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Legal Sidebar

The Federal Government's Plenary Immigration Power Collides with the Constitutional Right to an Abortion (Part I)

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This Sidebar is the first in a two-part series discussing Garza v. Hargan*, a decision by the U.S. Court of Appeals for the D.C. Circuit involving a detained unaccompanied alien minor and the right to terminate a pregnancy. The second Sidebar is available here.*

In *Garza v. Hargan*, the U.S. Court of Appeals for the D.C. Circuit (D.C. Circuit), sitting en banc, upheld a federal district court's order requiring the Department of Health and Human Services (HHS) to allow a detained 17-year-old unaccompanied alien minor to have an abortion. The alien minor (Jane Doe), who had been apprehended by immigration authorities when attempting to enter the United States, sued the federal government on the grounds that HHS's decision to deny her access to an abortion while she remained in agency custody interfered with her right to terminate her pregnancy. Jane Doe obtained an abortion following the D.C. Circuit's en banc decision. The *Garza* decision, however, may have broader implications for other aliens in U.S. custody.

The court's decision to afford Jane Doe access to an abortion turned upon the application of the Supreme Court's longstanding precedent that a woman has a constitutional due process right to terminate her pregnancy. Nevertheless, the D.C. Circuit's decision raises renewed questions over the extent to which the government may impose abortion restrictions, particularly in light of HHS's current policy to deny a detained unaccompanied alien minor access to the procedure in the United States until she secures a sponsor. In addition, the court's decision arguably leaves unresolved a threshold question – does an alien

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who is immediately apprehended at the border and remains in U.S. custody even have a constitutional right to an abortion? This two-part Sidebar examines the *Garza* case and the broader implications that the D.C. Circuit's ruling has not only for abortion rights, but also with respect to the rights of unlawfully present aliens in the United States.

Factual Background

Jane Doe, a 17-year-old reportedly from Central America, attempted to enter the United States without inspection near Brownsville, Texas in September 2017. Immigration authorities of the Department of Homeland Security (DHS) immediately apprehended Jane Doe upon her arrival. Pursuant to statutory requirements concerning an "unaccompanied alien child" who is detained by federal immigration authorities, Jane Doe was transferred to HHS custody and placed in a federally funded shelter pending her potential removal from the United States. While in custody, Jane Doe obtained a Texas court order granting her permission for an abortion, and asked HHS to allow her access to the procedure. Following HHS's refusal, Jane Doe (through her guardian ad litem) filed a lawsuit in the D.C. federal district court.

On October 18, the district court granted Jane Doe's application for a temporary restraining order (TRO), and directed HHS to immediately transport Jane Doe (or allow her to be transported) to an abortion provider. The government – which never disputed that Jane Doe had a constitutional right to an abortion – appealed and filed an emergency motion to stay the TRO. In the motion, the government argued that HHS could refuse to facilitate abortions while an unaccompanied alien child remained in federal custody, but that this policy did not prevent a minor from leaving custody if she found a qualified sponsor in the United States. Accordingly, the government argued, HHS's refusal to facilitate an abortion did not impermissibly burden Jane Doe's ability to obtain an abortion.

On October 20, a divided three-judge panel of the D.C. Circuit (Judges Henderson, Kavanaugh, and Millett) vacated the TRO in part, and agreed with the government that HHS's policy was permissible "so long as the process of securing a sponsor to whom the minor is released occurs expeditiously." The court thus ordered the district court to issue an 11-day deadline for HHS to secure a sponsor for Jane Doe. In a dissenting statement, Judge Millett argued that the government's refusal to release Jane Doe until she secured a sponsor – a process "entirely in the control" of HHS – placed an "immovable barrier" to her constitutional right to an abortion.

On October 24, the D.C. Circuit granted Jane Doe's petition for rehearing en banc and vacated the panel decision "substantially for the reasons set forth" in Judge Millett's dissent. The court remanded to the district court to amend the effective dates for compliance with the TRO. In a concurring opinion, Judge Millett reiterated her view that the government's refusal to allow Jane Doe access to an abortion while she remained in custody violated her constitutional rights. In a dissenting opinion, however, Judge Henderson argued that Jane Doe did not have a constitutional right to an abortion because, as an alien immediately apprehended and detained at the border, she never "entered" the United States as a matter of law, and had not developed "substantial connections" with this country.

Does HHS's Policy Unduly Burden the Right to an Abortion?

The continued validity of HHS's policy involving sponsorship for an unaccompanied alien minor seeking an abortion may be questioned in light of the D.C. Circuit's October 24 order. In a statement concurring with the en banc court's disposition of the case, Judge Millett concluded that HHS's policy and any delay associated with finding a sponsor impose an "undue burden" on a woman's ability to terminate her pregnancy. Judge Millett based this conclusion on the standard established by the Supreme Court in *Planned Parenthood of Southeastern Pennsylvania v. Casey*. There, the Supreme Court indicated that an

undue burden exists if the purpose or effect of an abortion regulation is "to place a substantial obstacle in the path of a woman seeking an abortion before the fetus attains viability."

Applying the undue burden standard in *Casey* and subsequent cases, the Supreme Court has invalidated a variety of abortion regulations, such as those requiring a woman to notify her spouse before an abortion, and others mandating abortion facilities to satisfy the same standards as ambulatory surgical centers. On other occasions, however, the Court has upheld abortion regulations, including those that require a minor to notify a parent before the procedure will be performed, and others that require a woman's informed consent before an abortion.

In *Garza*, Judge Millet maintained in an opinion concurring with the en banc court's disposition of the case that "the government's position that [Jane Doe] cannot exercise her constitutional right unless the government approves a sponsor imposes a flat prohibition on her reproductive freedom that [Jane Doe] has no independent ability to overcome." At the time of the en banc decision, the search for a sponsor had continued unsuccessfully for seven weeks. Under the panel's October 20 decision, the search would have continued for another 11 days, or nearly nine weeks since a search for a sponsor was initiated. Judge Millett contended that this waiting period constituted a "prolonged and complete barrier" to Jane Doe's right to have the procedure. Moreover, Judge Millett argued that further delay would increase health risks for Jane Doe and make it more difficult for her to obtain an abortion. Under Texas law, for example, an abortion is generally prohibited once a fetus has reached a postfertilization age of 20 weeks.

In a dissenting opinion, Judge Kavanaugh criticized what he believed was the en banc majority's recognition of a "new right for unlawful immigrant minors in U.S. Government detention to obtain immediate abortion on demand[.]" According to Judge Kavanaugh, a process that provides for the expeditious transfer of an alien minor to a sponsor before an abortion is performed does not impose an undue burden on a woman's right to terminate her pregnancy (though Judge Kavanaugh further clarified that under Supreme Court precedent, the government cannot use the transfer process as "some kind of ruse to unreasonably delay the abortion past the point where a safe abortion could occur"). Because Jane Doe's transfer was to occur within 11 days of the panel's October 20 decision and the government agreed that she could have an abortion immediately after the transfer, Judge Kavanaugh contended that the sponsorship process was sufficiently expeditious. Judge Kavanaugh also noted that the Supreme Court has routinely upheld a variety of abortion regulations, like mandatory waiting periods "that entail some delay[.]" Given the Supreme Court's treatment of these requirements, Judge Kavanaugh concluded that requiring the expeditious transfer of an alien minor to a sponsor before she has an abortion similarly does not impose an undue burden.

The dispute between Judges Millett and Kavanaugh concerning the permissible length of a waiting period would not seem to raise a novel question. Twenty-seven states prescribe a mandatory waiting period before an abortion may be performed, but none would potentially delay the procedure for nine weeks. For its part, the Supreme Court in *Casey* upheld a 24-hour waiting period. However, in its most recent abortion decision, *Whole Woman's Health v. Hellerstedt*, the Court observed that the undue burden standard requires a reviewing court to consider the burdens a law imposes on abortion access together with the benefits conferred by the law. Neither Judge Millett nor Judge Kavanaugh evaluated the benefits and burdens imposed by the sponsorship process on unaccompanied alien minors seeking an abortion. Arguably, *Whole Woman's Health* advises that such an analysis should be conducted if the sponsorship process is challenged again in the future.

Nevertheless, earlier this month, Acting HHS Secretary Hargan filed a petition with the Supreme Court that seeks a vacating of the D.C. Circuit's en banc decision. The government is pursuing such action, in part, because "the en banc court's decision should not be left on the books for use by . . . other plaintiffs." Jane Doe brought her claim as a putative class action on behalf of herself and other pregnant unaccompanied alien minors in HHS's custody, and the government is concerned that the decision could be applied to these possible claims if it is not vacated. In his dissenting opinion, Judge Kavanaugh argued

that the precedential value of the majority's decision for future abortion cases involving persons in U.S. custody was unclear and that, in any event, the decision conflicted with Supreme Court precedent upholding "a wide variety of abortion regulations that entail some delay in the abortion but that serve permissible Government purposes." The Supreme Court has not indicated whether it will review *Garza*.

Whether, as a threshold matter, the right to terminate a pregnancy should be recognized for an unaccompanied alien minor who is immediately apprehended at the border is explored in part II of this Sidebar.