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In an important order issued late on Friday, Dec. 7, the U.S. Court of Appeals for the Ninth Circuit denied the government's request for a stay of the temporary restraining order (TRO) issued by U.S. District Court Judge Jon Tigar of the Northern District of California against a new Department of Homeland Security (DHS) interim final rule implementing President Trump's proclamation limiting access to asylum for entrants at the U.S.-Mexico border. Judge Jay Bybee, joined by Judge Andrew Hurwitz, wrote the Ninth Circuit order, relying heavily on the text, structure, and plan of the Immigration and Nationality Act (INA) and on past practice interpreting the INA; Judge Edward Leavy dissented. The denial of a stay leaves Judge Tigar's TRO intact.

Judge Bybee is a conservative jurist, generally inclined to defer to the executive on matters of foreign policy and national security. In March 2017, he dissented from the Ninth Circuit's refusal to vacate an unfavorable ruling on the first version of Trump's travel ban. In his careful opinion Friday denying the stay of the asylum ban TRO, Judge Bybee acknowledged a point made by the government: asylum applications, including those filed by Central Americans who typically enter the United States through Mexico, have risen significantly in recent years. Asylum seekers have for many years entered at the U.S. southern border, and evaluating asylum claims has been a perennial challenge. The increase in asylum claims has contributed to a growing backlog in U.S. immigration courts. Applying the rigorous standard for judging stay requests, the Ninth Circuit determined that the government's response to this issue was inconsistent with the INA.

The interim DHS rule, which the government issued without the prior notice and comment from interested stakeholders that the Administrative Procedure Act (APA) typically requires, bars foreign nationals crossing between designated ports of entry on the U.S. southern border from seeking asylum. It allows those persons to seek only remedies, such as withholding of removal and relief under the Convention Against Torture (CAT), that are far more difficult to obtain and offer only partial relief from removal. For support, the new proclamation relies on 8 U.S.C. § 1182(f)—the same provision that the government cited to support the travel ban upheld by the Supreme Court term in *Trump v. Hawaii*—which authorizes the president to bar the entry of "any alien or class of aliens" whose entry would be "detrimental to the interests of the United States." The statute also allows the president to impose other "restrictions" on such individuals.

Judge Bybee weighed the legal merits of the DHS rule against the INA's plain language in 8 U.S.C. § 1158(a)(1), which establishes the threshold eligibility for asylum of "any alien who is physically present in the United States or who arrives in the United States *(whether or not at a designated port of arrival)*" (emphasis added). Along with David Marcus and Alan Schoenfeld of WilmerHale and Penn State's Shoba Wadhia, I noted in an amicus curiae brief for immigration scholars filed in the district court that this language expressly precludes the barrier to threshold eligibility that the new DHS rule seeks to erect. Congress's use of the phrase, "whether or not at a designated port of arrival," squarely demonstrates that the legislature wished to define threshold eligibility inclusively, instead of tying it to the asylum seeker's precise location.

To counter the statute's plain meaning, the government has argued that its new rule did not affect any asylum seeker's ability to *apply* for asylum, but merely defined when an applicant would be "*ineligible* for asylum" (emphasis added). The government certainly has a measure of discretion in setting rules governing eligibility under 8 U.S.C. § 1158(b)(2)(C)—but only as long as it uses criteria that are "consistent" with § 1158. That consistency condition was the government's problem here.

Citing the common sense that the Supreme Court has long viewed as necessary in the reading of statutes, Judge Bybee found that the new DHS rule read the INA's clear language in an artificial and unconvincing fashion. As Judge Bybee put it, the new DHS rule would transform the comprehensive eligibility authorized by the statute into the "hollowest of rights." According to Judge Bybee, the new DHS rule's categorical bar on *granting* asylum to applicants who arrived at an undesignated location amounted in practice to "a bar to *applying* for asylum" (emphasis in original) in the first place. Judge Bybee's explanation is starkly simple: "[t]he technical differences between applying for and eligibility for asylum are of no consequence to a refugee when the bottom line—no possibility of asylum—is the same." It would defy common sense to read the statute as permitting this sleight of hand.

Like Lucy van Pelt repeatedly thwarting Charlie Brown's efforts to kick the football, the new DHS rule encourages asylum seekers to complete a task but consigns them to perpetual disappointment. In essence, Judge Bybee grasped that Congress's clear language on asylum eligibility in the INA does not contemplate an artificially narrow meaning. Viewed in common sense terms, as precedent requires, the government's sleight of hand is not "consistent" with the INA.

As Judge Bybee found, Congress's overall plan in enacting the language on asylum eligibility in § 1158 (as well as earlier clear language in the Refugee Act of 1980) buttresses the plain language of the statute. The extensive protections in the U.N. Refugee Protocol, which the U.S. ratified in 1967, and the U.N. Convention on Refugees, which the protocol incorporates by reference, reflect that an individual fleeing persecution cannot always surgically select a border crossing-point into the country where she seeks refuge. "[I]n most cases," Judge Bybee wisely observed, "an alien's illegal entry or presence has nothing to do with" the merits of the individual's assertion that he as a well-founded fear of persecution. As the Conference Report on the 1980 Act noted, the language in the Refugee Act was "based directly" on the Protocol's language and "is intended … [to] be construed consistent with the Protocol." Making an asylum applicant's manner of entry dispositive would undermine Congress's intent to follow the Refugee Protocol's framework of protections.

Judge Bybee also noted that the structure of the INA's asylum provision conflicts with the new DHS rule. In 1996, Congress reinforced its language on eligibility for asylum, even as it imposed tough new restrictions, such as requiring applicants to file within one year of their arrival in the United States in 8 U.S.C. §§ 1158(a)(2)(B). Since Congress was concerned about pressure at the border from arriving asylum seekers, it could have included a restriction matching the new DHS rule. However, Congress chose instead to *reinforce* the 1980 Refugee Act's broad language on asylum eligibility. Imposing a categorical restriction in 2018 that Congress declined to impose in 1996 would disrupt the asylum provisions' overall statutory scheme.

Finally, as Judge Bybee explained, the new DHS rule is inconsistent with "thirty years" of past practice. In 1987, the Justice Department's Board of Immigration Appeals (BIA) held in *Matter of Pula* that an asylum adjudicator may consider an applicant's manner of entry as "one of a number of factors." However, the BIA cautioned, an adjudicator should not consider manner of entry "in such a way that the practical effect is to deny relief in virtually all cases." Because asylum seekers often flee arrest, torture, or even death and cannot spare the time to select their mode of border-crossing, the new DHS rule's categorical use of undesignated-entry-point arrival to deny asylum claims would risk barring the vast majority of claims.

Given the new DHS rule's effect on the statutorily prescribed and long-practiced process for adjudicating asylum claims, the Ninth Circuit also held that DHS had to resort to notice and comment procedures under the APA prior to implementing its rule. The government asserted that immediate implementation of the rule was authorized under the "foreign policy" exception to notice and comment procedures. However, Judge Bybee observed that such a capacious reading of the foreign policy exception would swallow up the norm favoring notice and comment, allowing officials to decimate asylum adjudication at the stroke of a pen without input from interested stakeholders. According to Judge Bybee, this drastic consequence could not have been Congress's intent.

Judge Bybee's methodical opinion could have used elaboration in one important respect: distinguishing the Supreme Court's decision in *Trump v. Hawaii* upholding Trump's travel ban. In defending the asylum ban, the Justice Department has relied on 8 U.S.C. § 1182(f), the same broadly worded provision that the *Hawaii* Court cited as support for Trump's earlier action. § 1182(f) authorizes the president to "impose on the entry of aliens any restrictions he may deem to be appropriate." Judge Bybee is correct that this admittedly broad wording should count for less in assessing the asylum ban's legality—but the reason why requires more context than Judge Bybee provided in the exigent posture of a ruling on a stay request.

Judge Bybee's discussion hinges on a somewhat strained distinction between the power § 1182(f) provides to "impose… restrictions" on the "entry of aliens" and the situation of the asylum seekers affected by the new DHS rule, who have *already* entered the United States. This reading is unduly technical, especially in light of Judge Bybee's rejection of the government's own hyper-technical distinction between the act of applying for asylum and threshold asylum *eligibility*. Neither distinction is persuasive. If the president can restrict the "entry" of foreign nationals, he can also restrict incidents of that entry, including eligibility for asylum. So the wording of § 1182(f), viewed in isolation, does not distinguish the asylum ban from the travel ban that the Supreme Court upheld in *Trump v. Hawaii*. That textual point is the gravamen of Judge Leavy's dissent from the stay denial.

However, there is a better analysis available to support the sound outcome that Judge Bybee reached. Under accepted methods of statutory interpretation, a court cannot read § 1182(f) in isolation. Instead, it must consider that section in conjunction with the carefully calibrated asylum provision and the whole range of restrictions on asylum that Congress imposed in 1996. In both the 1980 Refugee Act and the 1996 legislation, Congress pivoted away from the ad hoc refugee protection regime that characterized the period from the end of World War II to the 1980 statute. As scholars have shown (see John Scanlan's paper here), that ad hoc regime had required continual spasms of presidential and legislative activity to address refugee crises, including those resulting from the Hungarian uprising in 1956, Castro's seizure of power in Cuba and the Communist takeover in Vietnam, along with many other episodes. Since the United States during this period had no comprehensive refugee statute, both Congress and the executive had to repeatedly swing into action to meet the needs of each episode. Congress enacted § 1182(f), the touchstone of President Trump's defense of the asylum ban, in 1952, in the midst of this fragmented asylum regime. Both the 1980 Refugee Act and Congress's 1996 legislation were efforts to fix this fragmented approach.

Under black-letter rules on statutory interpretation in precedents such as *FDA v. Brown & Williamson Tobacco Corp*., when Congress has enacted a specific scheme that is later in time than an earlier, more amorphous provision, the later, more specific scheme should govern. The comprehensive refugee framework that Congress adopted in 1980 and modified in 1996 comprise a later, more specific set of provisions that should narrow the reach of § 1182(f). Construing § 1182(f) as broadly as the *Hawaii* Court did would disrupt Congress's handiwork on asylum procedure. To avoid such disruption here, a court should construe § 1182(f) as permitting only discretion that is "consistent" with the asylum provisions. That view would certainly permit the case-by-case discretion that the BIA has long exercised regarding manner of entry, per *Matter of Pula*. However, it would not permit the categorical use of discretion to deny asylum claims that the new DHS rule asserts.

With this caveat, Judge Bybee's analysis in the Ninth Circuit's stay denial provides a valuable template for future adjudication regarding Trump's asylum ban. Judge Bybee did nothing fancy or exotic. Instead, he merely applied the statute as written. His opinion should signal the government that it risks defeat as it attempts to persuade Judge Tigar not to replace his TRO with a preliminary injunction and ponders asking the Supreme Court to stay the current TRO. Unless Judge Bybee's lucid opinion persuades the government to alter its course, the Supreme Court is the likely final destination for adjudication of the asylum ban.

Topics: Immigration

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