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One subject of senior U.S. officials' talks with Mexico on Thursday was a proposal in the recently issued DHS memo on border enforcement that would return undocumented noncitizens to Mexico *before* a U.S. deportation hearing (See Memo Part H, p. 7). News reports have indicated that U.S. officials plan to use this approach to send nationals from Central American states back to Mexico if those individuals have entered the U.S. along the southern border. However, there are serious legal problems with this pre-hearing return proposal, including problems under the Immigration and Nationality Act (INA).

In fairness to DHS, the return-first/hearing-later idea originated with Congress, which provided some authority to this effect in the INA at 8 U.S.C. § 1225(b)(2)(C). This subsection's language permits return to "contiguous" countries that share a border with the United States. Technically, the language would include Canada, but in immigration practice, it refers to Mexico. Once returned, the DHS memo envisions a noncitizen participating in his or her removal hearing via "video teleconference" with an Immigration Judge (IJ) in the U.S. Department of Justice.

At first blush, the return-first/hearing-later idea seems counterintuitive. Generally, a significant action such as return from the U.S. to another country would call first for a hearing to determine whether return was appropriate. In the criminal context, the U.S. usually doesn't sentence defendants first, and try them later. Nevertheless, reversing this default setting would reap benefits for DHS. The pre-hearing return option reduces the need for detention capacity in the United States: if noncitizens have already been returned to Mexico, the U.S. government has no need to detain them. Unfortunately for DHS, the INA severely limits the return-first provision's utility as a fix for shortages in detention space.

The key problem for the DHS proposal is a neighboring subsection of the INA: § 1225(b)(2)(B)(ii). This subsection excludes from the return-first option any noncitizen subject to expedited removal (ER). That statutory carve-out is crucial, because the vast majority of noncitizens that DHS wishes to target with the return-first option are Central Americans eligible for ER.

As I explained in my earlier post here on the DHS memo, ER replaces the adversarial IJ removal hearing with an inquisitorial process. As part of the inquisitorial process, a DHS asylum officer conducts an interview to determine whether a noncitizen has a "credible fear" of persecution in his or her country of origin. A negative determination is subject to review by an IJ in another inquisitorial proceeding, where the noncitizen has a chance to speak, but legal counsel has virtually no formal role. My earlier post described the procedural issues posed by broader use of ER beyond the context of an arrest of a noncitizen at the U.S. border (for a good discussion of these issues, see Josh Blackman's post here). The key takeaway is that, whatever the procedural shortcomings of ER, most Central Americans arriving in the U.S. by land claim eligibility for asylum. They are then potentially subject to ER, and thus *categorically ineligible* for the return-first provision. That statutory limitation accounts for the rarity of the return-first provision's use by immigration officials prior to the new DHS memo's attempt torevive the concept.

For INA enthusiasts, the chain of statutory cross-references works this way: Subsection 1225(b)(2)(C)—the return-first provision relied on by DHS—refers to subsection 1225(b)(2)(A). Subsection (A) provides for the detention of noncitizens pending a full adversarial IJ hearing. Section 1225(b)(2)(B(ii) modifies subsection (A) by providing that subsection (A) does not apply to noncitizens addressed in subsection 1225(b)(1). Still with me? Subsection 1225(b)(1) in turn provides that ER, *not* the full adversarial removal hearing before an IJ referred to in subsection (A), is the appropriate procedure for noncitizens arriving in the U.S. without formal admission by immigration officials. This group of noncitizens includes the Central American migrants that DHS wishes to return to Mexico before their removal hearings. Thus, the INA's chain of cross-references makes clear that subsection 1225(b)(2)(B(ii) *excludes* arriving Central American migrants from the return provision.

In theory, DHS could seek to bypass ER and the statutory carve-out in the following manner: DHS could opt for the full adversarial IJ hearing under 8 U.S.C. § 1229a. It could then use the return-first provision to return the noncitizen to Mexico, and use video-conferencing to conduct the hearing. However, this tactic would face formidable obstacles under both the Due Process and Suspension Clauses.

Let's assume that a noncitizen can assert a defense to removal, such as an asylum claim. For a Central American national, establishing an asylum claim from Mexico would be exceedingly difficult. Obtaining access to a lawyer conversant with U.S. asylum law would be an obstacle, as would be obtaining access to experts. Granted, video communication tools are becoming more pervasive as smart-phones proliferate, but coverage in Mexico is still spotty and secure communications capability is rarer still. The risk of a false negative—someone

who should qualify for asylum but is adjudicated as failing the legal test—is far greater for this group than for a noncitizen remaining in the United States. Under the Supreme Court's decision in *Mathews v. Eldridge* (1976), that heightened risk of error would tilt the balance against pre-hearing return's compliance with due process.

Moreover, in *Nken v. Holder* (2009), the Supreme Court indicated that even removal *after* a hearing can be problematic. The INA provides for judicial review of removal orders in U.S. courts of appeals (8 U.S.C. § 1252). In *Nken*, the Court held that the INA did not divest appellate courts of their traditional power to grant a stay pending appeal. While the stay is not automatic, it is appropriate under *Nken* when necessary to prevent irreparable harm. Irreparable harm could include consequences from use of the return-first option, such as undermining orderly appellate review of the removal order. Chief Justice Roberts, who wrote for the Court in *Nken*, cited Justice Felix Frankfurter's concern that absent the capacity to grant a stay pending appeal, the appeal might become an "idle ceremony," undermined by events on the ground that made an appeal more difficult. The government's return of a noncitizen to Mexico *prior to an initial hearing* magnifies that risk.

Pre-hearing return would also raise Suspension Clause concerns. It's unclear how a noncitizen would seek a stay of pre-hearing return, because the INA specifies a particular path to review through federal appellate courts (*see* 8 U.S.C. § 1252(b)) and bars any other route. The Suspension Clause, as interpreted by the Supreme Court in *Boumediene v. Bush*, requires that the statutory path to review specified by Congress constitute an adequate substitute for a petition for habeas corpus. In *Boumediene*, the Court applied this analysis, holding that the statutory procedure for Guantanamo detainees seeking release was an inadequate substitute for habeas.

Similarly, the INA's consignment of judicial review to appellate courts would not be adequate to address the prejudice caused by pre-hearing return of noncitizens to Mexico. An appellate court would lack jurisdiction over a removal proceeding *still pending* before an IJ. A stay of return pending completion of a removal hearing might thus entail filing a petition for habeas corpus in a U.S. *district court*. Provisions of the INA that strip district courts of jurisdiction over habeas petitions would deprive noncitizens of an effective remedy for prejudice they would suffer because of pre-hearing return. Those provisions would not provide an adequate substitute for habeas, and would therefore clash with the Suspension Clause. (A writ of mandamus to the appeals court might be available to stop a pre-hearing return. That remedy is also not authorized under 8 U.S.C. § 1252(b). However, a court might hold that authority to grant a writ of mandamus is an inherent power of appellate courts preserved by the Judiciary Act of 1789, like the power to grant a stay pending appeal in *Nken v. Holder*.)

Until now, such Due Process and Suspension Clause questions have rarely arisen. The government has usually waited for a final order of removal entered after an IJ hearing (or, in the case of expedited review, for IJ review of a DHS removal decision). The pre-hearing return proposed in the DHS memo raises the question squarely. That question might be moot, in light of Mexican officials' coolness to the return-first tactic. Mexico has no legal duty to accept the return of Central Americans who merely used Mexico as a transit route for entry into the United States. However, even if Mexico eases its opposition, expanded DHS use of the return-first provision would still face barriers under both the Constitution and the INA, setting the stage for further legal setbacks for the new administration.

Topics: Immigration

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