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Asylum Ban Litigation: Supreme Court Declines to Stay Injunction

By Peter Margulies Friday, December 21, 2018, 9:36 PM

In a brief order on Dec. 21, the Supreme Court denied the Trump administration's request for a stay of the preliminary injunction against the asylum ban issued earlier this week by Judge Jon Tigar of the Northern District of California. The Supreme Court split 5-4, with Chief Justice John Roberts joining Justices Ruth Bader Ginsburg, Stephen Breyer, Sonia Sotomayor, and Elena Kagan. The denial means that the administration will have to first seek review of Judge Tigar's injunction in the U.S. Court of Appeals for the Ninth Circuit, which earlier had denied the government's request for a stay of Judge Tigar's temporary restraining order.

Predicting outcomes from preliminary rulings by the Supreme Court is a perilous business. While the court's denial of a stay could foreshadow a ruling against the government on the merits, it might relate more to the procedural posture of the case. One or more of the justices who voted to deny a stay may believe that the government has not shouldered the heavy burden entailed in a stay request, including a "strong showing" on the merits, irreparable harm, and a balance of equities favoring the moving party, as Chief Justice Roberts wrote in *Nken v. Holder*.

While the government's ultimate prospects on the merits comprise one element in a stay determination, the other factors are also important. If the government has not persuaded the tribunal that emergency relief is necessary to avoid lasting harm to the public interest and that the harm to the public interest outweighs any harm to the opposing party, the court will not grant a stay. Here, one or more of the justices voting to deny the stay may have believed that the government's showing on the non-merits factors was not strong enough to warrant relief. In addition, they may have been wary of intervening with undue haste in a case that would otherwise proceed to the Ninth Circuit and ultimately be subject to review in the Supreme Court anyway, pursuant to a certiorari petition from one of the parties.

Viewed in that light, the denial of a stay may have flowed from the same source as judicial wariness regarding the Trump administration's penchant for seeking certiorari directly from the district court (see Steve Vladeck's analysis here). Unlike a petition for certiorari before judgment, a stay request does not bypass the circuit courts of appeal, whose rulings often clarify issues for the Supreme Court. Nevertheless, a stay can also subtly shape further proceedings in ways that might have inspired caution in one or more of the five justices voting against the administration.

Alternatively, the vote to deny the stay may have been a harbinger of the justices' view of the asylum ban's merits. The Supreme Court's December 2017 issuance of a stay of lower court rulings against President Trump's travel ban heralded the court's eventual 5-4 vote to uphold the ban in *Trump v. Hawaii*. The denial of a stay here might suggest that five justices viewed the asylum ban as beyond the president's statutory authority. But it would be premature to infer definitively that the denial here reflects those justices' views on the merits.

The only matter resolved by the Supreme Court's denial of a stay is the timing of the litigation; the government will have to make its arguments first to the Ninth Circuit, before the Supreme Court can revisit the case. Since the Ninth Circuit will require some time to issue a decision, the time for the Supreme Court to hear a subsequent appeal by either side during this term is fleeting. If the administration remains committed to implementing the asylum ban, a hearing on the merits in the Supreme Court *next* term is more increasingly more likely than a decision by late June 2019, when this term concludes.

Topics: Immigration

Tags: Asylum

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