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Ninth Circuit Stays Part of Injunction Against Third Country Asylum Rule

By **Peter Margulies** Friday, August 16, 2019, 7:09 PM

In a decision with benefits for both the government and the plaintiffs, the U.S. Court of Appeals for the Ninth Circuit issued a partial stay on Aug. 16 of the preliminary injunction granted in July by Judge Jon Tigar of the Northern District of California in a challenge to the third country asylum rule recently issued by the Department of Homeland Security (DHS). The rule would bar foreign nationals who cross the U.S.-Mexico border from seeking U.S. asylum when they transit through a third country while en route to the United States without applying for protection in that country.

In Friday's order, a panel consisting of Judges A. Wallace Tashima, Milan D. Smith, Jr. and Mark J. Bennett (appointed by Presidents Clinton, George W. Bush, and Trump, respectively) held that the government had failed to make a "strong showing" that it had complied with the notice-and-comment provisions in the Administrative Procedure Act (APA). However, in a ruling that prompted a dissent by Judge Tashima, the panel also stayed Judge Tigar's injunction outside the Ninth Circuit, ruling that Tigar had not made adequate findings to support a nationwide injunction against the third country rule. In other words, for asylum seekers at the southern border, the new rule will go into effect in Texas and New Mexico (which are not part of the Ninth Circuit), but not in California and Arizona (which are in the Ninth Circuit).

The panel's partial stay was unexpected and a bit anticlimactic for those who looked forward to a ruling on the merits of the DHS third country rule. Under the rule, a foreign national seeking asylum in the United States must first seek protection in any country that the foreign national has passed through en route and await that decision, as long as that country is a party to the 1951 Refugee Convention, the 1967 Refugee Protocol or the Convention Against Torture. Since almost every country, no matter how repressive or corrupt, is a signatory to one or more of these agreements, the new DHS rule would force asylum seekers to seek protection in countries that lack rule of law institutions—countries in which refugees will risk continued harm. Because it subjects refugees to this risk, the new rule will effectively gut U.S. asylum protections and clash with the framework Congress carefully crafted in the Immigration and Nationality Act. In its challenge to the rule, the ACLU made this point, as did an amicus curiae brief by distinguished professors of immigration law in which I served as co-counsel alongside Shoba Sivaprasad Wadhia of Penn State Law and Alan Schoenfeld and Alex Gazikas of WilmerHale.

The Ninth Circuit panel asserted that nationwide injunctions caused tradeoffs between uniformity of effects on the ground and the value served by having different federal courts of appeals weigh in on a particular policy. Preserving the chance for different courts to weigh in can yield fresh insights and enhance appellate decisionmaking, as Samuel Bray has observed. In particular, the Ninth Circuit noted that another challenge to the new DHS rule is proceeding in the U.S. District Court for the District of Columbia, where Judge Timothy Kelly declined to issue preliminary relief and has asked the parties to file opposing motions for summary judgment. Despite the virtue of percolating insights across different courts, however, curbing nationwide injunctions can also lead to inconsistent protections across the country, as Amanda Frost has explained.

The future path of this litigation is unsettled. In its ruling, the Ninth Circuit set a briefing schedule for appeal of Judge Tigar's injunction that will culminate in a December argument. In the meantime, either party can seek en banc rehearing before the full Ninth Circuit, or the challengers may return to Judge Tigar, whom the Ninth Circuit invited to provide a fuller rationale of why a nationwide injunction was necessary in this case.

Topics: Immigration

Tags: Asylum

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