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On Tuesday, Dec. 19, U.S. District Judge Jon Tigar of the Northern District of California granted a preliminary injunction against the new Department of Homeland Security (DHS) rule precluding asylum grants for persons who enter at undesignated border locations. The nationwide injunction supplants the temporary restraining order (TRO) that Judge Tigar entered in November. Earlier this month, the U.S. Court of Appeals for the Ninth Circuit, in an opinion by Judge Jay Bybee, denied the government's request to stay the TRO.

Both Judge Bybee's opinion and the preliminary injunction decision by Judge Tigar stressed the plain language of the Immigration and Nationality Act (INA). As Judge Tigar noted in Tuesday's decision, 8 U.S.C. § 1158(a)(1) provides that a foreign national can apply for asylum "whether or not" she crosses the U.S. border at a designated entry point. Comparing the new DHS rule's preclusion of asylum with this statutory language, Judge Tigar observed that, "[i]t would be hard to imagine a more direct conflict." Finding the statute unambiguous, the judge held that DHS's contrary reading was not entitled to deference under the leading administrative law precedent, *Chevron v. Natural Resources Defense Council*. In addition, Judge Tigar noted that, even if the statute were ambiguous, the new DHS rule's categorical denial of asylum was not reasonable under *Chevron*'s second step. Reaching that decision, he alluded to the longstanding practice of treating a person's manner of entry as just one of several factors that may affect the discretionary decision to grant asylum. That case-by-case approach has developed because a bona fide asylum seeker is typically fleeing violence, and cannot always pick and choose her manner of entry into a country offering refuge.

But Judge Tigar's decision has a significant gap: The judge should have supplemented his discussion of the statute's text with a more comprehensive analysis of statutory structure. As noted in an amicus curiae brief for immigration scholars, in which I served as co-counsel with David Marcus and Alan Schoenfeld of WilmerHale and Penn State's Shoba Wadhia, Congress in 1980 and 1996 fashioned a detailed and comprehensive set of procedures for asylum adjudication. Those procedures included significant limits such as requiring, absent special circumstances, that claimants file for asylum within one year of entering the United States. This detailed statutory scheme did *not* include the harsh restrictions that the new DHS rule imposes.

A reviewing court should view Congress's calibrated limits and clear provisions for asylum eligibility as a measured compromise. Allowing the government to impose sweeping new categorical restrictions would rewrite the contours of that legislative deal.

An executive rewrite of the INA would be inappropriate, especially since the provision relied on by the government, 8 U.S.C. § 1182(f)—the same provision that the government cited to support the travel ban upheld by the Supreme Court in *Trump v. Hawaii*—dates from 1952. That provision authorizes the president to impose restrictions on foreign nationals entering the United States. Under established principles of statutory construction, a later, more specific statutory scheme, such as the asylum provisions enacted in 1980 and 1996, should prevail over an earlier general provision (see Justice Antonin Scalia's opinion for the court in *RadLAX Gateway Hotel v. Amalgamated Bank*). The new DHS rule seeks to upend this traditional rule of interpretation.

In addition to his analysis of the INA, Judge Tigar also ruled that the government had violated the Administrative Procedure Act (APA) by not following the APA's procedures for providing notice to the public about the rule and seeking comments from interested parties prior to its implementation.

Responding to Judge Tigar's ruling, the government may appeal to the Ninth Circuit or seek to have the Supreme Court intervene. The administration is already asking the Supreme Court to stay Judge Tigar's earlier TRO; the Justice Department may simply ask the justices to vacate or stay the preliminary injunction, bypassing the Ninth Circuit. Any action by the Supreme Court on such a government request could provide an indication of whether the justice are inclined to follow the reasoning of Judge Tigar and the Ninth Circuit panel, or display greater deference.

Topics: Immigration

Tags: Immigration and Nationality Act, Asylum, Trump Administration, immigration, Border

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