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Unpacking DOJ's New Claim that DHS Can Legally Detain Migrant Children with Their Parents for Longer than Twenty Days

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by Marty Lederman, Deborah Pearlstein and Ryan Goodman
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The Trump administration recently claimed it could not reunite migrant children with parents who are being held in ICE detention due to a court order requiring the government to release such children from custody within (at most) 20 days. The government now claims, however, that it can legally detain the children with their parents in ICE detention for much longer than 20 days. How did the government come to this position? In this post we'll answer that question, and address a central flaw in the government's logic.

You might have heard the Trump Administration insist in recent weeks that legal restrictions prevent it from keeping migrant children together with their parents in cases where the parents' immigration proceedings (including asylum claims) are still in process. The principal restriction they have in mind is a judicial decree in the longstanding *Flores* case, enforcing a settlement that requires the government to "release a minor from its custody without unnecessary delay" except where detention of the minor is required "either to secure his or her timely appearance before the INS or the immigration court, or to ensure the minor's safety or that of others." The courts have construed that injunction generally to require release within 20 days. Therefore, the government claimed, the *Flores* decree prevents DHS from holding minors in detention with their parents for more than 20 days, which in turn requires family separation.

Accordingly, a couple of weeks ago the Department of Justice filed an "Application for Relief" with the judge in the *Flores* case, Dolly Gee of the U.S. District Court for the Central District of California, seeking "limited emergency relief that would: (1) exempt DHS from the *Flores* Settlement Agreement's release provisions so that ICE may detain alien minors who have arrived with their parent or legal guardian together [with that

parent] in ICE family residential facilities; and (2) exempt ICE family residential facilities from the Agreement's state licensure requirement."

Judge Gee has not yet ruled on that DOJ request for a new, limited exemption from application of the *Flores* injunction (a request that presents its own problems). But before the plaintiffs even had a chance to respond to it, last Friday evening DOJ filed a very different, and extraordinary, sort of document with Judge Gee—a self-described "Notice of Compliance" in which DOJ informed Judge Gee that DHS will unilaterally proceed with family detention of longer than 20 days, without first hearing from her on the government's earlier application for a partial exemption from the *Flores* injunction.

What's the government's theory of why it can act unilaterally, in a way that a few days earlier it claimed would violate the *Flores* injunction? In short, DOJ now argues that, in light of a *second* injunction recently issued by a different trial judge in a different case, the *Flores* settlement itself is best read to *permit* extended detention of children with their DHS-detained parents.

Confused? Well, here's the basic structure of DOJ's argument, as we understand it:

1. The recent order in the second case, *Ms. L v. ICE*—issued by District Judge Dana Sabraw on June 26—preliminarily enjoins DHS (including ICE) from detaining adults in its custody "without and apart from their minor children, absent a determination that the parent is unfit or presents a danger to child, unless the parent affirmatively, knowingly, and voluntarily declines to be reunited with the child in DHS custody."

2. The earlier court decree in *Flores* enforces the requirement of paragraph 14 of the 1997 *Flores* settlement agreement that the government must "release a minor from its custody without unnecessary delay," which courts have construed to impose a 20-day maximum for minors' detention.[1]

3. It is impossible for DHS both to release minors after 20 days, as the *Flores* agreement appears to require, and simultaneously to keep families together, as the *Ms. L.* injunction commands.

4. However, DOJ now construes the phrase "without *unnecessary* delay" in paragraph 14 of the *Flores* settlement to *allow* DHS to keep the children in custody with their parents, because the *Ms. L.* injunction has made such family detention beyond 20 days "necessary." Once the *Flores* order is interpreted in this manner, writes DOJ, "the rulings work together to permit detention of parents with their minor children with whom they are apprehended."

Accordingly:

5. DOJ has informed the court that, based upon this unilateral construction of paragraph 14, "the government will not separate families but detain families together during the pendency of immigration proceedings when they are apprehended at or between ports of entry and therefore subject to the *Ms. L* injunction." (In its earlier brief, DHS represented that it was seeking the court's permission to do so only in ICE "family residential centers" that (allegedly) satisfy all of the *Flores* minimum standards for conditions in facilities holding minors *except* the requirement of state licensing. The DOJ brief last Friday does not specify whether the facilities at which it will now "detain families" meet any or all of those minimum standards.)

The Justice Department is correct about Points 1 and 2—i.e., about what the *Ms. L.* order and the *Flores* order respectively require. The problem with DOJ's argument, however, comes at Point 3—its claim that it's impossible for the government simultaneously to comply with both injunctions and that therefore it is "necessary" (as that term should be construed under paragraph 14 of the *Flores* agreement) not to release the minors but instead to hold the whole family in long-term ICE detention.

In fact, in the vast majority of cases it's possible for the government to handle families seeking asylum in a way that would comply with *both* court rulings: DHS could simply return to what it was doing until recently in those cases where an adult member of a family presents neither a flight risk nor a danger to the public—namely, releasing the parents and children together,[2] subject to a number of proven tools to prevent any risk of nonappearance at future hearings that Eleanor Acer discusses in her very important post, such as various forms of community supervision or (in cases where such supervision is determined to be insufficient) the use of ankle monitors.[3]

Because DHS can thereby comply with both injunctions at once, at least in many of the cases in question, it is not "necessary" to delay release of the minors in such cases, even accepting DOJ's new, aggressive reading of the "without unnecessary delay" qualification of paragraph 14 of the *Flores* agreement.

Therefore it appears that the government's announced intention to detain children in DHS facilities with their parents will violate the *Flores* agreement unless and until a court amends that injunction. DOJ's "Notice of Compliance," in other words, is in truth a notice of *noncompliance*. At the very least, surely the Department of Justice should have asked Judge Gee whether she shares the government's view of what paragraph 14 allows, before acting unilaterally. The Trump Administration's decision to go it alone before even hearing from the judge on its own pending application for relief (a tailored exemption) from the *Flores* injunction is, to say the least, audacious (and probably tone-deaf, too, because it's not likely to sit well with the court). [UPDATE: In a brief in the *Ms. L.* case that DOJ filed on Thursday, the government wrote that it has "advised" the *Flores* court "that the *Flores* Settlement Agreement permits the Government to use ICE family residential centers to hold families together while in Government custody." It is, to say the least, unusual for an enjoined party to purport to "advise" the court of the meaning of its own injunction, especially when the plaintiffs have not assented to that understanding. In the usual course, it is the court that "advises" the parties as to what an injunction does and does not "permit."]

One further aspect of the recent filings is also noteworthy: Counsel for the *Flores* plaintiffs, in their brief filed late last Friday evening, *agreed* with DOJ to a very limited extent about the possibility of family detention under the *Flores* agreement without the need for new "exemptions." They argue that the agreement implicitly allows a parent in DHS detention to "knowingly and voluntarily waiv[e] her or his child's right to release under Paragraph 14" if that parent would prefer family detention in an ICE facility. In its own filing last Friday, DOJ included a sentence that sounds very similar to plaintiffs' parental "waiver" precondition: "Relying on a parent's consent in these circumstances where the family is together makes sense." In the remainder of its Notice, however, DOJ does not suggest that DHS will engage in family detention only with, and after, truly knowing and voluntary parental waiver of *Flores* rights. It appears to be asserting, instead, DHS's authority to detain whole families even in cases where the parents have

not exercised such waiver. Presumably Judge Gee will, in the days to come, address whether the *Flores* agreement recognizes the possibility that a detained parent might "knowingly and voluntarily waiv[e] her or his child's right to release under Paragraph 14"; if so, what a "knowing and voluntary" waiver might require in a case such as this, where detained parents are put to such an extraordinary choice; and whether (contrary to DOJ's apparent view) such a waiver is a necessary precondition for DHS to keep minors in custody with a parent for longer than 20 days.[4]

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[1] According to paragraph 14, release of the minor must be in this "order of preference": to a (presumably nondetained) parent; to a legal guardian; to an adult relative (brother, sister, aunt, uncle, or grandparent); to an adult individual or entity designated by the parent or legal guardian as capable and willing to care for the minor's well-being; to a licensed program willing to accept legal custody; or to "an adult individual or entity seeking custody, in the discretion of the [government], when it appears that there is no other likely alternative to long term detention and family reunification does not appear to be a reasonable possibility."

The Agreement generally requires DHS to release a minor in one of these ways within five days, but there's an exception "in the event of an emergency or influx of minors into the United States," and the judge has held that "[a]t a given time and under extenuating circumstances, if 20 days is as fast as Defendants, in good faith and in the exercise of due diligence, can possibly go in screening family members for reasonable or credible fear, then the recently-implemented DHS polices may fall within the parameters of Paragraph 12A of the Agreement, especially if the brief extension of time will permit the DHS to keep the family unit together."

[2] Most noncitizens who are detained after having already been in the country may be released "on bond . . . or conditional parole" pending a decision on whether they shall be removed from the United States." 8 U.S.C. § 1226(a). Bond hearings are also available for persons who cross the border without inspection, are encountered within two weeks and 100 miles of that illegal entry, are subject to expedited removal pursuant to designation by the Secretary, and are found to have a credible fear of prosecution. If past practice is

any guide, most of those persons detained upon arriving at the border seeking asylum also will be eligible for release. Such a person is referred for an interview to determine whether his or her alleged fear of persecution or torture is credible. Id. § 1225(b)(1)(A)(ii). If the interviewing officer determines that the applicant has made the requisite showing of a credible fear, the individual "shall be detained for further consideration of the application for asylum," which includes a full asylum hearing before an immigration court and, if unsuccessful, an administrative appeal to the Board of Immigration Appeals. An individual detained under § 1225(b) can, however, be paroled "into the United States temporarily . . . for urgent humanitarian reasons or significant public benefit." Id. § 1182(d)(5)(A). The agency has construed this to "generally" justify parole pending asylum adjudication for "[a]liens whose continued detention is not in the public interest as determined by [designated DHS] officials," 8 C.F.R. § 212.5(b), and ICE has further determined—in a "Parole Directive" that remains binding on the agency—that if an asylum-seeker establishes his identity and that he presents neither a flight risk nor a danger to the public, "[ICE] should, absent additional factors . . . parole the alien on the basis that his or her continued detention is not in the public interest." ICE Directive 11002.1 ¶ 6.2.

[3] Then-DHS-Secretary John Kelly asserted, early in the Trump Administration, that such release practices "allow [removable aliens] to abscond and fail to appear at their removal hearings." According to a recent study, however, 96% of families released from detention between 2001-2016 while their application for asylum was pending attended all required court hearings; and the appearance rate for asylum applicants with lawyers was 97%. As Eleanor Acer explains, these programs have not only been successful, but are also dramatically less expensive than mass family detention.

[4] What's more, the ACLU has filed an amicus brief arguing that family release is not only possible but legally *required* in many cases because the government's stated reason for detaining at least some of the adults—namely, in order to deter *other* migrants and asylum seekers from trying to enter the United States with their children—is not a legally permissible justification for detention, citing a 2015 D.C. District Court decision to that effect. Obviously, this question could also affect the cases challenging DHS's treatment of minors whose parents DHS seeks to detain for the pendency of their immigration proceedings. If the courts affirm that DHS cannot detain adults for deterrence purposes,

as the ACLU argues, then the question of parental "waiver" of *Flores* rights presumably would become inapposite in at least some cases.

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