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Legal Sidebar

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

Hillel R. Smith
Legislative Attorney

Jon O. Shimabukuro
Legislative Attorney

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This Sidebar is the second in a two-part series discussing the en banc decision by the U.S. Court of Appeals for the D.C. Circuit (D.C. Circuit) in Garza v. Hargan*, affirming a district court's order requiring the Department of Health and Human Services (HHS) to allow an unaccompanied alien minor in federal custody to have an abortion. An earlier Sidebar, addressing the D.C. Circuit's decision and its impact on abortion rights, is available here.*

Does an Unaccompanied Alien Minor Detained at the Border have a Constitutional Right to an Abortion?

The D.C. Circuit's en banc decision in *Garza* applied longstanding precedent holding that there is a constitutional right to terminate one's pregnancy, and that the government may not place an "undue burden" on that right. In ruling that Jane Doe, an unaccompanied alien minor in HHS custody, could not be barred by the agency from obtaining an abortion, the *Garza* panel was not called upon to address a possibly fundamental question: does the constitutional right to abortion attach to an unaccompanied alien minor who is immediately apprehended and detained at the border? Notably, the government never disputed that Jane Doe had that right, and the D.C. Circuit decision thus left the issue unresolved. However, Judge Henderson argued in dissent that Jane Doe did *not* have a right to terminate her

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pregnancy because, as an alien immediately apprehended and detained upon her arrival in the United States, she never "entered" the country as a matter of law, and consequently could not avail herself of any constitutional protections.

The Supreme Court has never squarely addressed the extent to which the Constitution confers substantive rights, including the right to obtain an abortion, on detained aliens who sought to enter the United States unlawfully. Nevertheless, there are two considerations that the government could cite to in support of its contention that such aliens should have limited access to an abortion.

First, the federal government has broad plenary power over immigration, including decisions regarding the admission and exclusion of aliens. This power is most significant with respect to aliens at the border. For example, the Supreme Court has long held that arriving aliens seeking to enter the United States are entitled only to whatever procedural due process Congress has given them with respect to their admission, and that "it is not within the province of any court, unless expressly authorized by law, to review the determination of the political branch of the Government to exclude a given alien." The Court, moreover, has upheld the government's ability to detain such aliens, potentially for lengthy periods, while preparing to effectuate their removal. (Whether the government may indefinitely detain such aliens under existing law, however, is a question implicated by a case pending before the Supreme Court).

Secondly, the nature and scope of constitutional protections for aliens may differ from United States citizens. In particular, the Supreme Court has repeatedly recognized that the constitutional rights of aliens who have not entered the United States – including those who are on the cusp of initial entry – are far less robust than the rights of U.S. citizens and aliens lawfully admitted into the country. In *Shaughnessy v. United States ex rel. Mezei*, for example, the Court held that an arriving alien detained within the United States pending a determination of his admissibility had not "entered" this country, and therefore, had no constitutional due process right to challenge his exclusion. And in *United States v. Verdugo-Urquidez*, the Court held that the Fourth Amendment did not confer protections to an alien outside the United States who had not "developed substantial connections with this country."

Accordingly, it could be argued that the government's plenary authority over immigration, coupled with the arguably lesser constitutional rights owed to arriving aliens who have not entered, and developed significant voluntary ties to, the United States, support the notion that an arriving alien apprehended and detained by the U.S. government has no constitutional right to be provided access to an abortion. Indeed, in *Garza*, there was no question that immigration authorities immediately apprehended and detained Jane Doe as she attempted to enter the United States, and that she established no significant connections to this country prior to being taken into federal custody. Therefore, because Jane Doe arguably remained "on the threshold" of entry from the time of her arrival, it might be argued that the government could permissibly limit her access to an abortion.

On the other hand, the federal government's immigration power is not unlimited, and the Supreme Court has recognized that all "persons" in the United States come under the protection of the Due Process Clause, including unlawfully present aliens. Moreover, some courts have suggested that the constitutional limitations that apply to arriving aliens seeking entry into this country pertain only to their *procedural* rights regarding their applications for admission, but do not foreclose the availability of *other* constitutional rights. Thus, for example, courts have determined that aliens at the border are entitled to substantive due process, including the right to be free from inhumane treatment or physical abuse. And there appears to be little dispute that an arriving alien who is placed in criminal proceedings receives the same constitutional protections as other criminal defendants.

In *Garza*, Jane Doe was challenging the government's refusal to grant her access to an abortion, not her exclusion from the United States. The D.C. Circuit's recognition that substantive due process protections applied to Jane Doe, along with its scrutiny of HHS's sponsorship policy, may have turned upon the fact that the case did not simply involve the procedural protections of aliens subject to exclusion from the

United States – an area firmly entrenched within the scope of the federal government's immigration power. Instead, the outcome in *Garza* signals that the courts may be more accommodating to the rights of unlawfully present aliens – even those who theoretically stand at the "boundary line" of the nation – where the government's actions impact fundamental liberty interests, such as the right to terminate a pregnancy recognized by the Supreme Court. Therefore, although the federal government has broad plenary power to regulate immigration, there may be circumstances where that authority is limited by certain substantive rights that arguably attach to all aliens within the United States, even those who have otherwise gained no legal foothold into this country.

Implications for Congress

The D.C. Circuit's decision in *Garza* renews longstanding questions regarding the extent to which the federal government may impose abortion restrictions. In particular, the court's ruling opens the door for debate over the circumstances in which the government may delay the availability of an abortion for unlawfully present aliens in federal custody.

Of particular relevance to the situation at issue in *Garza*, Section 235 of the Trafficking Victims Protection Act provides for the care and custody of unaccompanied alien minors and identifies HHS as the agency primarily responsible for these individuals. Specifically, the Office of Refugee Resettlement (ORR), a component within HHS, is responsible for providing food, shelter, and medical care for unaccompanied alien minors until the agency secures a sponsor (such as a family member) who can provide for the child's well-being. In *Garza*, the government argued that HHS's refusal to facilitate an abortion for Jane Doe did not impermissibly burden her ability to obtain an abortion because the agency's policy did not prevent her from leaving custody upon finding a qualified sponsor. Although the statute and agency policy set forth the criteria for determining the suitability of a sponsor, these provisions do not contemplate timelines for securing a sponsor. Nor do they address the availability of an abortion for unaccompanied alien minors in ORR custody. Therefore, any congressional concerns over such matters could possibly be addressed by amending the governing statute.