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Immigration Update: Ninth Circuit Rules Against Trump Ban on Uninsured

By Peter Margulies Wednesday, May 6, 2020, 3:12 PM

In a ruling on May 4 in *Doe v. Trump*, the U.S. Court of Appeals for the Ninth Circuit denied the government's request for a stay of a nationwide preliminary injunction against an October 2019 presidential proclamation barring admission of immigrants without "approved" health insurance. In the majority were Ninth Circuit Judges Sidney Thomas and Marsha Berzon; Judge Daniel Bress dissented.

In denying the government's stay request, the court suggested that the deference that the Supreme Court showed in *Trump v. Hawaii* (upholding President Trump's 2017 travel ban) was inappropriate for a proclamation unmoored from the national security and foreign affairs justification of the travel ban—particularly since the proclamation also conflicted with a specific provision of the Immigration and Nationality Act (INA) and with Congress's express authorization of immigrants' enrollment in programs under the Affordable Care Act (ACA).

The uninsured ban relies on 8 U.S.C. § 1182(f), which empowers the president to bar entry of foreign nationals who would be "detrimental to the interests of the United States." This same provision supported President Trump's 2017 travel ban, which the Supreme Court upheld in *Trump v. Hawaii*. The uninsured ban would bar many immigrants who lack an "approved" insurance plan, defined as a plan not supported by a government subsidy. Approved plans include an array of bare-bones insurance policies that provide minimal benefits and are thus incompatible with the comprehensive coverage in the ACA.

In practice, the ban bars the entry of many who would otherwise be eligible for visas—spouses, adult children, parents and siblings of many U.S. citizens, as well as the spouses of lawful permanent residents. This is because families already in the U.S. in which the primary breadwinner works for a salary at or just above the minimum wage often lack employer health insurance plans. And without an employer plan, it becomes effectively impossible to sponsor relatives under the INA unless the noncitizen can personally afford an "approved" plan under the ban.

In its focus on a domestic issue, not a foreign affairs or national security problem, the ban also diverges from all previous invocations of § 1182(f) authority. I served as co-counsel (along with Loeb & Loeb's Neil Nandi and Laura McNally and Penn State's Shoba Sivaprasad Wadhia) on an amicus brief detailing the almost 70 years of § 1182(f)'s history. Our brief showed that the more than 40 instances in which presidents have invoked this power have invariably involved national security and foreign affairs—for example, retaliating against intransigent or hostile foreign powers (including the countries that the travel ban cited as performing inadequate vetting) or promoting international cooperation on issues such as human trafficking.

The Ninth Circuit appeared to agree with our analysis and found that the uninsured ban strayed from previous proclamations' foreign affairs or national security nexus and instead addressed a "purely domestic economic problem" of "uncompensated healthcare costs." In this "purely domestic" realm, the court found no basis for the broad deference to the executive branch that the Supreme Court had displayed in *Hawaii*.

The 2017 travel ban's nexus with national security and foreign affairs was a significant feature of the opinion of Chief Justice Roberts for the court in *Hawaii*. Roberts noted that proclamations under § 1182(f) had often "retaliat[e]d for conduct by ... governments that conflicted with U.S. foreign policy interests." A prime example of use of § 1182(f) from this function was Proclamation No. 5517 from 1986, in which President Reagan had suspended immigration from Cuba to push the Castro regime to live up to an immigration agreement with the United States. In the remaining examples under § 1182(f), presidents issued proclamations to implement cooperation with other nations on issues of mutual interest. Perennial subjects included deterrence of human trafficking, cybercrime and human rights abuses. In another prominent instance, Proclamation No. 4865 was one component of bilateral measures to promote orderly and safe immigration in the Caribbean. The Supreme Court referred to this proclamation in *Haitian Centers Council v. Sale*, in which the court upheld a policy interdicting vessels on the high seas containing asylum-seekers from Haiti and elsewhere. Roberts discussed this example in *Hawaii*, as well.

The court, in *Hawaii*, used this historical national security or foreign affairs nexus to place § 1182(f)'s admittedly broad language in context. By its terms, § 1182(f) is indeed sweeping; it authorizes the president to suspend the entry of foreign nationals when entry would be "detrimental to the interests of the United States." However, in *Hawaii*, Roberts suggested that "past applications" of "executive practice" may illuminate § 1182(f)'s contours. Our amicus brief demonstrated that past invocations of § 1182(f) concerned what the Ninth Circuit called the "traditional spheres" of "international affairs and national security[,]," which often trigger judicial deference to the executive branch. In the purely domestic realm in which the uninsured ban deals, judicial review is typically more robust. We argued in the brief, and the Ninth Circuit agreed, that the uninsured ban thus warrants such searching judicial scrutiny.

Countering this point, Bress's Ninth Circuit dissent interpreted the national security and foreign affairs nexus far more broadly. He argued that *any* immigration restriction necessarily has some nexus with national security and foreign affairs because it affects foreign nationals. But that expansive view would leave the president's power in the immigration space without intelligible limits. With such uncabined authority, a president would have full license to disrupt the INAs careful scheme and other statutory provisions.

By contrast, the more tailored approach that the majority adopted in *Doe v. Trump* would be a salutary check on executive license, at least when proclamations lacked a clear national security or foreign affairs nexus.

The Ninth Circuit also found that the uninsured ban upset the balance struck in the INA's public charge provision, now found at 8 U.S.C. § 1182(a)(4). That provision, which has been part of the INA for well over a century, bars admission of immigrants who are likely to become public charges; in other words, persons who depend on the state for some part of their subsistence. The uninsured ban addresses the very same subject—given scarce government resources, it tries to preempt public responsibility for immigrants' private needs.

But the uninsured ban actually undercuts the approach to the public charge provision taken by the Trump administration's own Department of Homeland Security in a final rule issued in August 2019, after full notice and comment under the Administrative Procedure Act (APA). Unpacking that conflict requires some background.

Controversially, the new Homeland Security rule establishes a *per se* rule that classifies as public charges those immigrants who have received certain benefits, such as food stamps, public housing, and Medicaid, for 12 out of the past 36 months. Once a government official finds dependence of this type, the official can automatically find that the noncitizen is a public charge. The official need not address the impact of other factors mentioned in the public charge provision—including age, health, education and skills, and family status, as well as "assets, resources, and financial status." The fact that the presence of one factor automatically triggers an adverse finding, with total disregard to other factors, is the essence of a *per se* approach.

On the surface, the new Homeland Security public charge rule seems to echo the *per se* approach taken by the uninsured ban. Indeed, in a December 2019 Ninth Circuit ruling, *City & Cty. of San Francisco v. U.S. Citizenship & Immigration Services*, a more conservative panel had deferred to the new Homeland Security rule's *per se* approach. Judge Jay Bybee, who wrote for the court in that case, cited the courts' traditional hands-off posture toward public charge determinations. The Supreme Court left the stay in effect, signaling the likely presence of 5 votes on the court to uphold the new public charge rule's *per se* test.

Despite the surface similarity between the public charge rule and the uninsured ban, there is a conflict between the rule and the ban. But that conflict is *not* the one highlighted by the Ninth Circuit liberal majority in its May 4 *Doe v. Trump* ruling. The next two paragraphs explain the flawed analysis in the liberal Ninth Circuit panel's May 4 decision on the uninsured ban and then describe the *actual* conflict between the public charge rule and the ban.

The more liberal May 4 Ninth Circuit panel in *Doe v. Trump* went astray because it asserted that a *per se* approach was absolutely contrary to the public charge provision. To support this argument, the May 4 panel cited the public charge provision's mention of an array of factors, including age, health, education and skills, and family status, as well as "assets, resources, and financial status." According to the *Doe v. Trump* panel, this laundry list of factors germane to a public determination precluded a *per se* approach. Unfortunately, there is a substantial problem with this insistence that the public charge provision requires a holistic inquiry into age, education, and the like: The more conservative Ninth Circuit panel's December 2019 *San Francisco* decision had squarely rejected this logic, and the Supreme Court had signaled its likely agreement with the more conservative panel's analysis by staying injunctions against the new public charge rule. The Judge Bybee-led *San Francisco* panel's opinion in fact explicitly endorsed Homeland Security's new approach.

In the May 4 *Doe v. Trump* decision, the more liberal Ninth Circuit panel did not even mention the *San Francisco* panel's reasoning. Perhaps the *Doe v. Trump* panel disagreed with the earlier panel's take and viewed the Supreme Court's staying of injunctions against the public charge rule as a passing procedural move, not a harbinger of the court's views on the rule's ultimate merits. But just because one panel may disagree with the decisions of another panel of the same court and discount rulings by the Supreme Court does not make either disappear. To the extent that the *Doe v. Trump* majority engaged in this kind of wishful thinking, it impeded the development of legal doctrine on *per se* tests.

The *Doe v. Trump* court would have been on firmer ground in citing the conflict between the uninsured ban and the Homeland Security rule's more nuanced analysis of the specific issue in the newer case: noncitizens' lack of health insurance. Informed by full APA notice and comment, the new rule distinguished between the *per se* test it applied to government benefits like food stamps and a case-by-case approach that it applied to noncitizens' lack of health insurance. Under the rule, lack of health insurance is merely "one factor in the totality of the circumstances," to be resolved on an individual basis as cases arise. That case-by-case approach diverges dramatically from the uninsured ban's *per se* test: The uninsured ban took a *per se* approach to the same subject as the rule change and undercut Homeland Security's nuanced approach. Yet the uninsured ban did not stem from any sort of deliberative process comparable to APA notice and comment.

As the Ninth Circuit's uninsured ban decision observes, while the new Homeland Security rule went through APA notice and comment, the uninsured ban emerged with "virtually no factual findings, minimal reasoning, and an extremely limited window for public comment." The uninsured ban's deliberative deficit when measured against Homeland Security's rule is another signal that the ban exceeds the authority that Congress delegated to the president. In *Trump v. Hawaii*, the Supreme Court highlighted the multiagency process that produced the 2017 travel ban. In contrast, the uninsured ban was issued in haste and in disregard for the more considered judgment of the agency—the Department of Homeland Security—charged by Congress with interpreting the INA.

The uninsured ban also undermines the structure of the ACA, something the Ninth Circuit noted in its decision. As Roberts explained in his opinion for the Supreme Court in *King v. Burwell*, Congress sought in the ACA to promote sustainable access to health care through a pillar of sound insurance: pooling risks by enrolling healthy individuals who would pay in premiums more than they withdrew in benefits, thus balancing-out less healthy individuals who would be more likely to claim benefits. Several ACA provisions authorize enrollment of lawfully present noncitizens. Encouraging enrollment of immigrants, many of whom are likely to be young and healthy, aided the risk-pooling at the heart of the statute.

Testimony to Congress before it began deliberation on legislation that became the ACA noted noncitizens' comparative edge in overall health. At a 2008 House Ways and Means Committee hearing, Alameda County public health official Anthony B. Iton noted that immigrants are "by and large healthier than American born residents" and that they "live longer, have less chronic disease, and use less medical resources per capita." Indeed, the "healthy immigrant effect" is a staple of the public health canon (see here and here). Enrollment of immigrants thus fit the ACA's risk-pooling plan. By refusing to classify ACA plans as "approved," the uninsured ban frustrated Congress's objective of enrolling immigrants.

While the uninsured ban's tension with the ACA is substantial, here, too, the *Doe v. Trump* majority overshot the mark. The majority opinion suggests that, under the uninsured ban, a noncitizen will not be admitted to the United States without an agreement in place to buy "approved" health insurance. As Bress's dissent notes, this is not correct. Rather, the proclamation requires that the noncitizen acquire approved health insurance *within 30 days of entry* into the country (Proclamation § 1(a)). Moreover, as Bress explained in his dissent, the uninsured ban does not preclude immigrants from enrolling in ACA programs.

However, the Ninth Circuit was correct that in practice an immigrant will have to make arrangements to acquire health insurance and have the means to do so *prior* to entering the country. Section 3(a) of the proclamation requires that a noncitizen must demonstrate compliance with the ban "to the satisfaction of a consular officer" *before* issuance of a visa. In addition, as the Ninth Circuit correctly suggested, the ban chills enrollment in ACA programs. Many immigrants will not be able to afford approved health insurance, so they will not be able to enter the United States. Others will not be able to pay twice: first for minimalist "approved" plans under the ban, which they must commit to buy within 30 days of entry, and then, post-entry, for insurance under the ACA. The prospect of double payment will surely chill ACA enrollment—exactly the opposite of what Congress intended with the landmark health care act. In this sense, the uninsured ban erodes what Roberts called the ACA's "broader structure."

These twinned tensions of the uninsured ban with the INA and the ACA support the Ninth Circuit's conclusion that the ban exceeded the president's power under § 1182(f). The need to mitigate these tensions persuaded the Ninth Circuit to uphold the nationwide preliminary injunction against the ban—a broad remedy that Bress criticized in his dissent. The government may soon ask the Supreme Court to grant the stay that the Ninth Circuit denied (see Stephen Vladeck's paper on the government's frequent efforts to seek preliminary recourse at the Supreme Court). The reception the government encounters at the Supreme Court will be the best indication yet of the uninsured ban's legal merits.

Topics: Immigration

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