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The Ninth Circuit's Refugee EO Decision: Methodically Misreading the Immigration Statute

By Peter Margulies Tuesday, June 13, 2017, 8:30 AM

On Monday, the Ninth Circuit issued a decision that relied on statutory grounds in declining to vacate most of the preliminary injunction against President Trump's revised refugee executive order (EO). While a reliance on statutory instead of constitutional grounds is often a calling card of judicial restraint, the methodical tone of the per curiam opinion by the Ninth Circuit panel (consisting of Judges Hawkins, Gould, and Paez) is deceptive. Despite this generally measured tone, the opinion's flawed statutory analysis distorts precedent and disrupts the carefully rendered framework of the Immigration and Nationality Act (INA).

Before exploring the opinion's skewed reading of the INA, it's useful to stress that the Ninth Circuit modified part of the Hawaii District Court's injunction: the portion barring government review of visa-processing in the six countries identified in the EO. The government had specifically urged the court to make this change. As a result, the government can now review visa-processing procedures even as it seeks review of the Ninth Circuit ruling, together with the decision of the Fourth Circuit denying a stay (in which Hawaii filed a brief in the Supreme Court today). As Mark Tushnet observed here, this modification of the District Court's injunction also leaves open the possibility that the government will complete its task before any Supreme Court review, upping the chances that the Court will hold that the case is moot.

Because the Ninth Circuit decided the case on statutory grounds, it did not have to reach the Establishment Clause issue that drove the Fourth Circuit's decision (see my analysis here and Josh Blackman's here). As a result, the Ninth Circuit's decision says little about Candidate Trump's or President Trump's statements about the EO, with one exception I'll discuss later in this post. Suppose the Supreme Court agrees to take the case, as Josh Blackman recommended in Monday's *New York Times*, and determines that the plaintiffs have standing (a question that the Ninth Circuit answered in the affirmative but which I will leave for others to address). At that point, the Court faces a similar choice: take the Ninth Circuit's view and deny a stay on statutory grounds, or rule that the EO is consistent with the INA, thus requiring analysis of the Establishment Clause question.

Because the Ninth Circuit panel's neutral tone masks serious errors in statutory interpretation, the Supreme Court should provide guidance on that score. A brief review of the relevant touchstones in the INA's architecture is in order (as I first discussed here). Three subsections are key. The first provision, 8 U.S.C. § 1182(f) (the "entry provision"), authorizes the President to "suspend the entry of all aliens or any class of aliens" upon a finding that such entry would be "detrimental to the interests of the United States." As I have suggested here, this provision is broad, but not unbounded: it doesn't authorize action that is arbitrary in light of Congress' statutory scheme, such as the denial of admission to lawful permanent residents and current visa-holders in the original refugee EO. The same limits apply to 8 U.S.C. § 1152(a)(1)(B) (the "procedures provision"), which empowers the Secretary of State to "determine the procedures for the processing of immigrant visa applications." A third provision, 8 U.S.C. § 1152(a)(1)(A) (the "nondiscrimination provision") bars discrimination based on nationality in the issuance of immigrant visas.

Harmonizing these provisions is the central task in this statutory analysis. The Ninth Circuit (1) read the "entry" provision too narrowly, (2) ignored the "procedures" provision, and, (3) read the "nondiscrimination" provision too broadly. That's statutory discord, not harmony.

In fairness, given the government's unduly aggressive litigating posture, the panel would have needed to work hard to reach a different result. The government's take inverted the panel's reading: Acting Solicitor General Jeffrey Wall read the "entry" provision as basically neutering the "nondiscrimination" provision. According to the government, because under § 1182(f) the President can suspend "entry," that power is not limited by the nondiscrimination provision, which merely regulates "issuance of an immigrant visa." Per SG Wall, the government could under § 1182(f) deny entry to *any and all* visa recipients for any reason (apparently including invidious reasons) without running afoul of the INA's scheme. That stark position is an untenable reading of the statute. The entry, procedures, and nondiscrimination provisions must be read together, as Judge Paez noted at the oral argument. However, that harmonious reading leads to a different outcome than the one reached by the Ninth Circuit panel.

Just as the government's reading errs by granting the President unchecked authority, the Ninth Circuit's reading of § 1182(f) unduly discounts the deference that the Supreme Court has shown the President in foreign affairs, particularly regarding the treatment of prospective immigrants overseas. For example, the Supreme Court deferred to the executive branch in *Kleindienst v. Mandel* (1972), holding that the government denied a nonimmigrant visa to a Marxist academic for a "facially legitimate and bona fide reason" rooted in the visa applicant's participation in fundraising during a previous visit—although the applicant's previous visa had not barred him from that activity.

A less deferential standard in *Mandel* might have led to a different result. Consider as well Justice Kennedy's concurrence in *Kerry v. Din* (2015), which rejected a due process challenge to denial of an immigrant visa to an Afghan national based on the applicant's service as a clerical official in a town controlled by the Taliban. Justice Kennedy, citing *Mandel*, opined that due process did not even require that the government disclose to the applicant the *specific statutory subsection* which formed the basis for the denial. As a result, the visa applicant was left guessing about the government's reasoning—not the usual outcome for a due process challenge. One can quibble with Justice Kennedy's reluctance to require such disclosure. However, there is no mistaking the deferential posture adopted by both the *Mandel* Court and Justice Kennedy in *Kerry v. Din*.

These cases are just the tip of the iceberg of the Court's deference to the President on national security, even when executive actions concern *U.S. citizens*. The heart of the matter, as Justice Blackmun recognized in his opinion for the Court in *Department of the Navy v. Egan* (1988), is that courts face a marked information deficit in assessing the fraught realm of foreign affairs. As a result, courts lack a solid foundation for second-guessing executive decisions. In *Haig v. Agee* (1981), for example, the Court ruled that Congress had authorized the President to revoke the passport of a former U.S. intelligence agent who wished to travel abroad. In *Egan*, the Court upheld a truncated procedure for assessing the denial of a security clearance to a government employee. While *Egan* concerned a security clearance, Justice Blackmun's caution is also applicable to executive decisions about noncitizens overseas: each case involves “[p]redictive judgment” in which a court lacks the tools to ascertain an “acceptable margin of error in assessing the potential risk.” That is precisely why the Supreme Court deferred to the executive in each of the cases discussed above.

The Ninth Circuit dismisses deferential decisions like *Kleindienst v. Mandel* and *Kerry v. Din* in a perfunctory footnote. The per curiam opinion distinguishes *Mandel* as addressing a visa denial rather than a mere *pause* in visa-processing (p. 33 n. 9). However, this reasoning has *Mandel* and *Din* backwards. A denial of a visa is a final decision that for the foreseeable future will preclude a noncitizen's admission to the United States. In contrast, the 90-day pause on admissions from the six countries listed in the revised EO is purely temporary in nature. Moreover, as Justice Kagan observed in *Scialabba v. Cuellar de Osorio* (2014), visa processing typically “takes time.” As a longtime immigration law practitioner, I've often reassured anxious clients that even routine visa adjudication involves a series of delays, such as waits for interviews, obtaining additional information to confirm the applicant's identity, and (at least for some visa categories) exhausting the backlog of previous applicants. The wait is often 8-10 months, and may stretch into years. For most of the visa applicants affected by the EO, a ninety-day pause will thus have little practical impact.

For those applicants who experience hardship and have compelling equities such as the need for family reunification, the revised EO provides a waiver. The Ninth Circuit rejects the waiver option as posing a “substantial hardship” to applicants. That characterization, at odds with the methodical language of the opinion as a whole, exaggerates the impact of filling out an additional form in a process replete with them.

The Ninth Circuit's disdain for deference isn't merely of academic interest. Critically, that disregard leads the panel to an unduly parsimonious definition of Congress's delegation to the President of power to suspend entry of noncitizens under § 1182(f) when entry is “detrimental to the interests of the United States.” In making this finding regarding the six countries listed, the EO cited letters from the Attorney General (AG) and Secretary of Homeland Security (DHS), who cited the bitter armed conflicts raging in five of the six countries (Libya, Somalia, Sudan, Syria, and Yemen) and the sponsorship of terror by the sixth state, Iran. Both the AG and DHS believed that such conditions made it more difficult to base visa processing on information from the regimes in these states. This is the backdrop for President Trump's tweet, cited by the panel, that the countries themselves are “dangerous.” According to the EO, the 90-day pause in admissions from the six countries was designed to ensure, in light of these challenging conditions, that U.S. consulates set “adequate standards” to prevent danger to the United States.

That endeavor to assure adequate standards is at the core of Congress's delegation to the executive branch in 8 U.S.C. § 1152(a)(1)(B) (the “procedures” provision). Many might argue that procedures are already adequate; indeed, that is my view. However, that position reflects a *policy* dispute with the President. The Supreme Court's precedents exhibit little interest for converting disputes about foreign policy into binding law. On the contrary, the EO's rationale for a 90-day pause in admissions from conflict zones is precisely the kind of assessment of the “acceptable margin of error” that Justice Blackmun deferred to in *Egan*. The Ninth Circuit's review is markedly more intrusive.

According to the Ninth Circuit, even a temporary pause in admissions with a built-in waiver requires the government to shoulder a heavy burden. To justify the pause in admissions, the per curiam holds that the government must specifically identify visa applicants from the six listed countries as being members of terrorist organizations, “contributors to active conflict,” or personally “responsible for insecure country conditions.” Shouldering that burden would require just the sort of heightened visibility into opaque country conditions that is absent in conflict zones. As Justice Kennedy's concurrence in *Kerry v. Din* demonstrated, the government need not shoulder that burden, even for a visa *denial*. The tradition of judicial deference would abjure such contortions for a temporary visa pause.

To be sure, there are limits on the President's power under § 1182(f). The “nondiscrimination” provision, 8 U.S.C. § 1152(a)(1)(A), prohibits nationality-based discrimination in visa issuance. That provision is embedded in a sequence of INA provisions passed in 1965 that dismantled the old, discredited system of permanent national origin quotas. The nondiscrimination provision prevents the President from

turning an interstitial, temporary pause into a permanent ban on an express or de facto basis. If the Supreme Court were to take either the Ninth or Fourth Circuit cases, it should hold that 90 days is the outer limit for the government to accomplish the procedural, gap-filling goal sought in the revised EO.

In sum, despite the Ninth Circuit's methodical tone, it failed to give deference its due. Moreover, it failed to do what Judge Paez wisely recommended at oral argument: read the provisions of the INA *together*. The Supreme Court should reset the balance.

Topics: Donald Trump, Executive Power, Immigration

Tags: Executive Order

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