Center for Immigration Studies February 2019

The History of the Flores Settlement

How a 1997 agreement cracked open our detention laws

By Matt Sussis

In April 2018, the Trump administration implemented new guidelines as part of its "zero tolerance" policy toward illegal entry, in response to the rising number of illegal aliens showing up with their children at the southern border. Under these guidelines, the Justice Department prosecuted every border infiltrator for the crime of entry without inspection.

After detaining the parents, the government could either put the children in a shelter (due to legal prohibitions on keeping children in detention for over 20 days), or release the entire family into the interior of the country — "catch-and-release" — and hope that they don't simply disappear into the illegal immigrant population. The first of these two options has been decried by critics as one of "family separation".

To understand how this conundrum arose, one must learn the history of the *Flores* settlement agreement.

Digging into its history bolsters the theory that the Clinton administration was well aware of what it was doing when it signed the agreement, and may have shared more in common with the activist plaintiffs than originally thought with regard to loosening the rules governing asylum.

Key takeaways:

- The consequences of the *Flores* settlement, a 1997 agreement between immigration activist groups and the government, have been central to the debates over President Trump's "zero-tolerance" policy at the border and accusations of family separations. A full understanding of this agreement requires understanding its history.
- Beginning in 1985, the activist groups began a series of lawsuits against the federal government over its perceived mistreatment of alien minors in detention facilities (notably a 15-year-old Salvadoran girl named Jenny Flores), culminating in a consent decree, the *Flores* settlement, more than a decade later.
- This 1997 settlement led to the government agreeing to set immigration detention standards for unaccompanied alien children (UACs), particularly regarding facility conditions and the timing and terms of the UACs' release.
- When the government entered into the *Flores* settlement agreement, its stated intention was to finally resolve years of litigation against the INS, but this is only partially true. Recent comments and actions by Clinton administration officials indicate that they were at least partially motivated by a desire to cooperate with the activist plaintiffs to loosen asylum rules.
- Since 1997, *Flores* has been significantly expanded upon by federal judges with loose border proclivities, and is now interpreted to mean that all minors in detention — accompanied by their parents or not — cannot be held for more than 20 days.

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- Partially driven by *Flores*, the number of apprehended aliens who claim credible fear (the first step in applying for asylum) has soared — up 67 percent in FY 18 vs. FY 17, and up over 10-fold from a decade ago. Moreover, only 3.5 percent of UACs are ever removed, according to DHS.

- Congress could pass a law superseding *Flores*, but has yet to do so.

Timeline

1985: Class action lawsuit against INS over minor detention.

1988: District court judge places limits on INS treatment of aliens minors in custody.

1990: 9th Circuit reverses district court judge, then overturned en banc.

1992: Case reaches Supreme Court, which rules in favor of the government.

1997: *Flores* agreement reached between government and plaintiffs.

2008: Congress passes TVPRA, partially codifying *Flores* into law.

2015: Judge interprets *Flores* to include all minors, and sets 20-day detention limit.

The Path to *Flores*: 1985-1997

The immigration laws and regulations of the United States were administered by the Immigration and Naturalization Service (INS) before Congress passed the Homeland Security Act of 2002 and President George W. Bush transferred that agency's responsibilities to what are now three agencies — U.S. Citizenship and Immigration Services (USCIS), U.S. Immigration and Customs Enforcement (ICE), and U.S. Customs and Border Protection (CBP), each located in the Department of Homeland Security.

It was during the time that INS had jurisdiction over immigration that Carlos Holguin, an immigration lawyer in Los Angeles, received a call from a Hollywood actor about that actor's housekeeper, an illegal Salvadoran immigrant.[1] Her daughter, Jenny Flores, was being detained by INS. Jenny's mother didn't want to pick her up, as she feared bringing herself before INS would result in her deportation. INS would not release Flores to her cousins — they said that only legal guardians, for the sake of the child's safety, could pick her up. Jenny Flores later alleged that the conditions of her detention were substandard.

Eventually, this led to a 1985 class-action lawsuit on behalf of illegal immigrant children headed by several activist groups: The Center for Human Rights and Constitutional Law, to which Holguin belongs; the National Center for Youth Law; the ACLU; and the law offices of Streich Lang, which has since merged to become Quarles & Brady LLC.[2]

The lawsuit sought to establish standards for how INS handles detained minors, and specifically expressed concerns that Jenny Flores was strip-searched, that she shared living quarters and bathrooms with male adults, and that she couldn't be released to non-guardian relatives.

In 1988, Judge Robert Kelleher of the U.S. District Court for the Central District of California, who had been appointed by President Nixon, delivered a win to these groups. He ruled that the INS policy of strip-searching children was unconstitutional because the "defendants have failed to establish a plausible, much less compelling, need to routinely strip search detained juveniles." He also removed the restrictions that INS had in place regarding to which adults the detained minors could be released.[3]

However, in 1990, a three-judge panel of the Ninth Circuit Court of Appeals reversed Kelleher's decision, and instead sided with the government. Judge John Clifford Wallace and Judge Lloyd D. George (both appointed by Republican presidents) wrote in their majority opinion that "it is clear that Flores' substantive due process challenge to the regulation must be rejected. To the extent the district court based its ruling on this prong of due process law, it must be reversed."[4]

This victory for the INS was short-lived. One year later, the Ninth Circuit *en banc* (a full 11-judge court) reversed its prior ruling, and in a 7-4 decision affirmed Judge Kelleher's 1988 ruling.

On October 13, 1992, the Supreme Court began to hear oral arguments in the case. A year later, the Supreme Court delivered a significant win to the government, voting 7-2 in favor of reversing the lower court's decision. Justices Scalia, Rehnquist, White, O'Connor, Kennedy, Souter, and Thomas all held that there was no constitutional right for unaccompanied alien children to be released to someone other than a close relative, and further held that these minors could be kept in detention centers if they lacked a close relative or guardian in the United States to take them in.[5] Scalia wrote: "Where the Government does not intend to punish the child, and where the conditions of Governmental custody are decent and humane, such custody surely does not violate the Constitution."

And yet, even after this sweeping victory, the lawsuits and pressure from activist groups did not abate. For example, a 1997 book penned by Human Rights Watch titled *Slipping Through the Cracks* alleged that the INS was still not complying with the terms of the Supreme Court's decision in *Reno v. Flores*. Following interviews with INS officials and tours of facilities, the authors argued that INS agents' attitudes ranged from being apathetic to harboring "ill will" toward detained UACs, and that the conditions of UAC detention were still poor.[6]

That year, in what was seen as an attempt to end the ongoing criticism and litigation by the government, INS Commissioner Doris Meissner signed the *Flores* settlement agreement. The agreement included several major concessions from the government:

1. The government would release children "without unnecessary delay" to (in order of preference) the children's parents, legal guardians, other adult relatives, or another individual designated by the parents/guardians.

2. The government would put children in the "least restrictive" setting appropriate.

3. The government would create and implement standards for the care and treatment of immigrant children in detention.[7]

That settlement laid the groundwork for the current asylum crisis at the border and extends well beyond its initial mandate.

Why Did the Government Sign *Flores?*

Why, just a few years after a sweeping Supreme Court victory, did the Clinton administration agree to the *Flores* settlement? The stated reason was that the government was looking to finally put an end to over a decade of litigation that began in 1985, and certainly there may be some truth to that. The settlement, however, seemed like a major concession by the winning side, and certainly one that could (and later did) crack the door open further for open-borders groups to exploit asylum laws for minors.

A 2018 NPR interview with former INS Commissioner Doris Meissner provides insight into that action. When asked by NPR's "All Things Considered" host Michel Martin about the Trump administration's "zero tolerance" policy, Meissner had the following response:

> *Well, so here is the situation. What — the reference that they're making is to a court settlement called* ***the Flores decision, which took place in 1997. I'm very familiar with it because I signed it.*** *And it was a settlement of a long-standing piece of litigation that said that children would be detained in the least restrictive setting possible and for the shortest period of time in order to be placed with either a family member or another care situation.*
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> *That law — that — and that's not a law. It's a court settlement, but it has the force of law. And it has been expanded by another court judgment just a few years ago to apply both to children and to families with children. So it is valid to say that it has the force of law. It is not actually a law. It would have — to change it would require legislation, which is what the Congress is talking about.*
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> *However, it is a judgment on the part of the administration how to implement that court decision. And* ***this implementation of the court decision that says children need to be separated from their parents because their parent is being prosecuted — that has never happened before in the past from the time that this settlement took place through other administrations*** *— both Democratic and Republican administrations.*
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> *Everybody has recognized that this issue is a balancing act — that we, of course, have a responsibility to enforce the laws at the border. But to those who are especially vulnerable — young people and families —* ***there are other measures that can be taken that, of course, enforce the law but are not so excessively harsh as to violate a principle so fundamental as young children being in detention for long periods of time****. [Emphasis added.]*[8]

Meissner appears to be making a new admission here: Her decision to sign *Flores* was guided by humanitarian considerations for the children, rather than simply a concern about the risks of further litigation. There's nothing inherently wrong with that, of course, but it is curious that the 1997 defendant — the INS — didn't appear to think of detention reform much differently

than did the activist plaintiffs. And, if the then-INS believed that these changes were necessary, it could have simply made them itself, without binding future administrations to its policies.

This view is reinforced by other INS actions under the Clinton administration during that same time period. Most notable is the decision of INS General Counsel Paul Virtue a year later, in 1998, to implement "parole in place", allowing the INS to grant parole to any alien applying for admission for humanitarian or "public benefit" purposes that further helped facilitate the vision of groups like the ACLU that were seeking significantly looser asylum policies.[9]

Certainly, President Clinton, Meissner, and Virtue (among others who supported the agreement at the time) could not have predicted the ways in which *Flores* would be even further contorted in the years to come. Nonetheless, Occam's razor states that the simplest answer tends to be the correct one. The simplest explanation for the actions of the Clinton administration around the signing of *Flores* in 1997 is that it held the same views on asylum laws that the activist groups did — namely, that they ought to be looser.

Developments Since Settlement, 1997-2019

In 2003, as part of a major government re-organization following the 9/11 terrorist attacks, Congress abolished the INS, and transferred its responsibilities to several entities within the Department of Homeland Security. The responsibility for transferring alien minors to their parents, however, was shifted to the Department of Health and Human Services, with the Office of Refugee Resettlement handling both care and custody of unaccompanied children.

Meanwhile, activists continued to allege that the terms of *Flores* were not being fully met by DHS/HHS. In 2008, Congress passed the Trafficking Victims Protection Reauthorization Act (TVPRA), which codified parts of *Flores* into federal law in what are called "savings clauses", preserving certain rights for alien children.

The next major change to *Flores*, and almost certainly the most significant, came in 2015. An Obama-appointed federal district court judge in California, Dolly Gee, ordered that the Obama administration must release detained children and their mothers who were caught crossing the border illegally, saying that detention centers in Texas had failed to meet the *Flores* standards.

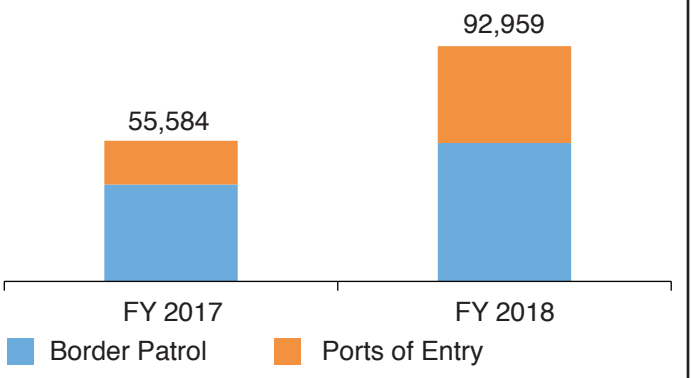
This was a major development — Gee had now expanded *Flores* to cover not only unaccompanied children, but also accompanied children.[10]

In fact, Judge Gee even went a step further. *Flores* calls on the government to release children "without unnecessary delay". Gee interpreted that to mean 20 days. In other words, now all minors in detention, whether or not they were with their parents, couldn't be detained for more than three weeks. This ruling laid the groundwork for the current crisis at the border, in which children are released while their parents can still be detained awaiting hearings — hence, the "separation" of families. The alternative is simply releasing the entire family after three weeks or less. In other words, "catch-and-release".

The next year, in 2016, Ninth Circuit Judge Andrew Hurwitz, joined by judges Michael Melloy and Ronald Gould, reaffirmed that *Flores* applies to all children, regardless of whether they're accompanied — although they did reverse the notion that parents have an affirmative right of release.[11]

In the past few years, the number of aliens who have sought to initiate the asylum process by claiming "credible fear" of persecution during expedited removal — either at ports of entry or between them — has soared, in large part owing to the *Flores* settlement agreement and to Judge Gee. Aliens have clearly gotten the message that if they ask to be put into asylum proceedings, their children — and often if not usually the

Figure 1. Total Claims of Credible Fear Apprehensions and Inadmissibles



Source: "Claims of Fear: CBP Southwest Border and Claims of Credible Fear Total Apprehensions/Inadmissibles (FY2017 - FY2018)", U.S. Customs and Border Protection, last modified December 10, 2018.

adults, too — will be released into the country shortly after they are apprehended as they await their removal proceedings. In fact, in FY 2018 alone, the number of aliens apprehended by Border Patrol claiming credible fear was 10-fold higher than a decade before, and 67 percent above the FY 2017 figure, reaching a staggering 92,959 claims. (See Figure 1.)

Aliens respond to incentives, and *Flores* remains a strong one. After all, if a Central American mother knows that bringing her child means that she can simply show up at a port of entry, claim credible fear, and then quickly be released from detention into the country regardless of the actual validity of her asylum claim, why wouldn't she do so?

There have been discussions in Congress about passing a law that would supersede *Flores* and finally settle the issue. Several Republicans, mostly notably Ted Cruz (R-Texas), called on Congress to fix *Flores* in order to resolve the related issue of child-parent separations and catch-and-release. As of early 2019, however, such a fix has yet to pass Congress, and doesn't look likely to any time soon.

End Notes

[1] See "The History Of The Flores Settlement And Its Effects On Immigration", NPR, June 22, 2018.

[2] See the websites for The Center for Human Rights and Constitutional Law, the National Center for Youth Law, and the law offices of Streich Lang, which has since merged to become Quarles & Brady LLC.

[3] *Flores v. Meese*, 681 F. Supp. 665 (C.D. Cal. 1988).

[4] *Flores v. Meese* (1990).

[5] See Linda Greenhouse, "Detention Upheld on Alien Children", *The New York Times*, March 24, 1993.

[6] "Slipping Through the Cracks: Unaccompanied Children Detained by the U.S. Immigration and Naturalization Service", Human Rights Watch Children's Rights Project, April 1997.

[7] *Flores* settlement agreement.

[8] "Barbershop: Border Separations", *All Things Considered*, NPR, June 16, 2018.

[9] Paul Virtue 1998 memorandum.

[10] See Julia Preston, "Judge Orders Release of Immigrant Children Detained by U.S.", *The New York Times*, July 25, 2015.

[11] *Flores v. Lynch* (2016).