.

65. *Id.*; see also *Zadvydas v. Davis*, 533 U.S. 678, 690 (2001).

66. *R.I.L.-R*, 80 F. Supp. 3d at 188.

67. *Id.*

concerns' and 'relocate' their employees."⁶⁸ Therefore, because *In re D-J* allowed for the consideration of national security interests when determining whether to detain an alien, the government posited that the legal reality was such "that one particular individual may be civilly detained for the sake of sending a message of deterrence to other Central American individuals who may be considering immigration."⁶⁹ According to the government's logic, detention as deterrence should be allowed to stand.⁷⁰

B. Resolution

The D.C. District Court disagreed with the government's argument and held that deterrence through detention was unlikely to survive on the merits of the argument advanced by the government.⁷¹ The court held that "the simple fact that increased immigration takes up government resources cannot necessarily make its deterrence a matter of national security."⁷² What the D.C. District Court found would require the court to give legal deference and make factual characterizations beyond the scope of the court's power.⁷³

The government maintains that it did not overstep its bounds.⁷⁴ However, the outcome has remained the same; ICE remains prohibited from detaining class members for the purpose of deterring future immigration to the United States and from considering deterrence of such immigration as a factor in its custody determinations.⁷⁵ ICE has presently determined that it will discontinue invoking general deterrence as a factor in custody determinations in all cases involving families.⁷⁶ As far as *R.I.L-R v.*

68. *Id.* at 189.

69. Wil S. Hylton, *A Federal Judge and a Hunger Strike Take on the Government's Immigrant Detention Facilities*, N.Y. TIMES (Apr. 10, 2015), http://www.nytimes.com/2015/04/06/magazine/a-federal-judge-and-a-hunger-strike-take-on-the-governments-immigrant-detention-facilities.html?_r=0.

70. *R.I.L-R*, 80 F. Supp. 3d at 188–89.

71. *Id.*

72. *Id.* at 189.

73. *Id.* at 190.

74. *Id.*

75. See ACLU, *supra* note 60.

76. *Id.*

Johnson is concerned, the issue is over.⁷⁷ At this time, the lawsuit has been withdrawn and the injunction stayed.⁷⁸

C. Aftermath

The factual reality is that the issues underlying *R.I.L.-R v. Johnson* very much continue. The government continues to express the same overriding policy objectives of dissuading Central American families from attempting to enter the United States through stringent detention practices.⁷⁹ Furthermore, the pervasive proliferation of subregulatory policies and the procedures that emerged following the summer of 2014 remain in place and effective even after *R.I.L.-R v. Johnson*.⁸⁰ Detention as deterrence—a synonymous substitute for the national security reasons previously used to legally detain Central American families—died as a free-standing subregulatory policy in *R.I.L.-R v. Johnson*. In the aftermath of *R.I.L.-R v. Johnson*, there has been little action from Congress or from the executive branch to put in place new policy objectives.⁸¹ Instead, the government has been content to change its public rhetoric and fight for the subregulatory policies and procedures that align with its unwavering policy objectives.⁸² The federal district courts across the United States are the only battlefields where these subregulatory policies and procedures are being challenged.⁸³ This is highlighted by the ongoing struggle of the minors whose release would be predicated

77. *Id.*

78. *Id.*

79. Press Release, Dep't of Homeland Sec., Statement by Secretary Jeh C. Johnson on Southwest Border Security (Jan. 4, 2016), <http://www.dhs.gov/news/2016/01/04/statement-secretary-jeh-c-johnson-southwest-border-security> (outlining the most current policy statement by the Secretary and extensively addressing the goals and plans of the agency regarding removal).

80. *See id.*

81. *See* Terri Burke, *Give Me Your Tired, Your Poor, Your Huddles Masses... No More?*, HUFFINGTON POST (Jan. 12, 2016, 10:23 AM), http://www.huffingtonpost.com/terri-burke/give-me-your-tired-your-p_b_8955446.html (emphasizing that the federal government should cease its use of raids as a tactic and stop depriving families who are already in the United States from fair immigration hearings).

82. *See id.*; Stephan Manning, *A Promise Unfulfilled*, AM. IMMIGR. L. ASS'N (Mar. 23, 2015), <http://www.aileadershipblog.org/2015/03/23/a-promise-unfulfilled>.

83. Eleanor Acer, *Federal Court Got It Right: Detaining Mothers and Children to Deter Other Asylum Seekers Is Wrong*, HUM. RTS. FIRST (Feb. 25, 2015), <http://www.humanrightsfirst.org/blog/federal-court-got-it-right-detaining-mothers-and-children-deter-other-asylum-seekers-wrong> (referring to the ruling in *R.I.L.-R v. Johnson* by the D.C. District Court).

on the concurrent release of their likewise-detained biological parents.⁸⁴

IV. FLORES V. LYNCH

A. History

Flores v. Lynch is not the original name for this line of cases; rather, it is the most recent iteration of a case concerning the Flores Settlement Agreement (“FSA”)—the first document to establish guidelines for the treatment of children in the immigration detention system.⁸⁵ All of the cases relate to the same settlement agreement entered into to resolve the issues raised by Jenny Lisette Flores and the class of plaintiffs who joined her.⁸⁶ The case originated with Jenny, a fifteen-year-old from El Salvador who traveled to the United States in 1985 with the goal to live with family.⁸⁷ However, INS apprehended and arrested Jenny at the border and subsequently placed her in detention.⁸⁸ Jenny and her class of fellow plaintiffs, all unaccompanied minors, “had to share ‘bathrooms and sleeping quarters with unrelated adults of both sexes.’”⁸⁹ Furthermore, “[a]lthough Jenny had no criminal history, was not a flight risk, and was not a threat to anyone, INS would not release Jenny to her aunt because INS did not allow unaccompanied minors to be released to ‘third-party adults.’”⁹⁰ On July 11, 1985, the ACLU, together with Jenny and other members of what would become the class of plaintiffs, filed a class action lawsuit against INS.⁹¹ The lawsuit focused on the dual nature of detention: the state of detention, including the facilities, services, and policies,⁹² and the procedures by which

84. See *infra* Part IV.

85. See generally López, *supra* note 21 (explaining why so many iterations of *Flores* exist).

86. *Id.* at 1647–48.

87. *Id.* at 1648.

88. *Id.*

89. *Id.* (quoting 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)).

90. *Id.*

91. *Id.*

92. *Id.* at 1648–49.

unaccompanied minors could be released pending removal.⁹³ The litigation spanned nine years, but eventually the matter was resolved through the FSA.⁹⁴ It remains in effect and governs every aspect of the civil detention of minors for immigration purposes.⁹⁵

B. Current Line of Cases

In response to the rise of family detention following the summer of 2014, the original class members filed a motion to enforce the FSA on February 2, 2015.⁹⁶ According to the court, the Motion to Enforce was filed in response to various subregulatory policies and procedures, including ICE's "no-release" policy for families detained by Border Patrol and consisting of a mother as the head of the household and accompanied by minor children.⁹⁷ Specifically, the Motion to Enforce argues that "ICE's no-release policy . . . breaches the Agreement's requirements that Defendants must minimize the detention of children and must consider releasing class members to available custodians in the order of preference specified in the Agreement," and that ICE's current policies are subjecting minors to custodial conditions that are a violation of the agreement.⁹⁸ For the purposes of this Comment, the focus will be on the court's analysis on the decision to detain, not on the state of detention.

The FSA's so called "preference for release" provision stipulates that ICE must "'release a minor from its custody without unnecessary delay' to a parent . . . or other qualified adult custodian," with certain limited exceptions, and ICE "'[u]pon taking a minor into custody,'" must "make and record prompt and continuous efforts on its part toward family reunification and the

93. *Id.* at 1649. At the time, it was "INS policy to condition juveniles' release on bail on their parents' or legal guardians' surrendering to INS agents for interrogation and deportation." *Id.* at 1648.

94. *Id.* at 1649.

95. *See generally* Flores v. Lynch, 828 F.3d 898 (9th Cir. 2016) (holding that the FSA applied to unaccompanied minors, but did not provide a right to release parents who accompanied those detained minors).

96. *Id.* at 905.

97. *Id.*

98. Civil Minutes at 2, Flores v. Johnson, No. CV 85-4544 DMG (AGRx) (C.D. Cal. July 24, 2015), AILA Doc. No. 15072500, *reconsideration denied sum nom.*, Flores v. Lynch, No. CV 85-04544 DMG (EX), 2015 WL 9915880, at *8 (C.D. Cal. Aug. 21, 2015), *aff'd in part, rev'd in part and remanded*, 828 F.3d 898 (9th Cir. 2016).

release of the minor.”⁹⁹ Plaintiffs contended that Defendants failed to properly execute this part of the FSA because they refused to recognize accompanied minors as being covered by the FSA.¹⁰⁰ The District Court for the Central District of California agreed in its July 2015 Order to Show Cause (“OSC”).¹⁰¹ The court found that the FSA explicitly defined the class of persons covered as all minors detained by INS, and, citing a lack of ambiguity in the FSA itself, ruled that the FSA covered both accompanied and unaccompanied minors.¹⁰²

During this analysis, the court proceeded to the preference for release provisions.¹⁰³ The release provisions stipulate that “[j]uveniles may be released to a relative . . . who is willing to sponsor a minor and the minor may be released to that relative *notwithstanding that the juvenile has a relative who is in detention*,”¹⁰⁴ and, if a relative is unavailable outside of detention, “the minor may be released *with an accompanying relative* who is in detention.”¹⁰⁵ Although it is not a huge deal in the context of unaccompanied minors, the provisions are quite a big deal if the FSA covers all minors in detention and the parents who accompanied them to the border were subsequently detained. It should be obvious which side supported which interpretation. The two parties in the case highlight the dichotomy between the unaccompanied minor context of the FSA and the plain language of the FSA that seemingly covers all minors.

The court was not persuaded by the government’s assertion that the context should inform the plain meaning. The court highlighted that “[i]t is uncontroverted that, prior to June 2014, ICE generally released children and parents upon determining that they were neither a significant flight risk nor a danger to

99. *Id.* at 4.

100. *Id.*

101. *Flores*, 2015 WL 9915880, at *4–7.

102. *Id.*

103. Civil Minutes, *supra* note 98, at 6.

104. *Id.* (quoting 8 C.F.R. § 212.5(b)(3)(i) (1997)).

105. *Id.* (quoting 8 C.F.R. § 212.5 (b)(3)(ii) (1997)). In response to the government’s motion for reconsideration on the OSC, the district court went on to rule that minors and parents should be released together since the FSA states that first preference be given to parents. *Flores*, 2015 WL 9915880, at *8 (“To comply with . . . the Agreement . . . a class member’s accompanying parent shall be released with the class member in accordance with applicable laws and regulations unless the parent is subject to mandatory detention under applicable.”).

safety.”¹⁰⁶ The court applied the plain meaning of the aforementioned statutory provisions and ordered that it be followed effective immediately.¹⁰⁷ DHS, however, chose not to follow the court’s order. Instead, DHS filed a motion for reconsideration of the OSC with the district court and a subsequent appeal with the Ninth Circuit Court of Appeals after the district court denied its motion.¹⁰⁸ At stake in *Flores*, and the current battle over the FSA, are the various subregulatory policies and procedures that amount to a “no release” policy, which functions to further the government’s policy objective of generating deterrence through detention.¹⁰⁹

On July 6, 2016, the Ninth Circuit Court of Appeals ruled on the government’s appeal.¹¹⁰ Faced with the task of interpreting the FSA, the Ninth Circuit affirmed in part, reversed in part, and remanded in part the district court’s decision.¹¹¹ The Ninth Circuit echoed the district court, holding that the FSA clearly and unambiguously covered all detained minors.¹¹² Unlike the district court, the Ninth Circuit found that the parents had no new rights under the FSA, instead holding that that FSA should stand as written.¹¹³ Under the ruling, minors must be released into the care of their concurrently detained parents should no other sponsor be available for the minor.¹¹⁴ The challenge now becomes what to make of the separated families, whereby the minors are released into the custody of a relative and the parents remain in detention indefinitely subject to either processing backlogs or “no-bond/high-bond” situations.

106. Civil Minutes, *supra* note 98, at 9; see *Crestview Cemetery Ass’n v. Dieden*, 54 P.2d 171, 177 (Cal. 1960) (stating that a court can look to the subsequent conduct of the parties as evidence of their intent when necessary).

107. *Flores v. Lynch*, 828 F.3d 898, 901, 910 (9th Cir. 2016).

108. *Id.* at 905; *Flores*, 2015 WL 9915880, at *1.

109. *Flores*, 828 F.3d at 901–02.

110. *Id.* at 905.

111. *Id.* at 900, 910.

112. *Id.* at 905.

113. *Id.* at 908.

114. *Id.* at 900.

V. CURRENT GOVERNMENT POLICY, A STATE OF AFFAIRS AND OTHER IMPLICATIONS

The government's policy objective of deterrence through detention remains—the substance of Secretary Johnson's statement on border security from March 9, 2016, says as much.¹¹⁵ As recently as March 9, 2016, Secretary Johnson mentioned that he requested increased funding to provide legal resources for detained minors and to improve refugee processing.¹¹⁶ Unfortunately, the funding was requested for the 2017 fiscal year, and, although DHS has “taken preliminary steps to ensure [it is] able to implement [the improvements to refugee processing] as soon as possible,”¹¹⁷ these improvements work at a snail's pace. Meanwhile, the previously mentioned expedited removal process remains in full effect.¹¹⁸ On July 7, 2016, Secretary Johnson stated: “We are cognizant that conditions in Central America push many to flee the region in search of a better life in the United States. We recognize the need to provide a safe alternative path to our country, and that many from the region should be regarded as refugees.”¹¹⁹ Yet, at the time of this statement, the government was still fighting the release of accompanied minors on bond from detention pursuant to the FSA.¹²⁰ The disjointed narrative that emerges is a government that claims to be moving towards better services for those whom it currently detains while it, in fact, continues its long running policy objectives of deterring migration through detention. Accordingly, it has fallen—and will continue to fall—to the courts to sort this mess out. In this world of subregulatory policies and procedures, the judiciary is the only branch of government effecting change in the short term. In the interim, upwards of eighty-eight percent of families who have had

115. Press Release, Dep't of Homeland Sec., Statement by Secretary Jeh C. Johnson on Southwest Border Security (Mar. 9, 2016), <https://www.dhs.gov/news/2016/03/09/statement-secretary-jeh-c-johnson-southwest-border-security>.

116. *Id.*

117. *Id.*

118. See Noferi & Koulish, *supra* note 51, at 83.

119. Press Release, Dep't of Homeland Sec., Statement by Secretary Jeh C. Johnson on Southwest Border Security and Immigration Enforcement Priorities (July 7, 2016), <https://www.dhs.gov/news/2016/07/07/statement-secretary-johnson-southwest-border-security-and-immigration-enforcement>.

120. See *supra* Part IV.

success in asylum proceedings remain in detention at sites with terrible track records and limited services for children.¹²¹

VI. CONCLUSION

This most recent surge of immigrants at our borders has come and gone without any major legislative changes in United States immigration law.¹²² Congress has taken a backseat on the issue. Despite holding hearings and providing funding for new administrative initiatives,¹²³ Congress has been idle and non-responsive in the policy-making process.¹²⁴ Instead, the executive branch has been forced to develop subregulatory practices and policies to respond promptly, legally, and uniformly to the crisis.¹²⁵ The legal issues discussed at the heart of this Comment are the byproduct of a number of different exercises of executive power by DHS and its subsidiary agency, ICE. However, since the policies and practices at issue in the cases discussed have been subregulatory, the rulemaking process has not been implicated. The closest thing to discourse on the issues implicated by the executive branch's actions has occurred in federal courtrooms.

Detention as deterrence continues because the policy objectives that motivated it remain in place, but, even as detention as deterrence manifested itself in two ways in the cases above, the subregulatory policies put in place to effectuate it continue to be struck down. First, the court in *R.I.L-R v. Johnson* granted the plaintiff's preliminary injunction against the government, enjoining it from using deterrence as a factor to implicate national

121. See *Costly Family Detention Denies Justice to Mothers and Children*, NAT'L IMMIGR. JUST. CTR. (May 2015), http://immigrantjustice.org/sites/immigrantjustice.org/files/Family%20Detention%20Bed%20Quota%20Factsheet%202015_05_15.pdf.

122. Dana Bash, Deirdre Walsh & Tom Cohen, *House GOP Passes Border Bill—Likely to No Effect*, CNN (Aug. 1, 2014, 9:08 AM), <http://www.cnn.com/2014/08/01/politics/congress-immigration> (explaining the reasons for legislative inaction and ineffectiveness directly following the crisis in the summer of 2014). There has not been a major change to the Immigration and Naturalizations Act since 1996. See Mary Giovagnoli, *Overhauling Immigration Law: A Brief History and Basic Principles of Reform*, AM. IMMIGR. COUNCIL (Feb. 14, 2013), <https://www.americanimmigrationcouncil.org/research/overhauling-immigration-law-brief-history-and-basic-principles-reform>.

123. See generally *Immigration Issues in the 112th Congress*, CONG. RES. SERV. (Sept. 30, 2011), <https://www.fas.org/sgp/crs/homsec/R42036.pdf>.

124. See *id.*

125. See *supra* Part IV.

security and detain an alien pending removal.¹²⁶ Then, in *Flores*, detention as deterrence manifested itself in subregulatory policies described as “no release” and “no bond/high bond” practices¹²⁷—but the courts successfully pushed back by enforcing the plain language of the terms of the FSA.¹²⁸ Courts have emerged as more than a forum, they have been actively addressing the issues created by the aforementioned policies.

Courts are prioritizing jurisprudence and the plain language of the law to counteract contemporary policy shifts and the ensuing subregulatory policies. Most striking is the veracity of the courts in their actions. The preliminary injunction directed at the processing of all families detained was an extraordinary form of relief. Similarly, the court in *Flores* pulled no punches; the decision ordered the immediate release of countless minors and created a path for the minors’ parents should DHS be unable to find sponsors for the minors.¹²⁹ The case law, read together, shows that the courts favor an interpretation of jurisprudence that values the interests of undocumented minors and their asylum-seeking parents over the secondary objectives and interests manifested in the government’s detention policies.

126. *See supra* Part III.

127. *See supra* Part IV.

128. *See supra* Part IV.

129. *See Flores v. Lynch*, 828 F.3d 898, 909–10 (9th Cir. 2016) (affirming the district court’s denial of the government’s request to amend the FSA); *see also* 8 C.F.R. § 212.5(b)(3)(i)–(iii) (1997) (detailing the process for release of minors to sponsoring adults).