In April of 2018, Former Attorney General Jeff Sessions announced the Trump Administration’s Zero-Tolerance Policy for immigrants who enter the country without authorization. The plan, in an attempt to deter migrants from entering the country without inspection, was to separate immigrant children from their parents so that the parents could remain in immigration jail for prolonged periods. Sessions clearly iterated his intent, stating that, “If you are smuggling a child, then we will prosecute you and that child will be separated from you as required by law.” The policy quickly garnered national attention and subsequent backlash as the media started to publish powerful scenes of children and babies being separated from their parents by immigration officials. After more than 2,300 children were taken from their parents at the border, President Trump issued an executive order to end family separation, stating that he “didn’t like the sight or the feeling of families being separated.” But he did not like the sight or feeling of them being outside of jail either, so he attempted to rewrite policy to allow for immigration officials to jail children indefinitely. To do so, President Trump planned to eliminate the Flores Settlement Agreement (FSA or Agreement), a 1997 consent decree that is the single strongest legally binding contract that governs the detention, treatment, and release of immigrant children. This Article will discuss the origins and protections of the FSA, and the FSA’s continuing role in compelling the humane treatment of immigrant children in government custody.

I. Background of the FSA

The treatment of undocumented children in government custody was virtually ignored until as recently as the 1980s. During the 1980s, escalating violence and poverty in Central America caused thousands of migrants to flee to

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1 J.D. Candidate, December 2019, University of Denver, Sturm College of Law.
4 Id.
the United States. The Immigration and Naturalization Service (INS) apprehended individuals who were caught crossing the border without authorization and held the migrants in hybrid detention centers and shelters pending the results of their immigration cases. At that time, the INS had a policy that allowed migrants under the age of eighteen to only be released to a parent or legal guardian, which resulted in a high population of undocumented minors in government custody. Immigrant advocates criticized INS’ decision to detain the children, as the agency was also directly responsible for the prosecution of the children’s immigration court cases.

In addition to the inherent conflict of interest, human rights activists denounced the INS’ detention of migrant children because of the conditions of the detention centers. Most of the facilities were preexisting detention halls for delinquent children or private detention facilities, and the vast majority of them lacked accreditation or licensure for the care of children. Juvenile justice experts described the facilities that housed the children as “makeshift jails” that were surrounded by high-security fences, barbed wire, and uniformed guards. The facilities were not partitioned to separate children detainees from adults, and all migrants within the facility were treated with the same punitive model of care. The children were not provided opportunities for education and were routinely subjected to body cavity and strip searches.

In 1985, human rights activists filed a class action lawsuit against the INS, the INS Commissioner, and two private detention facility operators, challenging the conditions of confinement of immigrant children and the surrounding policies. The lawsuit exposed the conditions of the detention centers and objected to the current policy of only releasing migrant children to a parent or legal guardian. After nine years of pending litigation, the government finally agreed to a settlement in the form of a consent decree that would establish legally binding standards for the government to adhere to in its detention of migrant children. The 1997 Agreement was named the Flores Settlement Agreement after Jenny Lisette Flores, the named plaintiff in the class action suit. The FSA continues to be the only source of regulation of the government’s conditions of confinement for migrant children.

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9 Id.
10 Flores v. Meese, 942 F.2d 1352, 1355 (9th Cir. 1991).
14 Id. at 10.
15 Id.
16 Lopez, supra note 8, at 1647.
17 Flores v. Meese, 942 F.2d 1352, 1357 (9th Cir. 1991).
18 Lopez, supra note 8, at 1649.
19 Id.
20 In 2002, the INS was abolished and replaced with the Department of Homeland Security. The assignment of responsibility for detaining migrant children was subsequently transferred to the
II. The Flores Settlement Agreement

The FSA explicitly requires the government to place each detained minor “in the least restrictive setting appropriate to the minor’s age and special needs.”21 The Agreement also demands that minors be held in facilities that are “safe and sanitary” and that are “consistent with the INS’s concern for the particular vulnerability of minors.”22 In addition, the FSA gives migrant juveniles notice of the right to judicial review, which provides an individual who feels that his or her placement was improper, the right to have the placement reviewed by a federal judge.23 Equally important is the FSA’s requirement that the facilities housing juveniles be state licensed for the care of dependent minors.24

Regarding the release of minors to a parent or legal guardian, the FSA expanded who could assume care for the minor. The Agreement stipulates that a juvenile shall be released “without unnecessary delay” in an order of preference, to a parent, legal guardian, adult relative (brother, sister, aunt, uncle, or grandparent), an adult individual or entity designated by the parent or legal guardian, a licensed program willing to accept custody, or to an adult or individual seeking custody when there is no other alternative to long-term detention.25 The Agreement established that its terms would terminate “the earlier of five years after the date of final court approval of this Agreement or three years after the court determines that the INS is in substantial compliance with this Agreement.”26 In 2001, the parties agreed to amend the language to say that the terms of the Agreement will terminate “45 days following defendants’ publication of final regulations implementing this Agreement.”27

The Agreement has not been terminated since the 2001 Stipulation and has been brought before district court Judge Dolly Gee on numerous occasions to ensure compliance.28 Because Judge Gee initially oversaw the FSA, any disputes arising under the Agreement are assigned to her for adjudication. Courts treat consent decrees as contracts, so the government’s noncompliance with any term in

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22 Id.
23 Id. at 14.
24 Id. at 48.
25 Id. at 10.
26 Id. at 22.
27 Id.
the FSA is considered a breach of contract.\textsuperscript{29} In 2015, under the Obama Administration, the government tried to detain children and parents together in Customs and Border Protection facilities, claiming that the FSA did not apply to minors who were accompanied by a parent.\textsuperscript{30} Judge Gee held that the FSA applies to all juvenile migrants in government custody and found the government in breach of contract.\textsuperscript{31} She ordered the children to be released “without unnecessary delay,” noting that the facilities also failed to comply with the FSA because they were secure facilities that were unlicensed.\textsuperscript{32}

In April 2018, immigrant rights advocates again filed motions to enforce the FSA. The plaintiffs alleged that the government was in violation of the FSA because the Department of Health and Human Services (DHHS) was making inappropriate decisions regarding placement of minors, and was detaining minors for prolonged periods as expressly prohibited by the Agreement.\textsuperscript{33} In addition, more than thirty migrant juveniles in detention reported being forcibly drugged for more than health issues.\textsuperscript{34} Judge Gee ordered DHHS to transfer children out of the detention facility due to the allegations, once again demonstrating that the Agreement was fulfilling its protective purpose.\textsuperscript{35}

III. The Trump Administration’s Attempt to Eliminate the FSA

Amidst the chaos of family separation in the summer of 2018, President Trump made it clear that he wanted to eliminate the FSA altogether.\textsuperscript{36} He issued an order to request that Judge Gee modify the Agreement to allow for the detention of “alien families together throughout the pendency of criminal proceedings for improper entry or any removal or other immigration proceedings.”\textsuperscript{37} Judge Gee swiftly rejected the motion because she saw it as a request by the Administration to

\textsuperscript{29} In Chambers Order Re Plaintiffs’ Motion to Enforce Settlement and Defendants’ Notice of Termination and Motion in the Alternative to Terminate the Flores Settlement Agreement, CV 85-4544-DMG (AGRx).


\textsuperscript{31} \textit{Id.}

\textsuperscript{32} \textit{Id.}

\textsuperscript{33} \textit{Id.}

\textsuperscript{34} \textit{Id.}

\textsuperscript{35} \textit{Id.}


circumvent the rules to allow for prolonged detention of children.\(^38\) Judge Gee called the request “procedurally improper and wholly without merit.”\(^39\)

Because the 2001 Stipulation of the FSA says that the settlement will terminate forty-five days after the government’s final publication of regulations that codify the Agreement, the Department of Homeland Security (DHS) and the DHHS subsequently published a notice of proposed rulemaking to “amend regulations governing the care of undocumented minors.”\(^40\) The government agencies claimed that the proposed regulations would offer “minor modifications” and “largely replicate the language of the FSA.”\(^41\) However, the new rules varied so widely from the original settlement that upon publication of the final rule on August 21, 2019, the agencies immediately faced issues because the 2001 Stipulation to the FSA requires any subsequent administrative rule to replicate the terms of the Agreement.\(^42\)

After the government published the notice of proposed rulemaking, immigrant advocates filed a Motion to Enforce the FSA, requesting the court declare that the proposed regulations amount to a breach of the Agreement, permanently enjoin the DHS and DHHS from implementing the regulations, and if need be, declare that such implementation would constitute civil contempt.\(^43\) Upon formal publication of the final regulations, the government agencies filed a Motion to Terminate, and the advocates filed a supplemental brief addressing their Motion to Enforce the FSA.\(^44\) The advocates argued that the new regulations did not effectively terminate the Agreement, and that the court should enjoin the agencies from implementing the new policies.\(^45\)

Judge Gee ultimately held that the new regulations did not replicate the terms of the FSA, and the government was therefore enjoined from implementing them. On September 27, 2019, she issued a twenty-four-page in-chambers order outlining her decision to issue a permanent injunction, noting the glaring discrepancies between the FSA and the government’s proposed rules.\(^46\) She pointed to large areas where the government’s rule had major deviations from the language of the FSA. Specifically, the new rule contained substantial differences regarding the length of detention and placement of juveniles, who the minors can be released


\(^{41}\) *Id.*

\(^{42}\) In Chambers Order Re Plaintiffs’ Motion to Enforce Settlement and Defendants’ Notice of Termination and Motion in the Alternative to Terminate the Flores Settlement Agreement, CV 85-4544-DMG (AGRx).

\(^{43}\) *Id.*

\(^{44}\) *Id.*

\(^{45}\) *Id.* at 2.

\(^{46}\) *Id.*
The government’s proposed rule did not require state licensure of detention facilities that housed immigrant children. They defined “licensed facility” as requiring state licensures for family unit detention centers, which DHS itself has conceded does not exist in most states. Instead of state licensure under child welfare regulations, the new regulations effectively authorized DHS to have its own internal audit procedure to ensure the compliance of the regulations by Immigration and Customs Enforcement (ICE) facilities. Judge Gee defined this as “more than a minor or formalistic deviation” from the FSA.

The regulations would also allow the government to detain migrant children indefinitely, regardless of whether such detention would be necessary to secure their timely appearance before the immigration court or to ensure their safety. In terms of potential custodians upon release of the minor, the new regulations eliminated the language that allowed for anyone other than the child’s parent or legal guardian to take custody of the child. Judge Gee noted that this provision was, “not surprising, as DHS candidly admits that its new regulations are intended to allow the agency to ‘detain the family unit together as a family by placing them at an appropriate [facility] during their immigration proceedings.’”

In addition, the FSA established a right to bond hearing for all juveniles in immigration proceedings. The agencies’ new regulations would require the minor to request the bond hearing himself or herself, stripping the minors of an automatic right to a hearing. This provision is especially problematic because immigrant children are not afforded a right to counsel due to immigration proceedings being civil in nature. The new regulations would require the minor to ask for a bond hearing instead of automatically being afforded one.

Finally, Judge Gee also noted the glaring discrepancy in the government’s deletion of binding language that suggested that the government did not intend to be bound by the FSA’s substantive terms. For example, the new regulations erase the word “shall,” suggesting the elimination of a mandatory obligation. Judge Gee noted DHS and DHHS have been repeatedly sued as a result of non-compliance with the terms of the Agreement. She held that because she has not seen a record of compliance, she was legally restricted from terminating the consent decree.

47 Id.
48 Id. at 9.
49 Id.
50 Id.
51 Id. at 6.
52 Id.
53 Id. at 7.
54 Id. at 13.
55 Id.
57 In Chambers Order Re Plaintiffs’ Motion to Enforce Settlement, supra note 42, at 13.
58 Id. at 14.
59 Id.
altogether.\textsuperscript{60} Thus, Judge Gee permanently enjoined the government from enforcing the new regulations, requiring the government to remain bound by the terms of the FSA.\textsuperscript{61}

IV. Conclusion

Since 1997, the FSA has remained the strongest legally-binding source of regulation for the government’s detention of immigrant children, whether they are with or without their parents. The Agreement has withstood various presidential administration’s attempts to jail children for indefinite periods and continues to do so today. During tumultuous times for immigrant families, the 2001 Stipulation that holds the FSA in place continues to prove strong. As Judge Gee said herself, “The blessing or the curse — depending on one's vantage point—of a binding contract is its certitude.”\textsuperscript{62}

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\textsuperscript{60} Id. at 15.  \\
\textsuperscript{61} Id. at 3.  \\
\textsuperscript{62} Id. at 24.
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