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DONALD TRUMP

The Ninth Circuit and the Refugee EO: Back to the Statute?

By Peter Margulies Tuesday, May 16, 2017, 10:30 AM

The Ninth Circuit's argument yesterday on President Trump's revised Refugee EO in *Hawaii v. Trump* took a novel turn: Judges Gould, Hawkins, and Paez focused on what the Immigration and Nationality Act (INA) actually says. Hearing the government's appeal of a Hawaii district court's preliminary injunction against the EO, the panel was thoughtful and discerning on both the INA and the Establishment Clause. Unfortunately, the parties' positions were each too extreme to provide the court with optimal guidance.

Although I believe the revised EO is consistent with the INA, the government's statutory theory overshoots the mark. However, the plaintiffs-appellees' theory also misreads the statute. Based on the panel's nuanced questioning, my hope is that it finds a way to find for the government, based on a theory more closely tailored to Congress's overall scheme. However, the government's sweeping view of presidential power might push the panel into holding for the plaintiffs-appellees, just to hold the government in check.

As Judge Paez noted during Monday's argument, courts generally read statutory provisions "together," not in isolation. That common sense proposition is key to Supreme Court decisions such as *King v. Burwell* (2015), holding that health insurance exchanges under the Affordable Care Act included state exchanges. The panel should apply Judge Paez's approach to the revised EO, which exempts lawful permanent residents (LPRs) and current visa-holders (VHs) covered by the original EO. The revised EO applies only to noncitizen visa applicants with no previous ties to the United States—a group with scant, if any, statutory or constitutional rights.

Here are the three statutory subsections that a court should read "together," in accordance with Judge Paez's wise suggestion. The first provision, 8 U.S.C. § 1182(f) (the "entry provision"), authorizes the President to "suspend the entry of all aliens or any class of aliens." As I have suggested here, this provision is broad but not unbounded: it doesn't authorize action that is arbitrary in light of Congress's statutory scheme. The same can be said for 8 U.S.C. § 1152(a)(1)(B) (the "procedures provision"), which empowers the Secretary of State to "determine the procedures for the processing of immigrant visa applications." A third provision, 8 U.S.C. § 1152(a)(1)(A) (the "nondiscrimination provision") bars discrimination based on nationality in the issuance of immigrant visas. Unfortunately, neither the government, represented by Acting Solicitor General (SG) Jeffrey Wall, nor the State of Hawaii, represented by former Acting SG Neal Katyal, offered a reading that answered Judge Paez's commendably straightforward invitation to reconcile the entry, procedures, and nondiscrimination provisions of the INA.

Acting SG Wall declined to take up Judge Paez's invitation because Wall was unduly invested in a broad reading of the entry provision. Wall declined to countenance *any* restriction in the power that Congress had delegated to the President under § 1182(f). On Wall's view, courts at best could require the government to issue visas. However, under § 1182(f), Wall said, the President could then block the entry of visa-holders, rendering the issuance of visas a futile exercise.

The problem with Wall's argument is its lack of any meaningful limits. As Wall painted it, the entry provision would swallow up the rest of the INA, allowing the President to bar the entry of any and all noncitizens, including the LPRs and VHs covered under the *original* EO, which the Trump administration wisely walked back when it issued the revised EO. Wall's reading was a recipe for arbitrary and unlawful executive action.

A more balanced reading might have earned approval from Judge Paez and his two colleagues. This view would have conceded that the President cannot rewrite the elaborate framework of the INA under the guise of invoking authority under the entry provision. On this view, the nondiscrimination provision acts as a brake. The President cannot reinvent the national origin quotas that Congress decisively repudiated in the 1965 immigration statute. Moreover, the President cannot use the procedures provision to transform a modest, temporary pause into a permanent ban. However, both the entry and procedures provisions authorize the President to take more tailored steps to address the volatile realm of foreign affairs.

As a question from Judge Hawkins appeared to suggest, a modest, temporary pause in admissions might pass muster to determine whether current procedures adequately addressed the uncertainty yielded by ongoing armed conflicts or the risk posed by state sponsorship of terrorism—contexts that collectively encompass each of the six countries (Iran, Libya, Somalia, Sudan, Syria, and Yemen) included in the revised EO. One could regard this as a sound legal outcome, even while criticizing the EO's policy underpinnings (as I do). Similarly, as Judge Gould appeared to suggest, letters supporting the need for the EO from the Attorney General and the Secretary of Homeland Security would ordinarily be entitled to a measure of deference. However, while Acting SG Wall gestured in this direction, he also pressed a more sweeping view of the entry provision that would not turn on these tailored considerations. The panel seemed troubled by the prospect of writing such a blank check to any President.

For his part, former Acting SG Katyal offered the plaintiffs-appellees' counterpart to the government's sweeping arguments. The principal difference: while Wall hung his hat on the entry provision to justify unbounded executive power, Katyal invoked the nondiscrimination provision to hamstring the executive branch's response to foreign policy concerns. To accomplish this, Katyal invoked a string of cases that he asserted put limits on the entry provision or barred executive branch discrimination in immigration decisions. Read in context, however, these decisions counsel deference to the executive branch and demonstrate the risk that judicial second-guessing of executive decisions will frustrate Congress's intent.

The Second Circuit's decision in *Abdullah v. INS* (1999) illustrates that much of Katyal's claimed authority is double-edged. In *Abdullah*, the court upheld the government's denial of LPR status to several noncitizens who had applied for legalization under an INA provision designed for agricultural workers. The plaintiffs, who were Indian and Pakistani, had placed their national origin at issue, asserting that the government had discriminated against them on that basis. Supporting their claim of discrimination, the plaintiffs had claimed that officials adjudicating their status had used a "profile" that relied in part on national origin to flag possible fraudulent applications. The court agreed that discrimination by immigration officials was "impermissible." Score one for Katyal. However, the court then took a sharp turn away from Katyal's position.

According to the *Abdullah* court, the government's use of a fraud profile showed experienced officials addressing facts on the ground. Rather than demonstrating invidious discrimination, the profile may have highlighted a pattern of deceptive devices by applicants, such as "repeated use of identical form documents . . . or repeated use in answer to stock questions of identical answers found to be fraudulent, occurring with regularity among applicants . . . of a particular nationality." Flagging such instances, the court found, would draw sound inferences from the "tendency of persons who have recently emigrated to this country to maintain a community" with others from the same country of origin.

One can argue that this is merely discrimination by another name. But that is precisely the point: the *Abdullah* court was willing to defer to this kind of decisionmaking in the immigration context, even if it would be impermissible in other contexts (such as Fourth Amendment drug searches). The Refugee EO's temporary pause in admission of noncitizens outside the U.S. is a good deal more tailored than the administrative rules of thumb that immigration officials used to *permanently* deny LPR status in *Abdullah*.

The other cases Katyal relied on tell the same tale. A D.C. district court decision, *Olsen v. Albright* (1997), is a government employment case with passing negative references to short-hand criteria ("RK" for "rich kid," LP for "looks poor") used to evaluate applications for visas at the U.S. consulate in Sao Paulo, Brazil. However, stray mentions in a single district court case do not yield the seismic trend that Katyal touted at Monday's argument. Indeed, consular officials' search for patterns in *Olsen* showing fraud by Korean, Chinese, and Arab visa applicants in Sao Paulo seems consistent both with *Abdullah* and with the venerable doctrine of consular nonreviewability recently affirmed by the Supreme Court in *Kerry v. Din* (2015). Katyal also highlighted the celebrated Second Circuit judge Henry Friendly's warning about invidious discrimination in *Wong Wing Hang v. INS* (1966), but neglected to mention that Judge Friendly found *for the government* in that case, as did the Second Circuit in another case cited by Katyal, *Bertrand v. Sava* (1982), which held that the government had advanced neutral reasons for detaining Haitian immigrants while paroling noncitizens from other countries.

Another case cited by Katyal at Monday's argument, *Abourezk v. Reagan* (1986), is readily distinguishable. In *Abourezk*, the D.C. Circuit sought to limit immigration officials' power to exclude noncitizen Communist Party members from countries such as the Soviet Union, Nicaragua, or Cuba, whom U.S. citizens wished to invite to speak before American audiences. In an opinion by then-judge Ruth Bader Ginsburg, the court curbed the government's power, citing a statutory provision called the McGovern Amendment, which aimed to promote the free international flow of ideas pursuant to the Helsinki Accords on human rights.

The McGovern Amendment sought to achieve this goal by requiring that the Secretary of State admit Communist Party members who were not otherwise excludable (e.g., because they had committed crimes) unless the Secretary of State certified to Congress that admission would be "contrary to the security interests of the United States." Congress ultimately substituted another provision, codified at 8 U.S.C. § 1182(a)(3)(C)(i)-(iv), for the McGovern Amendment, requiring that the Secretary of State "personally determine[]" that admission would undermine a "compelling United States foreign policy interest." Since both provisions governing ideological exclusions are far more specific and detailed than the nondiscrimination provision invoked by plaintiffs-appellees, the *Abourezk* decision is only marginally helpful in limiting the scope of the entry provision, § 1182(f), that the government cites as the source of power for the Refugee EO.

In sum, at Monday's argument, the government's statutory argument failed to acknowledge meaningful limits on the President's power. In contrast, the plaintiffs-appellees saw little room in the entry provision for the exercise of executive discretion. Neither position is persuasive.

A similar dynamic prevailed on the Establishment Clause issue, which I discussed in this post on last week's Fourth Circuit argument. Acting SG Wall argued that then-candidate Trump's statements were irrelevant. Addressing how to view those statements if the court found them relevant, Wall argued that the campaign statements were at the very least ambiguous, because candidate Trump pivoted quickly from

advocating a Muslim ban to arguing for “extreme vetting” tied to volatile conditions in particular states. Judge Paez suggested that some discounting of candidate Trump’s statements might be appropriate, given the “highly contentious” political campaign in which Trump made his remarks.

For his part, Neal Katyal argued that those campaign statements were important evidence, although he also asserted that *President* Trump’s statements offered definitive proof of bad faith. Katyal pointed to President Trump’s statement upon signing the original EO that, “we all know what that means.” Wall, in accord with Josh Blackman’s detailed analysis of the signing ceremony, asserted that that Trump’s words were not a dog-whistle for anti-Muslim animus, but merely a generic reference to the threat of foreign terrorism. I agree with Josh, and with Wall’s fallback position that although campaign statements are relevant, Trump’s are too wide-ranging for the affirmative showing of bad faith that Justice Kennedy’s concurrence in *Kerry v. Din* requires.

Finally, on the issue of standing to sue, Acting SG Wall argued cogently that Hawaii’s injuries, such as a loss of tourist dollars or an unspent surplus of financial aid for refugees, were too remote to count as injury in fact. Similarly, Wall argued that the individual plaintiff in the suit, Dr. Elsheikh, had suffered merely speculative harm. Dr. Elsheikh had alleged that his wife had sought to sponsor his Syrian mother-in-law for an immigrant visa, and that the revised EO had delayed his mother-in-law’s admission. Wall noted that the revised EO contains a waiver specifically for family reunification, and that Dr. Elsheikh’s mother-in-law was highly likely to qualify. Neal Katyal argued that Dr. Elsheikh had suffered the additional harm of feeling marginalized because of his Muslim faith. Wall responded that even if this were true (as Wall denied), the revised EO did not explicitly condemn Islam. Holding that any indirect message read into the revised EO by plaintiffs constitutes injury in fact would eviscerate the Supreme Court’s venerable test for standing under Article III.

At a discursive level, the parties’ sharpest dispute concerned whose position marked the biggest departure from past practice. Neal Katyal, taking a page from his successful advocacy for the Guantanamo military commission defendant Salim Hamdan in *Hamdan v. Rumsfeld* (2006), asserted that the Refugee EO departed from the status quo. Judge Hawkins pushed back, observing that Katyal himself, in an amicus brief supporting President Obama’s immigration plan, had urged courts to defer to the President’s need to “balance a broad range” of foreign policy and other factors. That deference was Acting SG Wall’s touchstone on Monday. Wall argued that the plaintiffs-appellees would disrupt “settled legal rules” by removing the revised Refugee EO from the political arena, where it belongs.

We’ll see if the panel can traverse a path that sets limits on the President while upholding the tailored and temporary measures in the revised EO. On balance, I’d say Wall’s tendency to sound in the key of executive unilateralism gives the plaintiffs-appellees a modest edge, but the balanced nature of the panel’s questioning makes this a close call.

Topics: Donald Trump, Executive Power

Tags: immigration, refugees, Executive Order, Hawaii v. Trump

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