INS Policy on Alien Youth Struck Down

■ En banc panel rules that 'governmental confinement of a child to an institution should be a last resort.'

By Sandra Parker
Daily Journal Staff Reporter

LOS ANGELES – In a case several federal judges described as one of the most troubling to reach the court, an en banc panel of the 9th U.S. Circuit Court of Appeals declared unconstitutional a government policy of refusing to release children suspected of being illegal aliens to anyone other than a relative.

The majority in the 7-4 decision issued Friday in *Flores v. Meese, III,* 91 Daily Journal D.A.R. 9727, said aliens have a fundamental right to be free from detention unless the government can prove that detention furthers a "significant" governmental interest.

Chief Judge J. Clifford Wallace wrote the dissent, arguing the right at stake is not fundamental, the courts should defer to the government in the "unique context" of immigration laws and the constitutional rights of juveniles are not as extensive as those given to adults.

The en banc opinion in the emotional case affirms a district court ruling ordering the Immigration and Naturalization Service to release the children – some of them younger than 5 – to a responsible adult, inform the children of the conditions of their release and automatically set an administrative hearing to determine probable cause for their arrest.

"I'm exhilarated," said Carlos Holguin, lead attorney for the children and general counsel for the National Center for Human Rights and Constitutional Law.

"It sounds to me like the majority was persuaded by the facts – what the INS was doing just didn't make sense," Holguin said after being read portions of the opinion. "This ruling is great for kids who have suffered a lot under this misguided policy. This victory in the courts will substantially strengthen the hand of those asking the INS to adopt a more humane policy in other parts of the country."

The release policy was devised at first by the INS' western regional commissioner and applied only to that region, but later was adopted in other parts of the country. Organizations opposing the policy have been meeting with INS Commissioner Gene McNary in an effort to institute a less-restrictive policy nationwide.

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Assistant U.S. Attorney Stan Blumenfeld, who represented the INS, declined comment on the ruling or on whether the government plans to appeal to the U.S. Supreme Court.

A former Assistant U.S. Attorney on the case, Ian Fan, said the court should have applied a rational-basis test, rather than a strict-scrutiny test.

"Nowhere is there a fundamental right to freedom from bodily restraint. It's a due process right, but it's not a fundamental right and is not entitled to strict scrutiny," Fan said. "I wouldn't be surprised if the government took it up and the Supreme Court reversed."

Writing for the majority, Judge Mary Schroeder said the INS failed to show that its "blanket" policy is necessary to ensure children's appearance at deportation hearings or that it protects the agency from liability for releasing them. The additional fact that the detainees are children adds to the agency's burden to prove they should be incarcerated.

"This case in unprecedented in that it involves post-arrest detention of persons who have not been convicted of any crime, do not pose a risk of flight, and who have not been determined to present any threat of harm to themselves or to the community."

Joining Schroeder in the majority opinion were Judges Thomas Tang, Dorothy Nelson, William Canby, William Norris, David Thompson and Pamela Rymer. Rymer dissented in part and Tang and Norris issued separate concurring opinions.

The majority said the INS presented no evidence that children released to unrelated adults prior to the adoption of the policy suffered any ill treatment. The agency's contention that it needed to conduct "home studies" of potential caretakers was undermined by its own assertion of little expertise in the field of child welfare, the majority said.

"Child welfare is not an area of INS expertise and its decisions in this area are not entitled to any deference," Schroeder wrote.

Nor did the policy insulate the INS from liability because governmental agencies face more exposure to suits by maintaining custody of the children, the majority said, citing the recent U.S. Supreme Court decision in *International Union, UAW v. Johnson Controls*. In that case, the court struck down a policy excluding pregnant women from holding certain jobs because of the company's fear of liability, which the court said was "remote at best" and did not justify violating individual rights.

In addition, the judges noted that congressional policy favors housing minors in foster home or community facilities rather than institutionalizing them.

Tang wrote a separate concurrence to emphasize that the liberty at stake is a fundamental one and that the dissent's characterization of it "stands the Constitution on its head."

Judge John T. Noonan said the INS' policy "not only violates due process, but does so flagrantly ... The dissent casts the INS as a parent, but I see only a jailer."

In her separate opinion, Rymer said the case "touches a raw nerve in us all" but said it could have been decided on narrower grounds because the INS regulations "fail to meet minimum requirements of procedural due process."

In the dissent, Wallace said the majority erred in defining the issue as a blanket denial of liberty and giving it status as a fundamental right rather than the right to be released to unrelated adults.

He called the majority's conclusion "novel" and said it led them to engage in a discussion of issues "irrelevant" to the true issue in the case. As he argued in the three-judge panel decision last June upholding INS' regulation, Wallace said the INS should be given deference by the courts because of the political nature of immigration laws. He also said the court must consider the "accepted principle" that children's constitutional rights are more limited than those accorded to adults.

He was joined in the dissent by Judges Charles Wiggins, Melvin Brunetti and Edward Leavy.