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Trump's Torture Legacy: Isolating, Incarcerating, and Inflicting Harm Upon Migrant Children

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TRUMP’S TORTURE LEGACY: ISOLATING, INCARCERATING, AND INFLECTING HARM UPON MIGRANT CHILDREN

BRENDAN LOKKA*

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I. INTRODUCTION

"Don't tell me it doesn't work- torture works . . . Half these guys [say]; 'Torture doesn't work.' Believe me, it works." - Donald J. Trump, Feb. 17, 2016.¹

1. Jenna Johnson, *Trump Says 'Torture Works,' Backs Waterboarding and 'Much Worse'*, WASH. POST (Feb. 17, 2016), <https://www.washingtonpost.com/politics/trump-says->

Since becoming a party to the Convention Against Torture (C.A.T.) in the 1990s, the United States federal government has faced repeated criticism from advocacy groups for its treatment of non-citizen detainees.² In response to the 9/11 attacks, for example, the Bush Administration subjected suspected terrorists to what it called “enhanced interrogation techniques” in places like Guantanamo Bay, Cuba.³ Advocacy groups suggested that this wording disguised a harsher truth: that the United States actively engaged in torture.⁴

In 2017, this debate over detention practices shifted from Guantanamo Bay to the U.S.-Mexico border and from suspected terrorists to migrant children.⁵ Parallel accusations of condoning torture have correspondingly followed from the Bush to Trump Administrations.⁶ As a presidential candidate, Donald Trump sought out

torture-works-backs-waterboarding-and-much-worse/2016/02/17/4c9277be-d59c-11e5-b195-2e29a4e13425_story.html.

2. See, e.g., *USA: Policy of Separating Children from Parents is Nothing Short of Torture*, AMNESTY INT’L (June 18, 2018), <https://www.amnesty.org/en/latest/news/2018/06/usa-family-separation-torture/> [hereinafter AMNESTY INTERNATIONAL]; *Close Guantánamo*, ACLU, <https://www.aclu.org/feature/close-guantanamo> (last visited Feb. 15, 2018); Reed Brody, *Getting Away with Torture: The Bush Administration and Mistreatment of Detainees*, HUM. RTS. WATCH 1–2 (July 12, 2011), <https://www.hrw.org/report/2011/07/12/getting-away-torture/bush-administration-and-mistreatment-detainees#>.

3. See Scott Shane, *Abu Zubaydah, Tortured Guantánamo Detainee, Makes Case for Release*, N.Y. TIMES (Aug. 23, 2016), <https://www.nytimes.com/2016/08/24/us/abu-zubaydah-torture-guantanamo-bay.html> (listing waterboarding, confinement in small spaces, shackling in uncomfortable positions, and other tactics as exemplars of “so-called enhanced interrogation techniques”).

4. E.g., S. SELECT COMM. ON INTELLIGENCE, 112TH CONG., COMMITTEE STUDY OF THE CENTRAL INTELLIGENCE AGENCY’S DETENTION AND INTERROGATION PROGRAM 4 (Comm. Print 2012) [hereinafter SENATE SELECT COMMITTEE STUDY] (determining that, according to Chairman Dianne Feinstein, “under any common meaning of the term, CIA detainees were tortured” in Guantanamo Bay between 2002 and 2007).

5. See AMNESTY INTERNATIONAL, *supra* note 2 (“This is a spectacularly cruel policy, where frightened children are being ripped from their parent’s arms and taken to overflowing detention centres, which are effectively cages. This is nothing short of torture.”).

6. See, e.g., Adam Goldman, *Gina Haspel, Trump’s Choice for C.I.A., Played Role in Torture Program*, N.Y. TIMES (Mar. 13, 2018), <https://www.nytimes.com/2018/03/13/us/politics/gina-haspel-cia-director-nominee-trump-torture-waterboarding.html> (linking Gina Haspel’s work for the

and relied upon the advice of Paul Manafort and Roger Stone- lobbyists adept in advising torturers.⁷ Once elected, President Trump nominated a proponent and participant in the Bush Administration's "enhanced interrogation" programs, Gina Haspel, to be Director of the Central Intelligence Agency.⁸

This Comment asserts that the Trump Administration's zero-tolerance immigration policy has violated the United States' obligations pursuant to the C.A.T. by contravening the prohibition of torture and other cruel, inhuman, or degrading treatment or punishment.

Section II of this Comment delineates the United States' obligations under the C.A.T.⁹ Next, it describes how the zero-tolerance immigration policy¹⁰ separated thousands of migrant children from their parents¹¹ and the fallout resulting from its inept execution.¹²

Central Intelligence Agency during the Bush Administration, where she ran a secret prison in Thailand that tortured suspected terrorists, to her nomination by Trump to be the agency's director).

7. See Betsy Woodruff & Tim Mak, *Top Trump Aide Led the 'Torturers' Lobby*, DAILY BEAST (Apr. 13, 2016), <https://www.thedailybeast.com/top-trump-aide-led-the-torturers-lobby> (detailing how Paul Manafort and Roger Stone ran a firm dubbed the "torturers' lobby" by the Center for Public Integrity for representing clients "responsible for government-sanctioned torture, detainment, and rape").

8. Goldman, *supra* note 6 ("With his elevation of Ms. Haspel, now the agency's deputy director, Mr. Trump displayed a willingness to ignore the widespread denunciations of waterboarding, sleep deprivation, confinements in boxes and other interrogation techniques that were used by the C.I.A. more than a decade ago."); Amanda Holpuch, *Who is Gina Haspel? Donald Trump's Pick for CIA Chief Linked to Torture Site*, THE GUARDIAN (May 9, 2018), <https://www.theguardian.com/us-news/2018/mar/13/who-is-gina-haspel-trump-cia-director-torture-site-link> (claiming, according to an ACLU source, that Haspel "was up to her eyeballs in torture").

9. See *infra* Section II. A; Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Nov. 20, 1994, 1465 U.N.T.S. 85 [hereinafter CONVENTION AGAINST TORTURE].

10. Memorandum from the Att'y Gen., U.S. Dep't of Justice, to Fed. Prosecutors Along the Southwest Border, Zero Tolerance for Offenses under 8 U.S.C. § 1325(a) (Apr. 6, 2018), (on file with the U.S. Department of Justice at <https://www.justice.gov/opa/press-release/file/1049751/download>) [hereinafter Attorney General Zero Tolerance Memorandum].

11. OFF. OF INSPECTOR GEN., U.S. DEP'T OF HEALTH AND HUMAN SERV., OEI-BL-18-00511, SEPARATED CHILDREN PLACED IN OFFICE OF REFUGEE RESETTLEMENT CARE (2019) [hereinafter HHS OIG REPORT] ("HHS has thus far identified 2,737 children in its care . . . who were separated from their parents.").

12. See *infra* Section II. B.

Section III detangles the *mens rea* and *actus reus* required to satisfy the definition of torture under the C.A.T. and U.S. understandings.¹³ It then assesses how federal agencies' conduct has breached, and continues to breach, the aforementioned obligations.¹⁴ Finally, this section deems judicial intervention an ineffective remedy to an ongoing problem, at least thus far.¹⁵

Section IV proposes alternative means to counter the government's family separation practices.¹⁶ First, it recommends that prosecutors arrest and bring criminal charges in compliance with the C.A.T.¹⁷ Second, it calls for reinstating and modifying the Department of Homeland Security's Central American Minors Program.¹⁸ Third, it urges the U.S. government to certify a class for immigration status adjustment.¹⁹ Fourth, Section IV endorses Congressional action to enact effective oversight and boost transparency in the immigration detention system.²⁰

II. BACKGROUND

A. U.S. OBLIGATIONS UNDER THE CONVENTION AGAINST TORTURE AND OTHER CRUEL, INHUMAN, OR DEGRADING TREATMENT OR PUNISHMENT

The United Nations General Assembly adopted the C.A.T. in 1984,²¹ and the U.S. Senate ratified it in 1990 with a series of understandings that will be addressed shortly.²² The United States did not become a party until it deposited this ratification instrument with the United Nations in 1994.²³

13. *See infra* Section III. A.

14. *See id.*

15. *See infra* Section III. B.

16. *See infra* Section IV.

17. *See infra* Section IV. A.

18. *See infra* Section IV. B.

19. *See infra* Section IV. C.

20. *See infra* Section IV. D.

21. G.A. Res. 39/46 (Dec. 10, 1984).

22. Resolution of Ratification accompanying S. Treaty Doc. 100-20, 101st Cong., 136 CONG. REC. 36198 (1990) (as amended).

23. *See* Convention Against Torture, *supra* note 9, at art. 25.2 ("This Convention is subject to ratification. Instruments of ratification shall be deposited with the Secretary-General of the United Nations."); STEPHEN H. LEGOMSKY ET AL., IMMIGRATION & REFUGEE LAW AND POLICY 1374 (Saul Levmore et al. eds., 7th ed. 2019) [hereinafter

1. *The meaning of “torture” under the C.A.T. and the U.S. understandings*

Under Article 1 of the C.A.T., torture consists of “any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person. . . .”²⁴ Torture, under this rather expansive definition, must be performed for “such purposes as” eliciting confessions, punishment, intimidation, coercion, or discrimination.²⁵ Underlying purposes like these may be directed toward either the victim or a third party.²⁶ As for the perpetrator, the pain or suffering must generally be inflicted by a public official.²⁷ Alternatively, a torturer could also be a person acting with the consent, acquiescence, or instigation of a public official or person acting within an official capacity.²⁸ Torture does not, however, include pain or suffering incidental to lawful sanctions.²⁹

The U.S. Senate, in ratifying the C.A.T., entered several understandings that modified the government’s obligations from what they would have been under the plain language of Article 1.³⁰ Understanding 1(a) amended the torture definition’s *mens rea* to specific, rather than general, intent.³¹ The contours of this specific intent remain unclear, though, given the Senate Committee on Foreign Relations’ understanding that Article 1’s phrasing of “for such purposes as”

LEGOMSKY ET AL.] (noting that upon deposit in 1994, “[o]nly at that point did the United States become a party”); Implementation of the Convention Against Torture, 8 C.F.R. § 208.18 (2019).

24. Convention Against Torture, *supra* note 9, at art. 1.

25. *Id.* (“[S]uch purposes as obtaining from him *or a third person* information or a confession, punishing him for an act he *or a third person* has committed or is suspected of having committed, or intimidating or coercing him *or a third person*, or for any reason based on discrimination of any kind . . .”) (emphasis added); see generally IMMIGRATION AND REFUGEE LAW AND POLICY, *supra* note 23, at 1381 (“Since the listed purposes are prefaced by the phrase ‘such purposes as,’ they seem merely illustrative, not exhaustive.”).

26. See Convention Against Torture, *supra* note 9, at art. 1 (referencing third parties as possible objects of the reasons for which the torture is inflicted).

27. *Id.* (“inflicted by . . . a public official”).

28. *Id.* (“inflicted . . . at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity”).

29. *Id.* (“[Torture] does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.”).

30. See generally 136 CONG. REC. 36198 (1990) (as amended).

31. *Id.* (“an act must be specifically intended to inflict severe physical or mental pain or suffering”).

provides a more expansive view of the required intent.³² Additionally, Understanding 1(a) stated that mental pain or suffering must be long-term³³ and in some way tied to physical harm or death, profound disruptions to one's senses or personality, or a threat that a third party will be subjected to these conditions.³⁴

The United States further constrained its conception of the torture definition in Understanding 1(b) as “apply[ing] only to acts directed against persons in the offender’s custody or physical control.”³⁵ According to Understanding 1(d), for cases in which the offender acts at the acquiescence of a public official, such acquiescence requires the official’s prior awareness of the act and subsequent failure to intervene.³⁶

2. State obligation to prevent certain acts

Foremost amongst the state obligations espoused by the C.A.T. is Article 2’s mandate to “prevent acts of torture in any territory under its jurisdiction.”³⁷ Prevention shall, amongst other measures taken by State parties, take the form of “effective legislative, administrative, [and]

32. COMM. ON FOREIGN RELATIONS, CONVENTION AGAINST TORTURE AND OTHER CRUEL, INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT, S. REP. NO. 101-30, 2d Sess., at 14 (1990) [hereinafter S. REP. NO. 101-30] (“The purposes given are not exhaustive, as is indicated by the phrasing ‘for such purposes as.’ Rather, they indicate the type of motivation that typically underlies torture, and emphasize the requirement for deliberate intention or malice.”).

33. 136 CONG. REC. 36198 (1990) (clarifying that “mental pain or suffering refers to prolonged mental harm”).

34. *Id.* (“[M]ental pain or suffering . . . caused by or resulting from: (1) the intentional infliction or threatened infliction of severe physical pain or suffering; (2) the administration or application, or threatened administration or application, of mind altering substances or other procedures calculated to disrupt profoundly the senses or the personality; (3) the threat of imminent death; or (4) the threat that another person will imminently be subjected to” the foregoing harms); 18 U.S.C.S. § 2340 (LexisNexis 2018).

35. 136 CONG. REC. 36198 (1990).

36. *Compare id.* (“the term ‘acquiescence’ requires that the public official, *prior* to the activity constituting torture, have *awareness* of such activity and *thereafter breach his legal responsibility* to intervene to prevent such activity.”) (emphasis added), *with* *Ontunez-Tursios v. Ashcroft*, 303 F.3d 341, 354 (5th Cir. 2002) (“‘Willful blindness’ suffices to prove ‘acquiescence.’”) and *Reyes-Reyes v. Ashcroft*, 384 F.3d 782, 787 (9th Cir. 2004) (distinguishing “willful blindness” from “knowingly acquiesc[ing],” the former being sufficient and the latter unnecessary to constitute torture under the CAT).

37. Convention Against Torture, *supra* note 9, at art. 2.1.

judicial . . . measures.”³⁸ The same prevention directives apply to acts which are “cruel, inhuman[,] or degrading” but fall short of the torture definition.³⁹ However, this obligation to prevent does not apply with equal force to the Article 1 obligations.⁴⁰

3. *State obligation to investigate, arrest, and prosecute torture suspects*

If torturous acts occur or are attempted within its jurisdiction,⁴¹ regardless of a state’s efforts to prevent them, a state party to the C.A.T. has the distinct and affirmative obligation to address the issue within its domestic criminal law system.⁴² This obligation enables torture victims to seek redress for their severe pain or suffering by providing them with a private right of action subject to prompt judicial review.⁴³

To effectuate this review, state parties must promptly investigate where there are reasonable grounds to believe torture occurred.⁴⁴ If satisfied by the allegations’ factual basis, considering all available information, a state party must arrest the perpetrators or otherwise

38. *Id.*

39. *Id.* at art. 16.1 (“Each State Party shall undertake to prevent in any territory under its jurisdiction other acts of cruel, inhuman, or degrading treatment or punishment, which do not amount to torture . . . when such acts are committed by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.”).

40. *Compare* S. REP. NO. 101-30, *supra* note 32, at 25 (1990) (“Article 16 thus creates a separate and more limited obligation . . .”), *with* IMMIGRATION AND REFUGEE LAW AND POLICY, *supra* note 23, at 1380-81 (differentiating Article 16 obligations from Article 2 ones on the basis that the former “merely require[s] states to include certain information in the education and training of law enforcement officials, investigate alleged misconduct, and provide a forum for complaints.”).

41. *See generally* Convention Against Torture, *supra* note 9, at art. 5 (“Each State Party shall . . . establish its jurisdiction over the offences referred to in article 4” via territorial, active, and passive jurisdiction).

42. *See id.* at art. 4.1 (“Each State Party shall ensure that all acts of torture are offenses under its criminal law” including attempted torture and conspirator liability); *id.* at art. 4.2 (“Each State Party shall make these offenses punishable. . .”).

43. *See id.* at art. 13 (“Each State Party shall ensure that any individual who alleges he has been subjected to torture in any territory under its jurisdiction has the *right to complain to, and to have his case promptly and impartially examined* by, its competent authorities.”) (emphasis added).

44. *Id.* at art. 12 (“Each State Party shall ensure . . . prompt and impartial investigation, wherever there is *reasonable ground to believe* that an act of torture has been committed. . .”) (emphasis added).

ensure their appearance in court.⁴⁵ Once arrested, the state party must subsequently extradite the torture suspect to his/her home country, subject to limited restrictions,⁴⁶ or prosecute him/her.⁴⁷

4. *Civil remedies for C.A.T. violations*

Article 14 of the C.A.T. provides an alternate, not substitute, remedy for torture victims: civil compensation.⁴⁸ It establishes “an enforceable right to fair and adequate compensation” for claimants.⁴⁹ Types of compensation, however, are left open-ended.⁵⁰ Still, States must “ensure” that some form of this right be available to torture victims.⁵¹

B. THE TRUMP ADMINISTRATION’S ZERO-TOLERANCE POLICY AND RESULTING MASS SEPARATION OF MIGRANT FAMILIES BY FEDERAL AGENCIES

1. *Implementation of the zero-tolerance policy and the roles of various federal agencies*

On April 6, 2018, then Attorney General Jeff Sessions instructed the Department of Homeland Security (D.H.S.) and Department of Justice (D.O.J.) to adopt a “zero-tolerance policy” (Z.T.P.) for all suspected violations of 8 U.S.C. § 1325(a) along the United States’ Southern

45. *Id.* at art. 6.1 (“Upon being satisfied, after an examination of information available to it, . . . any State Party in whose territory a person alleged to have committed [torture under domestic law] is present *shall take him into custody* or take other legal measures to ensure his presence.”) (emphasis added).

46. *See id.* at art. 3.1 (prohibiting extradition to a state in which there are “substantial grounds for believing” that the individual may be subjected to torture, otherwise known as nonrefoulement obligations).

47. *Id.* at art. 7.1 (“The State Party . . . *shall . . .*, if it does not *extradite* [the suspect], submit the case to its competent authorities for the purpose of *prosecution*.”) (emphasis added).

48. *Id.* at art. 14.1 (“Each State Party *shall* ensure in its legal system that the victim of an act of torture obtains redress and has an *enforceable right to fair and adequate compensation, including* the means for as full rehabilitation as possible. In the event of the death of the victim as a result of an act of torture, his dependents shall be entitled to compensation.”) (emphasis added).

49. *Id.*

50. *Id.* (using of the word “including” before listing “full rehabilitation” as a form of redress).

51. *Id.* (failing to clearly state whether such compensation is available to victims of acts that fall short of the torture definition under Article 16).

Border.⁵² That same day, President Trump terminated a policy authorizing various federal agencies to release migrant children and families from detention pending rulings in their asylum cases.⁵³

Though not explicitly stated in either executive order, their combined effect resulted in the D.H.S. separating undocumented children from their families along the U.S.-Mexico border.⁵⁴ To comply with both directives, the D.O.J. took all apprehended adults into custody as they “await[ed] prosecution for immigration offenses,” rendering the separated minors Unaccompanied Minor Children (U.A.C.s).⁵⁵ The Office of Refugee Resettlement (O.R.R.), a distinct office within the Department of Health and Human Services (D.H.H.S.), then obtained custody of these newly-designated U.A.C.s.⁵⁶ The O.R.R. placed these children in a variety of facilities, from adult detention centers,⁵⁷ to

52. Attorney General Zero Tolerance Memorandum, *supra* note 10 (“Today’s zero-tolerance policy further directs each U.S. Attorney’s Office along the Southwest Border . . . to prosecute all Department of Homeland Security referrals of section 1325(a) violations, to the extent practicable.”); 8 U.S.C.S. § 1325(a) (LexisNexis 2019) (“Any alien who (1) enters or attempts to enter the United States at any time or place other than as designated by immigration officers . . . shall, for the first commission of any such offense, be fined . . . or imprisoned not more than 6 months, or both. . .”).

53. *Presidential Memorandum for the Secretary of State, the Secretary of Defense, the Attorney General, the Secretary of Health and Human Services, and the Secretary of Homeland Security*, WHITE HOUSE (Apr. 6, 2018), <https://www.whitehouse.gov/presidential-actions/presidential-memorandum-secretary-state-secretary-defense-attorney-general-secretary-health-human-services-secretary-homeland-security/> (last visited Feb. 28, 2018) [hereinafter *Presidential Memorandum*] (equating asylum to “catch and release”).

54. OFFICE OF THE INSPECTOR GENERAL, *supra* note 11 (“Under these policies, when a child and parent were apprehended together by immigration authorities, DHS separated the family. . .”).

55. See 6 U.S.C. § 279(g)(2) (2012) (defining UACs as children under the age of eighteen lacking lawful immigration status who are in the US without a parent or guardian “available to provide care and physical custody”); HHS OIG REPORT, *supra* note 11 (attributing these separation practices to the Attorney General’s and President’s mandates).

56. *Children Entering the United States Unaccompanied: Section 1 Placement in ORR Care Provider Facilities*, OFF. OF REFUGEE RESETTLEMENT, <https://www.acf.hhs.gov/orr/resource/children-entering-the-united-states-unaccompanied-section-1#1.1> (last visited Jan. 1, 2019) [hereinafter *Children Entering the United States Unaccompanied*].

57. See Manny Fernandez et al., *The Price of Trump’s Migrant Deterrence Strategy: New Chaos on the Border*, N.Y. TIMES (Jan. 4, 2019), <https://www.nytimes.com/2019/01/04/us/mexico-wall-policy-trump.html> (describing “bare-bones government detention facilities never intended for children”).

responsibility for separating migrant families.⁶³ For example, then D.H.S. Secretary Kirstjen Nielsen denied the policy's existence⁶⁴ while Trump simultaneously acknowledged and blamed Democrats for it.⁶⁵

Numerous D.H.S. officials, then Attorney General Jeff Sessions, and White House advisor Stephen Miller echoed an alternate explanation: that the Trump Administration intended to deter families from entering the United States via the zero-tolerance policy.⁶⁶ The acting White House Chief of Staff John Kelly stated that “a big name of the game is deterrence. . . .”⁶⁷ A draft memo co-authored by the D.O.J. and the

63. See Julie Hirschfeld Davis, *Trump Again Falsely Blames Democrats for His Separation Tactic*, N.Y. TIMES (June 16, 2018), <https://www.nytimes.com/2018/06/16/us/politics/trump-democrats-separation-policy.html> (reporting that Trump “repeated his false assertion that Democrats were responsible” for child separations while Sessions “made a spirited case for it, arguing that a strict approach is a vital tool for deterrence”).

64. Kirstjen Nielsen (@SecNielsen), TWITTER (June 17, 2018, 2:52 PM), <https://twitter.com/SecNielsen/status/1008467414235992069> (“We do not have a policy of separating families at the border. Period.”); see generally Stef W. Kight, *Senator Asks FBI to Open Perjury Investigation into Kirstjen Nielsen*, AXIOS (Jan. 18, 2019), <https://www.axios.com/immigration-family-separation-nielsen-lying-fbi-merkle-830b1cec-d761-4427-a003-522987fc7e19.html> (accusing Sec. Nielsen of perjuring herself by denying that the Trump Administration had a child separation policy).

65. See Donald J. Trump (@realDonaldTrump), TWITTER (May 26, 2018, 6:59 AM), <https://twitter.com/realDonaldTrump/status/1000375761604370434> (“Put pressure on the Democrats to end the horrible law that separates children from there [sic] parents once they cross the Border. . . .”); *id.* (June 16, 2018, 6:03AM), <https://twitter.com/realDonaldTrump/status/1007972046666690561> (“Democrats can fix their forced family breakup at the Border. . . .”).

66. See HIRSCHFELD DAVIS, *supra* note 63 (naming numerous DHS officials and Sessions as proponents of the deterrence strategy); Nick Miroff et al., *Trump Administration Weighs New Family-Separation Effort at Border*, WASH. POST (Oct. 12, 2018), https://www.washingtonpost.com/local/immigration/trump-administration-weighs-new-family-separation-effort-at-border/2018/10/12/45895cce-cd7b-11e8-920f-dd52e1ae4570_story.html [hereinafter Miroff et al., *Trump Administration Weighs New Family-Separation Effort at Border*] (“. . . Stephen Miller is advocating for tougher measures because he believes the springtime separations worked as an effective deterrent to illegal crossings.”); Raul A. Reyes, Opinion, *Taken from Their Parents: There is Nothing Right About This*, CNN (Apr. 23, 2018), <https://www.cnn.com/2018/04/23/opinions/taken-from-their-parents-there-is-nothing-right-about-this-reyes/index.html> (stating that DHS officials claiming the separations were meant to “protect the best interests of minor children crossing our borders” rather than deter undocumented entry).

67. John Burnett, *Transcript: White House Chief of Staff John Kelly's Interview with NPR*, NPR (May 11, 2018), <https://www.npr.org/2018/05/11/610116389/transcript-white->

D.H.S. in December 2017 also revealed an intent to deter.⁶⁸

Emblematic of the fragmented executive responses to public outcry, President Trump issued an Executive Order on June 20, 2018 that at once reiterated his Administration's continued efforts "to rigorously enforce our immigration laws" while announcing a new policy of "maintain[ing] family unity," subject to several qualifications.⁶⁹ This second Executive Order effectively ended the Trump Administration's Z.T.P.⁷⁰ but not its child separation policy.⁷¹ In subsequent months, information about the scale of child separations emerged with figures ranging from a total of 700 to over 2,600 displaced children.⁷²

house-chief-of-staff-john-kellys-interview-with-npr [hereinafter Burnett, *John Kelly's Interview with NPR*]; see also Philip Bump, *Here are the Administration Officials Who Have Said that Family Separation is Meant as a Deterrent*, WASH. POST (June 19, 2018), <https://www.washingtonpost.com/news/politics/wp/2018/06/19/here-are-the-administration-officials-who-have-said-that-family-separation-is-meant-as-a-deterrent/>.

68. See Julia Ainsley, *Trump Admin Weighed Targeting Migrant Families, Speeding Up Deportation of Children*, NBC NEWS (Jan. 17, 2019), <https://www.nbcnews.com/politics/immigration/trump-admin-weighed-targeting-migrant-families-speeding-deportation-children-n958811> (opining, according to the memo's authors, that an "increase in prosecutions would be reported by the media and it would have a substantial deterrent effect").

69. See Exec. Order No. 13841, 83 Fed. Reg. 29435 (June 20, 2018) (blaming Congressional inaction for "put[ting] the Administration in the position of separating alien families to effectively enforce the law"); see also *L. v. United States Immigr. & Customs Enft* ("ICE"), 310 F. Supp. 3d 1133, 1142 (S.D. Cal. 2018) [hereinafter *L. v. ICE*] (pointing out numerous qualifications that temper the Executive Order's ability to halt child separations).

70. See Michael D. Shear et al., *Trump Retreats on Separating Families, but Thousands Remain Apart*, N.Y. TIMES (June 20, 2018), <https://www.nytimes.com/2018/06/20/us/politics/trump-immigration-children-executive-order.html?module=inline> ("President Trump caved to enormous political pressure on Wednesday and signed an executive order meant to end the separation of families at the border by detaining parents and children together for an indefinite period.").

71. See Miroff, *supra* note 66 ("The White House is actively considering plans that could again separate parents and children at the U.S.-Mexico border . . . " in October 2018).

72. Compare Caitlin Dickerson, *Hundreds of Immigrant Children Have Been Taken from Parents at U.S. Border*, N.Y. TIMES (April 20, 2018), <https://www.nytimes.com/2018/04/20/us/immigrant-children-separation-ice.html?module=inline> (quoting an HHS employee at 700 displaced children), with U.S. GOV'T ACCOUNTABILITY OFF., GAO-19-163, UNACCOMPANIED CHILDREN: AGENCY EFFORTS TO REUNIFY CHILDREN SEPARATED FROM PARENTS AT THE BORDER 3

Oversight agencies later found that “thousands more” children than previously disclosed were separated⁷³ and that the total number may never be known.⁷⁴ One reason for this uncertainty are revelations that the Administration’s child separations began long before the April 2018 Z.T.P. announcement.⁷⁵ Another reason is that the government tested new ways to continue the Z.T.P. by other names and means.⁷⁶ In fact, in October 2018, Trump reiterated his Administration’s deterrence strategy.⁷⁷ The American Civil Liberties Union (A.C.L.U.) further asserts

(2018), <https://www.gao.gov/assets/700/694918.pdf> (arriving at an estimate of 2,654) [hereinafter GAO UNACCOMPANIED CHILDREN] and OFFICE OF THE INSPECTOR GENERAL, *supra* note 11 (2,737).

73. See JORDAN, *supra* note 72 (relaying an estimate obtained from Ann Maxwell, HHS’ Assistant Inspector General for Evaluation and Inspections); Dartunorro Clark, *GOP Removes Lawmaker’s Remarks from the Record After Dispute over Border Deaths*, NBC NEWS (May 22, 2019), <https://www.nbcnews.com/politics/congress/gop-removes-lawmaker-s-remarks-record-after-dispute-over-border-n1008886> (estimating that 5,000 children had been separated as of May 2019, according to Rep. Lauren Underwood, D-Illinois).

74. See HHS OIG REPORT, *supra* note 11 (“The total number of children separated from a parent or guardian by immigration authorities is unknown . . . [T]housands of children may have been separated during an influx that began in 2017, before the accounting required by the Court [in *L. v. ICE*], and HHS has faced challenges in identifying separated children.”).

75. See JORDAN, *supra* note 72 (“But even before the administration officially unveiled the zero-tolerance policy in the spring of 2018, staff of the [DHHS] . . . had noted a ‘sharp increase’ in the number of children separated from a parent or guardian, according to the report from the agency’s Office of the Inspector General.”).

76. *E. Bay Sanctuary Covenant v. Trump*, 909 F.3d 1219, 1231 (9th Cir. 2018), *aff’d*, 202 L.Ed.2d 510 (U.S. 2018) (denying the government’s request for a stay of a temporary restraining order that prevented it from denying asylum claims from those who crossed the US-Mexico border anywhere other than a port of entry, including children applying for derivative asylum through a parent); *E.g.*, Miroff et al., *Trump Administration Weighs New Family-Separation Effort at Border*, *supra* note 66 (outlining options the White House subsequently considered to effectuate child separations by other means, including a “binary choice” proposal in which parents detained with their children could decide whether to remain detained indefinitely or relinquish custody of their children to government shelters); Pam Fessler, *Proposed Rule Could Evict 55,000 Children from Subsidized Housing*, NPR (May 10, 2019), <https://www.npr.org/2019/05/10/722173775/proposed-rule-could-evict-55-000-children-from-subsidized-housing> (proposing, via the Department of Housing and Urban Development, a rule withdrawing housing subsidies for 25,000 families of mixed immigration statuses, which “the agency assumes” would cause them to separate).

77. *Trump Speaks About Border Security on South Lawn*, MSNBC (Oct. 13, 2018), <https://www.msnbc.com/msnbc/watch/trump-speaks-about-border-security-on-south-lawn-1343657027589> (“If they feel there will be separation, they won’t come.”).

that between June 28, 2018 and June 29, 2019, the Trump Administration separated an additional 911 families.⁷⁸ Due to the nebulous nature of its start and end dates, for the purposes of this Comment, references to the Z.T.P. shall encompass all child separations during President Trump's tenure.

3. *Detention facility conditions and their effects on migrant children's health*

Conditions at immigration detention facilities have been criticized long before the Z.T.P. took effect.⁷⁹ They include recorded instances of physical and sexual abuse, lack of adequate medical care, and inmate suicides.⁸⁰ The U.S. government itself determined that, as of 2015, "certain D.H.S.-owned facilities and [Contract Detention Facilities] are subjecting detained immigrants to torture-like conditions."⁸¹ These problems were exacerbated by the sudden influx of thousands of migrant children who were, as a result of the Z.T.P., automatically deemed U.A.C.s and sent to immigration detention centers.⁸²

78. Elliot Spagat & Astrid Galvan, *ACLU: 911 children split at border since 2018 court order*, AP NEWS (July 31, 2019), <https://www.apnews.com/ba5a05e6a7f14b6b898d75712dee1f6b> ("More than 900 children, including babies and toddlers, were separated from their parents at the border in the year after a judge ordered the practice be sharply curtailed[.]").

79. See, e.g., HUM. RTS. WATCH, CODE RED: THE FATAL CONSEQUENCES OF DANGEROUSLY SUBSTANDARD MEDICAL CARE IN IMMIGRATION DETENTION 1 (June 2018), <https://www.hrw.org/report/2018/06/20/code-red/fatal-consequences-dangerously-substandard-medical-care-immigration> [hereinafter CODE RED] (comparing present death rates among immigration detention inmates to figures dating back to 2009).

80. *United States Immigration Detention Profile*, GLOBAL DETENTION PROJECT, May 2016, <https://www.globaldetentionproject.org/countries/americas/united-states> (last visited Feb. 23, 2019) (citing various reports, including the New York Times in 2010, ICE in 2009, and Amnesty International in 2009).

81. *With Liberty and Justice for All: The State of Civil Rights at Immigration Detention Facilities*, U.S. COMM'N ON CIV. RTS., Sept. 2015, at 149-50 [hereinafter *With Liberty and Justice for All*].

82. See e.g., John Burnett, *Almost 15,000 Migrant Children Now Held at Nearly Full Shelters*, NPR (Dec. 13, 2018), <https://www.npr.org/2018/12/13/676300525/almost-15-000-migrant-children-now-held-at-nearly-full-shelters> [hereinafter Burnett, *Almost 15,000 Migrant Children Now Held at Nearly Full Shelters*] (attributing the DHHS' detention facilities being over ninety percent full and in poor condition to the increased number of UACs held under the ZTP).

i. Abuse and deaths of migrant children

Pediatrics experts, including members of the American Academy of Pediatrics, have determined that “[t]he Department of Homeland Security facilities do not meet the basic standards for the care of children in residential settings.”⁸³ Pediatricians have also noted pervasively “egregious conditions” in child immigration detention.⁸⁴ Such conditions include “constant light exposure, children sleeping on concrete floors . . . insufficient food, [and the] denial of access to thorough medical care . . .”⁸⁵ The A.C.L.U. further asserted that child immigrants in federal custody are exposed to “federal officials’ verbal, physical and sexual abuse . . . the denial of clean drinking water and adequate food . . . [and] detention in freezing, unsanitary facilities.”⁸⁶

The O.R.R. has, according to an investigative report, housed migrant children in nonprofit facilities with known histories of neglect or abuse.⁸⁷ For example, in Texas, “state inspectors have cited homes with more than 400 deficiencies,” including the failure to seek medical care for children with burns, broken wrists, and sexually transmitted diseases.⁸⁸ In Arizona, video evidence revealed several staffers at a private shelter pushing and dragging three children on the floor.⁸⁹

83. Julie M. Linton et al., American Academy of Pediatrics, Council on Community Pediatrics, *Detention of Immigrant Children*, 139 PEDIATRICS 5 (2017).

84. Laura C. N. Wood, *Impact of Punitive Immigration Policies, Parent-Child Separation and Child Detention on the Mental Health and Development of Children*, BMJ PAEDIATRICS OPEN (July 24, 2018), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6173255/>.

85. *Id.*

86. *ACLU Obtains Documents Showing Widespread Abuse of Child Immigrants in U.S. Custody*, ACLU (May 22, 2018), <https://www.aclu.org/news/aclu-obtains-documents-showing-widespread-abuse-child-immigrants-us-custody> (last visited Feb. 15, 2018) [hereinafter *ACLU Abuse Report*].

87. *See e.g.*, Aura Bogado et al., *Migrant Children Sent to Shelters with Histories of Abuse Allegations*, REVEAL NEWS (June 20, 2018), <https://www.revealnews.org/article/migrant-children-sent-to-shelters-with-histories-of-abuse-allegations/> (finding that “federal officials continued sending children who crossed the border to shelters after . . . [incidents of child abuse in these facilities] came to light”).

88. *Id.*

89. Dakin Andone et al., *Videos Showing Shelter Staffers Pushing, Shoving Migrant Children Under Review for Possible Criminal Charges*, CNN (Dec. 30, 2018), <https://www.cnn.com/2018/12/30/us/arizona-migrant-child-abuse-allegations/index.html>.

Sustained sexual abuse allegations of detained migrant children by nonprofit employees have also not prevented the O.R.R. from renewing or continuing contracts with these partner organizations.⁹⁰ In fact, of the O.R.R.'s \$3.4 billion budget for paying private organizations to house migrant children between 2014 and 2018, \$1.5 billion of that was paid to companies facing allegations of serious maltreatment, including child pornography and sexual abuse.⁹¹ Sexual misconduct accusations against federal officials regarding children held in custody also abound.⁹² Evidence also suggests that federal officials “were aware of these abuses as they occurred, but failed to properly investigate, much less to remedy, these abuses.”⁹³ D.H.S. received about two hundred claims of sexual abuse of detainees between 2007 and 2015, not including the unknown number of cases that have not been reported.⁹⁴

Detention conditions have also led to the numerous deaths during the Trump Administration's tenure, including at least seven minors.⁹⁵ As of this publication, the earliest known death of a minor in U.S. government custody was that of Darlyn Cristabel Cordova-Valle, a ten-year-old, in September 2018.⁹⁶

Maríee Juárez, a twenty-month-old infant, died from a respiratory illness in May 2018 that her mother alleges developed while in

90. Bogado et al., *supra* note 86 (detailing various acts of sexual abuse or child pornography in nonprofit detention facilities for children in Florida, New York, Maine, and Texas between 2014 and 2018).

91. *Id.*

92. Pamela Brown & Steve Almasy, *Sexual Abuse of Minors Alleged at Border as Kids Flock Into U.S.*, CNN (June 12, 2014), <https://www.cnn.com/2014/06/11/us/undocumented-children-immigrants-abuse-complaint/> (citing a complaint filed by the ACLU on behalf of 116 minors).

93. *ACLU Abuse Report*, *supra* note 85.

94. *With Liberty and Justice for All*, *supra* note 80, at 149-50.

95. See Nicole Acevedo, *Why are Migrant Children Dying in U.S. Custody?*, NBC NEWS (May 29, 2019), <https://www.nbcnews.com/news/latino/why-are-migrant-children-dying-u-s-custody-n1010316> (“At least seven children are known to have died in immigration custody since last year, after almost a decade in which no child reportedly died while in the custody of U.S. Customs and Border Protection.”); see also Lisa Riordan Seville et al., *22 Immigrants Died in ICE Detention Centers During the Past 2 Years*, NBC NEWS (Jan. 6, 2019), <https://www.nbcnews.com/politics/immigration/22-immigrants-died-ice-detention-centers-during-past-2-years-n954781> (addressing twenty-two detainees' deaths at ICE facilities during the Trump Administration, most of whom were adults).

96. See ACEVEDO, *supra* note 94 (congenital heart defect).

Immigration and Customs Enforcement (I.C.E.) custody.⁹⁷ On December 8, 2018, 7-year-old Jakelin Caal Maquín “died of dehydration and shock less than 36 hours after she was apprehended by border agents.”⁹⁸ About two weeks later, a Guatemalan boy named Felipe Alonzo-Gomez succumbed to an unknown illness while in U.S. Customs & Border Patrol (C.B.P.) custody.⁹⁹

In April 2019, Juan de León Gutiérrez entered O.R.R. custody, transferred to a federally funded shelter, and died within nine days.¹⁰⁰ For Wilmer Josué Ramírez Vásquez, eighteen months-old, it took just three days.¹⁰¹ A week later, Carlos Hernandez Vásquez was found unresponsive in a shared cell.¹⁰² The A.C.L.U. also detailed how one detainee’s pregnancy resulted in a stillbirth after C.B.P. officials “[d]enied [the] pregnant minor medical attention when she reported pain.”¹⁰³

97. See Nomaan Merchant, *U.S. Sued for \$60 Million After Infant in Detention Later Died*, WASH. POST (Nov. 27, 2018), <https://www.washingtontimes.com/news/2018/nov/27/us-sued-for-60-million-after-infant-in-detention-1/> (seeking damages for substandard medical care that resulted in the illness and releasing the pair while Marice was still ill).

98. Nick Miroff, *7-year-old Migrant Girl Taken into Border Patrol Custody Dies of Dehydration, Exhaustion*, WASH. POST (Dec. 13, 2018), https://www.washingtonpost.com/world/national-security/7-year-old-migrant-girl-taken-into-border-patrol-custody-dies-of-dehydration-exhaustion/2018/12/13/8909e356-ff03-11e8-862a-b6a6f3ce8199_story.html [hereinafter Miroff, *7-year-old Migrant Girl Taken into Border Patrol Custody Dies of Dehydration, Exhaustion*]; Francesca Paris, *8-Year-Old Migrant Boy Dies in Government Custody in New Mexico Hospital*, NPR (Dec. 25, 2018), <https://www.npr.org/2018/12/25/680066848/8-year-old-migrant-boy-dies-in-government-custody-in-new-mexico-hospital>.

99. See Lenny Bernstein et al., *Migrant Boy Dies in U.S. Custody; Trump Vows Shutdown Will Last Until Border Wall is Funded*, WASH. POST (Dec. 26, 2018), https://www.washingtonpost.com/national/health-science/an-8-year-old-migrant-has-died-in-us-custody-on-christmas-day/2018/12/25/b45d387a-0870-11e9-85b6-41c0fe0c5b8f_story.html.

100. See Molly Hennessy-Fiske, *Six Migrant Children have Died in U.S. Custody. Here's What We Know About Them*, L.A. TIMES (May 24, 2019), <https://www.latimes.com/nation/la-na-migrant-child-border-deaths-20190524-story.html> (brain infection).

101. See *id.* (pneumonia).

102. See *id.* (dying without prior hospitalization for the flu).

103. *ACLU Abuse Report*, *supra* note 85.

ii. Psychological effects of detention on children

Amnesty International's Americas Director, Erika Guevara-Rosas, has derided the Z.T.P. as a "spectacularly cruel policy" that dumps children into "overflowing detention centers, which are effectively cages."¹⁰⁴ She concludes that such treatment "is nothing short of torture."¹⁰⁵ The U.S. Commission on Civil Rights reached a similar conclusion in 2015 regarding the "torture-like physical and emotional pain" federal officials inflicted upon migrants as a form of punishment for their undocumented status.¹⁰⁶

Multiple pending lawsuits allege that, among other things, agencies acting as government contractors to detain migrant children have "[d]osed children with cocktails of psychotropic drugs disguised as vitamins" and held children "down for forcible injections, which medical records show are powerful antipsychotics and sedatives."¹⁰⁷ These medications rendered migrant children "unable to walk, afraid of people, and wanting to sleep constantly."¹⁰⁸ As a result, at least one federal court has ordered the Trump Administration to end its practice of prescribing powerful psychotropic drugs.¹⁰⁹

Aside from involuntary medical treatment, separations themselves may have profoundly negative effects on children's mental health.¹¹⁰

104. *USA: Policy of Separating Children from Parents is Nothing Short of Torture*, *supra* note 2.

105. *Id.* ("The severe mental suffering that officials have intentionally inflicted on these families for coercive purposes, means that these acts meet the definition of torture under both US and international law.")

106. *See With Liberty and Justice for All*, *supra* note 80, at 150.

107. Blake Ellis et al., *Handcuffs, Assaults, and Drugs Called 'Vitamins': Children Allege Grave Abuse at Migrant Detention Facilities*, CNN (June 22, 2018), <https://edition.cnn.com/2018/06/21/us/undocumented-migrant-children-detention-facilities-abuse-invs/index.html>.

108. REVEAL NEWS, *supra* note 87; *see also* Tessa Stuart, *The Trump Administration was Ordered to Stop Drugging Kids in Custody*, ROLLING STONE (Aug. 1, 2018), <https://www.rollingstone.com/politics/politics-news/trump-administration-drugging-kids-704431/> (recalling a boy's account of taking seven unknown pills in the morning, nine at night, and receiving injections to stifle his behavior).

109. STUART, *supra* note 107.

110. *See* Press Release, Am. Psychol. Ass'n, Statement of APA President Regarding the Traumatic Effects of Separating Immigrant Families (May 19, 2018), (on file at <https://www.apa.org/news/press/releases/2018/05/separating-immigrant-families>) (providing that according to the American Psychological Association's President, "[t]he

Adverse outcomes include post-traumatic stress disorder, disrupted neurodevelopment, toxic stress, depression, and heightened risks of both chronic mental and physical illnesses.¹¹¹ More than a thousand mental health professionals agree that “disruptive attachment experiences can have profoundly negative impacts . . . not only during the acute phase of experience, but as well across the lifespan. . . .”¹¹² According to one study, the harmful mental health outcomes for refugee family separations equates only to, among a list of twenty-six types of trauma, physical beatings, or torture.¹¹³

4. Federal court intervention: *L. v. ICE*

On June 26, 2018, the U.S. District Court for the Southern District of California (S.D. Cal.) granted a class-wide preliminary injunction intended to halt the Trump Administration’s child separation policy.¹¹⁴ The certified class included all adult parents held in immigration detention centers and separated from their minor children who were, in turn, detained in O.R.R. facilities, O.R.R. foster care, or other D.H.S. locations.¹¹⁵ Absent individualized findings that a parent was unfit to care

longer that children and parents are separated, the greater the reported symptoms of anxiety and depression for the children.”).

111. See Letter from Physicians for Human Rights to Kirstjen Nielsen, Sec’y, U.S. Department of Homeland Security, to Jeff Session, Att’y Gen., U.S. Department of Justice (June 14, 2018) [hereinafter PHR Letter] (arguing that these adverse outcomes can result in social, emotional, and cognitive impairment that can continue into adulthood); *Take Action to End Family Separation*, PHYSICIANS FOR HUM. RTS. (Sept. 26, 2018), <https://phr.org/resources/take-action-to-end-family-separation/#top> (indicating that over 5,000 medical professionals signed a petition to end family separation because it is profoundly harmful to families and violates fundamental human rights).

112. Press Release, N.Y. State Psychol. Ass’n, NYSPA’s Statement on Children Separated from Their Parents at the Border (June 12, 2018), <https://www.nyspa.org/news/404727/NYSPAs-Statement-on-Children-Separated-from-Their-Parents-at-the-Border.htm> (downloaded Jan. 7, 2019).

113. Alexander Miller et al., *Understanding the Mental Health Consequences of Family Separation for Refugees: Implications for Policy and Practice*, 88 AM. J. ORTHOPSYCHIATRY 26 (2018) (forthcoming Jan. 2019) (manuscript at 14-15) (on file with author).

114. See *L. v. ICE*, 310 F. Supp.3d, at 1141, 1148-49 (granting the injunction and ordering, amongst other things, that the government stop separating class members and reunify ones who have already been separated).

115. See *L. v. United States Immigration & Customs Enft* (“ICE”), No. 18cv0428 DMS (MDD), 2018 U.S. Dist. LEXIS 107364, at *4, *27-28 (S.D. Cal. June 26, 2018); see also *ACLU Comment on Family Separation Ruling*, ACLU (Mar. 8, 2019),

for or presented a danger to the child, the Court held that the U.S. government could no longer separate migrant families.¹¹⁶ Thus the government's child separation policy, at least theoretically, ended.

To reach this result, the S.D. Cal. ruled that the irreparable harm of separating class members from their children¹¹⁷ warranted extraordinary relief in the form of a class injunction nationwide.¹¹⁸ Although the relevant class consisted entirely of parents, the Court addressed some long-term harms that the Z.T.P. inflicted upon migrant children.¹¹⁹ Using these "children as tools in the parents' criminal and immigration proceedings," the S.D. Cal. found was "so 'brutal and offensive'" that it "shock[ed] the contemporary conscience."¹²⁰

The U.S. government's response consisted of arguments that this injunction would prevent the Executive Branch from enforcing criminal and immigration laws.¹²¹ Ultimately, this failed to persuade the court. The Trump Administration remained free to enforce the law as the injunction only restrained the manner in which it separated families.¹²²

<https://www.aclu.org/news/aclu-comment-family-separation-ruling> (explaining that the U.S. District Judge agreed to expand the class to include those families separated beginning July 1, 2017 instead of June 26, 2018).

116. *L. v. ICE*, 310 F. Supp.3d at 1149.

117. *See id.* at 1146 ("The injury in this case . . . is the separation of a parent from his or her child, which the Ninth Circuit has repeatedly found constitutes irreparable harm.").

118. *See id.* at 1136 ("Extraordinary relief is requested, and is warranted under the circumstances.").

119. *See id.* at 1146-47 (citing the Children's Defense Fund as providing that separations lead to "serious, negative consequences to children's health and development" including increased risks of physical and mental illness, psychological distress, anxiety, and depression that "would follow the children well after the immediate period of separation— even after eventual reunification . . .").

120. *L. v. ICE*, 310 F. Supp.3d at 1145-46 (citing *Breithaupt v. Abram*, 352 U.S. 432, 435 (1957); *City of Sacramento v. Lewis*, 523 U.S. 833, 847 n.8 (1998)).

121. *Id.* at 1148.

122. *See id.* at 1148 ("Plaintiffs do not seek to enjoin the Executive Branch from carrying out its duties . . ."); *Rodriguez v. Robbins*, 715 F.3d 1127, 1146 (9th Cir. 2013) ("While ICE is entitled to carry out its duty to enforce the mandates of Congress, it must do so in a manner consistent with our constitutional values.").

III. ANALYSIS

A. THE U.S. BREACHED ITS OBLIGATION TO PREVENT TORTURE AND OTHER INHUMAN, CRUEL, OR DEGRADING TREATMENT UNDER THE C.A.T.

Due to the C.A.T.'s construction of international obligations under domestic criminal law, it follows that the Trump Administration's child separation policy should be assessed through a criminal lens.¹²³ Standard criminal analysis requires that an offender possess the proper *mens rea* at the time he or she commits the offense's *actus reus*.¹²⁴ Thus, if federal agents possessed the proper intent while torturous conduct occurred within their purview, as defined by the C.A.T. and modified by the United States' understandings, then those officials are subject to criminal liability for torture.¹²⁵

1. *Mens rea: reconciling the differing intent requirements for torture under the C.A.T. and the U.S. Senate's understandings*

The Convention Against Torture, ratified by the United States on October 21, 1994,¹²⁶ defines the *mens rea* for torture as "intentionally inflicting" a qualifying act upon a victim "for such purposes as" punishment, intimidation, coercion, or discrimination.¹²⁷ Underlying purposes like these may be directed toward either the victim or a third

123. See Convention Against Torture, *supra* note 9, art. 2 (preventing torture); Convention Against Torture, *supra* note 9, art. 4 (criminalizing torture); art. 12 (investigating torture allegations); Convention Against Torture, *supra* note 9, art. 6 (arresting torture suspects); Convention Against Torture, *supra* note 9, art. 7 (prosecuting or extraditing torture suspects).

124. See David Cowley, *Coincidence of Actus Reus and Mens Rea: R. v. Le Brun*, 56 J. CRIM. L. 126, 163 (1992) ("It is a general rule of criminal law that to establish liability for an offence the *mens rea* required to be proved must coincide in point of time with the act which causes the *actus reus* of the particular crime charged.").

125. See *id.*; Convention Against Torture, *supra* note 9, art. 1 (defining torture as "intentionally inflict[ing]" certain acts upon a victim with some form of consent by a public official); Convention Against Torture, *supra* note 9, art. 4 (requiring that torture be codified as a criminal offense in state parties' domestic law).

126. 8 C.F.R. § 208.18.

127. Convention Against Torture, *supra* note 9, art. 1; see LEGOMSKY ET AL., *supra* note 23, at 1381 (sharing the Senate Committee on Foreign Relations' view that "[s]ince the listed purposes are prefaced by the phrase 'such purposes as,' they seem merely illustrative, not exhaustive").

party.¹²⁸ This intent to inflict harm must accompany a public official's "instigation . . . or . . . consent or acquiescence" when performed by someone acting on their behalf.¹²⁹ Simply put, the *mens rea* for torture under the C.A.T.'s plain language is the intent to inflict an act on a person for specified purposes and with a public official's permission when performed by a deputized person.

In ratifying the C.A.T., the United States took issue with the permissive form of transferred intent from a public official to any "other person acting in an official capacity."¹³⁰ The United States specified, accordingly, that "[a]cquiescence of a public official requires . . . prior . . . awareness of [the] activity and thereafter breach his or her legal responsibility to intervene or prevent" it.¹³¹ With an eye toward awareness, state acquiescence does not require an intricate grasp of each instance of torture or a *respondeat superior* relationship.¹³² Neither does it require, according to U.S. federal caselaw, "actual control or knowledge, willful acceptance, or even an agency relationship" between the torturer and public official.¹³³ Rather, "'willful blindness' on the part of government officials toward abuse inflicted exclusively by private individuals" may suffice for acquiescence.¹³⁴

128. See Convention Against Torture, *supra* note 9, art. 1 (" . . . obtaining from . . . a third person information or a confession, punishing him for an act . . . a third person has committed or is suspected of committing, or intimidating or coercing . . . a third person. . . .").

129. *Id.*

130. 8 C.F.R. § 208.18; See also Convention Against Torture, *supra* note 9, art. 2 (describing the obligation to prevent torture); S. REP. NO. 101-30, *supra* note 32, at 14 (excluding from the torture definition that which "occurs as a wholly private act").

131. 8 C.F.R. § 208.18; see LEGOMSKY ET AL., *supra* note 23, at 1382 ("As for the 'legal responsibility' requirement . . . the General Counsel's Office of the former INS agreed, that 'legal' includes international law and that the . . . CAT itself should therefore suffice.").

132. See *Respondeat Superior*, BLACK'S LAW DICTIONARY (10th ed. 2014) ("The doctrine holding an employer or principal liable for the employee's or agent's wrongful acts committed within the scope of the employment or agency."); *Morales v. Gonzales*, 478 F.3d 972, 983 (9th Cir. 2007) ("Government acquiescence is not restricted to actual . . . knowledge.").

133. *Morales*, 478 F.3d at 983.

134. *Id.*; see *Zheng v. Ashcroft*, 332 F.3d 1186, 1197 (9th Cir. 2003) (remanding to the Board of Immigration Appeals "to apply the correct standard of 'acquiescence' as intended by the Senate in ratifying the Convention -- a standard that includes awareness and willful blindness and does not require actual knowledge or 'willful[] accept[ance].'").

The willful blindness standard, as has been applied to C.A.T. cases,¹³⁵ likens itself to one of advertent negligence rather than a rigid construction of specific intent.¹³⁶ Unsurprisingly, then, a Circuit split exists as to whether willful blindness may satisfy the C.A.T.'s acquiescence requirement.¹³⁷ Six Circuits have applied this standard and four have rejected it, while the 7th Circuit and D.C. Circuit have yet to expressly adopt or reject it.¹³⁸ Taken together, federal caselaw tends to suggest that a government official may satisfy the *mens rea* for torture under the C.A.T. by failing to intervene where awareness of an unreasonable risk exists that torture may occur at the hands of another.¹³⁹

Importantly, the element of state acquiescence is “separate and distinguishable” from that of specific intent.¹⁴⁰ Another significant difference between the *mens rea* required by the C.A.T. and by U.S. federal

135. See generally *Morales*, 478 F.3d at 983 (applying the willful blindness standard); *Zheng*, 332 F.3d at 1197 (applying the willful blindness standard and explaining that the application of the standard was intended by the Senate).

136. Compare *Advertent Negligence*, BLACK'S LAW DICTIONARY (10th ed. 2014) (“Negligence in which the actor is aware of the unreasonable risk that he or she is creating. . . .”), with *Specific Intent*, BLACK'S LAW DICTIONARY (10th ed. 2014) (“The intent to accomplish the precise criminal act that one is later charged with.”).

137. See *Orellana-Arias v. Sessions*, 865 F.3d 476, 489 n.3 (7th Cir. 2017) (“Our circuit has not affirmatively adopted the ‘willful blindness standard.’”); *Ya Pao Vang v. Lynch*, 620 F. App'x 3, 4 (1st Cir. 2015) (applying the standard); *Suarez-Valenzuela v. Holder*, 714 F.3d 241, 246 (4th Cir. 2013) (noting that the 2nd, 3rd, 5th, and 6th Circuits had discredited the willful blindness principle while the 4th and 9th Circuits approved of it); *Diaz v. Holder*, 501 F. App'x 734, 740 (10th Cir. 2012) (applying the standard); *Mendoza-Rodriguez v. United States AG*, 405 F. App'x 359, 363 (11th Cir. 2010) (applying the standard); *Ramirez-Peyro v. Holder*, 574 F.3d 893, 899 (8th Cir. 2009) (applying the standard).

138. See *Orellana-Arias*, 865 F.3d at 489; *Lynch*, 620 F. App'x at 4; *Suarez-Valenzuela*, 501 F. App'x at 246; *Diaz*, 501 D. App'x at 740; *Mendoza-Rodriguez*, 405 F. App'x at 363; *Ramirez-Peyro*, 575 F.3d at 899.

139. See *Morales*, 478 F.3d at 984 (reprimanding an immigration judge for not applying the willful blindness standard in denying an asylee's CAT claims that entailed “prison officers laughing and ignoring [the transgendered plaintiffs] screams and cries when she was repeatedly raped by fellow inmates.”); 8 C.F.R. § 208.18 (“Acquiescence of a public official requires that the public official, prior to the activity constituting torture, have awareness of such activity and thereafter breach his or her legal responsibility to intervene to prevent such activity.”); *Advertent Negligence*, *supra* note 135 (“Negligence in which the actor is aware of the unreasonable risk that he or she is creating. . . .”).

140. *Cherichel v. Holder*, 591 F.3d 1002, 1013 n.14 (8th Cir. 2010).

law is the latter's need for specific intent¹⁴¹ beyond unforeseeable consequences.¹⁴² Specific intent to inflict severe physical or mental suffering belongs to the perpetrator, whether a private party or state actor, and not necessarily the state actor who acquiesces.¹⁴³ According to this reasoning, a way to understand the interplay between state acquiescence and specific intent is that the latter belongs to a private actor who tortures, while the former assigns to the government official who is aware and breaches the C.A.T. obligation to intervene.¹⁴⁴

Mirroring this melded *mens rea* notion is the principle that repercussions incidental to lawful sanctions do not constitute torture because they lack the requisite intent.¹⁴⁵ Pain or suffering that arises from inherent or incidental conditions cannot implicate any sort of mental state.¹⁴⁶ Article 1's use of the word "only" in its last sentences, though, implies that otherwise torturous intent may coincide with or supplement legitimate penal intent.¹⁴⁷

Contravening a narrow or strict interpretation of specific intent, and lending credence to the spirit of the willful blindness standard, is the C.A.T.'s inclusion of the phrasing "for such purposes as" in Article 1.¹⁴⁸ Expansive on its face, this language does not limit the purposes

141. Compare Convention Against Torture, *supra* note 9, art. 1 ("torture . . . it intentionally inflicted on a person . . ."), with 136 CONG. REC. 36198 (1990) ("an act must be specifically intended to inflict severe physical or mental pain or suffering.") (emphasis added).

142. See 8 C.F.R. § 208.18. ("An act that results in unanticipated and unintended severity of pain and suffering is not torture.")

143. See *Cherichel*, 591 F.3d at 1013 n.14 ("[I]t is the torturer who must possess the specific intent to inflict severe physical or mental pain or suffering, not necessarily the state actor.")

144. See *id.* (reasoning that where a private actor possesses the specific intent to inflict and a public official acquiesces, torture under the CAT occurs).

145. See Convention Against Torture, *supra* note 9, art. 1 (" . . . the term 'torture' . . . does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.") (emphasis added); S. REP. NO. 101-30, *supra* note 32, at 14 (interpreting "law enforcement actions authorized by U.S. law" as incapable of being "performed with the specific intent" required for the definition of torture).

146. See S. REP. NO. 101-30, *supra* note 32, at 14 ("Because specific intent is required, an act that results in unanticipated and unintended severity of pain and suffering is not torture for the purposes of this Convention.")

147. Convention Against Torture, *supra* note 9, art. 1.

148. See *id.* (modifying the required intent); S. REP. NO. 101-30, *supra* note 32, at 14 (finding these purposes to not be exhaustive but rather illustrative examples).

underlying the intentional infliction of severe pain or suffering.¹⁴⁹ Instead, Article I recites examples like obtaining information or a confession, punishment, intimidation, coercion, and discrimination.¹⁵⁰ One may infer that a torturer's intent to deter exemplifies and conforms with the root motives envisioned by the C.A.T.¹⁵¹

2. *Actus reus: sufficiently severe pain or suffering*

To qualify as torture, the acts in question must first be adequately "severe" to distinguish themselves from Article 16's prohibition of "other acts of cruel, inhuman, or degrading treatment or punishment. . . ."¹⁵² Except for a few specified circumstances,¹⁵³ this is a fact-specific, line-drawing inquiry based upon the degree of suffering.¹⁵⁴ Denial of medical care may amount to torture.¹⁵⁵ So too may choking, ear-boxing, burning, and electric shocks.¹⁵⁶ Conversely, disorientation and sensory deprivation techniques may only amount to a level of severity meriting Article 16 treatment.¹⁵⁷

As for the severity of mental suffering, Understanding 1(a) delineates

149. See S. REP. NO. 101-30, *supra* note 32, at 14 ("The purposes given are not exhaustive, as is indicated by the phrasing "for such purposes as." Rather, they indicate the type of motivation that typically underlies torture. . . .").

150. Convention Against Torture, *supra* note 9, art. 1.

151. See *id.*; LEGOMSKY ET AL., *supra* note 23, at 1374.

152. See Convention Against Torture, *supra* note 9, art. 1 (describing the severity of the act); Convention Against Torture, *supra* note 9, art. 16 (describing other harsh acts not amounting to torture).

153. See S. REP. NO. 101-30, *supra* note 32, at 14 (excluding "rough treatment" such as police brutality).

154. Compare *Zubeda v. Ashcroft*, 333 F.3d 463, 473 (3d Cir. 2003) (considering, beyond "[t]he severe pain and suffering endemic to rape[,] factors like the rapist's intent, Article 1's specified purposes, and public officials' acquiescence), with *Roye v. AG of the United States*, 693 F.3d 333, 344 (3d Cir. 2012) (deeming rape of a mentally ill detainee "severe mistreatment" without further inquiry).

155. See *Wilson v. Seiter*, 501 U.S. 294, 308 (1991) (citing *Estelle v. Gamble*, 429 U.S. 97, 102 (1976) ("[T]he denial of medical care is cruel and unusual because, in the worst case, it can result in physical torture. . . .")); see also Rep. of the Comm. Against Torture, ¶ 175, U.N. Doc. A/53/44 (1998) (arguing that denial to medical treatment "amount[s] to cruel and degrading treatment").

156. *In re. J-E-*, 23 I. & N. Dec. 291, 302 (B.I.A. Mar. 22, 2002).

157. See *Ireland v. United Kingdom*, 2 Eur. Ct. H.R. 25, 96 (1978) (finding, before the CAT was adopted, that acts like forcing prolonged stress positions and hooding, playing continuous hissing sounds, and depriving inmates of sleep and food as inhuman and degrading treatment did not amount to torture).

its contours more precisely.¹⁵⁸ Not only must mental suffering protract over a period of time beyond the immediate event causing harm, but it needs to accompany at least one of four listed acts or threats.¹⁵⁹ Most relevant amongst these are the physical acts from the previous paragraph, administration of mind altering drugs, and utilizing procedures to profoundly disrupt one's physical senses or personality.¹⁶⁰

Second, torturous acts cannot arise solely from lawful sanctions.¹⁶¹ Sanctions include punishments, "penalties imposed in order to induce compliance," and extrajudicial law enforcement activity.¹⁶² Unlike the *mens rea* section above, the focus here is on the lawful basis of the perpetrator's actions. That the sanction must be lawful means they may include "enforcement actions authorized by law" but cannot defeat the object and purpose of the C.A.T.¹⁶³ Sanctions' lawfulness is ultimately evaluated by judicial interpretation.¹⁶⁴

Third, the victim must be in the torturer's custody or physical control.¹⁶⁵ This Comment will not delve further into this issue as it is uncontested that the children detained under the Trump Administration's Z.T.P. were in government custody.¹⁶⁶

158. See generally 136 CONG. REC. 36193 (1990) (where the United States' Senate delineates their understanding in reference to Article 1 of the Convention Against Torture).

159. See *id.* ("[M]ental pain or suffering refers to prolonged mental harm caused by or resulting from" one of four listed occurrences).

160. See *id.*

161. See Convention Against Torture, *supra* note 9, art. 1 ("It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.").

162. S. REP. NO. 101-30, *supra* note 32, at 14.

163. 8 C.F.R. § 208.18(a)(3) ("Lawful sanctions . . . do not include sanctions that defeat the object and purpose of the Convention Against Torture to prohibit torture."); see Vienna Convention on the Law of Treaties, art. 18, May 23, 1969, 1155 U.N.T.S. 331 [hereinafter Vienna Convention] (stating generally that "[a] State is obliged to refrain from acts which would defeat the object and purpose of a treaty").

164. S. REP. NO. 101-30, *supra* note 32, at 14.

165. 136 CONG. REC. 36198 (1990) (enacted).

166. See HHS OIG REPORT, *supra* note 11, at 3-4 (explaining how the DHS executed the ZTP by placing UACs in ORR custody and how the ORR oversaw the various types of facilities in which children were placed).

3. *The Trump Administration's deterrence strategy and "willful blindness" toward child migrants' severe physical and mental suffering in custody*

At the time of this writing, less than eighteen months have passed since the Z.T.P. was first implemented.¹⁶⁷ As a result, evidence continues to emerge regarding the scale of harm exacted upon unaccompanied migrant children in O.R.R. facilities, O.R.R. foster care, and D.H.S. jails.¹⁶⁸ Available information, amid ongoing disclosures, already demonstrates a pattern of mass atrocities carried out against this vulnerable group.¹⁶⁹

The Trump Administration's intent to "deter immigrants from coming to the United States illegally" and the President's inclination to support the use of torture are both well documented.¹⁷⁰ Trump's deterrence strategy forced children to suffer as a means of punishing those attempting to cross the Southern Border, intimidating others who have not yet arrived, and coercing detained parents to revoke potentially valid asylum claims in an effort to reunite with their children.¹⁷¹ Motives like these, directed at parents and other third parties to severe suffering,

167. See Attorney General Zero Tolerance Memorandum, *supra* note 10, (implementing the ZTP on April 6, 2018); *Presidential Memorandum*, *supra* note 53 (supplementing the DOJ's actions on the same date).

168. See, e.g., Jordan, *supra* note 72 (reporting the HHS' admission that thousands more children were separated than reported previously); CODE RED, *supra* note 78, at 2, 7 (acknowledging that its data sample of fifteen detainee deaths is incapable of accurately representing the conditions at "many of the 200-plus jails and prisons that ICE uses to detain immigrants"); Haag, *supra* note 168 (demonstrating one type of harm inflicted upon detained migrant children: sexual abuse).

169. E.g., Matthew Haag, *Thousands of Immigrant Children Said They Were Sexually Abused in U.S. Detention Centers, Report Says*, N.Y. TIMES (Feb. 27, 2019), <https://www.nytimes.com/2019/02/27/us/immigrant-children-sexual-abuse.html?fbclid=IwAR2TKRacQhhgFurQSv8rUTT82yp2xgrjQIJd2ovPOHxDxugK-NQXlvCz%E2%80%A6> (revealing new DOJ statistics of 4,556 sexual abuse complaints by children in ORR custody between 2014 and 2018 with a spike during the Trump Administration's ZTP).

170. See Bump, *supra* note 67 (deter); Johnson, *supra* note 1, ("Don't tell me it doesn't work- torture works . . . Believe me, it works."); Woodruff & Mak, *supra* note 7 (detailing how "top Trump aide[s] Paul Manafort" and Roger Stone previously worked as lobbyists for "dictators, guerilla groups, and despots with no regard for human rights-including one man responsible for mass amputations, and another who oversaw state-sanctioned rape").

171. See AMNESTY INTERNATIONAL, *supra* note 2; see also *L. v. ICE*, 310 F. Supp.3d at 1145-46 (using children as "tools" in parents' criminal and immigration proceedings).

suffice for the “purposes” underlying torture.¹⁷² Acts that further these purposes cannot, then, be said to only arise from lawful sanctions, as this supplemental intent to penal interests directly contradicts the object and purpose of the C.A.T.¹⁷³

Additionally, the Z.T.P. demonstrated a “casual, if not deliberate, separation of families,” including those arriving legally with valid asylum claims, which expanded the U.S. government’s actions beyond their lawful scope.¹⁷⁴ Rather than merely enforcing the law, the evidence “portray[s] reactive governance— responses to address a chaotic circumstance of the Government’s own making.”¹⁷⁵

Considering the information that has surfaced since the *L. v. ICE* injunction, though, the Trump Administration’s intent appears more nefarious, punitive, and definite.¹⁷⁶ The President frequently espoused contempt for Central American immigrants,¹⁷⁷ suggesting that his intent to separate families rests upon a “rotten foundation” of racial animus.¹⁷⁸

172. See Convention Against Torture, *supra* note 9, at 1-2; LEGOMSKY ET AL., *supra* note 23, at 1381; Letter from U.S. Comm’n on Civ. Rts. to Jeff Sessions, Att’y Gen., U.S. Department of Justice, Kirstjen Nielsen, Sec’y, U.S. Department of Homeland Security (June 15, 2018) [hereinafter Comm’n on Civ. Rts. Letter] (considering the ZTP “coercive”); *contra* Donald J. Trump (@realDonaldTrump), TWITTER (Dec. 29, 2018, 1:30 PM), <https://twitter.com/realdonaldtrump/status/1079082188665171971> (“Any deaths of children or others at the Border are strictly the fault of the Democrats.”).

173. See Convention Against Torture, *supra* note 9, at 1-2; 8 C.F.R. § 208.18(a)(3) (2019).

174. *L. v. ICE*, 310 F. Supp. 3d at 1143; see also 8 U.S.C.S. § 1158(a)(1) (LexisNexis 2019) (allowing any noncitizen present in the U.S. to apply for asylum, regardless of immigration status); Exec. Order No. 13767, 82 Fed. Reg. 8793, 8795 (Jan. 30, 2017) (“It is the policy of the executive branch to end the abuse of . . . asylum provisions currently used to prevent the lawful removal of removable aliens.”).

175. *L. v. ICE*, 310 F. Supp. 3d at 1149.

176. See PHR Letter, *supra* note 110, at 1-3, (punitive); Feuer, *supra* note 62 (alluding to, via quotes from Judge Garaufis, Trump’s racial or nationalistic animus); Ainsley, *supra* note 68 (outlining a DOJ and DHS memo laying bare the government’s deterrence strategy).

177. See, e.g., Donald J. Trump (@realDonaldTrump), TWITTER (June 19, 2018, 9:52 AM), <https://twitter.com/realdonaldtrump/status/1009071403918864385> (likening immigrants to vermin by using the word “infest”); Donald J. Trump (@realDonaldTrump), TWITTER (July 29, 2018 7:58AM), <https://twitter.com/realdonaldtrump/status/1023538164298858497?llan=en> (declaring, without support, that immigrants bring children across the Southern Border for “sinister purposes”).

178. See *Trump v. Hawaii*, 138 S. Ct. at 2442-43 (2018) (Sotomayor, J., dissenting).

With a robust record as to the dismal conditions at immigration detention facilities,¹⁷⁹ the Z.T.P. amounts to intentionally subjecting minors to woefully substandard treatment.¹⁸⁰ In other words, the Trump Administration specifically intended to inflict severe physical and mental suffering upon migrant children to deter asylum claims.¹⁸¹

Assume, for the moment, that the Z.T.P. was not animated by the specific intent to inflict severe harm. Criminal liability still arises, under the willful blindness standard, from the United States' acquiescence¹⁸² to torture by federal contractors and officials operating detention facilities.¹⁸³ Even if the specific intent to cause severe harm, such as rape or physical beatings,¹⁸⁴ belonged only to the individual transgressors, the federal government nonetheless breached its duty to prevent torturous or inhuman suffering by continuing to place kids in these situations.¹⁸⁵

179. *E.g.*, *With Liberty and Justice for All*, *supra* note 80, at 149-50 (detailing the “torture-like” conditions government facilities subject migrants to as punishment for crossing the Southern Border without documentation); CODE RED, *supra* note 78, at 3 (“This is the third report in which our organizations have found that significant numbers of the deaths in detention are linked to inadequate medical care in detention.”).

180. *See* CODE RED, *supra* note 78, at 2, 7 (appalling conditions); 136 CONG. REC. 36198 (1990) (specific intent); *cf. In re. J-E-*, 23 I&N Dec. at 301 (finding that Haitian authorities intentionally detained people in substandard conditions not amounting to torture because they were the result of “budgetary and management problems[.]” not a specific intent to inflict torture).

181. *See Presidential Memorandum*, *supra* note 53 (alluding to asylum); Attorney General Zero Tolerance Memorandum, *supra* note 10 (criminalizing asylum claims by those arriving without inspection or documentation); Clark, *supra* note 73 (asserting that, according to Rep. Lauren Underwood of Illinois, the DHS' actions “at this point, with five children dead and 5,000 separated from their families, this is *intentional*. It's a policy choice being made on purpose by this administration, and it's cruel and inhumane”) (emphasis added).

182. *See* 8 C.F.R. § 208.18 (requiring awareness and breach of a legal duty); *Morales*, 478 F.3d at 983-84 (willful blindness); *Advertent Negligence*, *supra* note 135.

183. *See, e.g.*, Haag, *supra* note 168 (quoting Congressman Ted Deutch as attributing at least 178 sexual abuse claims by detained children to facility staff members); Bogado et al., *supra* note 86, (naming numerous federally funded shelters facing many, some as high as sixty-four, sexual assault complaints).

184. *See generally id.* (showing how hundreds of sexual assaults have occurred at the hands of detention center employees); *Zubeda*, 333 F.3d at 473 (recognizing the severity of suffering “endemic” to rape); AMNESTY INTERNATIONAL, *supra* note 2, (deeming the mental suffering experienced by separated children as “severe”).

185. *See* Convention Against Torture, *supra* note 9, at 2 (duty to prevent); Convention Against Torture, *supra* note 9, at 1-2, 6-7 (torture); Convention Against Torture, *supra* note 9, at 16 (inhuman treatment); LEGOMSKY ET AL., *supra* note 23, at 1382 (noting the

The Trump Administration was aware of these conditions,¹⁸⁶ failed to intervene, and instead attempted other means of continuing its child separation policy after the *L. v. ICE* injunction.¹⁸⁷

Contrary to the preceding hypothetical, though, President Trump blatantly exhibits a specific intent to cause severe harm to migrants.¹⁸⁸ He has espoused plans to “fortify[] a border wall with a water-filled trench, stocked with snakes or alligators” to harm those who tried to cross the Southern Boarder.¹⁸⁹ Trump also “wanted the wall electrified, with spikes on top that could pierce human flesh.”¹⁹⁰ Most egregiously, he suggested that soldiers “shoot migrants in the legs to slow them down.”¹⁹¹

Further exemplifying a specific intent to harm, his Administration has, during the course of this writing and amid condemnation for captivity conditions, supplanted various agency heads with candidates who take

government’s acknowledgement that the legal duties under its acquiescence definition entail those within the CAT itself); Bogado et al., *supra* note 86, (disclosing renewed contracts with problematic facilities).

186. *See, e.g.*, Comm’n on Civ. Rts. Letter, *supra* note 171 (putting the Trump Administration on notice of the “inadequate and inappropriate care” to which its “inhumane” ZTP subjected children); @realDonaldTrump, *supra* note 65 (blaming Democrats for separating families); Haag, *supra* note 168 (demonstrating the DOJ’s awareness of sexual assaults via its own data regarding complaints).

187. *See* Miriam Jordan et al., *U.S. Continues to Separate Migrant Families Despite Rollback of Policy*, N.Y. TIMES (Mar. 9, 2019), <https://www.nytimes.com/2019/03/09/us/migrant-family-separations-border.html> (divulging that 245 children were removed from their families in the nine months after the injunction); Miroff et al., *Trump Administration Weighs New Family-Separation Effort at Border*, *supra* note 66 (summarizing the “binary choice” option the Administration considered in October 2018); *Trump v. E. Bay Sanctuary Covenant*, 139 S. Ct. 782 (2018) (preventing an asylum ban that would potentially result in classifying more children as UACs subject to ORR custody).

188. *See, e.g.*, Nick Miroff & Josh Dawsey, *Trump Wants His Border Barrier to be Painted Black with Spikes. He Has Other Ideas, Too.*, WASH. POST (May 16, 2019), https://www.washingtonpost.com/national/trump-wants-his-border-barrier-to-be-painted-black-with-spikes-he-has-other-ideas-too/2019/05/16/b088c07e-7676-11e9-b3f5-5673edf2d127_story.html (urging military engineers to build a border fence with pointed tips and heat-absorbing paint, “describing in graphic terms the potential injuries that border crossers might receive”).

189. Michael D. Shear & Julie Hirschfeld Davis, *Shooting Migrants’ Legs, Build Alligator Moat: Behind Trump’s Ideas for Border*, N.Y. TIMES (Oct. 1, 2019), <https://www.nytimes.com/2019/10/01/us/politics/trump-border-wars.html>.

190. *Id.*

191. *Id.*

harder lines on detention practices,¹⁹² especially those involving children.¹⁹³ For example, former D.H.S. Secretary Nielsen lost her job after resisting a White House plan that would “arrest thousands of parents and children in a blitz operation.”¹⁹⁴ President Trump contemporaneously endorsed, or at least inspired, extrajudicial violence against migrants.¹⁹⁵

As for *actus reus*, the physical harms encountered by detained immigrant children clearly qualify as sufficiently severe to meet Article 1’s high bar.¹⁹⁶ At least seven children, and one stillborn child, died as a

192. *E.g.*, Goldman, *supra* note 6 (“With his elevation of Ms. Haspel, now the [CIA’s] deputy director, Mr. Trump displayed a willingness to ignore the widespread denunciations of waterboarding, sleep deprivation, confinements in boxes, and other interrogation techniques that were used by the C.I.A. more than a decade ago.”).

193. *See* Ted Hesson, *Trump’s Pick for ICE Director: I Can Tell Which Migrant Children will Become Gang Members by Looking into Their Eyes*, POLITICO (May 16, 2019), <https://www.politico.com/story/2019/05/16/mark-morgan-eyes-ice-director-1449570> (“Mark Morgan, the White House choice to lead [ICE] . . . said . . . ‘I’ve been to detention facilities where I’ve walked up to these individuals that are so-called minors, 17 or under . . . I’ve looked at them and I’ve looked at their eyes . . . and I’ve said that is a soon-to-be MS-13 gang member. It’s unequivocal.’”).

194. Nick Miroff & Josh Dawsey, *Before Trump’s Purge at DHS, Top Officials Challenged Plan for Mass Family Arrests*, WASH. POST (May 13, 2019), https://www.washingtonpost.com/immigration/before-trumps-purge-at-dhs-top-officials-challenged-plan-for-mass-family-arrests/2019/05/13/d7cb91ce-75af-11e9-bd25-c989555e7766_story.html (intending to use this as “a show of force to send [a] message” to immigrant families).

195. *See* Antonia Noori Farzan, *‘Shoot Them!’: Trump Laughs Off a Supporter’s Demand for Violence Against Migrants*, WASH. POST (May 9, 2019), <https://www.washingtonpost.com/nation/2019/05/09/shoot-them-trump-laughs-off-supporters-demand-violence-against-migrants/> (questioning, at a rally, how CBP agents can “stop these people” without using weapons and responding to a spectator’s exclamation “Shoot them!” with a smile, finger point, and joke); Keith Allen, *Border Patrol Agent Calls Migrants ‘Subhuman’ and ‘Savages’ in Text Messages, Court Papers Say*, CNN (May 22, 2019), <https://www.cnn.com/2019/05/21/us/border-patrol-agent-savages-subman-texts/index.html> (inspiring a CBP agent to intentionally strike an immigrant with his government-issued Ford F-150 truck, as demonstrated by the agent’s text to “PLEASE let us take the gloves off trump!”).

196. *Compare* Convention Against Torture, *supra* note 9, at 1-2 (“*any act* by which *severe pain or suffering*, whether physical or mental, is intentionally inflicted on a person”) (emphasis added), *with* Convention Against Torture, *supra* note 9, at 6-7 (“ . . . *other acts* of cruel, inhuman or degrading treatment or punishment *which do not amount to torture* . . .”) (emphasis added).