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# DID THE GOVERNMENT FINALLY GET IT RIGHT? AN ANALYSIS OF THE FORMER INS, THE OFFICE OF REFUGEE RESETTLEMENT AND UNACCOMPANIED MINOR ALIENS' DUE PROCESS RIGHTS\*

*I crossed a border, no more. But they treat me as if I am a criminal. Other boys here have used weapons and drugs. All I did was cross a border. All I can do is look at these four walls and go crazy.<sup>1</sup>*

## INTRODUCTION

Imagine being a toddler locked in a juvenile detention center against your will even though you have not committed a crime. Imagine being unjustly subjected to the violence and abuse accompanying life in a criminal correctional facility. Imagine having no hope of being released and having no one to help you escape these injustices. Each year thousands of children, who are unaccompanied minor aliens,<sup>2</sup> do not have to imagine such a scenario because for them, these atrocities are

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<sup>1</sup> WOMEN'S COMM'N FOR REFUGEE WOMEN & CHILDREN, PRISON GUARD OR PARENT?: INS TREATMENT OF UNACCOMPANIED REFUGEE CHILDREN 23 (2002) [hereinafter WOMEN'S COMM'N], available at [http://www.womenscommission.org/pdf/ins\\_det.pdf](http://www.womenscommission.org/pdf/ins_det.pdf) (quoting a fourteen-year-old homeless Honduran boy, who came to the United States seeking asylum but instead was forced to live in a juvenile detention facility and share a cell with a minor convicted of assault with a deadly weapon).

<sup>2</sup> See *Convention on the Rights of the Child*, G.A. Res. 44/25, U.N. GAOR 44th Sess., Supp. No. 49, art. 1, U.N. Doc. A/44/736 (1989), available at <http://www.un.org/documents/ga/res/44/a44r025.htm> (codifying a generally accepted definition of children as persons under the age of eighteen); AMNESTY INT'L USA, UNITED STATES OF AMERICA: UNACCOMPANIED CHILDREN IN IMMIGRATION DETENTION pt. 2 n.15 (2003) [hereinafter CHILDREN IN DETENTION] (noting that the UN Rules for the Protection of Juveniles Deprived of Their Liberty is applied to people under the age of eighteen); see also 8 C.F.R. § 236.3(a) (2003) (defining juveniles as an alien under the age of eighteen). The U.S. Supreme Court incorporates this definition in *Reno v. Flores*, 507 U.S. 292, 296 (1993). It is important to note, however, that:

The Flores settlement agreement gives the INS some latitude in determining whether an alien is a juvenile or an adult. . . . ("If a reasonable person could conclude that an alien detained by the INS is an adult despite his claims to be a minor, the INS shall treat the person as an adult for all purposes, including confinement and release on bond or recognizance.")

Christopher Nugent & Steven Schulman, *Giving Voice to the Vulnerable: On Representing*

a daily reality. Unaccompanied minor aliens have been forced to live in deplorable conditions where detention personnel lack the adequate skills and capacity to communicate effectively.<sup>3</sup> As a result, detention personnel “are unaware of the needs, legal and otherwise, of the children in their custody.”<sup>4</sup> Because detention personnel cannot properly address the needs of falsely imprisoned children, innocent “children are sometimes commingled with youthful offenders and treated indistinguishably from that population, forced to wear prison uniforms and live in a punitive environment subject to strict rules and regulations.”<sup>5</sup>

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*Detained Immigrant and Refugee Children*, 78 No. 39 INTERPRETER RELEASES, Oct. 8, 2001, at 1569, 1591 n.44 (quoting the *Flores* Settlement Agreement, ¶ 13).

For purposes of this Note, “unaccompanied minor alien” is defined as an individual under the age of eighteen who entered into the United States with neither a familial relation nor a legal guardian. Also, this Note will address the due process concerns of deportable aliens, not excludable aliens. The distinction between a deportable and excludable alien is legally significant because the Supreme Court has historically granted substantially less constitutional protections to an excludable alien. *See* Beth S. Rose, Case Comment, *INS Detention of Alien Minors: The Flores Challenge*, 1 GEO. IMMIGR. L.J. 329, 329 n.2 (1986); *see also* *Zadvydas v. Davis*, 533 U.S. 678, 682 (2001) (“We deal here with aliens who were admitted to the United States but subsequently ordered removed.”). “It is well established that certain constitutional protections available to persons inside the United States are unavailable to aliens outside of our geographic borders.” *Id.* at 693 (citing *United States v. Verdugo-Urquidez*, 494 U.S. 259, 269 (1990) (holding that Fifth Amendment rights do not extend to aliens outside the boundaries of the United States)).

<sup>3</sup> Wendy A. Young, *Refugee Children at Risk*, 28 HUM. RTS. 10, 11 (2001); *see also* David Oliver Relin, *Who Will Stand Up for Them?*, PARADE, Aug. 4, 2002, at 1, available at <http://www.womenscommission.org/archive/02/articles/relin.html>.

<sup>4</sup> Young, *supra* note 3, at 11.

<sup>5</sup> *Id.*; *see also* WOMEN’S COMM’N, *supra* note 1, at 27. For example, in a recent survey of secure facilities that detain unaccompanied minors, sixty-one percent of the respondents acknowledged that their facility conducted routine strip-searches of children. AMNESTY INT’L USA, REFUGEES: “WHY AM I HERE?” CHILDREN IN IMMIGRATION DETENTION (2003) (Executive Summary) [hereinafter WHY AM I HERE? (ES)], available at [http://www.amnestyusa.org/refugee/usa\\_children\\_summary.html](http://www.amnestyusa.org/refugee/usa_children_summary.html) (last visited Jan. 25, 2004). One child was strip-searched approximately twenty-five times in five weeks, including being subjected to a search simply because he lost a pen. Press Release, Amnesty Int’l USA, First National Survey of Children in Immigration Detention Exposes Mistreatment, Lengthy Detentions, Legal Barriers (June 18, 2003), at <http://www.amnestyusa.org/news/2003/usa06182003.html> (last visited Jan. 25, 2004). “[C]hildren in some secure units are reportedly required to take off all clothing after any visit with attorneys or others.” WHY AM I HERE? (ES), *supra*. These accounts are particularly disturbing because “[p]utting down and strip-searching represent intrusive physical contact and compound the sense that the child has done something wrong. The searches cause the children considerable distress and do not allow for an individual assessment of the security concerns.” *Id.* Other types of punitive procedures inflicted upon this group of aliens include, but are not limited to, being held in solitary confinement as a disciplinary measure, and being denied adequate exercise. AMNESTY INT’L USA, REFUGEES: “WHY AM I HERE?” CHILDREN IN IMMIGRATION

Until recently, the government agency authorized to handle immigration issues was the Immigration and Naturalization Service (INS).<sup>6</sup> The INS was dissolved, however, because it historically pursued its mandate in an inefficient manner — often losing sight of its goal to protect the rights of children under its authority.<sup>7</sup> As a result of its inefficiency, the former INS subjected unaccompanied minor aliens to constitutional due process violations on a daily basis.<sup>8</sup>

On November 25, 2002, President Bush approved the Homeland Security Act.<sup>9</sup>

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DETENTION (2003) (Key Findings) [hereinafter WHY AM I HERE? (KF)], available at [http://www.amnestyusa.org/refugee/usa\\_children\\_keyfindings.html](http://www.amnestyusa.org/refugee/usa_children_keyfindings.html) (last visited Jan. 25, 2004).

<sup>6</sup> See 8 U.S.C.A. § 1103 (West Supp. 2002); Rose, *supra* note 2, at 329 (describing the powers of the INS before its dissolution).

<sup>7</sup> See Young, *supra* note 3, at 10–11. The failure of the former INS to fulfill its responsibility of meeting aliens' legal needs was even more disturbing with children, because:

[They] are often too young or uninformed to appreciate the nature of the immigration proceedings in which they are involved and are vulnerable to agreeing to deportation as their only recourse to getting out of the correctional facility. They are also often unaware that they should have legal counsel, which may not be available in any case due to the remote locations of many of the jails with which the INS contracts.

*Id.* at 11.

<sup>8</sup> See *id.* at 10 (noting the due process violation of unreasonably detaining “children [who] were held in local juvenile jails for some period of time, ranging from days to more than a year”).

These children are forced to endure the physical abuse that often accompanies juvenile detention centers. For example, at Berks County Youth Center's Secure Unit in Pennsylvania, physical abuse is used as a disciplinary method. See WHY AM I HERE? (ES), *supra* note 5. “Staff reportedly kick children, throw them to the floor and knock their heads into walls for infractions such as looking the wrong way, saying ‘can I use the bathroom’ instead of ‘may I,’ or not being able to count properly.” *Id.* Notwithstanding the appalling injustice of beating a child for looking the wrong way, this abuse is especially horrific, as these children often cannot speak English, let alone be able to decipher correct forms of grammar or be able to count properly. See CHILDREN IN DETENTION, *supra* note 2, pt. 1.2.

Moreover, many children spend months or even years in detention — even though relatives or other appropriate adults are willing to take care of them, an arrangement that is permissible and even preferable according to U.S. standards governing the treatment of unaccompanied minors. These standards' criteria are ignored, as immigration authorities often fail to ensure the timely release of children.

WHY AM I HERE? (ES), *supra* note 5.

<sup>9</sup> Homeland Security Act of 2002, Pub. L. 107-296, 116 Stat. 2135 (2002). This legislation was significant, as it proposed the largest reorganization of the federal government in over half a century. CHILDREN IN DETENTION, *supra* note 2, pt. 1.2.1. Specifically, President George Bush proposed a unification of various agencies and activities, creating a homeland security agency “whose primary mission is to protect [the nation's] homeland.”

This legislation created a new executive governmental agency that would oversee immigration issues.<sup>10</sup> When the legislation was enacted on March 1, 2003, the former INS was dissolved and immigration issues were delegated to the Department of Homeland Security (DHS).<sup>11</sup> Custody of unaccompanied minor aliens, however, was delegated to the Office of Refugee Resettlement (ORR).<sup>12</sup> Under the authority of the Department of Health and Human Services, the ORR has been given the grave responsibility<sup>13</sup> of assisting refugees, unaccompanied minors and other special groups in achieving social and economic self-sufficiency.<sup>14</sup>

This Note will evaluate the repeated failure of the government to provide unaccompanied minor aliens due process protection against indefinite detention; will discuss the government's recent attempt to remedy this failure by eliminating the former INS and authorizing the ORR to handle unaccompanied minor aliens; and finally, will analyze additional legislative proposals designed to protect these minors' constitutional rights.

Section I provides a description of the plight of unaccompanied minor aliens and the constitutional implications of indefinite detention. Section II discusses the category of unaccompanied minor aliens discussed in this Note. Section III describes the case history of due process rights regarding detention policies for unaccompanied minor aliens. Section IV addresses legislative developments since the most recent Supreme Court decision in this area<sup>15</sup> and the September 11, 2001, terrorist attacks. Specifically, Section IV addresses the implications of the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001 (PATRIOT Act).<sup>16</sup> Section V discusses the

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PRESIDENT GEORGE W. BUSH, THE DEPARTMENT OF HOMELAND SECURITY (2002), *available at* <http://www.dhs.gov/interweb/assetlibrary/book.pdf>.

<sup>10</sup> Press Release, Women's Comm'n for Refugee Women & Children, Homeland Security Bill is Important First Step for Unaccompanied Refugee Children (Nov. 27, 2002), *at* [http://www.womenscommission.org/archive/02/press\\_releases/1127.html](http://www.womenscommission.org/archive/02/press_releases/1127.html) (last visited Jan. 25, 2004).

<sup>11</sup> See Homeland Security Act §§ 402, 471.

<sup>12</sup> *Id.* § 462(b). The ORR was originally created under section 101(a)(42) of the Immigration and Nationality Act. See OFFICE OF REFUGEE RESETTLEMENT, U.S. DEP'T HEALTH & HUMAN SERVS., ELIGIBILITY FOR REFUGEE ASSISTANCE AND SERVICES THROUGH THE ORR (2003), *Who We Are*, *at* <http://www.acf.dhhs.gov/programs/orr/geninfo>.

<sup>13</sup> The responsibility is grave because "[c]hildren in . . . custody are among the most vulnerable newcomers to the United States. The U.S. immigration system *must* recognize that unaccompanied children are children first and have a fundamental right to due process and the care and protection that is appropriate to their young age." Young, *supra* note 3, at 11.

<sup>14</sup> OFFICE OF REFUGEE RESETTLEMENT, *supra* note 12.

<sup>15</sup> *Zadvydas v. Davis*, 533 U.S. 678 (2001).

<sup>16</sup> Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT ACT) Act of 2001, Pub. L. No. 107-56, 115 Stat. 272 (2001) [hereinafter PATRIOT Act].

factors leading to the demise of the former INS and the reasoning behind transferring custody of unaccompanied minors to the ORR. Section VI discusses the structure of the Department of Homeland Security and the ORR. Section VII analyzes whether the newly formed structure and policies of the ORR will meet minors' due process requirements and thereby eliminate the constitutional violations inflicted upon this class of aliens. Section VIII evaluates whether additional legislative proposals, specifically the Unaccompanied Alien Child Protection Act of 2003, can be implemented in an effective manner so that children are not deprived of the freedoms guaranteed to all individuals.

The ORR is presented with the unique opportunity to implement changes that will ameliorate the constitutional violations of rights routinely inflicted upon these innocent children by the INS. In order to do so, however, the ORR and the DHS must abandon the practice of detaining juveniles indefinitely and adhere to a reasonable time limitation policy. Moreover, this reasonable time limitation policy must focus primarily on the child's best interests by expediting immigration procedures and removing children from detention facilities. Ultimately, this Note will determine that while the ORR has the potential to provide the due process protections the government is obligated to ensure, its success depends on prohibiting indefinite detention by codifying specific guidelines mandating a "least restrictive setting" requirement, and adhering to the Immigration and Nationality Act's postremoval detention period's "reasonable time" limitation as established by the Supreme Court in 2001<sup>17</sup> — guidelines that are outlined in the *Flores* Settlement Agreement and Unaccompanied Alien Child Protection Act of 2003.<sup>18</sup>

## I. BACKGROUND

Edwin Munoz is one of countless unaccompanied minor aliens forced to endure harsh treatment by the U.S. government.<sup>19</sup> Edwin fled his native country of Honduras at the age of thirteen.<sup>20</sup> While living in Honduras, he was beaten with car tools at the hands of his cousin, with whom he was left to live after the death of his father and abandonment by his mother.<sup>21</sup> Edwin's cousin forced him to beg on the streets and would beat Edwin if he did not return with sufficient money.<sup>22</sup> Edwin

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<sup>17</sup> See *Zadvydas*, 533 U.S. at 678.

<sup>18</sup> See *infra* notes 118–24, 274–82 and accompanying text.

<sup>19</sup> See *The Unaccompanied Alien Child Protection Act: Hearing Before the Subcomm. on Immigration of the Senate Comm. on the Judiciary*, 107th Cong. (testimony of eighth-grader Edwin L. Munoz), available at [http://judiciary.senate.gov/testimony.cfm?id=172&wit\\_id=237](http://judiciary.senate.gov/testimony.cfm?id=172&wit_id=237) [hereinafter Testimony of Edwin Munoz].

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

<sup>22</sup> *Id.* Edwin explained, "When I didn't earn enough money, he punished me, beating me with a noose, car tools, and other objects, leaving scars on my body . . ." *Id.*

could not report his cousin's violent abuse because Edwin feared the beatings would escalate or he would be thrown out of the house and forced to live on the streets.<sup>23</sup> Compared to living with his cousin, living on the streets presented an even greater danger, as Honduran authorities were known to kill homeless children.<sup>24</sup> Unable to endure the continued physical and emotional abuse, Edwin fled to the United States in search of freedom.<sup>25</sup>

Edwin came to the United States because he believed he could have a peaceful life.<sup>26</sup> In search of his dreams, he left Honduras and hitchhiked for approximately five months, working for food and shelter before arriving in the United States.<sup>27</sup> It was at this time that his nightmare with the INS began. After arriving in California and being detained by the INS, Edwin was subjected to what he ironically describes as "the worst place I have ever been in my life."<sup>28</sup>

"My whole life, ' he sa[id], 'I'd heard wonderful things about America and how children were treated there.'"<sup>29</sup> But instead of finding freedom and a peaceful life, Edwin was forced to live among violent criminals in a juvenile detention center.<sup>30</sup> During this time, Edwin was beaten with sticks, doused with pepper spray, and for almost six months, confined to a cell for eighteen hours a day.<sup>31</sup> According to Edwin, "[T]hey forced me to wear a prison uniform with flip-flops. They then locked me in a cell by myself without windows. . . . I spent three entire days in the cell, sad and afraid."<sup>32</sup>

Edwin's story is not an aberration. Fega, another unaccompanied minor alien, endured similar hardships upon arriving in the United States.<sup>33</sup> After being abused and eventually abandoned by her father in Nigeria, Fega was placed alone on a plane.<sup>34</sup> She was only eight-years-old.<sup>35</sup> The INS held Fega for fifteen months, refusing her access to a juvenile court that would determine if she could be granted

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*:

I . . . did not think the police would protect a child like me. I did not want to live on the streets because I had heard that the authorities and gangs kill children living in the streets. I had no other choice but to look for safety, and a real family, in the United States.

<sup>25</sup> *See id.*

<sup>26</sup> *See id.*

<sup>27</sup> *See id.*

<sup>28</sup> *Id.*

<sup>29</sup> *Relin, supra* note 3.

<sup>30</sup> Testimony of Edwin L. Munoz, *supra* note 19.

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

<sup>33</sup> *See* WOMEN'S COMM'N, *supra* note 1, at 22.

<sup>34</sup> *Id.*

<sup>35</sup> *Id.*

a Special Immigrant Juvenile visa.<sup>36</sup> “A social worker documented that Fega’s development and mental well-being had deteriorated . . .” because of her prolonged confinement.<sup>37</sup>

Mekabou Fofana flew to the United States at the tender age of fifteen in search of asylum.<sup>38</sup> Unfortunately, all Mekabou found was continued hardship.<sup>39</sup> Under the authority of the INS, this young Liberian boy was held in an adult facility and was forced to share a cell with a convicted murderer.<sup>40</sup> According to Mekabou, “I was the youngest one among [the prisoners] and was very scared that the criminal detainees would hurt me. . . . I was so afraid that I couldn’t sleep at night . . . .”<sup>41</sup> Mekabou was forced to live in detention facilities with adults for one-and-a-half years.<sup>42</sup> Commenting about his detention, Mekabou recalled the horror of being “handcuffed, chained, and shackled, like a criminal . . . . I felt like my life was finished. I was too young to be there.”<sup>43</sup>

Malik fled Guinea because he and his family were being persecuted and were in serious danger.<sup>44</sup> Malik sought refuge in the United States because he feared continued persecution if he returned to his homeland.<sup>45</sup> “Malik’s family was singled out for persecution in 1998 as part of a well-publicized incident in which the Guinean government destroyed several thousand homes and reportedly displaced 120,000 Guineans in particular areas of the country.”<sup>46</sup>

When he arrived in Washington, D.C., however, Malik was not granted asylum.<sup>47</sup> The former INS imprisoned Malik in an adult correctional facility in Arlington, Virginia.<sup>48</sup> “He was then seemingly forgotten by the INS, remaining in detention for nine months before having his first hearing before an immigration judge after older inmates, feeling sorry for the boy, helped him write to an attorney to get help.”<sup>49</sup>

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<sup>36</sup> *Id.*

<sup>37</sup> *Id.* Fega’s release occurred only after her plight was published in a *New York Times* article. Eric Schmitt, *I.N.S. Both Jailer and Parent to a Child Without a Nation*, N.Y. TIMES, June 24, 2001, at A1; Eric Schmitt, *Case of Detained Nigerian Girl Takes U.S. Agency to London*, N.Y. TIMES, June 26, 2001, at A15.

<sup>38</sup> WOMEN’S COMM’N, *supra* note 1, at 16.

<sup>39</sup> *Id.*

<sup>40</sup> *Id.*

<sup>41</sup> *Id.*

<sup>42</sup> *Id.* The Board of Immigration Appeals eventually granted Fofana asylum.

<sup>43</sup> *Id.*

<sup>44</sup> See CHILDREN IN DETENTION, *supra* note 2, pt. 2.1.

<sup>45</sup> *Id.*

<sup>46</sup> *Id.*

<sup>47</sup> See *id.*

<sup>48</sup> *Id.*

<sup>49</sup> *Id.*



Malik produced a birth certificate proving that he was still a minor but the former INS denied his request to be transferred to a juvenile facility.<sup>50</sup> Malik, who “suffers from moderate mental retardation,” was reportedly beaten by guards and abused by inmates, making Malik “become even more fearful, confused, and depressed.”<sup>51</sup> Despite his requests to be transferred and despite the abuse he has been forced to endure, Malik continues to be detained. He has been detained for more than two years.<sup>52</sup>

Unfortunately, these children’s experiences are not uncommon. Thousands of children who are unaccompanied aliens arrive in the United States each year and their numbers are increasing.<sup>53</sup> “[M]ost children have lost their families, been sent out of their homelands by families who fear for the child’s safety, or — sadly — have been forced to flee abuses inflicted by the family itself.”<sup>54</sup> Unaccompanied minors flee abuses such as bonded labor, child prostitution, child marriages, female genital mutilation, and homelessness.<sup>55</sup> The United States receives unaccompanied minors primarily from China, Mexico and Central America.<sup>56</sup> Smaller numbers of children have also fled from Kosovo, Colombia, Somalia, Algeria, Sierra Leone and Afghanistan.<sup>57</sup> The children arrive by crossing the U.S. border or through ports of entry.<sup>58</sup> They travel alone, with a family friend, distant relative, or smuggler.<sup>59</sup>

<sup>50</sup> *Id.*

<sup>51</sup> *Id.*

<sup>52</sup> *Id.*

<sup>53</sup> “Since 1997, the number of children in INS custody has increased dramatically, nearly tripling in number.” *Id.* The government has recognized the dramatic increase in minors immigrating to the United States. See U.S. DEP’T OF JUSTICE IMMIGRATION & NATURALIZATION SVC., FACT SHEET: INS’ OFFICE OF JUVENILE AFFAIRS para. 3 (2002) [hereinafter INS FACT SHEET], available at <http://uscis.gov/graphics/publicaffairs/factsheets.OJA.pdf> (reporting that “[t]he number of unaccompanied juveniles arriving in the United States has more than doubled in the last five years, rising from 2,375 in FY 1997 to 5,385 in FY 2001”).

<sup>54</sup> Young, *supra* note 3, at 10.

<sup>55</sup> WOMEN’S COMM’N, *supra* note 1, at 4. Many children are “forced to flee abuses inflicted by the[ir] famil[ies or] . . . persecution, including military recruitment, abusive child labor, sexual slavery, and female genital mutilation.” Young, *supra* note 3, at 10; see also Claire L. Workman, *Kids Are People Too: Empowering Unaccompanied Minor Aliens Through Legislative Reform*, 3 WASH. U. GLOBAL STUD. L. REV. 223 (2004). Often times, “[s]mugglers kidnap, trick, or ‘buy’ children (often under the guise of international adoption) and usher them into the United States for child labor or prostitution.” *Id.* at 223 (citing Jacqueline Bhabha, *Lone Travelers: Rights, Criminalization, and the Transnational Migration of Unaccompanied Children*, 7 U. CHI. L. SCH. ROUNDTABLE 269, 271–73 (2000)); see also CHILDREN IN DETENTION, *supra* note 2, pt. 2.1.

<sup>56</sup> See WOMEN’S COMM’N, *supra* note 1, at 5.

<sup>57</sup> *Id.*

<sup>58</sup> *Id.*

<sup>59</sup> *Id.*

Some children arrive involuntarily because they are “coerced or forced to come to the United States by traffickers to work as child laborers or prostitutes.”<sup>60</sup>

Approximately 5,000 children are detained annually<sup>61</sup> and many are placed in juvenile detention centers.<sup>62</sup> While the average age of these children is fifteen,<sup>63</sup> some detained children are toddlers.<sup>64</sup> Seventy-five percent of detained children are boys and twenty-five percent are girls.<sup>65</sup>

Representing dozens of nationalities, the plight of these children presents a dilemma for the U.S. government. On one hand, it must protect these children’s constitutional rights. On the other hand, protecting their rights requires the government to expend resources on these children, which taxes the nation’s economy and its limited resources. The government is faced with striking a balance between preserving its limited resources for its citizens and expending resources to meet the due process requirements afforded to aliens by the Constitution.<sup>66</sup>

As interpreted by the Supreme Court, the Fifth Amendment provides due process protections to aliens.<sup>67</sup> “[O]nce an alien enters the country, the legal circumstance changes, for the Due Process Clause applies to all *persons* within the United States, including aliens, whether their presence is lawful, unlawful, temporary, or permanent.”<sup>68</sup> Specifically, the Supreme Court has interpreted Fifth Amendment due process rights to encompass an alien’s right against indefinite detention.<sup>69</sup> The Constitution, therefore, places responsibility on the U.S. government to enforce minor aliens’ due process rights by ensuring that they are not detained indefinitely.

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<sup>60</sup> *Id.*

<sup>61</sup> Press Release, *supra* note 10; see also WOMEN’S COMM’N, *supra* note 1, at 1.

<sup>62</sup> Young, *supra* note 3, at 10. “In 1999, almost 2,000 children were held in local juvenile jails. . . . [M]ost children’s cases are handled by low-level INS deportation officers. [And] most children are held in . . . juvenile correctional facilities.” *Id.*

<sup>63</sup> Relin, *supra* note 3.

<sup>64</sup> WOMEN’S COMM’N, *supra* note 1, at 1.

<sup>65</sup> *Id.*

<sup>66</sup> See Relin, *supra* note 3. “We want [unaccompanied minor aliens] to be safe, but we have a duty to make sure America is safe.” *Id.* (quoting Mark Matese, INS’s Director of Juvenile Affairs).

<sup>67</sup> See *Zadvydas v. Davis*, 533 U.S. 678 (2001). The Fifth Amendment of the Constitution provides: “No *person* shall be . . . deprived of life, liberty, or property without due process of law . . . .” U.S. CONST. amend. V (emphasis added). For the purposes of this Note, the analysis of the INS detention period will be limited to the due process provision of the Constitution, and thus, will not consider international treaties and conventions that the United States has ratified.

<sup>68</sup> *Zadvydas*, 533 U.S. at 679 (emphasis added).

<sup>69</sup> See *id.* at 690 (“A statute permitting indefinite detention of an alien would raise a serious constitutional problem. . . . Freedom from imprisonment — from government custody, detention, or other forms of physical restraint — lies at the heart of the liberty that [the Due Process Clause] protects.”).

While unaccompanied minors can assert due process against indefinite detention, historically the government has failed to provide protection against this infringement of constitutional rights.<sup>70</sup> Innocent unaccompanied minors<sup>71</sup> are often incarcerated among violent criminals for extended periods of time.<sup>72</sup> These children are detained indefinitely largely due to the implementation of the postremoval-period detention statute.<sup>73</sup> According to the Supreme Court:

The post-removal-period detention statute is one of a related set of statutes and regulations that govern detention during and after removal proceedings. While removal proceedings are in progress, most aliens may be released on bond or paroled. After entry of a final removal order and during the 90-day removal period, however, aliens must be held in custody. Subsequently, as the post-removal-period statute provides, the Government "may" continue to detain an alien who still remains here or release that alien under supervision.<sup>74</sup>

In addition, former INS regulations mandated that minors be released from juvenile detention centers only if they were taken into custody by their parents, close relatives, or legal guardians, except in unusual and compelling circumstances.<sup>75</sup> These two policies were used by the former INS to hold children indefinitely in juvenile detention centers, violating the Due Process clause.<sup>76</sup>

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<sup>70</sup> See generally *id.* at 690 (deciding a federal habeas case brought by an alien because the government held him indefinitely and holding the government need not release detainee right away); *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206 (1953) (holding no constitutional violation when alien was detained indefinitely because his admittance was denied by twelve countries); *Rosales-Garcia v. Holland*, 238 F.3d 704 (6th Cir. 2001), *vacated by* 534 U.S. 1063 (2001) (deciding a case brought by an alien for being held indefinitely by the government because his country of origin would not accept him).

<sup>71</sup> In 2001, over eighty percent of the children imprisoned in secure detention centers were nondelinquent. CHILDREN IN DETENTION, *supra* note 2, pt. 3.2.2.

<sup>72</sup> See *Relin*, *supra* note 3. "[C]hildren who are apprehended . . . and who lack the required documentation to remain in the United States are subject to prolonged detention, in some cases for more than two years . . ." WOMEN'S COMM'N, *supra* note 1, at 9 (emphasis added).

<sup>73</sup> See Batoul Makki, Note, *The United States Supreme Court Holds Indefinite Detention of Deportable Aliens to be Unconstitutional: Where Do They Go From Here?*, 79 U. DET. MERCY L. REV. 479, 483 (2002) (citing 8 U.S.C.A. § 1231(a)(6) (West Supp. 2002)).

<sup>74</sup> *Zadvydas*, 533 U.S. at 683 (citations omitted).

<sup>75</sup> See *Reno v. Flores*, 507 U.S. 292, 297 (1993); Nugent & Schulman, *supra* note 2, at 1579-80; see also *Flores v. Meese Settlement Agreement Part VI* (establishing minimum standards for release of juveniles in INS custody) [hereinafter *Flores Settlement*], available at [http://www.centerforhumanrights.org/Detained\\_minors/FloresSettle.html](http://www.centerforhumanrights.org/Detained_minors/FloresSettle.html) (Center for Human Rights).

<sup>76</sup> See *Zadvydas*, 533 U.S. at 678; Workman, *supra* note 55, at 224 n.10 ("[T]he former INS often manipulated its caregiving role by locating a child's undocumented relatives and then using the child as 'bait' to arrest his undocumented family members.").

Supporters of an indefinite-detention policy believe that while the due process rights of these children should be protected, the threat released aliens pose to national security places the United States in a delicate position.<sup>77</sup> First, an alien released from a detention facility can be a danger to communities and may be inclined to flee from the government.<sup>78</sup> Second, national security is a concern because releasing aliens into the general public poses a viable threat of terrorism.<sup>79</sup> Based on these considerations, there is an advantage to an indefinite detention policy since it prevents children from fleeing from the government, using the nation's resources, and turning to a potential life of crime — as often happens to homeless youths.<sup>80</sup> The postremoval detention policy attempts to prevent these dangers, and protect the U.S. national interests, by authorizing the detention of aliens for as long as necessary — even indefinitely.<sup>81</sup> Protecting national security interests surged to the top of the legislative agenda after the September 11, 2001, terrorist attacks.<sup>82</sup> Congressional support is illustrated by the bicameral approval of the PATRIOT Act, which specifically grants the Attorney General the power to detain aliens on an indefinite basis.<sup>83</sup>

Despite support for the INS indefinite-detention policy, Attorney General John Ashcroft, created the Office of Juvenile Affairs (OJA) on April 17, 2002.<sup>84</sup> The OJA was created to remedy the abusive INS treatment of unaccompanied minor aliens,<sup>85</sup> but was eliminated while still in its formative stage.

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<sup>77</sup> See Makki, *supra* note 73, at 484–85.

<sup>78</sup> See *id.* (citing Erika M. Anderson, *A Man Without a Country: When the Inability to Deport Becomes a Life Sentence*, 24 *HAMLIN L. REV.* 390, 430 (2001)).

<sup>79</sup> See *id.* at 485.

During a time when the United States is at war, aliens who oppose the government can easily pass information to each other as part of a network. The risk is clearly the same in terrorist networks. . . . “It is . . . reasonable not to fix a definite period of detention for such an alien. An alien suspected of terrorism can reasonably be detained until he can be deported or until the threat that he will engage in actions threatening the national security is abated.”

*Id.* at 485, 499.

<sup>80</sup> See *id.* at 484–85.

<sup>81</sup> See *id.* at 484–85, 497–500.

<sup>82</sup> *Id.* at 497 (“In response [to the September 11th attacks], Congress adopted measures that aim at countering terrorist threats.”).

<sup>83</sup> See PATRIOT Act, *supra* note 16. For a discussion of the indefinite detention provision, see *infra* notes 180–88 and accompanying text.

<sup>84</sup> See Press Release, INS, INS Announces First Major Structural Changes in Restructuring, para. 9 (Apr. 17, 2002), available at [http://uscis.gov/graphics/publicaffairs/newsrels/restruct\\_nr.htm](http://uscis.gov/graphics/publicaffairs/newsrels/restruct_nr.htm).

<sup>85</sup> *Id.* (explaining that the OJA was created “[t]o ensure the proper care of juveniles in INS custody . . . and will lead and direct national programs that meet the needs of unaccompanied minors in INS custody”).

The ORR has been given the opportunity to implement changes that strike a balance between the competing interests of the U.S. government and minor aliens' constitutional rights.<sup>86</sup> In order for the ORR to balance these competing interests, it must establish guidelines and implement programs that eliminate indefinite detention and adhere to a "least restrictive setting" requirement and to a "reasonable time" limitation during the postremoval detention period.

## II. UNACCOMPANIED MINOR ALIENS WHO CANNOT RETURN TO THEIR HOMELAND

Unaccompanied minors are a special group of aliens. In addition to lacking the political weight necessary to protect themselves from injustices, they also lack the capability and opportunity to advocate for their well-being and against justice.<sup>87</sup> Unaccompanied minors "are often too young or uninformed to appreciate the nature of the immigration proceedings in which they are involved and are vulnerable to agreeing to deportation as their only recourse to getting out of the correctional facility."<sup>88</sup> Secondly, unaccompanied minor aliens are different because unique procedures must be followed to secure their release. As noted earlier, minors may be released from juvenile detention centers only if they are taken into custody by their parents, close relatives, or legal guardians, except in unusual and compelling circumstances.<sup>89</sup>

The limited ability to release unaccompanied children becomes even more complicated when the United States is unable to repatriate the minors to their home country. Repatriation cannot occur when a country refuses to accept the individual child or when a nation has not signed an alien repatriation treaty.<sup>90</sup>

The Status of Aliens is an example of a repatriation treaty that has failed to garner complete international support.<sup>91</sup> Under article 6, "[s]tates are required to

<sup>86</sup> The balance of competing interests involves the interest of the government in preserving its resources for its citizens, while satisfying the level of due process constitutional protection promised to unaccompanied minor aliens. *See supra* notes 61-68 and accompanying text.

<sup>87</sup> Children are inherently different from any other population that the [government] encounters. In contrast to adults, who are typically able to understand at least the fundamentals of the immigration system as they seek to regularize their immigration status, many children lack the capacity to appreciate the complexities of U.S. immigration law and to make reasoned decisions that will fundamentally affect their futures.

WOMEN'S COMM'N, *supra* note 1, at 13; *see also* Workman, *supra* note 55, at 241 (noting that children often lack the ability or confidence to advocate on their own behalf).

<sup>88</sup> Young, *supra* note 3, at 11.

<sup>89</sup> *See Reno v. Flores*, 507 U.S. 292, 297 (1993).

<sup>90</sup> *See Convention on Status of Aliens (Inter-American)*, Feb. 20, 1928, 46 Stat. 2753.

<sup>91</sup> *Id.*

receive their nationals expelled from foreign soil who seek to enter their territory."<sup>92</sup> This treaty was signed on February 20, 1928, and became binding on the United States on May 21, 1930.<sup>93</sup> Because the United States did not accept the reservations made by Mexico, the United States does not consider the covenant to be in force between the two countries.<sup>94</sup> As a result, under the Status of Aliens treaty, if the United States receives an unaccompanied minor who is Mexican, Mexico is not bound to accept the child.<sup>95</sup> Other countries that do not have a repatriation agreement with the United States include Vietnam, Cambodia and Cuba.<sup>96</sup>

If the unaccompanied child, who has been ordered to leave the country but cannot be repatriated, does not have relatives within the United States who are able to receive custody, and if no one is willing to assume legal responsibility for the child, the government must determine the postremoval fate of the child. The due process rights of unaccompanied minors are frequently infringed under this postremoval scenario. It is important to note that the Supreme Court has held that facially the Immigration and Nationality Act's postremoval policy<sup>97</sup> does not violate substantive due process rights.<sup>98</sup> The Court, however, has also declared the policy's inclusion of an *indefinite* detention provision to be unconstitutional.<sup>99</sup>

### III. CASE HISTORY OF DUE PROCESS PROTECTIONS REGARDING U.S. GOVERNMENT DETENTION OF ALIENS

Historically, courts have interpreted the Constitution as providing the U.S. government with substantial leniency in detaining illegal aliens.<sup>100</sup> The former INS took advantage of this leniency when it established the postremoval detention policies regarding unaccompanied minor aliens who were unable to be repatriated. These policies included the determination that it is constitutional to detain minors

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<sup>92</sup> *Id.*

<sup>93</sup> *Id.*

<sup>94</sup> *See id.*

<sup>95</sup> *See id.* art. 6. Other countries, such as Honduras, are not bound to accept the child, as they did not ratify the treaty, and thus, are not bound by its terms. *See id.* It is important to note that these countries could have reached an alternative agreement with the United States, and thus, may still be bound to accept the child.

<sup>96</sup> Makki, *supra* note 73, at 479.

<sup>97</sup> *See* 8 U.S.C.A. § 1231(a)(6) (West Supp. 2002); *see also supra* notes 73–76 and accompanying text.

<sup>98</sup> *See Reno v. Flores*, 507 U.S. 292, 301–06 (1993).

<sup>99</sup> *See Zadvydas v. Davis*, 533 U.S. 678, 690–96 (2001).

<sup>100</sup> *See, e.g., Reno*, 507 U.S. 292 (1993). As early as 1889 the Court held "that the federal power to exclude aliens stems from the notion that the United States is a sovereign state and such power is inherent in the plenary power doctrine." Makki, *supra* note 73, at 482 (referring to the *Chinese Exclusion Case*, 130 U.S. 581 (1889)).

in criminal facilities for as long as its officials believed necessary.<sup>101</sup> This policy determination garnered both support and opposition from the American judiciary.

*A. Shaughnessy v. United States ex rel. Mezei*

In 1953, the Supreme Court was presented with the habeas corpus petition of an alien who faced indefinite detention on Ellis Island.<sup>102</sup> The case involved an alien, Mezei, who was a lawful U.S. resident for over twenty-five years.<sup>103</sup> After being abroad for nineteen months, Mezei was denied readmittance to the United States.<sup>104</sup> Mezei was detained indefinitely on Ellis Island because after his removal order was executed, more than twelve countries denied him admittance.<sup>105</sup> In his habeas petition, Mezei claimed that the INS's continued detention infringed his constitutional due process rights.<sup>106</sup>

The Court denied Mezei's habeas corpus petition and upheld Congress's authority to detain aliens on an indefinite basis.<sup>107</sup> The Court specifically noted that "[c]ourts have long recognized the power to expel or exclude aliens as a fundamental sovereign attribute exercised by the Government's political departments largely immune from judicial control."<sup>108</sup> Since this area of immigration law was outside the Court's jurisdiction, it refrained from infringing upon legislative and executive authority.<sup>109</sup> The Court noted: "Whatever our individual estimate of that policy and the fears on which it rests, respondent's right to enter the United States depends on the congressional will, and courts cannot substitute their judgment for the legislative mandate."<sup>110</sup>

*B. Reno v. Flores*

A judicial shift in the interpretation of minor aliens' due process rights occurred in 1993, when the Court granted a writ of certiorari to a group of juvenile aliens suing the Attorney General.<sup>111</sup> *Reno v. Flores* was a class-action lawsuit challenging INS procedures regarding juvenile detention, process, and release.<sup>112</sup>

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<sup>101</sup> See Young, *supra* note 3, at 10.

<sup>102</sup> Shaughnessy v. United States ex rel. Mezei, 345 U.S. 206 (1953).

<sup>103</sup> *Id.* at 208–09.

<sup>104</sup> *Id.*

<sup>105</sup> *Id.*

<sup>106</sup> *Id.* at 209.

<sup>107</sup> *Id.* at 215–16.

<sup>108</sup> *Id.* at 210.

<sup>109</sup> See *id.* at 210–16.

<sup>110</sup> *Id.* at 216.

<sup>111</sup> Reno v. Flores, 507 U.S. 292 (1993).

<sup>112</sup> See *id.*; *INS Reopens Comment Period for Juvenile Detention Proposed Rule*, 79 No. 4 INTERPRETER RELEASES, Jan. 21, 2002, at 117 [hereinafter *INS Reopens Comment*].

The class argued that the INS release policy pertaining to detained juveniles<sup>113</sup> was unconstitutional<sup>114</sup> and that the Constitution and immigration laws only required juveniles to be placed in the custody of “responsible adults.”<sup>115</sup>

The Court held that the regulation permitting the release of detained juvenile aliens only to relatives or legal guardians did not facially violate the substantive Due Process Clause.<sup>116</sup> The Court also stated that the regulations instituted by the INS did not infringe upon the procedural due process rights of juvenile aliens.<sup>117</sup> The Supreme Court ultimately remanded the case, but the parties agreed on a settlement before the lower court issued a decision.<sup>118</sup> The plaintiffs and the government negotiated the settlement agreement with the intent of addressing key issues, such as “the detention, release, and treatment of minors in INS custody.”<sup>119</sup> The INS was supposed to adopt the agreement as an INS regulation, but that goal was never realized.<sup>120</sup>

The *Flores* Settlement Agreement placed essentially three specific obligations on the former INS to: (1) ensure the prompt release of children from immigration detention; (2) place children for whom release is pending, or for whom no release option is available, in the “least restrictive” setting appropriate to the age and special needs of minors; and (3) implement standards relating to care and treatment of children in U.S. immigration detention.<sup>121</sup>

In addition, “the agreement establishes a ‘general policy favoring release’ pending immigration proceedings, and, for minors not released from INS custody, a

<sup>113</sup> The INS would only release juvenile aliens to parents, close relatives, or legal guardians, except in unusual and compelling circumstances. See *Reno*, 507 U.S. at 309–11.

<sup>114</sup> See *id.* at 299–300.

<sup>115</sup> *Id.* at 294.

<sup>116</sup> *Id.* at 301–06. The Court held that the policy was constitutional because it was “rationally connected to a governmental interest in ‘preserving and promoting the welfare of the child,’ and is not punitive since it is not excessive in relation to that valid purpose.” *Id.* at 303 (citation omitted).

<sup>117</sup> *Id.* at 306–09.

<sup>118</sup> See WOMEN’S COMM’N, *supra* note 1, at 9. For a discussion of the settlement agreement, see *Flores* Settlement, *supra* note 75.

<sup>119</sup> Young, *supra* note 3, at 10.

<sup>120</sup> WOMEN’S COMM’N, *supra* note 1, at 9.

<sup>121</sup> CHILDREN IN DETENTION, *supra* note 2, pt. 2.4.

The *Flores* agreement [also] allows exceptions . . . in certain cases, including when a child is deemed a flight risk; when there has been an emergency influx of children; when a child’s safety is at risk; or when a child is chargeable, has been charged, or has been convicted of a crime. In such cases, children may be housed in secure settings, i.e., juvenile jails.

Young, *supra* note 3, at 10; see also WOMEN’S COMM’N, *supra* note 1, at 10.



preference for low-security placements."<sup>122</sup> The government is also obligated to authorize the release of a minor without unnecessary delay once it is determined that detention is not necessary to ensure his safety, the safety of others, or the alien's appearance at immigration court.<sup>123</sup> Additionally, the INS was obligated to "make and record the prompt and continuous efforts on its part toward family reunification and release of the minor . . . ."<sup>124</sup>

### *C. Immigration Procedures after the Flores Settlement Agreement*

The former INS never incorporated the *Flores* settlement agreement into its policies or procedures.<sup>125</sup> As a response to this failure, in July 1998, the former INS reconsidered adopting new procedures for processing juveniles in INS custody.<sup>126</sup> Under the reconsideration proposal, the former INS was obligated to "place detained juveniles in the 'least restrictive setting appropriate to the juvenile's age and circumstances,' as long as the placement is consistent with the need to protect the well-being of the juvenile or others and to ensure the juvenile's presence before the INS or the Immigration Court."<sup>127</sup> Furthermore, a juvenile would be released to a qualified custodian "if detention of the juvenile is not necessary to protect the juvenile or others, or to ensure that he or she will appear in Immigration Court."<sup>128</sup>

While the *Flores* settlement agreement and its reconsideration proposal provided hope for minor aliens, in reality implementation was not as effective as anticipated because the new standards were applied inconsistently.<sup>129</sup> For example, while shelters were provided for minor children, "[u]nfortunately, children . . . remain[ed] housed in these institutional settings for long periods of time, particularly if they [could not] be released to family."<sup>130</sup> The former INS also continued to place children in detention facilities, thus failing to meet the Court's "least restrictive setting" requirement.<sup>131</sup>

<sup>122</sup> Nugent & Schulman, *supra* note 2, at 1579.

<sup>123</sup> *Id.* at 1580 (citing the *Flores* Settlement Agreement, ¶ 14).

<sup>124</sup> *Id.* (noting that this provision is pursuant to ¶ 14 of the *Flores* Settlement Agreement) (citing the *Flores* Settlement Agreement, ¶ 18).

<sup>125</sup> WOMEN'S COMM'N, *supra* note 1, at 9.

<sup>126</sup> See *INS Reopens Comment*, *supra* note 112, at 117.

<sup>127</sup> *Id.*

<sup>128</sup> *Id.*

<sup>129</sup> See *Workman*, *supra* note 55, at 230; *Young*, *supra* note 3, at 10.

<sup>130</sup> *Young*, *supra* note 3, at 10.

<sup>131</sup> Leslie Castro et al., *Perversities and Prospects: Whither Immigration Enforcement and Detention in the Anti-Terrorism Aftermath?*, 9 GEO. J. ON POVERTY L. & POL'Y 1, 16 (2002). *Flores* . . . establishes a requirement that children get housed in the "least restrictive setting appropriate" under the circumstances, rather than in punitive settings — maximum-security detention centers and other institutional facilities. This also is a standard exhibiting a spotty record of INS compliance. . . . Rather

During the *Flores* settlement period, courts remained divided on the constitutionality of an indefinite detention policy. For example, the Tenth Circuit held that indefinite detention under the postremoval statute (8 U.S.C.A. § 1231 (a)(6)) does not violate an alien's constitutional due process rights because aliens do not have a liberty interest with respect to being released from custody.<sup>132</sup> "An alien seeking admission is not entitled to *any* constitutional protection merely because that alien is physically present in the United States."<sup>133</sup> In addition, the court noted that the judiciary does not have jurisdiction to interpret a time limit, as it is not codified in the plain language of the statute.<sup>134</sup> The court thus refused to "substitute its judgment for that of Congress."<sup>135</sup>

#### *D. Rosales-Garcia v. Holland*

In contrast, in 2001, the Sixth Circuit held that aliens could not be held on an indefinite basis since that would violate their substantive and procedural due process rights.<sup>136</sup> *Rosales-Garcia v. Holland* involved a Cuban citizen who was ordered to be removed from the United States by the INS but was unable to be deported because Cuba refused to accept him.<sup>137</sup> Since Rosales was unable to be repatriated, the INS held him in custody for an indefinite period.<sup>138</sup> Rosales subsequently sued for a writ of habeas corpus, presenting the court with "the difficult and complex question [of] whether an excludable alien has a liberty interest recognized by the Fifth Amendment's Due Process Clause when the . . . [government] seeks to detain him in custody, perhaps indefinitely, without charging him with a crime or affording him a trial but simply on the ground that it cannot effect his deportation."<sup>139</sup>

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than housing kids in the least restrictive setting appropriate as dictated by *Flores*, the INS sort of plays hot potato with these kids — sending them off to the most convenient detention center, rather than undertaking a careful investigation of less secure and more appropriate alternatives.

*Id.*; see also Workman, *supra* note 55, at 230 ("[T]he government often ignores the [*Flores* Settlement] Agreement's 'least restrictive setting' requirement by unnecessarily choosing secure facilities . . . despite the availability of . . . alternatives.").

<sup>132</sup> See *Ho v. Greene*, 204 F.3d 1045 (10th Cir. 2000). Ho filed a habeas corpus petition challenging his indefinite detention by the INS after his country of origin, Vietnam, refused to accept him. *Id.* at 1048.

<sup>133</sup> Makki, *supra* note 73, at 487 (citing *Ho*, 204 F.3d at 1060).

<sup>134</sup> *Ho*, 204 F.3d at 1057.

<sup>135</sup> *Id.*

<sup>136</sup> *Rosales-Garcia v. Holland*, 238 F.3d 704 (6th Cir. 2001), *vacated by* 534 U.S. 1063 (2001).

<sup>137</sup> *Id.* at 707.

<sup>138</sup> *Id.* at 707–09.

<sup>139</sup> *Id.* at 707.

The *Rosales* court held that indefinite detention violated aliens' Fifth Amendment due process rights.<sup>140</sup> "While it is true that aliens are not entitled to enjoy all the advantages of citizenship, we emphasize that aliens — even excludable aliens — are 'persons' entitled to the Constitution's most basic protections and strictures."<sup>141</sup> According to the court, *Rosales*'s indefinite imprisonment violated his Fifth Amendment due process rights.<sup>142</sup>

The Sixth Circuit's decision was eventually vacated, and the case was remanded by the Supreme Court.<sup>143</sup> However, even though the decision was vacated, the Sixth Circuit's opinion is still important because it illustrates the court's desire to expand the constitutional interpretation of aliens' due process rights.

### *E. Zadvydas v. Davis*

In 2001, the Supreme Court addressed constitutional protections for minor aliens in *Zadvydas v. Davis*.<sup>144</sup> The Court noted that confusion among lower courts led the Court to grant a writ of certiorari.<sup>145</sup> The *Zadvydas* decision was a combination of two cases involving aliens who were ordered removed after being admitted into the United States.<sup>146</sup> *Zadvydas* filed a petition for a writ of habeas corpus claiming due process violations because his stateless status rendered him unable to be deported.<sup>147</sup> Because *Zadvydas* was unable to be repatriated to another country, the former INS detained him on a presumptively indefinite basis beyond the statutory ninety-day removal period.<sup>148</sup>

The Court determined that because *Zadvydas* was stateless, there was no significant likelihood that he would be removed in the reasonably foreseeable future.<sup>149</sup> Since *Zadvydas*'s release was not reasonably foreseeable, he was entitled to habeas relief because continued detention violated his due process rights.<sup>150</sup>

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<sup>140</sup> *Id.* at 727. The court concluded that "Rosales's detention . . . crossed the line from permissive regulatory confinement to impermissible punishment without trial." *Id.*

<sup>141</sup> *Id.* at 721 (citation omitted).

<sup>142</sup> *Id.*

<sup>143</sup> *Thoms v. Rosales-Garcia*, 534 U.S. 1063 (2001).

<sup>144</sup> 533 U.S. 678 (2001).

<sup>145</sup> *Id.* at 686.

<sup>146</sup> *Id.* at 684–86.

<sup>147</sup> *Id.* at 684–85.

<sup>148</sup> *Id.*; see also 8 U.S.C.A. § 1231(a)(6) (West Supp. 2002) (providing that aliens "may be detained beyond the removal period and, if released, shall be subject to [certain] terms of supervision"). For a discussion of the postremoval-period detention statute, see notes 73–76 and accompanying text.

<sup>149</sup> See *Zadvydas*, 533 U.S. at 682–86.

<sup>150</sup> *Id.* at 690–96.

The Court consolidated the *Zadvydas* case with *Kim Ho Ma v. Ashcroft*.<sup>151</sup> *Kim Ho Ma* involved an alien who filed a writ of habeas corpus, claiming the government violated his due process rights by detaining him indefinitely after the former INS ordered him removed to Cambodia.<sup>152</sup> Cambodia refused to accept Kim Ho Ma because it did not have a repatriation agreement with the United States.<sup>153</sup> Like *Zadvydas*, the U.S. government was unable to repatriate Kim Ho Ma. The former INS, therefore, detained Kim Ho Ma beyond the ninety-day removal period.<sup>154</sup> Kim Ho Ma was held without any reasonable hope of being released from the detention facility.<sup>155</sup>

The critical issue presented to the Court in this consolidated case was whether the postremoval-period provision of the Immigration and Nationality Act authorized detention of aliens indefinitely or for a period “reasonably necessary” after the removal period.<sup>156</sup> Specifically, “the issue . . . address[ed was] whether aliens that the Government finds itself unable to remove are to be condemned to an indefinite term of imprisonment within the United States.”<sup>157</sup>

The government argued that the statute should be interpreted literally: no limit should be placed on detaining an alien during the postremoval period.<sup>158</sup> Under this interpretation, the decision of “whether to continue to detain such an alien and, if so, in what circumstances and for how long” is up to the Attorney General, not up to the courts.<sup>159</sup> Justice Breyer, writing for the majority, did not accept the government’s interpretation. The Court reasoned that the use of the word “may” illustrated that the legislators intended to prohibit indefinite detention.<sup>160</sup>

The Court determined that the federal habeas corpus statute<sup>161</sup> granted federal courts the authority to determine if an agency’s indefinite postremoval-period detention policy is statutorily authorized by the Immigration and Nationality Act.<sup>162</sup> The Court also concluded that in accordance with the Constitution, the Act’s postremoval detention period provision possessed an implicit “reasonable time”

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<sup>151</sup> 257 F.3d 1095 (9th Cir. 2001).

<sup>152</sup> *Zadvydas*, 533 U.S. at 685–86.

<sup>153</sup> *Id.* at 686.

<sup>154</sup> *See id.* at 685–86.

<sup>155</sup> *Id.*

<sup>156</sup> *Id.* at 682.

<sup>157</sup> *Id.* at 695.

<sup>158</sup> *Id.* at 689.

<sup>159</sup> *Id.* (quoting Brief for Petitioners at 22, *Zadvydas v. Davis*, 533 U.S. 678 (2001) (No. 00-38)).

<sup>160</sup> *See id.* at 697–99.

<sup>161</sup> 28 U.S.C.A. § 2241(c)(3) (West Supp. 2002) (stating that federal courts may grant a writ of habeas corpus if a prisoner “is in custody in violation of the Constitution or laws or treaties of the United States”).

<sup>162</sup> *See Zadvydas*, 533 U.S. at 699–701. “We conclude that . . . habeas corpus proceedings remain available as a forum for statutory and constitutional challenges to post-removal-period detention.” *Id.* at 688.

limitation.<sup>163</sup> The Court declined to hold the presumptively reasonable period as terminating at the conclusion of the ninety-day removal period.<sup>164</sup> Rather, the Court determined that six months, starting at the beginning of the removal period, was a presumptively reasonable period. The Court explained:

After this 6-month period, once the alien provides good reason to believe that there is no significant likelihood of removal in the reasonably foreseeable future, the Government must respond with evidence sufficient to rebut that showing. And for detention to remain reasonable, as the period of prior post-removal confinement grows, what counts as the 'reasonably foreseeable future' conversely would have to shrink. This 6-month presumption, of course, does not mean that every alien not removed must be released after six months. To the contrary, an alien may be held in confinement until it has been determined that there is no significant likelihood of removal in the reasonably foreseeable future . . . . [I]f removal is not reasonably foreseeable, the court should hold continued detention unreasonable and no longer authorized by statute.<sup>165</sup>

The Court's opinion invalidated the former INS indefinite detention policies regarding deportable aliens and held that the policies were unconstitutional.<sup>166</sup> The Court held that these policies infringed aliens' due process rights because "the INS is an administrative body and the Constitution has not granted any administrative body the unreviewable authority to detain an alien indefinitely[.] [A]uthorizing the INS to detain deportable aliens on an indefinite basis violates the alien's fundamental rights."<sup>167</sup>

Justice Kennedy, dissenting, argued that the majority misinterpreted the intent of the postremoval statute — to safeguard the public from harm.<sup>168</sup> Kennedy argued that the majority's opinion was improper because it usurped the executive's authority regarding foreign policy and repatriation.<sup>169</sup> Justice Kennedy also asserted

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<sup>163</sup> *Id.* at 682. The Act therefore "does not permit indefinite detention." *Id.* at 689.

<sup>164</sup> *Id.* at 701–02.

<sup>165</sup> *Id.* at 699–701.

<sup>166</sup> *Id.* at 678. The postremoval-period detention statute "read in light of the Constitution's demands, limits an alien's post-removal-period detention to a period reasonably necessary to bring about that alien's removal from the United States. It does not permit indefinite detention." *Id.* at 689.

<sup>167</sup> Makki, *supra* note 73, at 493–94.

<sup>168</sup> *Zadvydas*, 533 U.S. at 708 (Kennedy, J., dissenting).

<sup>169</sup> *Id.* at 711.

that the majority's decision would impact foreign policy, since it would discourage foreign countries from accepting their citizens.<sup>170</sup>

Justice Scalia, joining part of Justice Kennedy's dissent, agreed with Kennedy that the statute permitted the attorney general to detain aliens indefinitely.<sup>171</sup> Justice Scalia also argued that just like an alien inadmissible at the border, an alien who is subject to a final order of removal has no constitutional right to be released since there is no legal right to be in the United States.<sup>172</sup>

On remand, the Ninth Circuit, addressing Kim Ho Ma's habeas corpus claim, held that section 1231(a)(6) of the Immigration and Nationality Act does not authorize the indefinite detention of removable aliens.<sup>173</sup> The Ninth Circuit concluded that the statute authorizes the attorney general to detain removable aliens for a reasonable time (presumably for six months) beyond the ninety-day removal period.<sup>174</sup> The Court of Appeals for the Fifth Circuit, addressing *Zadvydas's* habeas corpus claims, held on remand that continued detention infringes upon an alien's due process rights if "there [is] no significant likelihood of his removal in the reasonably foreseeable future . . . ."<sup>175</sup>

*Zadvydas* directly impacts the rights of unaccompanied minor aliens. *Zadvydas* prohibits the government from interpreting the postremoval-period as encompassing indefinite detention. According to the Court's opinion, minor aliens will not have to spend years in juvenile detention centers. These children will finally be free from the punitive environment and abuses that accompany detention facilities, and will be allowed to reside in foster care facilities that are better equipped to ensure their well-being. But while the Court has declared this policy unconstitutional, Congress has continued to enact indefinite detention legislation, thereby enabling immigration officials to ignore the Court's authoritative conclusion that such policies violate minors' Fifth Amendment due process rights.<sup>176</sup>

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<sup>170</sup> *Id.* at 711–12. Attorney General John Ashcroft agreed with Justice Kennedy by commenting that "the result of the Supreme Court's ruling is that . . . alien's [sic] will be released from detention onto the streets of America simply because their countries of origin refuse to live up to their obligations to take them back under international law." Makki, *supra* note 73, at 499.

<sup>171</sup> *Zadvydas*, 533 U.S. at 702 (Scalia, J., dissenting).

<sup>172</sup> *Id.* at 703–05.

<sup>173</sup> *Kim Ho Ma v. Ashcroft*, 257 F.3d 1095 (9th Cir. 2001).

<sup>174</sup> *Id.*

<sup>175</sup> *Zadvydas v. Davis*, 285 F.3d 398, 398 (5th Cir. 2002) (holding that the alien had ample reason to believe he would not be removed in the foreseeable future, and since the INS did not rebut this presumption, he was entitled to habeas relief).

<sup>176</sup> See PATRIOT Act, *supra* note 16. For a discussion of the indefinite-detention provision, see *infra* notes 181–89 and accompanying text.

IV. THE EFFECTS OF SEPTEMBER 11TH ON THE *ZADVYDAS V. DAVIS* DECISION

The tragedies of September 11, 2001, heightened the U.S. government's concern regarding its ability to control immigration.<sup>177</sup> Unfortunately, as a result of intensified national security interests, unaccompanied minors face even greater danger, because the increased need for security decreases the protection of their constitutional rights.<sup>178</sup> Wendy Young, Director of Government Relations and U.S. Programs at the Women's Commission, commented upon the decreased protection, stating, "the United States has a rich history of opening its doors to those trying to escape tyranny in search of freedom and justice. . . . But increasingly, our asylum system is becoming punitive, abusing those who have come to us for help."<sup>179</sup> Since September 11th, "[r]efugee and asylum policy has become enmeshed in the debate on national security and the fight against terrorism; tensions between legitimate concerns about public safety and the adherence to our national tradition of welcoming newcomers to our shores have resulted in even more restrictions for asylum seekers."<sup>180</sup>

Despite the Supreme Court's decision in *Zadvydas*, the U.S. government, in reaction to the tragic events of September 11th, passed legislation that explicitly permits indefinite detention of aliens.<sup>181</sup> On October 25, 2001, Congress passed the PATRIOT Act, and on the next day, President Bush signed it into law.<sup>182</sup> Section 412 of the PATRIOT Act codifies an indefinite detention policy:

Any alien . . . who has not been removed . . . and whose removal is unlikely in the reasonably foreseeable future, may be detained for

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<sup>177</sup> See Makki, *supra* note 73, at 497–500. Because of this concern, President George W. Bush "urge[d] Congress to act quickly and enact legislation that would help fight terrorism." *Id.* at 497.

<sup>178</sup> See Press Release, Women's Comm'n for Refugee Women & Children, *From Fear to Freedom: Women's Commission Honors Those Working to Change Asylum and Detention in the United States* (May 13, 2003), at [http://www.womenscommission.org/newsroom/press\\_releases/0513.html](http://www.womenscommission.org/newsroom/press_releases/0513.html) ("Gaining access to the U.S. asylum system is more difficult now than perhaps ever before, and the treatment of those asylum seekers who do make it to the United States to present their claims continues to deteriorate.").

<sup>179</sup> *Id.* Young further asserted:

[The nation's] security concerns, however valid, should not come at the expense of refugees and legitimate asylum seekers who are looking to the United States for protection from persecution. It is vital that [the nation] not turn [its] back on those who — like [the nation's] predecessors more than two hundred years ago — came to this country in search of freedom and justice. Too often, however, we seem to be doing just that.

*Id.*

<sup>180</sup> *Id.*

<sup>181</sup> See Makki, *supra* note 73, at 497–500.

<sup>182</sup> See PATRIOT Act, *supra* note 16.

additional periods of up to six months only if the release of the alien will endanger the national security of the United States or the safety of the community or any person.<sup>183</sup>

According to this provision, while “the law places limitations on the Attorney General’s power to detain, the PATRIOT Act *may permit indefinite detention* where the Attorney General reasonably believes the alien poses a threat to our national security, the community, or any person.”<sup>184</sup>

While the Court has yet to address the constitutionality of the PATRIOT Act’s indefinite detention provision in light of the *Zadvydas* decision, the Court has implied that it would defer to the executive and legislative branches in matters of national security.<sup>185</sup> In *Zadvydas*, the Court specifically noted that while its holding declared the INS indefinite-detention policy unconstitutional, it did not “consider terrorism or other special circumstances where special arguments might be made for forms of preventive detention and for heightened deference to the judgments of the political branches with respect to matters of national security.”<sup>186</sup>

The *Zadvydas* Court also stated that Congress is authorized to enact legislation permitting the indefinite detention of aliens.<sup>187</sup> If legislative intent to grant the attorney general authority to indefinitely detain aliens is clearly expressed in the statutory language, the Court would be bound to uphold the law because it would be outside of the Court’s jurisdiction.<sup>188</sup> Given the Court’s previous statements, it is conceivable that the current need for increased national security may render an indefinite-detention policy, such as the provision contained in the PATRIOT Act, constitutional.<sup>189</sup>

<sup>183</sup> *Id.* § 412.

<sup>184</sup> Makki, *supra* note 73, at 498 (emphasis added).

<sup>185</sup> *Zadvydas v. Davis*, 533 U.S. 678, 696, 715 (2001).

<sup>186</sup> *Id.* at 696.

<sup>187</sup> *Id.* at 696–97.

[T]he *Zadvydas* Court did not state that Congress could not pass a *new* law that would authorize the Attorney General to detain certain immigrants indefinitely. . . . The Court’s holding expressly stated that Congress has the right to enact such a law and if the Court were to find clear Congressional intent authorizing indefinite detention in any new law, then it would be required to uphold it despite the constitutional problems that it would surely raise.

Makki, *supra* note 73, at 498–99.

<sup>188</sup> *Zadvydas*, 533 U.S. at 696–97. The Court would not interfere because the issue would constitute a political question and because “Congress expressly authorized the President to impose additional restrictions on aliens entering or leaving the United States during periods of international tension and strife.” *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 210 (1953). Therefore, under this scenario, “the Attorney General, acting for the President, may shut out aliens whose ‘entry would be prejudicial to the interests of the United States.’” *Id.* (quoting Passport Act of 1918, ch. 81, § 1, 40 Stat. 559 (1918)).

<sup>189</sup> “Although the Court stated that ‘a statute permitting indefinite detention would raise a serious constitutional problem,’ such a statute may pass court muster in light of the



It is important to note, however, that the Court has yet to determine the constitutionality of the PATRIOT Act's indefinite detention provision, and thus, the *Zadvydas* postremoval detention period's "reasonable time" limitation is still controlling law. The government, therefore, is obligated to release these children after a reasonable period of time as required by the U.S. Constitution.

#### V. THE REASONING BEHIND THE DISSOLUTION OF THE FORMER INS AND THE TRANSFERENCE OF UNACCOMPANIED MINORS TO THE ORR

In April of 2002, the INS, along with Attorney General John Ashcroft, established the Office of Juvenile Affairs (OJA).<sup>190</sup> The OJA was established to remedy due process concerns regarding detention policies for unaccompanied minor aliens.<sup>191</sup> The OJA was also created to alleviate pressures from the legislature and legal community.<sup>192</sup> Essentially, "[t]he INS was under tremendous scrutiny by . . . the public for its lack of effective management structure and inability to perform its various mandates"<sup>193</sup> and the OJA was created to ameliorate such problems.

The INS restructuring proposal, attempting to remedy the constitutional problems of indefinite detention, included viewing the minor as a child<sup>194</sup> and working to meet the child's best interests.<sup>195</sup> Furthermore, the former agency was

September 11, 2001 attack on America." Makki, *supra* note 73, at 498 (quoting *Zadvydas*, 533 U.S. at 690).

<sup>190</sup> INS FACT SHEET, *supra* note 53, para. 3.

<sup>191</sup> *Id.*

<sup>192</sup> See WOMEN'S COMM'N, *supra* note 1, at 12 (noting that the INS was under tremendous pressure from Congress). Congress manifested its criticism of the former INS by proposing several legislative bills, which were designed to overhaul the agency's structure. See Barbara Jordan Immigration Reform and Accountability Act of 2002, H.R. 3231, 107th Cong. (2002); Immigration Reform, Accountability, and Security Enhancement Act of 2002, S. 2444, 107th Cong. (2002); Unaccompanied Alien Child Protection Act of 2001, S. 121, 107th Cong. (2001). Legal pressure was manifested in the American Bar Association's support for the creation of an independent office consisting of child-welfare experts. See ABA Releases 'Best Practices' Recommendations for Immigration Proceedings Involving Alien Children, 79 No. 27 INTERPRETER RELEASES, Jul. 8, 2002, at 1014 [hereinafter ABA Releases Recommendations]; see also David B. Thronson, *Kids Will be Kids? Reconsidering Conceptions of Children's Rights Underlying Immigration Law*, 63 OHIO ST. L.J. 979 (2002); Young, *supra* note 3, at 10-11.

<sup>193</sup> WOMEN'S COMM'N, *supra* note 1, at 12 n.46.

<sup>194</sup> The INS previously treated minors as adults. This approach was criticized as it "frequently failed to take into account the unique situation of children, including their stage of development and the impact that may have on their ability to recollect and articulate traumatic experiences in their home countries. [This] failure to consider [minors'] circumstances . . . risks undermining their ability to gain asylum. . . ." *Id.* at 5-6.

<sup>195</sup> See INS FACT SHEET, *supra* note 53, para. 3-4, 8.

divided into two distinct functions: law enforcement and service.<sup>196</sup> The former OJA, however, was not designed to fall under the auspices of the law-enforcement bureau or the service bureau; it was designed to act as an independent office.<sup>197</sup>

The structure of the OJA was designed to meet President Bush's "pledge to fundamentally reform the [INS] by creating a clear division between its service and enforcement missions."<sup>198</sup> This clear division was intended to eliminate the inherent conflict of interest that jeopardized the existence of the INS.<sup>199</sup> As Wendy Young noted, "Clearly, the INS [wa]s not a child welfare agency but primarily a law enforcement agency, the mandate of which is dominated by its deportation functions. Because of this, the agency has an inherent conflict of interest in acting as the children's caregiver . . . ."<sup>200</sup> This fundamental conflict led to an undue emphasis on law enforcement and created an agency whose procedures were "rife with due process problems," including detaining minors indefinitely.<sup>201</sup>

#### *A. The Reasoning Behind Dissolution of the Former OJA and Former INS*

Critics of the former OJA believed that the newly created office did not go far enough in protecting children's interests.<sup>202</sup> For example, despite the structural changes, the former OJA did not eliminate the practice of placing aliens in juvenile correctional facilities indefinitely. In addition, the INS received criticism for failing to meet the *Flores* settlement agreement provisions. "[T]he Department of Justice[] concluded that while the former INS had made progress, 'deficiencies in the handling of juveniles continue[d] to exist . . . [which] could have potentially serious consequences for the well-being of the juveniles.'"<sup>203</sup>

<sup>196</sup> See *id.* para. 8.

<sup>197</sup> See *id.*

<sup>198</sup> Press Release, *supra* note 84, para. 1.

<sup>199</sup> This separation of responsibilities was supposed to eliminate the conflict of interest the INS had historically faced. The former INS possessed an inherent conflict of interest because "placing . . . kids in the custody of the INS, the very same agency that is prosecuting them, [creates] an untenable conflict." Elizabeth Amon, *Access Denied: Children in INS Custody Have No Right to a Lawyer; Those Who Get One Risk Retaliation*, NAT'L L.J., Apr. 16, 2001, at A1, A16 (quoting Wendy Young, Director of Government Relations and U.S. Programs for the Women's Commission on Women and Children Refugees); see also WOMEN'S COMM'N, *supra* note 1, at 9 (noting that the "INS detention of children continues to be driven by the agency's overwhelming bias on the side of law enforcement . . . [and] fail[s] to consider adequately the best interests of the child principle . . .").

<sup>200</sup> See Young, *supra* note 3, at 11.

<sup>201</sup> Amon, *supra* note 199, at A16 (quoting Arthur Helton, Senior Fellow at the Council on Foreign Relations).

<sup>202</sup> WOMEN'S COMM'N, *supra* note 1, at 13 (noting that it will not bring about the "kind of meaningful reform that would ensure that children receive appropriate care while their eligibility for immigration relief is being determined").

<sup>203</sup> CHILDREN IN DETENTION, *supra* note 2, pt. 2.4.

Critics also argued that because the OJA was under the INS umbrella, the restructuring did not eliminate the inherent conflict of interest since the office was still responsible for the well-being of minor aliens while attempting to deport or detain them.<sup>204</sup> Notwithstanding the policy obligation to keep service and enforcement missions separate, the restructuring proposal did not implement any procedural safeguards to prevent officials from placing undue preference on the enforcement interest when making detention decisions.

Ultimately, even though the former OJA's mission was to protect children, the office was incapable of fulfilling its goal because it fell under the umbrella of the former INS, and since "the INS [wa]s dominated by enforcement concerns at the same time that it completely lack[ed] child welfare expertise, its law enforcement functions frequently overr[ode] consideration of the best interests of the children [that were] in its custody."<sup>205</sup> Since the former INS was so fundamentally flawed concerning the custody of unaccompanied minors, the restructuring proposal was not sufficient to remedy due process concerns regarding indefinite detention policies — radical changes to the former agency were thus inevitable.

### *B. The Reasoning Behind Transferring Unaccompanied Minors to the ORR*

As a result of the INS's inherent conflict of interest, several organizations supported dissolving the INS and transferring custody of unaccompanied minor aliens to an independent agency, such as the ORR.<sup>206</sup> These organizations believed that the care of minors needed to be delegated to an agency that was not simultaneously attempting to deport the child.<sup>207</sup>

Responding to the vehement criticism and demands for the transfer of minors to an independent agency, Congress passed the Homeland Security Act of 2002.<sup>208</sup> The Homeland Security Act assigned immigration-enforcement responsibilities to

<sup>204</sup> WOMEN'S COMM'N, *supra* note 1, at 13.

<sup>205</sup> *Id.* One example was the consistent practice of the former INS to deny a child's request to be released to foster care while appealing his/her case, even though the child was granted asylum. *Id.* "This delay mean[t] that the child languishe[d] in detention for several more months, often in secure juvenile detention centers, unable to enjoy the stability of a home-like environment." *Id.*

<sup>206</sup> Several organizations "have long advocated that the responsibility for the care of unaccompanied children be transferred from the INS to an agency that is not also charged with acting as a prosecutor seeking the child's removal from the U.S." CHILDREN IN DETENTION, *supra* note 2, pt. 1.2.1; *see also* Press Release, *supra* note 10; WHY AM I HERE? (ES), *supra* note 5.

<sup>207</sup> *See* CHILDREN IN DETENTION, *supra* note 2, pt. 1.2.1. Organizations who advocated the transference, include, but are not limited to, Human Rights Watch, Women's Commission for Refugee Women and Children, the American Bar Association, Lutheran Immigration and Refugee Services, and the United States Conference of Catholic Bishops. *Id.* n.14.

<sup>208</sup> Homeland Security Act of 2002, Pub. L. No. 107-296, 116 Stat. 2135 (2002).

the Department of Homeland Security (DHS) and custody of unaccompanied minor aliens to the ORR.<sup>209</sup> The newly formed DHS is “responsible for apprehending children and then transferring them to ORR shelters or secure facilities, a period during which the INS [has] often denied children’s rights and mistreated them.”<sup>210</sup> The Homeland Security Act of 2002 “seems to ameliorate the situation of unaccompanied minor aliens by abolishing the [former INS] . . . and assigning its former duties of enforcing immigration laws and providing childcare to separate government agencies.”<sup>211</sup> Dividing the enforcement and childcare interests between two separate agencies “eliminates the inherent conflict of interest the INS previously faced when acting as both caregiver and law enforcement agent to unaccompanied minor aliens.”<sup>212</sup>

## VI. STRUCTURE OF DHS AND THE ORR

### A. Structure of DHS

Under the Homeland Security Act restructuring proposal, which took effect on March 1, 2003, DHS assumes the former INS responsibility of ensuring that immigration laws are enforced against all aliens.<sup>213</sup> The primary mission of DHS is to protect national security by focusing on three goals: preventing terrorist attacks within U.S. borders, reducing the nation’s vulnerability to terrorist attacks, and minimizing damage resulting from terrorism.<sup>214</sup>

The former INS functions were delegated to three bureaus that fall under the auspices of the DHS.<sup>215</sup> The Bureau of Citizenship and Immigration Services (BCIS) was delegated authority to oversee “the administration of benefits and immigration services.”<sup>216</sup> The Bureau of Immigration and Customs Enforcement (BICE) was formed to address immigration and customs investigations and enforcement within the United States.<sup>217</sup> Finally, the Bureau of Customs and Border Protection (BCBP) was created to assume the former INS Border Patrol functions and inspections by controlling immigration and customs activities at the borders.<sup>218</sup>

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<sup>209</sup> Workman, *supra* note 55, at 224 n.9.

<sup>210</sup> Press Release, *supra* note 5.

<sup>211</sup> Workman, *supra* note 55, at 223–24.

<sup>212</sup> *Id.* at 224.

<sup>213</sup> CHILDREN IN DETENTION, *supra* note 2, pt. 1.2.1.

<sup>214</sup> Homeland Security Act § 101(b); *see also* BUSH, *supra* note 9.

<sup>215</sup> *See* CHILDREN IN DETENTION, *supra* note 2, pt. 1.2.1.

<sup>216</sup> *Id.* The BCIS Director is responsible for reporting directly to Gordon England, Deputy Secretary of DHS.

<sup>217</sup> *Id.*

<sup>218</sup> *Id.*

The Directorate of Border and Transportation Security (BTS) falls under DHS and is responsible for enforcing immigration laws and securing the nation's borders.<sup>219</sup> BTS carries out its border security duty by coordinating port of entry activities and carries out its enforcement of immigration laws duty by "detering illegal immigration and pursuing investigations when laws are broken. BTS absorbed the enforcement units of the [INS], such as the Border Patrol and investigative agents of INS."<sup>220</sup> BCBP and BICE fall under the umbrella of BTS and are required to report directly to the Under Secretary for BTS.

BICE is the largest investigative branch of the DHS and is responsible for enforcing federal immigration laws and securing the nation's borders.<sup>221</sup> The primary mission of BICE is "to detect vulnerabilities and prevent violations that threaten national security."<sup>222</sup> Furthermore, BICE is responsible for apprehending, detaining and removing aliens who entered the country illegally.<sup>223</sup> BICE is headed by an assistant secretary who reports directly to the Under Secretary for BTS.

The Office of Detention and Removal (DRO) falls under the auspices of BICE and oversees the removal of unauthorized aliens within the United States.<sup>224</sup> Since it falls under the umbrella of the DHS, its primary mission is also promoting national security.<sup>225</sup> In addition, DRO is responsible for relocating aliens if necessary and managing aliens in custody while their cases are pending.<sup>226</sup>

### *B. Structure of the ORR*

Under Section 462 of the Homeland Security Act, the former INS functions that pertain to the custody of minors were transferred to the Director of ORR.<sup>227</sup> The ORR has a vast amount of experience and expertise concerning "the care and placement of refugee children."<sup>228</sup> The ORR mission "is to help refugees,

<sup>219</sup> U.S. DEP'T OF HOMELAND SEC.: DHS ORG.: BORDER & TRANSP. SEC., at [http://www.dhs.gov/dhspublic/interapp/editorial/editorial\\_0089.xml](http://www.dhs.gov/dhspublic/interapp/editorial/editorial_0089.xml).

<sup>220</sup> *Id.*

<sup>221</sup> U.S. IMMIGRATION & CUSTOMS ENFORCEMENT, ICE MISSION [hereinafter ICE MISSION], at <http://www.ice.gov/graphics/about/index.htm>; U.S. IMMIGRATION & CUSTOMS ENFORCEMENT, ORGANIZATION [hereinafter ORGANIZATION], at <http://www.ice.gov/graphics/about/organization/index.htm>.

<sup>222</sup> ICE MISSION, *supra* note 221.

<sup>223</sup> ORGANIZATION, *supra* note 221.

<sup>224</sup> U.S. DEP'T OF HOMELAND SEC.: ORGANIZATION: OFF. DETENTION & REMOVAL, at [http://www.ice.gov/graphics/about/organization/org\\_dro.htm](http://www.ice.gov/graphics/about/organization/org_dro.htm).

<sup>225</sup> *See id.*

<sup>226</sup> *Id.*

<sup>227</sup> OFF. OF REFUGEE RESETTLEMENT, ADMIN. FOR CHILDREN & FAMILIES, UNACCOMPANIED ALIEN CHILDREN [hereinafter UNACCOMPANIED ALIEN CHILDREN], at <http://www2.acf.hhs.gov/programs/orr/programs/uac.htm> (last updated Dec. 2, 2003).

<sup>228</sup> CHILDREN IN DETENTION, *supra* note 2, pt. 1.2.1.

Cuban/Haitian entrants, asylees, and other beneficiaries . . . to establish a new life that is founded on the dignity of economic self-support and encompasses full participation in opportunities which Americans enjoy.”<sup>229</sup> A director leads the ORR and reports directly to the Assistant Secretary for Children and Families, which falls under the Department of Health and Human Services (DHHS).<sup>230</sup> The director is required to report on issues, including, but not limited to, immigration and repatriation.<sup>231</sup>

The Office of the Director consists of four divisions: the Division of Community Resettlement; the Division of Refugee Assistance; the Division of Budget, Policy and Data Analysis; and the Division of Unaccompanied Children’s Services (DUCS).<sup>232</sup> The Homeland Security Act mandates that the DUCS be responsible for the care and placement of unaccompanied minor aliens.<sup>233</sup> The DUCS “consults with appropriate child welfare professionals and the [DHS]” and “develops placement policy, decisions and recommendations to ensure that children are receiving appropriate care.”<sup>234</sup>

Under the DUCS, the ORR created programs designed to better facilitate its obligation of ensuring that minors receive appropriate care. One such program is the Unaccompanied Alien Children (UAC) program, which was created “[t]o provide a safe and appropriate environment for minors during the interim period between the minor’s transfer into an Unaccompanied Alien Children’s . . . program and the minor’s release from custody by the ORR or removal from the United States by the [DHS].”<sup>235</sup> Under this program, the ORR Director is responsible for:

Coordinating and implementing the care and placement of unaccompanied alien children who are in Federal custody by reason of their immigration status; Making and implementing placement determinations; overseeing the infrastructure and personnel of facilities in which unaccompanied alien children reside; Reuniting children with guardians and/or sponsors, when appropriate; Conducting investigations and inspections of facilities and other entities in which unaccompanied alien children reside.<sup>236</sup>

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<sup>229</sup> OFF. OF REFUGEE RESETTLEMENT, ADMIN. FOR CHILDREN & FAMILIES, ORR MISSION, at <http://www2.acf.hhs.gov/programs/orr/mission/index.htm> (last updated Dec. 2, 2003).

<sup>230</sup> OFF. OF REFUGEE RESETTLEMENT, ADMIN. FOR CHILDREN & FAMILIES, WHO WE ARE [hereinafter WHO WE ARE], at <http://www2.acf.hhs.gov/programs/orr/mission/functional.htm> (last updated Dec. 2, 2003).

<sup>231</sup> *Id.*

<sup>232</sup> *Id.*

<sup>233</sup> *Id.*; see Homeland Security Act of 2002, Pub. L. No. 107-296, § 462, 116 Stat. 2135 (2002).

<sup>234</sup> WHO WE ARE, *supra* note 230.

<sup>235</sup> UNACCOMPANIED ALIEN CHILDREN, *supra* note 227.

<sup>236</sup> *Id.* In an attempt to assuage the public’s concerns that minors are being held in overly

The Unaccompanied Refugee Minors Program is another program available to minors who qualify for refugee status. This program is designed to assist minors (who are classified as refugees prior to, upon, or after arrival within the United States) in their development of skills necessary “to achieve economic and social self-sufficiency.”<sup>237</sup>

## VII. ANALYSIS OF THE ORR’S ATTEMPT TO REMEDY DUE PROCESS VIOLATIONS

Unaccompanied minors are a serious concern for the United States because of the ever-increasing number of children entering the country. In 2001, thirty-two percent of, or roughly 1,700, juvenile aliens were detained in secure facilities.<sup>238</sup> This increase will result in more children being subjected to constitutional violations if the ORR fails to prevent these minors from being detained in correctional institutions for indefinite periods of time.

The placement of minors under the care of the ORR presents an opportunity for the government to finally rectify its historical violations and abuses of these individuals’ due process rights. The delegation of custody to the ORR is commendable because the ORR falls under the Department of Health and Human Services, thus placing the custody of these children in an agency that has complete independence from the DHS and has extensive experience with refugee children.<sup>239</sup> This independence will finally eliminate the inherent conflict of interest that led to the downfall of the former INS, and will advance compliance with the due process protection procedures granted to unaccompanied minors by the Constitution.<sup>240</sup>

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restrictive environments, the ORR is also required to respond to questions concerning where a minor is located, the status of a minor’s welfare, and other related issues. *Id.*

<sup>237</sup> OFF. OF REFUGEE RESETTLEMENT, ADMIN. FOR CHILDREN & FAMILIES, THE UNACCOMPANIED REFUGEE MINORS PROGRAM, at <http://www2.acf.hhs.gov/programs/orr/programs/urm.htm>.

<sup>238</sup> INS FACT SHEET, *supra* note 53.

<sup>239</sup> See Press Release, Women’s Comm’n for Refugee Women & Children, A Landmark In Protection of Refugee Children: Women’s Commission Urges Support for Unaccompanied Alien Child Protection Act of 2003 (June 19, 2003), at [http://www.womenscommission.org/newsroom/press\\_releases/0619.htm](http://www.womenscommission.org/newsroom/press_releases/0619.htm).

<sup>240</sup> For a discussion of the inherent conflict that plagued the former INS, see WOMEN’S COMM’N, *supra* note 1, at 2. “[T]he INS [was] assigned two irreconcilable and competing functions. It is charged with providing custodial care to unaccompanied children at the same time that it is acting as the prosecutor arguing in favor of the child’s removal from the United States.” *Id.* Delegating both of these responsibilities to the INS presents “an inherent conflict of interest, under which it is simultaneously acting as service provider and law enforcement agency.” *Id.* The ramifications of the INS officials’ conflicts of interest are judicial inefficiencies and inequalities that “threaten[] the best interests of the children in question.” *Id.*; see also Amon, *supra* note 199, at A16. (surmising the conflict as “an untenable conflict” (quoting Wendy Young)).

The ORR's emphasis on promoting juveniles' best interests will improve detention conditions and help eliminate injustices stemming from the INS's failure to recognize them.<sup>241</sup> It is clearly not in an innocent child's best interest to be detained among violent delinquents and criminals and to be subjected to the abuse that accompanies the punitive environment of correctional facilities.

Compared to the INS, the ORR "is a more appropriate agency to care for unaccompanied children . . . ."<sup>242</sup> This is illustrated by the UAC program that promotes the welfare of children. Under the UAC program, the ORR director is responsible for making placement decisions designed "[t]o provide a safe and appropriate environment for minors."<sup>243</sup> This mandate clearly implies that the ORR will be advocating against detention in correctional facilities, as this is rarely a safe or appropriate environment for minors. This program also requires reunification of children "with guardians and/or sponsors."<sup>244</sup> This requirement undoubtedly promotes releasing minors in a timely fashion, because if no family member is willing to take custody of the child, a sponsor or guardian can assume custody. Finally, the program obligates the Director to respond to inquiries about detained minors.<sup>245</sup> This obligation unquestionably promotes the timely release of children, as the public will be empowered to monitor the ORR and ensure that the office is working towards their release.

All of the abovementioned benefits of the ORR illustrate that it finally has the opportunity to provide these children with the protection that the Court has demanded they be afforded. However, while the ORR is generally seen as a step in the right direction, criticism has developed regarding its potential for actually protecting these children's due process rights. According to Wendy Young, "Although these provisions reflect a promising beginning, they fail to satisfy adequately the needs and concerns of this young and vulnerable group of noncitizens."<sup>246</sup>

For example, the ORR does not establish legally binding regulations that mandate compliance with the *Flores* settlement agreement; it merely establishes the

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<sup>241</sup> WOMEN'S COMM'N, *supra* note 1, at 9. "INS policy and practice fail[ed] to consider adequately the best interests of the child principle, the cornerstone of child welfare policy, which holds that the needs of a child must be paramount in any decision affecting his or her well-being." *Id.*

<sup>242</sup> Press Release, *supra* note 10.

<sup>243</sup> UNACCOMPANIED ALIEN CHILDREN, *supra* note 227.

<sup>244</sup> *Id.*

<sup>245</sup> *Id.*

<sup>246</sup> Workman, *supra* note 55, at 223; Young further noted: "While shifting the care of unaccompanied refugee children to the ORR . . . is a good beginning, it is only that — a beginning. Many troubling gaps remain in the protection of unaccompanied refugee children in the United States." *Id.* at 223 n.8 (citing Press Release, *supra* note 10).



provisions as guidelines.<sup>247</sup> Viewing the agreement as a suggestion, rather than a mandatory requirement, will reduce its effectiveness. If adherence to minors' due process protections is merely a recommendation, the DHS will be less inclined to comply with the guidelines, especially if their rights conflict with national security interests. If, however, the provisions were codified as binding regulations, the DHS would be required to comply with the provisions and not detain juveniles indefinitely.

Criticism has also developed regarding the decision to divide the former INS into different DHS bureaus. "The former INS has been split into three different bureaus, separating 'enforcement' functions from 'service' functions . . . and that may render the notoriously inefficient INS bureaucracy even worse."<sup>248</sup> For example, an unaccompanied child is initially detained by BCBP, who later refers the child to BICE, who subsequently refers the child to the ORR.<sup>249</sup> The Homeland Security Act, however, fails to provide a time limit for transferring custody from BCBP's initial detention to the ORR.<sup>250</sup> Therefore, the child could be detained for an indefinite period of time before being transferred to ORR.

Despite ORR's independence from DHS, which eliminated the inherent conflict of interest, any attempt by the ORR to protect minors' due process rights might still be disregarded if it conflicts with DHS's national security interest. Since September 11, 2001, this possibility has become a likely conclusion and is especially acute considering the indefinite detention provision codified in the PATRIOT Act.<sup>251</sup> Thus, the structural independence of the ORR may be insufficient to protect minors from indefinite detention by DHS. Amnesty International is concerned that DHS "may focus more on its national security and law enforcement duties than on the 'best interests' of the unaccompanied minor aliens with whom it interacts."<sup>252</sup>

The probability that minors' due process right against indefinite detention will continue to be disregarded because of an overemphasis on national security was recently illustrated when Attorney General John Ashcroft, stated that "Haitian asylum-seekers must be kept in detention because they might threaten national security if released."<sup>253</sup> This ruling "applies to all Haitians, even in cases where an immigration judge has already found that the detainee poses no danger at all, and

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<sup>247</sup> UNACCOMPANIED ALIEN CHILDREN, *supra* note 227.

<sup>248</sup> AMNESTY INT'L, USA, REFUGEE UPDATE: US TREATMENT OF REFUGEES AND ASYLUM-SEEKERS HAS RECENTLY BECOME MUCH HARSHER [hereinafter REFUGEE UPDATE], at <http://www.amnestyusa.org/refugee/update.html> (last visited Jan. 25, 2004).

<sup>249</sup> CHILDREN IN DETENTION, *supra* note 2, pt. 8.3.

<sup>250</sup> *Id.*

<sup>251</sup> See PATRIOT Act, *supra* note 16.

<sup>252</sup> Workman, *supra* note 55, at 224 n.8 (citation omitted).

<sup>253</sup> REFUGEE UPDATE, *supra* note 248.

is not a flight risk.”<sup>254</sup> Ashcroft made this decision when addressing the case of David Joseph, who has been detained since fleeing Haiti in 2002.<sup>255</sup> “The Attorney General argued that it could threaten national security to release Joseph (although two separate immigration courts had decided in favor of releasing him) since that might encourage large numbers of Haitians to come from Haiti, which would strain resources of the U.S. . . .”<sup>256</sup> Despite any effort by the ORR, Haitian minors will continue to be detained indefinitely because Ashcroft believes that national security should take precedence over their constitutional rights.

Structurally, the ORR faces the challenge of inheriting a detention system that is riddled with problems:

Unfortunately, [the ORR] inherited a system [when it assumed responsibility for unaccompanied minors] that relied upon a variety of detention facilities to house children and was given little legislative direction to implement their new responsibilities. As a result, some children from repressive regimes or abusive families continue to fend for themselves in a complex legal and sometimes punitive system, without knowledge of the English language, with no adult guidance, and with no legal counsel.<sup>257</sup>

Children, therefore, remain indefinitely detained in correctional facilities despite the restructuring of the former INS.<sup>258</sup> Moreover, even though the ORR handles the care of minors, “unaccompanied children will continue to encounter immigration enforcement, now operated through [DHS].”<sup>259</sup> Senator Dianne Feinstein (D-CA) recently commented upon this problem by arguing that that the success of the ORR will require more than the mere transference of authority.<sup>260</sup>

Conversely, the ORR could be criticized as an excessive solution because while due process rights of minor aliens should be protected, these rights should not outweigh the national security concerns that aliens present to the United States.<sup>261</sup>

<sup>254</sup> *Id.*

<sup>255</sup> *Id.*

<sup>256</sup> *Id.* It is interesting to note that Ashcroft apparently does not share the same anxiety with regards to Cuban boat people, as they are only detained briefly by immigration officials. *Id.*

<sup>257</sup> 149 CONG. REC. E2106 (daily ed. Oct. 21, 2003) (statement of Rep. Lofgren). “[T]he ORR has inherited a detention system that reflects the law enforcement culture of the INS, an agency long criticized for routinely placing immigration control above the best interests of the child.” CHILDREN IN DETENTION, *supra* note 2, pt. 8.1.

<sup>258</sup> WHY AM I HERE? (ES), *supra* note 5.

<sup>259</sup> CHILDREN IN DETENTION, *supra* note 2, pt. 1.2.1.

<sup>260</sup> Workman, *supra* note 55, at 225 n.11 (citing 149 CONG. REC. S7020 (daily ed. May 22, 2003) (statement of Sen. Feinstein)).

<sup>261</sup> For a discussion of national security concerns, see *supra* notes 77–83 and accompanying text.

According to this perspective, there is a need to emphasize enforcement and uphold the indefinite detention policy.<sup>262</sup> Granting immigration officials and the attorney general the discretionary power to detain minors for as long as believed necessary protects national security and prevents children from using the nation's resources or resorting to criminal acts — as often happens to homeless youth.<sup>263</sup> This argument is supported by the tragedy of September 11, 2001, which illustrates the need for DHS to be able to hold aliens in secure facilities, especially with respect to aliens presenting a serious risk to the security of the nation.

Despite critics' contentions regarding the importance of upholding indefinite detention policies, the government simply does not have the ability under the Constitution to force these children to live indefinitely in juvenile detention facilities. Unaccompanied minor aliens have due process rights that protect them from being forced to live indefinitely with criminals in punitive conditions.<sup>264</sup> Furthermore, minor aliens do not pose a significant threat to national security in the context that the PATRIOT Act was designed to address. Minor aliens are also unlikely to flee from a shelter or foster care system, as they do not have the skills or resources to do so. To place these innocent children under the same conditions established for adult aliens, who pose much higher risks, is unjustified and unnecessary.

Furthermore, critics' fear that prohibiting indefinite detention will undermine national security is groundless. The Homeland Security Act created an entire executive agency dedicated exclusively to promoting national security.<sup>265</sup> It is simply inconceivable to think that providing these children an office dedicated to protecting their due process rights will overshadow the importance of national security and render the DHS helpless in fulfilling its mission. Finally, any criticism that providing separate facilities for minors will drain the nation's resources is unfounded. It costs less to place a child in foster care than it does to detain a child in a correctional facility.<sup>266</sup> "It costs only fifty-five dollars per day to place a child in foster care, compared to two hundred dollars per day for detention."<sup>267</sup> Therefore, providing these children their due process right against indefinite detention not only preserves the reputation of the United States as a steward of freedom and supporter of human rights, but it also conserves national resources.

In asserting their due process rights against indefinite detention, unaccompanied minor aliens are simply asking for removal from juvenile detention centers; they are not asking to be released from government authority. As the Supreme Court noted in *Zadvydas v. Davis*, declaring indefinite detention as unconstitutional does not

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<sup>262</sup> See Makki, *supra* note 73, at 484–85, 497–500.

<sup>263</sup> See *id.*; *supra* notes 77–81 and accompanying text.

<sup>264</sup> See *Zadvydas v. Davis*, 533 U.S. 678, 690–96 (2001).

<sup>265</sup> See *supra* notes 9–11 and accompanying text.

<sup>266</sup> Workman, *supra* note 55, at 243.

<sup>267</sup> *Id.*

mean that children will be allowed to fully enter society; rather, the decision is between “imprisonment and supervision under release conditions that may not be violated.”<sup>268</sup> Even if DHS is not willing to establish release conditions, it can provide separate facilities that are simultaneously secure and safe for children — facilities where children are not subjected to the cruelty and violence of correctional institutions.

### VIII. THE UNACCOMPANIED ALIEN CHILD PROTECTION ACT OF 2003

Considering the demands placed upon the government by the Supreme Court,<sup>269</sup> the programs and policies the ORR establishes must accommodate the due process rights of minor aliens by ensuring that minors do not remain in detention facilities for an unreasonable period of time. Congress has attempted to remedy these concerns and meet these demands by proposing legislation in addition to the Homeland Security Act. The most significant and promising piece of legislation is the Unaccompanied Alien Child Protection Act of 2003,<sup>270</sup> which was introduced by Senator Dianne Feinstein (D-CA) in the Senate<sup>271</sup> and Representative Zoe Lofgren (D-CA) in the House.<sup>272</sup>

Most importantly, this Act prohibits noncriminal unaccompanied children from being detained with adults or juvenile offenders and requires detention facilities to provide education, medical (including mental health) care, and access to telephones and interpreters.<sup>273</sup> The proposed legislation also requires children to be represented during immigration proceedings by counsel, either supplied by the government or on a pro bono basis.<sup>274</sup> The Act mandates the creation of a pilot program appointing guardians *ad litem* for minors.<sup>275</sup> The guardians would have training in child welfare and special training in the nature of problems encountered by unaccompanied alien children.<sup>276</sup> These two requirements “would not only render

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<sup>268</sup> *Zadvydas*, 533 U.S. at 696.

<sup>269</sup> *See id.* at 678, 689–99, 701–02.

<sup>270</sup> S. 1129, 108th Cong. (2003).

<sup>271</sup> *Id.* On May 22, 2003, the proposed legislation was referred to the Committee on the Judiciary; it has yet to leave the Committee.

<sup>272</sup> Unaccompanied Alien Child Protection Act of 2003, H.R. 3361, 108th Cong. (2003). On December 10, 2003, the House Committee on the Judiciary referred the bill to the House Subcommittee on Immigration, Border Security, and Claims.

<sup>273</sup> *Id.* § 103.

<sup>274</sup> *Id.* § 202.

<sup>275</sup> *Id.* § 201(c). Guardians *ad litem* serve as a “friend of the child” during immigration proceedings. If there is an absence of a traditional caregiver, a guardian *ad litem* assumes care of the child, ensuring that the child’s best interests are taken into account when making decisions. *See WHY AM I HERE? (ES)*, *supra* note 5.

<sup>276</sup> Unaccompanied Alien Child Protection Act § 201(a)(2).

the proceedings more humane and child-friendly, they would also make them more efficient, as judges could better ascertain the child's eligibility for relief."<sup>277</sup>

The legislation proposed by Senator Dianne Feinstein (D-CA) undoubtedly advances the protection of minors' due process rights, including the protection against indefinite detention. The Act provides more comprehensive protection for minors than the Homeland Security Act.<sup>278</sup> For example, the bill expressly codifies the *Flores* settlement agreement's "least secure setting possible" requirement, which is not included in the Homeland Security Act.<sup>279</sup> The proposed legislation emphasizes the importance of putting children's interests first because it would require the release of the minor aliens from correctional facilities. The Act provides numerous custody options, which would increase their chances of not being held indefinitely in a detention center.<sup>280</sup> For example, if no family or legal guardian is available, a child could still be assigned to a shelter or group home,<sup>281</sup> the punitive environment that accompanies a detention facility would be avoided completely.

Currently, unaccompanied minors are not guaranteed counsel or guardians *ad litem* to assist them during complex immigration proceedings. The appointment of legal counsel would help ensure protection against indefinite detention because it would promote DHS adherence to the *Zadvydas* postremoval detention period's "reasonable time" limitation and the *Flores* settlement agreement's "least restrictive setting" requirement. DHS adherence would be increased because knowledgeable counsel would zealously advocate for protection of their client's due process rights.<sup>282</sup> The potential for increased adherence by immigration officials is

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<sup>277</sup> Press Release, *supra* note 239. For a discussion on how former INS procedures forced unaccompanied minor aliens to endure proceedings without any help, including attorney representation, see Amon, *supra* note 199, at A16. The Homeland Security Act fails to provide counsel for minors, which is particularly disturbing because "their claims are subject to the same high standards of proof as those of adults. That often involves complex allegations about life-threatening issues of abuse, neglect, torture, violence and political upheaval. If they fail, they are deported." *Id.* Under the former INS and the current ORR and DHS structure, children are unable to maneuver within the immigration system because:

[c]hildren are not provided the assistance they need to successfully and expeditiously navigate their immigration proceedings. Less than half of children are represented by counsel. This drastically undermines due process for children, and creates the indefensible situation in which the INS is represented by counsel in the courtroom while the child is forced to defend him — or herself.

WOMEN'S COMM'N, *supra* note 1, at 39.

<sup>278</sup> Workman, *supra* note 55, at 238.

<sup>279</sup> Unaccompanied Alien Child Protection Act § 103(c); *see also id.* § 102(a)(1); Workman, *supra* note 55, at 238.

<sup>280</sup> *Id.* § 102(a).

<sup>281</sup> *Id.*

<sup>282</sup> Support for providing guardians *ad litem* and legal counsel was advocated by Wendy Young, Director of Government Relations and U.S. Programs, who argued "[t]hese are basic protections, which are essential to ensure that these children have a fair chance at asylum." Press Release, *supra* note 10.

illustrated by the lack of constitutional claims brought under the current structure because juvenile aliens do not know their rights and are not represented by counsel.

Supporters like Wendy Young believe that this Act should be adopted because it will “greatly expand services for the 5,000 children who arrive alone in the United States each year. This bipartisan legislation . . . would for the first time ensure that children receive the assistance they need to obtain refugee protection or other relief . . . .”<sup>283</sup> Furthermore, this legislative proposal, “would establish the most comprehensive domestic safeguards for children, whether under the domain of the DHS or ORR.”<sup>284</sup> Finally:

[This Act would] close the protection gaps that have in the past sacrificed the protection of these very vulnerable youngsters . . . . It would establish a system to provide appropriate care and assistance to children to ensure that those who should be returned to their homelands can do so quickly and safely and those who cannot return are given a chance at a new life in the United States.<sup>285</sup>

Overall, this legislation is an important step toward ensuring that minors are not detained indefinitely in correctional facilities, and therefore, must be approved by Congress and enforced against DHS and other government immigration officials.

## IX. CONCLUSION

*When a child's life or liberty or innocence is taken, it is a terrible, terrible loss. Our society has a duty, has a solemn duty, to shield children from exploitation and danger . . . . Our first duty as adults is to create an environment in which children can grow and thrive without fearing for their security. That's what we've got to do.*<sup>286</sup>

Over the past few years, the number of unaccompanied minor aliens entering the United States has grown rapidly.<sup>287</sup> This increase presents a troubling problem for the government because it must provide adequate resources for these individuals while also protecting its citizens. Minors who cannot be repatriated to their home country, and have no one within the United States who will assume legal custody,

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<sup>283</sup> Press Release, *supra* note 239.

<sup>284</sup> Press Release, *supra* note 5.

<sup>285</sup> Press Release, *supra* note 239.

<sup>286</sup> CHILDREN IN DETENTION, *supra* note 2, pt. 2.3.3 (quoting President George W. Bush, Remarks at White House Conference on Missing, Exploited, and Runaway Children, Ronald Reagan Building, Washington, D.C. (Oct. 2002)).

<sup>287</sup> See *supra* notes 53–65 and accompanying text.

present a unique and difficult problem.<sup>288</sup> Unfortunately, the United States has historically subjected these unaccompanied minor aliens to Fifth Amendment due process violations by detaining them indefinitely in correctional facilities. The violations were initially perpetuated under the auspices of the postremoval detention policy, and are currently perpetuated under the PATRIOT Act.<sup>289</sup>

The judiciary attempted to protect the constitutional rights of minor aliens by holding that the Constitution grants minors Fifth Amendment due process protection against indefinite detention.<sup>290</sup> In *Zadvydas*, the Court held that due process protection demands governmental adherence to a postremoval detention period "reasonable time" limitation.<sup>291</sup>

Despite the Court's holding in *Zadvydas*, Congress passed the PATRIOT Act, permitting the government to continue its practice of detaining aliens indefinitely. Detention advocates supported the congressional measure and continue to assert the need to support an indefinite detention policy because national security is threatened when the government does not detain aliens in a secure facility.<sup>292</sup> This sentiment intensified after the terrorist attacks of September 11, 2001.<sup>293</sup>

Confronted with support for a modification of immigration procedures<sup>294</sup> that accommodate minors' due process needs, the INS created the Office of Juvenile Affairs. Creating the OJA, however, did not remedy the fundamental conflict of interest that plagued the former INS. The OJA, therefore, was ultimately rendered incapable of eliminating the undue influence of the law enforcement interest.

Responding to support for reforming the failing federal immigration agency, Congress passed the Homeland Security Act, and on March 1, 2003, the INS was dissolved. The INS was transferred to the DHS, while the care of unaccompanied minor aliens was transferred to the Office of Refugee Resettlement.<sup>295</sup> This restructuring of the federal government effectively eliminated the inherent conflict of interest that plagued INS detention decisions.<sup>296</sup> Eliminating the conflict of interest was one of many reasons that the Homeland Security Act's creation of the ORR was praised as taking a "significant step toward addressing the needs of unaccompanied children . . . ."<sup>297</sup>

<sup>288</sup> See discussion *supra* Section II.

<sup>289</sup> See Young, *supra* note 3, at 10.

<sup>290</sup> See *Zadvydas v. Davis*, 533 U.S. 678 (2001).

<sup>291</sup> *Id.* at 682. The postremoval-period detention statute "read in light of the Constitution's demands, limits an alien's post-removal-period detention to a period reasonably necessary to bring about that alien's removal from the United States. It does not permit indefinite detention." *Id.* at 689.

<sup>292</sup> See *supra* notes 77–80 and accompanying text.

<sup>293</sup> See *supra* notes 82–83, 177–84 and accompanying text.

<sup>294</sup> See *supra* notes 191–93 and accompanying text; discussion *supra* Section VII.

<sup>295</sup> For a discussion of the newly formed structure, see Section VI.

<sup>296</sup> See Amon, *supra* note 199, at A16. For a discussion of the fundamental conflict of interest, see *supra* note 199 and accompanying text.

<sup>297</sup> Press Release, *supra* note 239.

While the Homeland Security Act was a “significant step” for protecting minors’ rights, congressional approval of the PATRIOT Act has decreased the likelihood that the ORR will be able to protect their due process rights against indefinite detention effectively. DHS’s and the PATRIOT Act’s emphasis on national security and the need to detain aliens will almost inevitably overshadow any constitutional concerns advocated by the ORR. DHS will indubitably focus on law enforcement and national security issues and disregard the best interests of the child, especially with regard to their detention status. Therefore, “despite taking an important step in the right direction, the U.S. government has far to go to ensure that unaccompanied children are treated in accordance with international law and its own standards.”<sup>298</sup>

The Homeland Security Act’s restructuring “changes have not yet directly impacted the experiences of children in immigration detention as they move through an immigration system that is now arguably more complex.”<sup>299</sup> Therefore, to help promote ORR’s success, it “must move quickly to implement critical changes in order to safeguard the rights of children under its care.”<sup>300</sup>

The ORR has inherited a fundamentally flawed system but has the unique opportunity and potential to make the necessary critical changes to ensure the due process rights that the government is obligated to respect. To help ensure that unaccompanied minors’ due process rights against indefinite detention are provided, the ORR must effectively prohibit indefinite detention by implementing guidelines adhering to the Immigration and Nationality Act’s “reasonable time” limitation of the postremoval detention statute, and mandating a “least restrictive setting” requirement.

Congressional passage of the Unaccompanied Alien Child Protection Act of 2003 and enactment of the *Flores* settlement agreement into binding regulations are two viable measures that ensure that the “least restrictive setting” requirement and “reasonable time” limitation are adhered to by government officials. The Unaccompanied Alien Child Protection Act of 2003, must be passed by Congress since, in addition to prohibiting the detainment of minors in adult or juvenile detention facilities, it provides “children with the professional assistance necessary to reach appropriate decisions in their proceedings,”<sup>301</sup> as it “is an essential element to ensuring that children are afforded due process.”<sup>302</sup> The *Flores* agreement must also be codified as a mandatory regulation regarding the care and custody of minors because it “provides a fundamental legal framework to measure U.S. compliance with regard to the treatment of unaccompanied children.”<sup>303</sup>

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<sup>298</sup> WHY AM I HERE? (ES), *supra* note 5.

<sup>299</sup> *Id.* Additional complexities are illustrated by the division of the former INS duties into several bureaus under DHS.

<sup>300</sup> *Id.*

<sup>301</sup> Young, *supra* note 3, at 11.

<sup>302</sup> *Id.*

<sup>303</sup> CHILDREN IN DETENTION, *supra* note 2, pt. 2.4.



If the “reasonable time” limitation of the post-removal detention statute and “least restrictive setting” requirement are codified, DHS will be less able to justify the indefinite detention of an unaccompanied minor alien. Expressly codifying these protections by implementing the Unaccompanied Alien Child Protection Act of 2003 and the *Flores* settlement agreement will help ensure that minors’ due process rights are not slighted or disregarded when issues of national security arise. Only then will unaccompanied minor aliens, like Edwin Munoz, Fega, Mekabou Fofana, and Malik, no longer be imprisoned indefinitely in detention facilities, be subjected to criminal injustices, and suffer at the hands of the U.S. government.

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