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The Revised Refugee EO in the Courts II: The Flawed Maryland District Court Decision

By Peter Margulies Thursday, March 16, 2017, 12:34 PM

Today's Maryland district court decision halting the revised refugee Executive Order (EO) exhibits the same marked lack of deference that undermined Wednesday's Hawaii decision (see my post here). Judge Theodore D. Chuang, a former Department of Homeland Security (DHS) lawyer, made two questionable interpretive moves. First, Judge Chuang narrowly interpreted executive authority under a provision of the Immigration and Nationality Act (INA), 8 U.S.C. 1152(a)(1)(B), that Congress added to *insulate* executive action from undue judicial intrusion. Second, like the Hawaii district court on Wednesday, the Maryland court broadly interpreted the Establishment Clause's reach in foreign affairs. Both moves pay insufficient heed to the need for a measure of judicial deference to the political branches in navigating the turbulent seas of foreign affairs and immigration policy.

The Maryland court interpreted the INA provision in a parched and parsimonious fashion wholly contrary to its text and purpose. The provision at issue gives the Secretary of State latitude in determining "procedures for the processing of immigrant visa applications" and the suitable venues for visa processing. Congress passed this provision in 1996 (see Josh Blackman's post here) to override a 1995 D.C. Circuit decision that struck down a State Department policy barring the filing of Vietnamese asylum applications in Hong Kong.

The State Department had made the change after it concluded that the Hong Kong venue was encouraging unmanageable migration patterns and frivolous asylum claims. The 1995 D.C. Circuit decision held that the venue change had violated 8 U.S.C. 1152(a)(1)(A), which bars discrimination in the issuance of immigrant visas. The State Department measure clearly singled out Vietnamese asylum applicants for more rigorous procedures, which almost certainly resulted in a greater risk of repatriation to Vietnam but also encouraged manageable migration and promoted orderly asylum adjudication. In response to the D.C. Circuit's ruling, Congress in 1996 enacted subsection (B), which gave the State Department flexibility in visa processing to counter courts' unduly broad readings of subsection (A). The Supreme Court then remanded the case to the D.C. Circuit, which upheld the venue change as a processing decision that Congress had delegated to the executive branch. *See Legal Assistance for Vietnamese Asylum Seekers v. Dep't of State*, 104 F.3d 1349 (D.C. Cir. 1997).

Instead of viewing 8 U.S.C. 1152(a)(1)(B) as a limit on judicial intrusion into visa processing, the Maryland court read the statute in a strained fashion that failed to heed its text or purpose. The court viewed subsection (B) as not permitting "temporal adjustments" to visa processing, such as the pauses required under the revised EO. According to the court, subsection (B) allowed executive modification of visa processing "place and manner," but not "time." This limit is painfully artificial. Courts routinely view incidental restrictions on time, place, and manner as appropriate in other contexts, including free speech. The authority to speed up or slow down visa processing is an integral part of decisions on visas. Country conditions, such as the intensity of an armed conflict within a state's territory, can and frequently do slow down visa processing, as the government noted to the Supreme Court in the *Vietnamese Asylum* case. To be sure, a permanent and pronounced slowdown in visa processing could be tantamount to a visa denial, thus triggering concerns about discrimination barred by subsection (B)'s statutory companion, subsection (A). However, a relatively brief pause in visa grants does not rise to that level.

On the Establishment Clause front, the Maryland court's holding echoed the Hawaii court's rationale. The Maryland court conceded that the six countries now subject to the visa processing pause posed "heightened security risks." However, the court then blinked at those risks, viewing the revised EO as motivated by anti-Muslim animus. As in the Hawaii case, the principal evidence for this animus came from then candidate Trump's campaign statements. However, the only case that the Maryland court could cite in support of using campaign statements as evidence was the 11th Circuit's 2003 decision, *Glassroth v. Moore*, involving Alabama judge Roy Moore's installation of an unmistakably religious monument to the Ten Commandments in his courthouse. Judge Moore could cite no neutral secular purpose for his monument, and didn't even try. In contrast, the "heightened security risks" that Judge Chuang acknowledged in the Maryland case deserved more deference than the court displayed.

The Maryland court also stood deference on its head in a fashion warned against by Judge Jay Bybee in his dissent to Wednesday's Ninth Circuit denial of a rehearing of the government's stay request on the original EO. Addressing the deferential "facially legitimate and bona fide" standard for visa denials that the Supreme Court set out in *Kleindienst v. Mandel* (1972), the Maryland court cited the Ninth Circuit's view that the standard only applied to line-level consular officers, not the "highest levels of the political branches." This specious distinction strikes at the heart of the rationale for judicial deference. If deference is appropriate for line-level officials, it surely is appropriate for senior officials who are directly accountable to the public. That accountability drives the deference that the Supreme Court has typically accorded the political branches in foreign affairs and national security. Reducing deference as officials ascend in seniority would authorize rampant judicial intrusions wholly inconsistent with the Framers' scheme.

This doesn't mean that deference should be absolute. However, a measure of deference is appropriate for the difficult judgments that senior officials make in the dynamic realm of foreign affairs. That measure of deference allows policy disputes, such as the dispute about the premises of the revised EO, to be resolved in the political branches, where such disputes belong. Judicial second-guessing is a poor substitute for that robust debate.

Topics: Refugees, Immigration

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