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PROCEEDINGS BEFORE

THE SUPREME COURT

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WASHINGTON, D.C. 20543

OF THE

UNITED STATES

CAPTION: WILLIAM P. BARR, ATTORNEY GENERAL, et al.,

Petitioners v. JENNY LISETTE FLORES, et al.

CASE NO: 91-905

PLACE: Washington, D.C.

DATE: October 13, 1992

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IN THE SUPREME COURT OF THE UNITED STATES

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WILLIAM P. BARR, ATTORNEY :
GENERAL, et al., :
Petitioners :
v. : No. 91-905
JENNY LISETTE FLORES, et al. :

- - - - -X
Washington, D.C.
Tuesday, October 13, 1992

The above-entitled matter came on for oral
argument before the Supreme Court of the United States at
1:45 p.m.

APPEARANCES:

MAUREEN E. MAHONEY, ESQ., Deputy Solicitor General,
Department of Justice, Washington D.C.; on behalf of
the Petitioners.
CARLOS HOLGUIN, ESQ., Los Angeles, California; on behalf
of the Respondents.

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1 P R O C E E D I N G S

2 (1:45 p.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument
4 next in number 91-905, William P. Barr, Attorney General,
5 v. Jenny Lisette Flores. You may proceed, Ms. Mahoney.

6 ORAL ARGUMENT OF MAUREEN E. MAHONEY

7 ON BEHALF OF THE PETITIONER

8 MS. MAHONEY: Mr. Chief Justice, and may it
9 please the Court:

10 This case concerns a facial challenge to the
11 constitutionality of a program adopted by the Attorney
12 General in 1988 to govern the care and custody of
13 unaccompanied alien minors who are charged with being in
14 the United States illegally.

15 The Ninth Circuit held that this program was
16 unconstitutional in two separate respects. First, it
17 invalidated the substantive determination that the
18 Attorney General made about who had the appropriate
19 requirements to serve as a custodian for these children.
20 And second, it invalidated the procedures that were used
21 to make that determination.

22 We respectfully request this Court to reverse
23 both rulings of the Ninth Circuit, and I would like to
24 turn first to the substantive due process issue.

25 I think that the best way to explain why the

1 program is constitutional is to explain the program.
2 Because a description of those terms reveals that this
3 program is not only supported by legitimate purposes which
4 conclusively establish its constitutionality, but, in
5 fact, these terms are far more consistent with the welfare
6 of these children than the program that was adopted by the
7 Ninth Circuit on its own.

8 And I think the best way to do this is just
9 to -- to try to describe the problem that INS confronts.
10 Every year thousands of unaccompanied minors are taken
11 into custody. These children have travelled large --
12 primarily from Haiti or from Central America. Sometimes
13 they're bound for relatives in the United States,
14 sometimes they're living on the streets of Los Angeles,
15 but all of them concede -- virtually all of them -- that
16 they are here illegally.

17 And when INS takes them into custody it doesn't
18 want to keep them in custody, but these children all share
19 the same problem and that is that they have no home to go
20 to. Now, what is INS supposed to do?

21 The easiest and the cheapest thing they could do
22 is adopt the substantive policy that the Ninth Circuit
23 said they should adopt, and that is to simply release them
24 to the first willing adult who comes along and says that
25 they'll ensure that they show up for their deportation

1 hearing. And that's what the Ninth Circuit said that the
2 INS must do.

3 QUESTION: May I just interrupt. You said the
4 policy was adopted in 1988. I had in the back of my mind
5 it was 1984. Whatever date it was, isn't it true that
6 they had been doing this for a long time before 1984?

7 MS. MAHONEY: Your Honor, this problem started
8 in the early -- in the 1980's, and there was no national
9 program to deal with the issue of the custody of
10 unaccompanied minors until 1988. It was done on a --
11 basically, on the basis of different districts using
12 different policies. And, frankly, the system was somewhat
13 haphazard.

14 But the important point here is that by the time
15 the district court ruled in 1988, the policy that was at
16 issue was the national policy that is reflected in two
17 places. It is reflected in the regulation, 242.24, which
18 establishes the requirements for fitness to serve as a
19 custodian. And it's established in the standards that
20 govern the shelter care facilities where these children
21 have to be placed, and that's set forth in the Federal
22 Register, and it is also adopted as part of a settlement
23 agreement in this case that is binding and enforceable.

24 Both of those aspects of the Attorney General's
25 program had been adopted and were being implemented at the

1 time that the district court found this program to be
2 unconstitutional. And the evidence in the case that had
3 related to the conditions of custody, and also the program
4 that had been followed previously, were simply irrelevant
5 by that period of time.

6 QUESTION: Well have they -- excuse me.

7 MS. MAHONEY: Go ahead.

8 QUESTION: I was just going to ask you are they
9 irrelevant in the sense -- sometimes history explains why
10 a regulation is adopted. A regulation responds to
11 problems that can be proved in the record of a case.

12 And I think -- isn't it true that in this record
13 there is no evidence of any problem that caused the
14 adoption of the new policy?

15 MS. MAHONEY: There is no evidence of any
16 problem, but the INS did not concede that there were no
17 problems in the districts where they released them.

18 QUESTION: They just didn't prove -- they just
19 didn't prove that there were any.

20 MS. MAHONEY: They did not prove that there were
21 any. But the important point here, I think, is that if we
22 look at the Federal Register notice that accompanies the
23 adoption of this regulation, it states quite clearly what
24 the purposes of INS are. And those purposes, the purposes
25 of the Attorney General, are to further the overall

1 welfare of these children.

2 One thing that the Ninth Circuit just
3 fundamentally did not discuss was what are -- what is the
4 condition of custody that is at issue here. It assumed
5 that what we are talking about is detention of children in
6 institutional facilities, incarceration. And they -- they
7 concluded that that doesn't make any sense if what you're
8 trying to do is further the children's welfare.

9 But that, in fact, is not what INS does with
10 these children. Instead, they -- while they retain legal
11 custody until an appropriate guardian can be found, they
12 have entered into a series of quite expensive agreements
13 with private, State-licensed child welfare organizations
14 to place the children in these homes, pending location of
15 a family member or the appointment of a guardian.

16 Typically, the placement in these homes is 30
17 days, maybe a little bit more, a little bit less. It
18 is -- it's an expensive program, and the restrictions on
19 their freedom are truly quite minimal. In fact, under the
20 terms of the -- of the program as established in the
21 Federal Register, the facilities that provide this care --
22 and I would note, for instance, that half of the care
23 providers are facilities that are -- have been established
24 -- group homes and foster homes established by the
25 Catholic Church.

1 These homes provide that -- that they are not --
2 they're to be done in an open setting. They don't have
3 barbed wire. They're -- to use the terms of the CRS
4 Standards, is that the homes are to use programs and
5 strategies that are designed to prevent unauthorized
6 absences. That's the nature of the restraint on liberty
7 that we're talking about here.

8 Furthermore, in the Federal Register where the
9 INS discusses why they retained legal custody of these
10 children while they're in these homes, it's so that they
11 can pay for it. They're not imposing substantial
12 restraints on these children. They're -- they're
13 retaining a legal obligation to care for the children
14 until the home can be found.

15 Another important aspect of this program that
16 absolutely goes by the board under the Ninth Circuit's
17 plan is that these facilities that -- the directors of
18 these child-care facilities are actually paid to help the
19 children find family members. The whole objective is to
20 find people that they can link up with and live with in a
21 caring and supportive environment, and typically that is
22 successful.

23 INS works with the director of the facility to
24 try and locate the parents to find out who they would
25 designate as a guardian, or to find relatives. And that

1 is precisely how this program works, and that is -- it is
2 the very purpose and, really, far more consistent with
3 these children's interests than the plan that the Ninth
4 Circuit has.

5 QUESTION: Now Ms. Mahoney, generally what is
6 the age of these children? Does it run all the way from 0
7 to 18?

8 MS. MAHONEY: Generally, they're -- most of them
9 are 16 and 17, some of them are as young as 13 and 14.
10 And there are different kinds of care facilities
11 available, particularly for the youngest children. Some
12 of the Catholic Church's organizations, for instance,
13 include foster-care homes where these children can be
14 placed pending the location of a family member.

15 QUESTION: You made mention of Haiti. I don't
16 find it in your brief, but how do those Haitians get over
17 here?

18 MS. MAHONEY: Well, a lot of them are brought
19 here or have -- had been brought here by the United
20 States, The Coast Guard picked them up and have brought
21 many of them from Guantanamo to the United States, to
22 assert -- they paroled them into the United States.

23 And I would note, Your Honor, that many of those
24 child -- some of those unaccompanied minors are housed in
25 precisely the same location as these children who have

1 been charged with illegal presence in the United States,
2 showing that -- that these terms -- the terms of custody
3 here are really not restrictive of liberty.

4 They are designed to further the interests of
5 the children. They offer specialized programs to help the
6 children in terms of becoming culturally acclimated into
7 our society, and -- as well as -- as educational efforts
8 and medical treatment. A whole range of services. But,
9 frankly I think --

10 QUESTION: Ms. Mahoney, all of the juveniles
11 which are subject to the INS program are themselves
12 thought to be subject to deport -- to be illegally
13 present.

14 MS. MAHONEY: Yes, Your Honor. And, in fact, as
15 this Court noted in NCIR last year, aliens that are
16 brought into custody and charged with being deportable, 97
17 percent of the time they concede deportability. And here
18 I think it's probably more like 99 percent of the time
19 they concede that they are deportable. And the only
20 issue, really, is whether they will be given relief from
21 deportation at the time of their hearing, which is often
22 much longer, I mean much --

23 QUESTION: If they are found nondeportable, what
24 provision is made for their custody? Assume a
25 15-year-old.

1 MS. MAHONEY: In other words if they were
2 brought -- if they were arrested, and there was no basis
3 to hold them.

4 QUESTION: They're arrested, they're found
5 nondeportable, yes.

6 MS. MAHONEY: I don't know the answer to that.
7 I assume that INS would place them in one of their shelter
8 care facilities and look for a parent. I'm really not
9 certain.

10 QUESTION: But if the police authorities
11 detained, say, a 15-year-old -- he's known to be a
12 citizen, he's not an alien -- can they hold -- continue to
13 hold him if no parent or close relative appears, or is
14 there a constitutional obligation to release the
15 15-year-old?

16 MS. MAHONEY: Not talking about aliens now.

17 QUESTION: Just -- just a citizen, a young
18 citizen.

19 MS. MAHONEY: Well, I think that -- that the way
20 it works under the statute, anyway, is that a magistrate
21 is to find an appropriate custodian for them, including a
22 licensed -- the director of a shelter care facility, and
23 is to release the child to --

24 QUESTION: This is under the Federal Youth
25 Corrections Act?

1 MS. MAHONEY: Yeah, 18 U.S.C. 5034, I believe.
2 They are to release them to the director of a shelter care
3 facility, or a responsible adult.

4 QUESTION: Even though no offense has been
5 committed.

6 MS. MAHONEY: Oh, excuse me, I'm sorry. If no
7 offense has been committed --

8 QUESTION: Yes.

9 MS. MAHONEY: -- I do not know what they do with
10 them.

11 QUESTION: Would it be constitutional for the
12 Federal Government to pass a statute saying that they must
13 be detained until an adult family member or other
14 responsible adult appears to take custody of the child?

15 MS. MAHONEY: I think it would, Your Honor. The
16 critical inquiry in due process analysis is the legitimacy
17 of the Government's purpose. And certainly I think the --
18 the best analogy to what you're talking about would be
19 statutes dealing with runaways.

20 Because oftentimes police, let's say, in
21 California will pick up a child who is not charged with an
22 offense, but who they discover has run away from their
23 home in, let's say, Illinois. And many States have
24 statutes that provide that the State authorities are not
25 to release the children to anyone other than a legal

1 custodian or a parent. And the reason is if they release
2 them to someone else, they will prevent the family
3 reunification which is really the heart of the liberty
4 interests that children might have.

5 QUESTION: And this is up to the age of 18, you
6 think?

7 MS. MAHONEY: That is up to the age of 18,
8 that's correct, Your Honor. And I know that in -- in
9 Arizona and in California they have such statutes.

10 Under the Ninth Circuit rationale, those laws
11 really should be unconstitutional. Because what they have
12 really said is that it is unconstitutional for the
13 Attorney General to prefer to place these children
14 temporarily in a licensed child-care facility pending the
15 location of a family member, instead of releasing them to
16 an unrelated adult.

17 And, I mean, from a parent's perspective, I
18 think that the Ninth Circuit's system is rather
19 frightening. I would certainly think that many parents
20 would prefer to know that their children are in the
21 custody of licensed child-care professionals than being
22 released to strangers who are not under the supervision or
23 monitoring of any State system. And they are simply
24 vulnerable and in those parents' homes with no -- in those
25 adults' homes with no one to watch them. So --

1 QUESTION: Ms. Mahoney, does the record include
2 what you've just represented to us about the basic reason
3 being to -- to, in effect, preserve conditions in which
4 the reunification of the family can be fostered, as
5 opposed to conditions in which that is less likely. Is
6 that in the record?

7 MS. MAHONEY: Well, the CRS Standards are
8 certainly in the record. Those are the standards, the
9 community relations standards, that govern the facilities.
10 And it very much says, in fact it places a contractual
11 obligation on the facility to assist the child in finding
12 an appropriate -- finding family relatives or an
13 appropriate custodian and, in fact, says that they are to
14 assist family members who need to go through the State
15 guardianship process.

16 And, yes, that is in the record. It is a
17 contractual obligation. It's in our appendix.

18 QUESTION: Ms. Mahoney, if we were dealing here
19 with someone over the age of 18, and that person had been
20 arrested on a deportation warrant, found not deportable, I
21 take it, then, the INS would simply release the person?

22 MS. MAHONEY: That's correct, Your Honor.

23 QUESTION: So the INS deals differently with --
24 with minors or juveniles than it does with adults.

25 MS. MAHONEY: That's correct.

1 QUESTION: Would you clarify for me something
2 that I think Justice Stevens asked you? Was it, in fact,
3 the policy of INS before 1988 to release deportable minors
4 to responsible adults other than the listed relatives?

5 MS. MAHONEY: Your Honor, it was not a national
6 policy. Some districts did and some districts did not.
7 San Diego, for instance, did not. They insisted that it
8 be --

9 QUESTION: But no articulated policy.

10 MS. MAHONEY: There was not a unified policy.
11 And, frankly, there was dissatisfaction with the policy,
12 which is what led to the adoption of this overall program,
13 in order to try to, in fact, assist the minors.

14 The --

15 QUESTION: But Ms. Mahoney -- excuse me.

16 QUESTION: This regulation was adopted with
17 virtually no explanation in the record, as far as a normal
18 APA explanation.

19 MS. MAHONEY: The Federal Register includes an
20 explanation of the reasons.

21 QUESTION: Well, isn't it pretty cursory? I
22 mean it just says no home studies; we're not equipped to
23 do it, we're not equipped to consider those matters.

24 MS. MAHONEY: Well, it also says, though, that
25 what they're concerned about is the welfare of the

1 children and that they think it appropriate to rely upon
2 State processes. And it talks about -- it's not just
3 about financing this issue, it's about expertise.

4 And I think it's important to note that under
5 certain provisions of the Immigration and Nationality Act,
6 Congress has, in fact, said that it is appropriate for the
7 Attorney General to defer to State laws concerning custody
8 of children. And I'd like to, sort of, point out which
9 those are, because I think they strongly support the
10 policy that the INS and the Attorney General have adopted
11 here.

12 First, in connection with adoption, which is set
13 forth in 8 U.S.C. 1101(b)(1)(F) and 1154(d), Congress said
14 that a foreign-born child can only be brought into the
15 United States for adoption if the Attorney General is
16 satisfied that proper care will be furnished, and that
17 finding can only be made if there is a valid home study
18 that has been favorably recommended by the State agency.
19 In other words, even with respect to immigration, the
20 State agencies' determinations are dispositive of fitness
21 to serve as a custodian.

22 And probably of more significance is the 1980
23 Refugee Act has a provision at 8 U.S.C. 1522(d) that deals
24 with the problem of what to do with the unaccompanied
25 minor refugees who are brought into the United States

1 legally. And there what Congress said is that these
2 children have to be placed in homes under the laws of the
3 States, and the director of the Office of Refugee
4 Resettlement specified in the Federal Register at 52
5 Federal Register, 38147 and in regulation 45 CRF 400.115,
6 that the States have to establish legal responsibility
7 under State law for these children, so that the children
8 can gain the protection that State law affords.

9 And stated that all -- that it is appropriate to
10 place these children in group homes, just like INS does,
11 pending location of a family, but cautioned that placing
12 them even in State-licensed foster homes should not be
13 done until those foster parents had received appropriate
14 training on how to care for these children. And really --

15 QUESTION: Ms. Mahoney, may I go back to the
16 history just a moment, please, because I think we're going
17 -- isn't it true that the -- this case began in 1985.

18 MS. MAHONEY: That's correct, Your Honor.

19 QUESTION: 3 years before the regulation that
20 you adopted.

21 MS. MAHONEY: That's correct.

22 QUESTION: And it terminated about the same time
23 you promulgated the regulation.

24 MS. MAHONEY: Shortly afterwards.

25 QUESTION: In the district court. And prior to

1 1984, is it not true that the nationwide policy was to
2 place the children with responsible adults?

3 MS. MAHONEY: I don't believe so, Your Honor.

4 QUESTION: Maybe there was no policy --

5 MS. MAHONEY: I believe there was -- they
6 would -- different districts did it different ways.

7 QUESTION: Is there any evidence that the --
8 this policy had been adopted in any district before 1984?

9 MS. MAHONEY: Yes, Your Honor. Well, I --

10 QUESTION: Before 1984.

11 MS. MAHONEY: Before 1984 I'm not certain. I
12 know it was a policy in San Diego at least during some
13 period of the pendency --

14 QUESTION: Between 1984 and 1988.

15 MS. MAHONEY: Right, but --

16 QUESTION: And is there any evidence in the
17 record that the old policy ever got the department in any
18 trouble or ever got any children in any trouble?

19 MS. MAHONEY: Your Honor, the department did not
20 put that evidence in the record, nor did they concede ever
21 that there had not been any problems.

22 QUESTION: And didn't they have two reasons for
23 adopting the policy, and one was to protect themselves
24 from liability?

25 MS. MAHONEY: They stated that that was a reason

1 when they adopted the policy in the region in -- in the
2 Los Angeles area. A lot of the evidence in the record ran
3 to --

4 QUESTION: And was that before the -- our
5 decision in the Deshaney case?

6 MS. MAHONEY: Your Honor, I believe that it was.
7 But that is not the --

8 QUESTION: You don't rely on that when -- that
9 reason anymore.

10 MS. MAHONEY: No. That may be a reason, but I
11 don't think that that is the -- what's motivating this. I
12 mean INS is -- the Attorney General is spending a lot of
13 money, a lot of effort, trying to help the children. And
14 I don't see why we should conclude that they're
15 constitutionally mandated to protect them less.

16 And even if that was once how they did it, one
17 reason they might not know about problems, Your Honor, is
18 that once they release them to an adult, they don't --
19 they don't necessarily hear from them ever again.

20 QUESTION: No, but the thing that puzzles me
21 is -- under your description of the history it's puzzling
22 to me to understand why anyone would bring this lawsuit.

23 MS. MAHONEY: Well, the lawsuit -- this was not
24 the policy at the -- national policy at the time the
25 lawsuit was brought.

1 QUESTION: No, but why wouldn't they have
2 just -- why wouldn't your opponents just throw in the
3 towel and say, well, they're taking such wonderful care of
4 these children that we have no reason to litigate?

5 MS. MAHONEY: Your Honor, I think they should
6 have. I think they should have, and I do not -- you know,
7 when we were before the district court lawyers for the
8 department said we have adopted a new policy.

9 First of all, we've settled all of the claims
10 concerning the conditions of confinement. We have adopted
11 the community relations standards and established a
12 network of shelter care facilities, and there is a
13 settlement agreement that is enforceable that requires us
14 to adhere to those standards. And now we've adopted,
15 related to that, this regulation which identifies who's
16 appropriate to be fit as a custodian.

17 The district court, nevertheless, went ahead.
18 He looked at -- he got supplemental briefs on the issue
19 and found that the program was facially unconstitutional,
20 and there's never been any question that it is that
21 regulation which has been the subject -- was the subject
22 of his order and which was before the Ninth Circuit at the
23 time that they ruled.

24 They were -- I mean maybe they were influenced
25 by ancient history, but the fact is this is the program

1 that has been held invalid. Outside the western region,
2 the Attorney General provides all of this support for the
3 children, and inside the western region the Attorney
4 General must release these children to any unrelated adult
5 absent affirmative evidence that they're going to harm the
6 child.

7 We don't like that system. We don't think it's
8 sound, and think that it's -- it's simply not only
9 legitimate, but that this is the way to do it. This is
10 the way to handle the problem and to serve the long-term
11 interests of these children.

12 If I could turn quickly to the procedural issue.

13 QUESTION: Ms. Mahoney, may I just ask you one
14 question before you do that. It's just sort of about the
15 present state of the record. We're left, it seems to me,
16 as Justice Stevens has pointed out, with evidence that
17 prior to '84 a -- we'll call it a less restrictive or less
18 protective, whichever word we want to use, policy was in
19 effect.

20 There's no evidence that the Government suffered
21 liability as a result of that policy, and there's no
22 evidence that, in fact, the Government had runaways and
23 found it difficult to -- to bring their respondents to the
24 point of adjudication. On top of that, we have a change
25 of policy in '84 to the more protective or restrictive.

1 We have no affirmative evidence supporting that.

2 How does that affect our right to -- to make a
3 determination about legitimacy for the -- for the kind of
4 threshold level substantive due process analysis?

5 MS. MAHONEY: Your Honor, I don't think there
6 needs to be a factual record for the issue of legitimacy
7 here. I think we can simply look at the program. There's
8 nothing about the features of this program that would
9 suggest an illegitimate purpose.

10 It is cheaper, it is easier, to release the
11 children in the manner that the Ninth Circuit has
12 established, so what possible illegitimate purpose could
13 the INS have unless one concluded that it is not relevant
14 whether these children find a home and an appropriate,
15 suitable guardian.

16 And, certainly, the provisions of the
17 Immigration and Nationality Act suggest otherwise, that
18 Congress is very concerned with the welfare of alien
19 children while they are in the United States, as they
20 should be. And, in fact, the Attorney General is
21 politically accountable to foreign nations for the
22 treatment of their citizens, including their minor
23 citizens, while they are here.

24 There's simply no basis to infer anything other
25 than a legitimate purpose under these circumstances. And

1 given that there really is not any significant restriction
2 on these children's liberty interests, it seems to me that
3 there's no real way to say that this doesn't survive
4 constitutional scrutiny.

5 Certainly, though, under *Kleindienst v. Mandel*,
6 all INS has to show is that it has a legitimate purpose,
7 and certainly we have done that.

8 I'd like to save the remainder of my time for
9 rebuttal, if there are no further questions.

10 QUESTION: Very well, Ms. Mahoney. Mr. Holguin,
11 we'll hear from you.

12 ORAL ARGUMENT OF CARLOS HOLGUIN

13 ON BEHALF OF THE RESPONDENTS

14 MR. HOLGUIN: Mr. Chief Justice, and may it
15 please the Court:

16 The issue here, we believe, is straightforward.
17 May a law enforcement agency institutionalize children
18 throughout a lengthy deportation process solely to protect
19 that child when there is a responsible adult available to
20 care for that minor.

21 The district court held that the INS may detain
22 children, provided the agency makes an individualized
23 determination that an available adult would not be -- or
24 release to an available adult would not in a given child's
25 best interests.

1 Now, heretofore under our Constitution, liberty
2 has been the norm and detention the carefully limited
3 exception.

4 QUESTION: Well, with respect to children, Mr.
5 Holguin, they're always in somebody else's custody, are
6 they not?

7 MR. HOLGUIN: That's true, Your Honor.

8 QUESTION: I mean it isn't -- you aren't
9 contending that these 13 or 15 or 16 should simply be
10 released on their own on the street.

11 MR. HOLGUIN: Absolutely not, Your Honor. In
12 fact, this case doesn't even involve those minors for whom
13 no person comes. If -- under this district court's order,
14 if no -- no responsible adult appears for that minor, then
15 the Immigration Service, under this order, is permitted to
16 continue detention.

17 QUESTION: And you don't contest the validity of
18 that.

19 MR. HOLGUIN: No, not in this case, Your Honor.

20 QUESTION: Well, as a matter of law there's a
21 right to detain in that circumstance, is there not?
22 There's no constitutional violation.

23 MR. HOLGUIN: In the event that the INS takes a
24 minor into custody and then no minor -- nobody comes
25 forward for that minor.

1 QUESTION: Yes.

2 MR. HOLGUIN: I believe -- or the Constitution
3 would require some efforts on the part of the State to
4 minimize detention. What those might be is -- is really
5 not at issue under the district court's order.

6 QUESTION: Well, would those efforts be
7 sufficient in the terms in which your -- Ms. Mahoney
8 described them to us, and that is that the -- that the
9 children are -- are -- are -- are retained. The custody
10 of the children is retained, and yet the contract parties
11 who have actual custody of the children are obligated,
12 among other things, to take steps to try to link them up
13 with their natural families and ultimately to be in a
14 position to reunify the families.

15 Would that be a sufficient justification on your
16 theory?

17 MR. HOLGUIN: If the -- if Government has
18 detained an individual and is making efforts to reduce or
19 to minimize the amount of detention that individual is
20 going to -- going to experience, then efforts toward
21 family reunification are certainly -- are certainly one
22 way of doing that.

23 The problem here is where we have no one coming
24 forward for the minor. The efforts to reunify the family
25 could go on for weeks, for months, even up to a year,

1 and -- and -- and the --

2 QUESTION: Well let's assume they do that.
3 Let's assume that that's what they do. Is the -- does the
4 justification fall because of that possibility?

5 MR. HOLGUIN: That there may be reunification
6 with a parent later on down the road?

7 QUESTION: That they're -- well, I am assuming,
8 and you don't, at least at this point, challenge, that
9 there is, in fact, a bona fide object to accomplish that
10 result and a bona fide effort to do so.

11 MR. HOLGUIN: Yes, yes.

12 QUESTION: Yeah, okay.

13 QUESTION: So is this a -- a facial challenge to
14 the policy? If that's so, if what you've just said is
15 conceded, that there is a policy established that says
16 they will look for a responsible family member to take the
17 child, then you just are left with a facial challenge, are
18 you not?

19 MR. HOLGUIN: I -- no, Your Honor. What we have
20 is a situation where there is somebody available to care
21 for that minor. There is no indication that there -- that
22 these family reunification efforts are at any time in the
23 future going to result in release.

24 The whole point is that the Immigration Service
25 never bothers to figure out, well, what are the

1 possibilities of family reunification here. It's simply a
2 blanket rule that's applied and says that unless one of
3 these people who appears on the blood relative list
4 appears in front of us, then we're not going to release.

5 We say in our -- in our -- in our papers and in
6 our plan that we're going to make efforts to find -- to
7 find family members, but there's no provision as to what
8 happens when those efforts appear to be futile.

9 And the record is quite clear. This is the
10 furthest thing from a facial challenge. We have an
11 extensive record here showing that minors, children were
12 being held for extraordinarily long periods, despite these
13 efforts that the Immigration Service has only recently
14 inaugurated, ostensibly, to find family members and so
15 forth, without there ever being an end to detention or any
16 kind of an individualized determination, no matter how
17 remote the possibility of finding any kind of a relative
18 is.

19 And that's the entire thrust of this case.

20 QUESTION: Mr. Holguin.

21 MR. HOLGUIN: Yes.

22 QUESTION: Does your position not require you to
23 maintain that the Federal statute governing detention of
24 aliens suspected of illegal immigration is
25 unconstitutional?

1 Because as I understand the statute, in
2 principle all aliens suspected of illegal immigration may
3 be detained in custody, adults and children alike. It's
4 up to the discretion of the Attorney General to release
5 them, if he wishes. Now is that unconstitutional?

6 MR. HOLGUIN: Your Honor, just last term this
7 Court held in National Center for Immigrants Rights,
8 Incorporated, versus the INS, that under that statute
9 there needs to be an individualized determination as to
10 cause for detain. Now once that happens --

11 QUESTION: Where -- as to cause, meaning as to
12 whether the person is an illegal immigrant or not, or is
13 likely to be an illegal immigrant. But you don't have to
14 let them out to enjoy the United States for 2 years before
15 you can finally deport them.

16 MR. HOLGUIN: Well --

17 QUESTION: You could -- you could hold them in
18 custody, could you not, all of them, adults and children
19 alike?

20 MR. HOLGUIN: You can maintain them in custody
21 under the precedent that I've just cited only if there is
22 an individualized determination, that there used to be
23 done.

24 QUESTION: Determination of what? Determination
25 that they're probably illegal immigrants, correct?

1 MR. HOLGUIN: I'm sorry, Your Honor. In that
2 case it was an individualized determination of right to
3 work or not.

4 So I think that the initial -- the initial
5 decision to detain here is not at issue. The initial
6 decision where the INS has said we're going to take you
7 into custody is not the issue.

8 QUESTION: You will have won a pretty small
9 victory if the only -- if the only minors that your-- that
10 your victory applies to are those who are not reasonably
11 suspected of being illegal immigrants, because I don't --
12 I don't suppose that that's a very large percentage of the
13 total at issue.

14 MR. HOLGUIN: The Immigration Service's
15 rationale for adopting this policy has nothing to do with
16 whether a minor is going to appear for a deportation
17 hearing or not, whether they're going to be available for
18 deportation. The entire justification for this policy
19 turns on one item, and that is whether or not detention is
20 going to be in the best interests of minors as a general
21 proposition.

22 QUESTION: Well, if -- if -- if it's determined
23 that there's -- individually determined that there's
24 probable cause to think an adult is deportable, I assume
25 you concede that the INS may detain that adult in custody

1 pending the final determination.

2 MR. HOLGUIN: Are you referring to the statute
3 itself?

4 QUESTION: Yes, and the Constitution.

5 MR. HOLGUIN: Under the Constitution the INS
6 would have to show a -- that its grounds for detaining are
7 weighty enough to justify that kind of infringement on
8 personal liberty. That showing --

9 QUESTION: So you don't concede that the INS
10 could detain adults?

11 MR. HOLGUIN: Detain every -- no.

12 QUESTION: Its grounds for detaining are that
13 this person does not belong in the United States. And we
14 have -- we have good reason to believe that this person
15 should be deported, and we're darned if we think that the
16 person should enjoy the United States for as long as it
17 takes to get the person deported.

18 MR. HOLGUIN: Well.

19 QUESTION: We're talking aliens, now, we're not
20 talking about United States citizens.

21 MR. HOLGUIN: We may be. The point of the
22 matter is, is that when counsel refers to the vast
23 majority of people who are apprehended by the Immigration
24 Service being illegally here and conceding their
25 deportability, we're not -- these are not the minors that

1 we're talking about in this case.

2 Those individuals sign what's called a voluntary
3 departure form and are -- and are sent on the next
4 available transportation outside of the country. Only
5 those minors who say wait a minute, I have a reason to
6 contest my deportability, are the ones that find
7 themselves in the deportation hearings and in the long-
8 term type of institutionalization that we're dealing with
9 in this case.

10 So the vast majority of those whom you correctly
11 point out are here illegally have gone and never find
12 themselves members of this particular class of children.
13 It's only those who have said wait a minute, I have a
14 reason to contest my deportability, I have a defense of
15 deportation, I want a deportation hearing -- and those are
16 the ones that we're placing into this long-term detentive
17 scheme.

18 QUESTION: Who do they deport these children to?
19 What do you do with a child who says you've got me, I'm an
20 illegal immigrant? Whom do we deport such a child to, if
21 we don't know where his parents are?

22 MR. HOLGUIN: They're simply -- they're
23 deported. They are deported. This is the reality of --
24 of -- of daily operations in this country. We'll deport
25 them.

1 QUESTION: Without locating the parents?

2 MR. HOLGUIN: We'll send them to San Salvador.
3 We'll send them to San Salvador. We'll send them to
4 Haiti. We'll send them to Mexico. We'll send them to
5 Europe. And if there is no one there to receive them,
6 then they're simply, basically, placed there and that's
7 it.

8 QUESTION: I can't believe that, but if that's
9 true it seems to me that's the problem you ought to be
10 concerned about. But the problem you're talking about is
11 nothing compared to that.

12 QUESTION: Doesn't your argument at this point
13 boil down, then, to a procedural due process argument that
14 there is an inadequate basis to -- to separate the one
15 category, children, and one category from children and the
16 other?

17 MR. HOLGUIN: And the two categories you're
18 referring to are?

19 QUESTION: Those who are reasonably suspected of
20 being illegal aliens and those who are not.

21 MR. HOLGUIN: I don't believe so, Your Honor.
22 What we've said here, and what Immigration has said again
23 and again, if I may elaborate, is that the only reason for
24 this policy is to protect children. It doesn't have
25 anything to do with their deportability, the likelihood

1 that they're going to be deported.

2 What we do know is that the majority of these
3 minors, all of them in fact, are at the front end of the
4 deportation process that could take anywhere from 6 months
5 to a year to longer. The Immigration Service --

6 QUESTION: And that may be, but whether the
7 Constitution is violated -- it may well be that the only
8 reason they do it is because they're trying to protect the
9 children, but whether the Constitution has been violated,
10 surely, depends upon whether it is constitutional to keep
11 these people without allowing any of them to leave
12 custody.

13 MR. HOLGUIN: But the constitutionality of any
14 detention must turn upon Government's reasons for
15 detaining. It must turn on the weight of society's
16 interest in having detention effected. Otherwise, as this
17 Court held -- has held repeatedly -- it's freedom that is
18 the constitutional norm.

19 Now just last term in *Foucha v. Louisiana*, that
20 -- Mr. Foucha could have been detained. He could have
21 been jailed for having committed a particular crime. He
22 was found guilty -- he was found not guilty by reason of
23 insanity, and this Court said, yes, the Government wants
24 to detain now because of dangerousness.

25 We might have been able to hold him for a

1 criminal -- having committed a criminal act, but we can't
2 because the Government is talking about dangerousness now,
3 and it's incumbent upon Government to show --

4 QUESTION: The reason for detention is this
5 statute which says you can detain illegal aliens. The
6 reason we're detailing -- detaining them is that they are
7 illegal aliens. Now you say, well, you're letting the
8 adults go until -- until the full trial.

9 And we say, well, maybe that's the case, but
10 don't tell me the reason I'm detaining them is that
11 they're children. There are a lot of children out there I
12 don't detain. I'm detaining them because they're illegal
13 aliens. Is that an unconstitutional reason for detaining?
14 I don't think so.

15 MR. HOLGUIN: Very well. Now I wish to go into,
16 now, the genesis of this policy, because counsel has made
17 certain statements concerning that policy and its genesis
18 that I think need to be explored.

19 First of all, the prior policy to 1984 was that,
20 across the Nation, Immigration Service officers were
21 entitled to make informed decisions as to whether they
22 should release an individual to a person who -- to someone
23 who comes for a minor.

24 QUESTION: Mr. Holguin, to what part of your
25 argument -- your legal argument are these policy

1 statements addressed? Is it to the constitutionality of
2 the regulations?

3 MR. HOLGUIN: Yes, sir, yes.

4 QUESTION: You're not claiming they weren't
5 authorized by statute.

6 MR. HOLGUIN: They weren't authorized by statute
7 to make --

8 QUESTION: Yes. You certainly -- that,
9 certainly, the Ninth Circuit never -- never passed on
10 that.

11 MR. HOLGUIN: The panel did. The -- the en banc
12 panel did not. The -- our position -- and continues to be
13 in front of this Court and we've raised it in front of the
14 Ninth Circuit -- is that because the Immigration Service,
15 under the statute, must make an individualized
16 discretion -- must exercise individualized discretion to
17 continue someone in detention, that this particular
18 blanket policy violates that statutory restriction.

19 The --

20 QUESTION: Did you cross petition for
21 certiorari?

22 MR. HOLGUIN: No, we did not.

23 Now then, the record is -- is quite clear that
24 the Immigration Service for years prior to 1984, and for 3
25 or 4 years now under the district court's order, has

1 released minors to responsible unrelated adults with
2 unblemished success.

3 The policy that we've heard about, and heard
4 talked about as being some -- an enlightened policy in
5 order to -- in order to protect minors, is simply not
6 something that's supported in this record. In fact, we
7 know that all 50 States, including the Federal Government
8 in 18 U.S.C. 5034, all the model standards all say that
9 detention is inimical to minors' well being. That what
10 you do, as a matter of sound child welfare policy, is that
11 that you release to responsible adults.

12 Now, the district court issued a simple order
13 after -- on the basis of an uncontroverted record that
14 showed that the INS lacks any substantial justification
15 for this rule. And that, in fact, the INS lacks even a
16 rational reason for this type of a detention policy.

17 QUESTION: So in -- what followed from that
18 conclusion in the eyes of the district court, that the
19 regulation violated some provision of the Constitution?

20 MR. HOLGUIN: That the regulation, to the extent
21 that it did not provide for an individualized
22 determination, did deny due process.

23 Now, the INS admitted that it had no evidence to
24 support its view that releasing to --

25 QUESTION: Well how -- how -- how -- how could

1 the lack of justification for the regulation -- if that
2 was the DC's basis, how would that support a procedural
3 due process violation?

4 MR. HOLGUIN: The procedural due process
5 violation is simply this. That if the INS has reason to
6 believe that detention is going to be in a given minor's
7 best interest, that an individual who comes forward and
8 says I would like to care for this minor is not qualified.
9 Then you have some kind of procedure by which that is
10 probed.

11 If, in fact, the Immigration Service comes to
12 any kind of a decision --

13 QUESTION: Why do you need a procedure whereby
14 it's probed? I mean where does the Constitution tell you
15 that?

16 MR. HOLGUIN: The Constitution says that
17 detention is going to be limited.

18 QUESTION: Well, but, again, you -- detention or
19 custody, certainly if you're talking about adults, you're
20 correct. But children are going to be in someone's
21 custody. You agree with that, the INS agrees with that.

22 MR. HOLGUIN: Yes.

23 QUESTION: It just depends on whose custody
24 they're going to be in.

25 MR. HOLGUIN: But why have we made that

1 exception for minors? We've made that exception for
2 minors because they need protection. Again, we come back
3 to the INS's justification for this policy. Does it
4 protect minors or doesn't it?

5 The INS -- and we have said that when you look
6 at the facts in this case and how this matter -- how this
7 matter has been applied, that is not the case. It does
8 not result in protection. Now --

9 QUESTION: Well, let -- let me ask you this.
10 Suppose that a State in its child welfare program
11 determined that as far as any minor that it had to take
12 into custody as being a runaway or a child without any
13 visible means of support, can the State make a blanket
14 determination that it thinks that a group home setting is
15 better for those children than individualized placement
16 with foster homes, for example?

17 Can the State do that, and just put all of such
18 children in group homes?

19 MR. HOLGUIN: Where they would be detained?

20 QUESTION: Yes, indeed, as much as you'd be
21 detained in any setting as a child.

22 MR. HOLGUIN: And this is a situation where
23 the -- where somebody is available other than someone that
24 the State has identified as being an appropriate
25 custodian.

1 QUESTION: Well, as much as you have here, I
2 guess. I don't know who all the people are that you say
3 come forward to take these children.

4 MR. HOLGUIN: If the State has in front of it a
5 responsible adult whom it has -- or whom it has simply
6 said we know this adult is responsible, or we've
7 determined this adult responsible, but we simply do not
8 want to release, we're going to place a minor into a group
9 home where he or she will be detained, then, no, that
10 policy would not be constitutional.

11 QUESTION: This is a child who has parents, as
12 far as the State knows.

13 MR. HOLGUIN: It may be a child who has parents,
14 it may be an orphan.

15 QUESTION: They're -- they're looking for the
16 parents and they're looking for relatives, and you're
17 saying in the interim they cannot keep that child in a
18 group home, they must release the child to anyone who
19 comes forward that they believe is responsible. That's
20 extraordinary.

21 MR. HOLGUIN: That's -- the position that we
22 have said -- we have taken is that if the parent does not
23 come forward, then, yes, there must be release. That a
24 minor's freedom should not turn upon the willingness of a
25 parent or a guardian to come forward for him or her.

1 QUESTION: A minor is not going to be free.
2 He's -- he's going to be imprisoned in my home or he's
3 going to be imprisoned in a group home. I mean, he's
4 under the custody of someone. Minors cannot come and go
5 at will; it's -- it's part of the problem of being a
6 minor. You grow out of it eventually, so it's not so bad.

7 MR. HOLGUIN: What I want to do -- why don't we
8 look at the reality. Let's look at the reality of this
9 for just one moment.

10 Now, the reality is that in California, for
11 example, INS detainees are kept in a facility in El
12 Centro, California. A place, in essence, remote from
13 anywhere, surrounded by desert.

14 It seems to me that -- as a parent, that if my
15 child were kept in such a place, that I would certainly
16 think that there's a big difference between having my
17 child in that place and having my child placed with
18 my -- with the child's godparents, with the child's adult
19 cousins, with a volunteer church family, with another
20 responsible adult who comes forward and wishes to lend
21 that kind of assistance. That seems to me to be a big
22 difference.

23 We are talking here in constitutional terms,
24 however, only about whether the cage is gilded or whether
25 it's not. The point is -- is that when minors are

1 released, they're free to go to -- to church services,
2 they're free to attend public schools, they're free to go
3 to the park. None of these things occur -- none of these
4 things occur from the middle of the California desert.

5 QUESTION: Free to do all those things, if their
6 parents or guardians allow them.

7 MR. HOLGUIN: If their parents or guardians
8 allow them, yes. And the point is -- is that the
9 Immigration Service, in its role as a parent or guardian
10 in this case, does not allow that.

11 QUESTION: May I ask you a question, counsel.
12 I -- the way this case is debated in the opinions,
13 everybody -- all -- the judge on the court of appeals
14 seemed to assume that you're dead right, that the children
15 would be better off if they could be placed with the --
16 with another adult. The Government says that's all wrong.
17 They're really much better off in organized detention
18 facilities.

19 Are there any district court findings telling us
20 which is better for the children?

21 MR. HOLGUIN: No there are not, Your Honor. We
22 can point, if I may elaborate, to the existence of
23 unanimity in juvenile justice standards amongst the 50
24 States, amongst the various amici that have filed a brief
25 before this Court saying we care for children all the

1 time, everybody agrees that, in fact, detention, even
2 under ideal circumstances, is inimical to child's well --
3 to children's welfare.

4 QUESTION: Yes, but your opponent cites to a lot
5 of statutes that say yes, but you only give it to people
6 who are either relatives or godparents, or there's a
7 limited class, and they do allow custody in that limited
8 class which is generally recognized in State statutes.

9 MR. HOLGUIN: I cannot disagree --

10 QUESTION: And maybe they're all wrong, but how
11 do we answer that sitting here?

12 MR. HOLGUIN: I cannot disagree more stren --
13 well, because in the brief that's filed by the Child
14 Welfare League of America you'll see citations to those
15 statutes, and they don't provide that. Every State, in
16 fact, says we don't lock children up unless we've made an
17 individualized determination that this is, in fact,
18 necessary.

19 Some sort of -- they all say released to
20 responsible adult, any other custodian, the Federal
21 Government itself, and Congress has said or any other
22 responsible adult. This is simply a unanimous proposition
23 amongst child welfare -- child welfare experts, and the
24 Immigration Service has had -- has never really disputed
25 that. It's said we're entitled to go off and simply

1 rewrite the book on child welfare, an area in which we
2 concede we have no special expertise.

3 QUESTION: I thought that -- I thought that --
4 wasn't the Immigration Service subject to some litigation
5 about how it took care of these children?

6 MR. HOLGUIN: That was this litigation.

7 QUESTION: Yes, but wasn't there a -- wasn't
8 there an order that they were supposed to comply with?

9 MR. HOLGUIN: There was -- there is a
10 settlement --

11 QUESTION: And then there isn't any -- there
12 isn't any dispute that the order has been complied with.

13 MR. HOLGUIN: That's correct, Your Honor, at
14 this time.

15 QUESTION: And so the INS is complying with --
16 what the court ordered had to be what the court thought
17 was adequate care. Is that right?

18 MR. HOLGUIN: What the parties agreed to in a
19 settlement, not what the court ruled on.

20 QUESTION: Well, it's in -- it's in a decree.

21 MR. HOLGUIN: Yes, yes.

22 QUESTION: It's in a decree and the Government
23 is complying with it. And you -- you say that -- that
24 complying in the way they do is unconstitutional.

25 MR. HOLGUIN: Complying with the settlement

1 agreement is certainly not constitutional. The --

2 QUESTION: Well --

3 MR. HOLGUIN: I mean certainly is
4 constitutional. The point that -- the point that I need
5 to make at this time is that --

6 QUESTION: But you -- you say they have to --
7 they have to do more than the decree requires.

8 MR. HOLGUIN: If there is a responsible --

9 QUESTION: Otherwise they're violating the
10 Constitution.

11 MR. HOLGUIN: Yes, yes, that's correct.

12 QUESTION: Uh-hum.

13 MR. HOLGUIN: We have said -- what we are saying
14 here is that -- what this settlement -- what the
15 settlement achieves that the Immigration Service's -- is
16 simply to bring INS detention facilities into compliance
17 with minimal standards that have -- that are applied in
18 all 50 States as to what an appropriate detention facility
19 should be.

20 I might point out that even though you have a
21 responsible person there that --

22 QUESTION: And so you say it's unconstitutional
23 unless they exceed minimal standards.

24 MR. HOLGUIN: The conditions --

25 QUESTION: Right?

1 MR. HOLGUIN: I didn't understand the question.
2 I'm sorry.

3 QUESTION: You say -- you say that they are
4 violating the Constitution unless they exceed minimal
5 standards.

6 MR. HOLGUIN: We're saying they violate the
7 Constitution if they do not make an individualized
8 determination that detention under those conditions or any
9 other conditions is actually going to be in a child's best
10 interests.

11 QUESTION: Well, but you would say -- you would
12 say that -- that -- that detaining the child -- detaining
13 the child in -- in the institution is unconstitutional if
14 there is an adult who will take of them.

15 MR. HOLGUIN: Yes.

16 Now, let's go back again to this -- to the
17 situation that prevails. We have a situation where the
18 INS had released minors for years without any kind of
19 problem. They've done this under the district court's
20 order for -- now, for almost 4 years without any kind of a
21 problem ever being reported.

22 It wasn't just a failure to produce evidence.
23 There was discovery conducted in this case in which we
24 asked the Government, produce any evidence you have. The
25 Government was simply unable to do it. They've not gone

1 back in front of the district court to seek relief under
2 Rule 60(b) saying look, we have a problem with this
3 policy.

4 In fact, if there were any kind of a significant
5 risk that minors were being endangered by this kind of
6 policy, we would be the first to come back in and say
7 Judge Kelleher, you need to reverse this policy, you need
8 to modify it. I don't believe that we'd have the U.S.
9 Catholic Conference, the Lutheran Church in America, the
10 Child Welfare League of America all filing amicus briefs
11 in this case saying this is a misguided policy, it simply
12 makes no sense.

13 The only thing the INS is able to say in support
14 of this policy is that we're unable to do the kind of home
15 studies that are required to ensure that this sort of a
16 thing doesn't lead to some kind of disaster.

17 QUESTION: What -- what do you say to the legal
18 response to this same argument which the Government --
19 assuming -- assuming what you say may be true, the fact is
20 that under Kleindienst and Mandel the only thing they've
21 got to satisfy us of is that they have a legitimate reason
22 for having changed the policy and doing what they are
23 doing, whether people think it is enlightened or not. Is
24 that the proper standard?

25 MR. HOLGUIN: What Congress, making a decision

1 about whether --

2 QUESTION: But was that the proper standard? Do
3 you so read that case?

4 MR. HOLGUIN: No, that's -- no, no, Your Honor,
5 that's not the standard.

6 QUESTION: What is the standard?

7 MR. HOLGUIN: The proper standard is whether the
8 INS is able to show a good and sufficient reason in the
9 individualized hearing for detention, simply that. If
10 the INS has any real reason to detain, it's entitled to
11 detain under this district court order.

12 It's only where there is no real reason to
13 detain and the INS has simply said, you, you, and you,
14 we're going to presume that you're going to be a fine
15 custodian, and everyone else is somehow excluded no matter
16 how reputable, no matter how much the INS officer, in
17 fact, wants to release this minor to this individual,
18 where it simply cannot be done.

19 It's that blanket, automatic detention that
20 offends the Constitution here. It stands the proposition
21 that detention is going to be the exception, liberty the
22 norm, on it head.

23 QUESTION: Does their policy absolutely forbid
24 any release to an unrelated -- can they somebody so
25 exceptionally well-qualified they will go ahead and

1 release to them?

2 MR. HOLGUIN: Again, we're talking about a -- a
3 facial challenge versus an applied challenge. On it's
4 face, the regulation appears to authorize that. We know
5 from discovery and in practice that the Immigration
6 Service never released an individual to anyone not on the
7 blood relative list, except when the minor needed health
8 care that the agency was simply not able or willing to
9 provide at that time. That's the only time the INS could
10 ever identify that, yes, we're going to go ahead and
11 release a minor to some adult not appearing on our blood
12 relative list.

13 QUESTION: You just said that -- according to
14 you, the Constitution says that liberty is the norm and
15 detention is the exception. Then you do contest the
16 constitutionality of this statute, I take it? Because
17 it -- it says just the opposite. It says detention is the
18 norm, but the Attorney General may, in his discretion,
19 release.

20 MR. HOLGUIN: If this were a statute --

21 QUESTION: That's not good, then?

22 MR. HOLGUIN: We do not contest the
23 constitutionality of the statute. In fact, we contend
24 that this statute supports the district court's order that
25 was issued in this case because it requires an

1 individualized determination, as this Court's held only
2 last term.

3 Now if the -- if, in fact, what we're talking
4 about here is the Constitution and not the statute, and
5 the statute were to be interpreted as to permit
6 nonindividualized detention just for everybody, then there
7 would be a problem with the constitutionality of that
8 statute, yes.

9 QUESTION: You think the individualized
10 determination has to be made on the basis of the
11 individual -- what's best for the individual? I assume
12 that would apply for adults too. The Attorney General has
13 to ask, with respect to each illegal alien, what would be
14 best for this illegal alien.

15 MR. HOLGUIN: No, Your Honor. There are myriad
16 reasons why the agency is entitled to detain adults and
17 detain these children. If they believe they're -- he or
18 she is a flight risk. If they believe that the minor
19 is -- is a danger to the community, to himself or some
20 others, they think that national security is involved.

21 All of these things are permitted. Detention is
22 permitted for all of these things.

23 QUESTION: How about the individual who wants to
24 take custody of them is not qualified?

25 MR. HOLGUIN: The agency is entitled to refuse

1 release for that ground as well.

2 If I -- in the remaining time, let me just sum
3 up our position on this. I believe that what we have --
4 we have seen here is a policy for which the INS has no
5 factual justification. The Immigration Service can have a
6 perfectly qualified individual come before it and say I am
7 prepared and able to care for a particular -- for this
8 particular minor. The Immigration Service says we will
9 not even consider you, we will not even consider you.

10 QUESTION: And who are you representing?

11 MR. HOLGUIN: We're representing the plaintiffs
12 in this matter, who include --

13 QUESTION: Who are who?

14 MR. HOLGUIN: Who is Jenny Flores, a 15-year-old
15 girl who had a cousin come for her, an uncle once or twice
16 removed. We have a girl for whom a family -- long-time
17 family friend.

18 QUESTION: But these are all minors.

19 MR. HOLGUIN: These are all minors, yes, four
20 girls.

21 The point at this -- that we find ourselves now
22 at is that we have a situation where the Immigration
23 Service is simply closing its eyes to what's in the best
24 interests of these minors.

25 QUESTION: Thank you, Mr. Holguin.

1 MR. HOLGUIN: Thank you.

2 QUESTION: May I just ask one question. Are any
3 of the named plaintiffs still in the custody of the INS?

4 MR. HOLGUIN: No, Your Honor. Judge Kelleher
5 ordered the release of the last ones shortly after the
6 litigation was filed.

7 QUESTION: Have they gone beyond age 18, the
8 four?

9 MR. HOLGUIN: Several of them have, yes, Your
10 Honor.

11 QUESTION: The four in question?

12 MR. HOLGUIN: One, I believe, is still under the
13 age of 18.

14 QUESTION: Ms. Mahoney, you have 6 minutes
15 remaining.

16 REBUTTAL ARGUMENT OF MAUREEN E. MAHONEY

17 ON BEHALF OF THE PETITIONERS

18 MS. MAHONEY: I'd like to emphasize that this is
19 a facial challenge to a policy that was adopted in 1988.
20 And the fact that there might theoretically be some child
21 who has the kind of bonds and relationship with a
22 godparent, for instance, that might have some claim to a
23 violation of their liberty because they weren't released
24 is a very different question. It's not presented on a
25 facial attack.

1 But I would also like to emphasize that the
2 Ninth Circuit rule does not, in fact, permit INS to
3 determine who is a responsible custodian for these
4 children. At 21a of the appendix the Ninth Circuit
5 specifically said: We hold that the INS may not determine
6 that detention serves the best interests of members of the
7 plaintiff class in the absence of affirmative evidence
8 that release would place the particular child in danger of
9 harm.

10 QUESTION: You don't think you'll win on this
11 narrow ground, do you?

12 MS. MAHONEY: Your Honor, we'll win on the
13 broadest grounds you'll give us.

14 But the -- the point here is that even under
15 their regime, we cannot determine who, in fact, is an
16 appropriate custodian. Under the regulations, if a
17 godfather comes forward and says I'm ready and willing to
18 take this child, we've had a long-term relationship, the
19 regulation permits the district director, in his
20 discretion, to determine that there are exceptional
21 circumstances that indicate that this person is a fit
22 custodian.

23 Under our regulation the unrelated adult,
24 outside the western region, has to sign an agreement
25 saying that they will care for the child. Not just that

1 they'll make them show up at the deportation hearing, but
2 that they will care for the child. And that's what we do
3 outside the western region. And, in fact, that discretion
4 is exercised sometimes.

5 That discretion is also reviewable before an
6 immigration judge. The child -- if the godfather comes
7 forward and thinks that the district director has unfairly
8 denied him custody of the child, they'll simply request a
9 hearing. There's no waiver; under the regulation at any
10 time the child who is detained, or any adult who is
11 detained, can ask for a hearing before the immigration
12 judge.

13 QUESTION: What -- what could he possibly prove
14 that would justify a direction to the Attorney General to
15 release them?

16 MS. MAHONEY: Well --

17 QUESTION: And it would be in the child's best
18 interest? Is that what he would have to prove?

19 MS. MAHONEY: That there are exceptional
20 circumstances. And, in fact --

21 QUESTION: Rendering it in the child's best
22 interest?

23 MS. MAHONEY: I think that's correct, Your
24 Honor.

25 QUESTION: Well.

1 MS. MAHONEY: That there were reasons --

2 QUESTION: Well, gee, you're not as far apart as
3 I thought you were, then.

4 MS. MAHONEY: Well the -- let me say that
5 in -- in -- the idea is to leave discretion for those
6 rather exceptional and unusual circumstances.

7 For instance, if the godfather has, in fact,
8 lived and cared for this child and they have the kind of
9 family relationship that INS is, in fact, trying to
10 promote and makes representations that they're in the
11 process of getting guardianship before the State, that
12 would be the type of -- of circumstance that might warrant
13 a release. But the fact is that the INS said -- that the
14 Ninth Circuit has said all of that goes out the window.

15 The other thing is that in this case the
16 godparent that we're referring to, even if the district
17 director won't release the child, can go to the State
18 court and get appointed a guardian. And in the interim
19 the child will remain in a group home run by the Catholic
20 Church or another private organization.

21 QUESTION: Ms. Mahoney, what -- does the record
22 tell us how long these children are retained in custody in
23 the typical case?

24 MS. MAHONEY: Yes, Your Honor. The -- it says
25 that it's typically 30 days, that that's about how long it

1 ordinarily takes. And the record also shows that it
2 typically takes about 30 days to be appointed a guardian
3 under State law. The record --

4 QUESTION: Ms. Mahoney, by the end of the 30
5 days they'd be deported.

6 MS. MAHONEY: Oh, no, Your Honor. Deportation
7 is ordinarily a long time out, and most of these children,
8 in fact, are never deported.

9 QUESTION: But they're only kept in the custody
10 for 30 days. I don't understand how it --

11 MS. MAHONEY: Approximate -- most children are
12 only kept in custody -- and, again, it's in the --

13 QUESTION: What happens at the end of the 30-day
14 period for the typical child?

15 MS. MAHONEY: They're ordinarily reunified with
16 family members or their -- a responsible custodian who
17 gets qualified under State law is found. That -- that's
18 the whole objective of the program, and that's where they
19 typically end up.

20 QUESTION: Ms. Mahoney, you -- you've said in
21 one breath that this is a facial challenge to the
22 regulation and the procedures. And yet you've referred to
23 something that the record shows and Mr. Holguin has
24 referred to something -- he says that the record shows
25 this exception is never really applied.

1 How can we assure ourselves that you're correct,
2 if you are, that this is a facial challenge?

3 MS. MAHONEY: Well, it is a facial challenge
4 because the program didn't fully go into place until 1988,
5 shortly before the district court ruled. And the district
6 court made no factual findings, so I think we have to
7 construe it as a facial challenge.

8 QUESTION: Well, then why do you refer to
9 something called the record?

10 MS. MAHONEY: Well, there was a record in this
11 case, you're right, Your Honor. This record related to
12 practices under the policy prior to the -- the time when
13 it was adopted. There -- there is a record in the sense
14 that there are Federal Register, that sort of thing, in
15 the record to rely on for the statement of purposes.

16 QUESTION: Ms. Mahoney, just out of curiosity,
17 is it really true that if the -- if the deportability of
18 the minor is conceded, the minor is just put on a boat to
19 somewhere?

20 MS. MAHONEY: No, Your --

21 QUESTION: Is that what really happens?

22 MS. MAHONEY: No, Your Honor, that isn't -- that
23 is not true.

24 QUESTION: I didn't think so.

25 MS. MAHONEY: No. First of all, even if

1 deportability is conceded, it's important here to -- these
2 children, typically, do not claim that they're in the
3 United States legally. But the vast majority of them want
4 an opportunity to seek relief from deportation, which is a
5 very different issue. They have no right to be here, but
6 at the hearing they will be given an opportunity to
7 establish that they're entitled to relief.

8 And if a -- a child is found to be deportable,
9 then arrangements are made through the consulate of that
10 child's foreign country for the return of the child -- the
11 government of the other country takes custody of the child
12 and reunifies them with their family or whatever, however
13 the government makes arrangements. But that is the way
14 this happens.

15 Thank you very much.

16 CHIEF JUSTICE REHNQUIST: Thank you, Ms.
17 Mahoney. The case is submitted.

18 (Whereupon, at 2:45 p.m., the case in the above-
19 entitled matter was submitted.)

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CERTIFICATION

Alderson Reporting Company, Inc., hereby certifies that the attached pages represents an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of The United States in the Matter of: 91-905

William P. Barr, Attorney General, et al., Petitioners v.

Jenny Lisette Flores, et al

and that these attached pages constitutes the original transcript of the proceedings for the records of the court.

BY *Lona M. May*

(REPORTER)