

Feds Tell 9th Circuit: Detained Kids ‘Safe and Sanitary’ Without Soap

Helen Christophi (2019, [Tuesday] June 18)

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SAN FRANCISCO (CN) – The Trump administration argued before a Ninth Circuit panel Tuesday that the government is not required to give soap or toothbrushes to children apprehended at the U.S.-Mexico border and can have them sleep on concrete floors in frigid, overcrowded cells, despite a settlement agreement that requires detainees be kept in “safe and sanitary” facilities.

All three judges appeared incredulous during the hearing in San Francisco, in which the Trump administration challenged previous legal findings that it is violating a landmark class action settlement by mistreating undocumented immigrant children at U.S. detention facilities.

“You’re really going to stand up and tell us that being able to sleep isn’t a question of safe and sanitary conditions?” U.S. Circuit Judge Marsha Berzon asked the Justice Department’s Sarah Fabian Tuesday.

U.S. Circuit Judge William Fletcher also questioned the government’s interpretation of the settlement agreement.

“Are you arguing seriously that you do not read the agreement as requiring you to do anything other than what I just described: cold all night long, lights on all night long, sleeping on concrete and you’ve got an aluminum foil blanket?” Fletcher asked. “I find that inconceivable that the government would say that that is safe and sanitary.”

The settlement at issue came out of *Jenny Lisette Flores v. Edwin Meese*, filed in 1985 on behalf of a class of unaccompanied minors fleeing torture and abuse in Central America.

Finally agreed upon in 1997, the settlement established guidelines for the humane detention, treatment and release of minors taken into federal immigration custody. The guidelines include the right to a bond hearing and requirements that immigration authorities timely release children to parents or guardians and place those not released in facilities that meet certain standards. The facilities are supposed to be “safe and sanitary.”

The settlement landed back in court in 2015, when class members moved to enforce it following the Obama administration’s announcement that it would scrap bond hearings because they conflicted with newer immigration laws. In legal filings, the class contended the elimination of bond hearings and dirty and dangerous conditions at short-term holding facilities operated by the Border Patrol violated the agreement.

U.S. District Judge Dolly Gee in Los Angeles granted the class’ motion and ordered the appointment of an independent monitor to ensure government compliance with *Flores*.

Gee said the administration had breached *Flores* by failing to provide detainees with adequate food and clean drinking water, or with hygiene items like soap, toothbrushes and towels. She also concluded that the children were being deprived of sleep and access to bathrooms, and were subjected to near-freezing temperatures.

The Ninth Circuit affirmed much of Gee’s ruling in July 2017, finding that detainees were still entitled to bond hearings.

On Tuesday, Fabian asked the Ninth Circuit to reverse Gee’s findings because they added new requirements – such as giving detainees soap and toothbrushes – that were not specifically included in *Flores*.

“One has to assume it was left that way and not enumerated by the parties because either the parties couldn’t reach agreement on how to enumerate that or it was left to the agencies to determine,” Fabian said.

“Or it was relatively obvious,” Fletcher shot back. “And at least obvious enough so that if you’re putting people into a crowded room to sleep on a concrete floor with an aluminum-foil blanket on top of them that it doesn’t comply with the agreement.”

“It wasn’t perfumed soap, it was soap. That’s part of ‘safe and sanitary.’ Are you disagreeing with that?” he added.

Senior U.S. Circuit Judge A. Wallace Tashima, who as a child during WWII was held in a U.S. internment camp for Japanese Americans, likewise assailed Fabian’s logic.

“It’s within everybody’s common understanding that if you don’t have a toothbrush, if you don’t have soap, if you don’t have a blanket, it’s not safe and sanitary. Wouldn’t everybody agree to that? Do you agree to that?” Tashima asked in a raised tone.

Class counsel Peter Schey said that, although Gee had listed specific items such as toothbrushes in her order, which were not listed in the settlement, settlement compliance must be analyzed in terms of California contract law, under which the general terms in an agreement must be “reasonably interpreted.”

“The first thing you do is honor the plain meaning” of words like “safe” and “sanitary,” Schey said.

“Today we have a situation where once a month a child is dying in [federal] custody,” he added. “Certainly the Border Patrol facilities are secure, but they’re not safe and they’re not sanitary.”

On rebuttal, Fabian said the administration plans to file a motion for reconsideration with Gee upon a favorable ruling from the panel, eliciting a portentous reply from Berzon.

“Have you considered whether you might go back and consider whether you really want to continue this appeal?” Berzon said.

“There doesn’t seem to be a whole lot left of it, considering that life has so moved on now,” she added, and noted that a government regulation codifying and extinguishing *Flores* is in the works.

“I just feel like we’re litigating ancient history at this point,” Berzon said.

All three panelists were appointed by Bill Clinton. They did not indicate when they would rule.

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