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Legal Sidebar

District Court Temporarily Blocks Implementation of Asylum Restrictions on Unlawful Entrants at the Southern Border

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Update: Following publication of this Sidebar, on December 7, 2018, the U.S. Court of Appeals for the Ninth Circuit in a 2-1 decision denied the Trump Administration's emergency motion to stay the federal district court's Temporary Restraining Order (TRO) pending appeal. The Ninth Circuit concluded that a stay was not warranted because the Administration failed to show that it was likely to succeed on the merits of its appeal of the TRO. The circuit panel agreed with the district court that (1) the plaintiff organizations have standing to challenge the Administration's new regulation making aliens who unlawfully enter the United States at the southern border ineligible for asylum; (2) the regulation conflicts with the Immigration and Nationality Act (INA), which provides that any alien physically present in the United States may apply for asylum; and (3) the regulation is likely subject to the notice-and-comment requirements of the Administrative Procedure Act (APA). In a dissenting opinion, Judge Leavy argued that the regulation is exempt from the APA's notice-and-comment procedures and does not conflict with the INA because it restricts an alien's eligibility to be granted asylum, but does not limit who may apply for asylum.

In light of the Ninth Circuit's ruling, the Trump Administration remains barred from implementing its new asylum rule pending appeal of the TRO. The original post from November 27, 2018 is below.

Prompted by reports of a "migrant caravan" traveling to the United States through Mexico, on November 9, 2018, the Trump Administration took two actions to make most non-U.S. nationals (aliens) who

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unlawfully enter the United States (i.e., without inspection or "between ports of entry") at the southern border ineligible for asylum. In one action, President Trump issued a Presidential Proclamation suspending the entry of aliens at the southern border, other than lawful permanent residents, unless they arrive at designated ports of entry. In the other action, taken a few hours before the issuance of the proclamation, the Department of Homeland Security (DHS) and the Department of Justice (DOJ) announced new regulations that would make aliens who violate the proclamation ineligible for asylum. Together, the proclamation and new regulations would bar a covered alien at the southern border from pursuing asylum unless the alien arrives at a designated port of entry. (Neither the proclamation nor the new regulations, however, bar unlawful entrants from claiming other forms of relief—besides asylum—based on persecution or torture if they overcome the stricter screening standards for those protections.)

The Trump Administration's actions depart from longstanding procedures that allow aliens arriving in the United States—including those who recently entered the country unlawfully between ports of entry—to pursue asylum if they establish a "credible fear" of persecution. Immediately following the Administration's actions, advocacy groups filed a lawsuit in federal district court in Northern California asserting that the Trump Administration lacks the authority to change asylum law in this manner. On November 19, 2018, the district court issued a Temporary Restraining Order (TRO) barring the Administration from implementing the new asylum restriction. The government has appealed that ruling to the U.S. Court of Appeals for the Ninth Circuit. Thus, while the Trump Administration is presently barred from implementing its new asylum rule, the district court's decision may only be the first chapter in the ongoing litigation. (Furthermore, the Trump Administration is reportedly considering an agreement with Mexico that would require aliens seeking asylum at a port of entry to remain in Mexico pending consideration of their claims. To date, there is no official description of such an agreement or official indication that such an agreement has been finalized. This Legal Sidebar may be updated or supplemented as events require.)

Legal Background

Asylum is a humanitarian-based form of relief from removal for certain aliens who face persecution in their country of origin. At least two statutory provisions of asylum law concern unlawful entrants. Section 208(a)(1) of the Immigration and Nationality Act (INA) provides that "[a]ny alien who is physically present in the United States or who arrives in the United States (*whether or not at a designated port of arrival* . . .), irrespective of such alien's status, may apply for asylum in accordance with this section" (emphasis added). In addition, INA § 235(b)(1)(A)(ii) provides that an alien apprehended at or near the border who is subject to expedited removal—including one who entered without inspection—must be referred to an asylum officer if "the alien indicates either an intention to apply for asylum under [INA § 208] or a fear of persecution." If the asylum officer determines that the alien has a "credible fear" of persecution, the alien will be placed in formal removal proceedings before an immigration judge (IJ) for consideration of an application for asylum, withholding of removal, or protection under the Convention Against Torture (CAT).

The INA imposes certain restrictions on asylum eligibility. For instance, INA § 208(b)(2) renders certain aliens statutorily ineligible for asylum, such as aliens convicted of aggravated felonies, or aliens who have firmly resettled in another country before arriving in the United States. That provision also states, at § 208(b)(2)(C), that "[t]he Attorney General may by regulation establish *additional limitations and conditions, consistent with this section*, under which an alien shall be ineligible for asylum" (emphasis added). Another provision, § 208(d)(5)(B), similarly authorizes the Attorney General to establish "conditions or limitations on the consideration of an application for asylum *not inconsistent with this chapter* [of the INA]." Furthermore, asylum is a discretionary form of relief; consequently, even if an alien establishes eligibility for asylum, the Attorney General may deny relief as a matter of discretion.

While INA § 208 governs the consideration and adjudication of asylum applications, a separate provision, INA § 212(f), grants the President broad authority over the entry of aliens into the United States. INA § 212(f) reads in relevant part as follows:

> Whenever the President finds that the entry of any aliens or of any class of aliens into the United States would be detrimental to the interests of the United States, he may by proclamation, and for such period as he shall deem necessary, suspend the entry of all aliens or any class of aliens as immigrants or nonimmigrants, or impose on the entry of aliens any restrictions he may deem to be appropriate.

The Supreme Court declared in its June 2018 decision in *Trump v. Hawaii* that § 212(f) "exudes deference to the President" and grants him "'ample power' to impose entry restrictions in addition to those elsewhere enumerated in the INA." The case held that the "Travel Ban" proclamation restricting the entry of certain nationals of seven countries constituted a lawful exercise of the President's § 212(f) powers.

The Presidential Proclamation Restricting the Entry of Aliens at the Southern Border

The President's November 9, 2018 proclamation primarily relies upon INA § 212(f) to suspend "[t]he entry of any alien into the United States across the international boundary between the United States and Mexico." The proclamation provides, however, that this entry restriction does not apply "to any alien who enters the United States *at a port of entry* and properly presents for inspection, or to any lawful permanent resident of the United States" (emphasis added). In addition, the suspension of entry "shall apply only to aliens who enter the United States after the date of this proclamation" (November 9, 2018). Further, the suspension on entry "shall expire 90 days after the date of this proclamation or the date on which an agreement permits the United States to remove aliens to Mexico in compliance with [INA Section 208(a)(2)(A)], whichever is earlier."

With regard to asylum, the proclamation states that aliens arriving at the U.S. southern border, including aliens without proper documentation, may still seek asylum "provided that they properly present themselves for inspection at a port of entry." It declares, on the other hand, that aliens who enter the United States without inspection (in violation of the proclamation) will be ineligible for asylum under federal regulations concurrently issued by DHS and DOJ. The proclamation does not prevent such aliens from seeking withholding of removal or CAT protection, which are separate and mandatory humanitarian-based forms of protection for aliens who likely face persecution or torture in their home countries.

Finally, the proclamation requires the Secretary of State, the Attorney General, and the Secretary of Homeland Security to jointly submit within ninety days a recommendation as to whether an extension or renewal of the proclamation's entry restrictions "is in the interests of the United States."

New Federal Regulations Accompanying the Presidential Proclamation

In conjunction with the proclamation, DHS and DOJ issued a *Federal Register* notice announcing new federal regulations that would amend existing asylum regulations in light of the restrictions imposed by the proclamation. Under the new rules, a covered alien who violates the proclamation by entering the United States at the southern border without inspection after the effective date of the proclamation will be **deemed ineligible** for asylum. The new rules also amend regulations governing the threshold assessment of whether an alien otherwise subject to expedited removal has established a "credible fear" of persecution warranting further review of his or her claim of relief. The "credible fear" threshold is defined by statute as a "significant possibility" the alien could establish eligibility for asylum. Under the new regulations, if the alien violates the proclamation (and is thus rendered ineligible for asylum), "the asylum officer shall enter a negative credible fear determination with respect to the alien's application for

asylum." However, if an alien otherwise subject to expedited removal establishes a "reasonable fear of persecution or torture"—a notably more difficult standard to meet than the "credible fear" standard—the alien will be placed in formal removal proceedings before an IJ for consideration of withholding of removal and CAT protection. (If the reviewing asylum officer concludes that the alien does not show a reasonable fear of persecution or torture, this determination may still be reviewed by an IJ.)

The asylum restrictions imposed by the new regulations also apply to unaccompanied alien children (UACs) who, by statute, may not be placed in expedited removal but instead are typically required to be put in formal removal proceedings before an IJ. Consequently, UACs who unlawfully enter the United States at the southern border will be ineligible for asylum under the new regulations, but may pursue withholding of removal and CAT protection during their removal proceedings. These restrictions, however, do not affect existing practice concerning the care and custody of UACs, who are generally transferred to the Department of Health and Human Services' Office of Refugee Resettlement pending their formal removal proceedings.

Federal District Court Oder Enjoining Implementation of the Asylum Restriction

In its November 19, 2018 decision issuing the TRO, the U.S. District Court for the Northern District of California held that the new regulations conflict with INA § 208(a)'s "clear[] command[] that immigrants be eligible for asylum regardless of where they enter." The court's construction of INA § 208 was also informed by treaty obligations that prompted the enactment of the asylum statute; namely, the 1967 United Nations Protocol Relating to the Status of Refugees (Refugee Protocol), to which the United States is a party and which incorporates Articles 2 through 34 of the 1951 U.N. Convention relating to the Status of Refugees (Refugee Convention). The court observed that, under Article 31 of the Refugee Convention, member states "shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened" on account of a protected ground (e.g., race, religion). While recognizing that the Refugee Protocol is not self-executing and therefore not directly enforceable in federal court, the court determined that it served as an "interpretive guide" for revealing Congress's intent. The court thus concluded that INA § 208(a), especially when read in light of Article 31 of the Refugee Convention, expresses "Congress's unambiguous intent" that physically present aliens "may apply" for asylum even if they did not arrive through "a designated port of arrival."

The court rejected the Trump Administration's contention that the new regulations do not conflict with the asylum statute because they "establish[] a condition on asylum eligibility, not on the ability to apply for asylum." The Administration's argument was that, even though INA § 208(a)(1) states that unlawful entrants "may apply" for asylum, DOJ and DHS nonetheless have authority to render unlawful entrants *ineligible* for asylum per se. Declaring that this argument "strains credulity," the court stated that "[t]o say that one may *apply* for something that one has no right to *receive* is to render the right to apply a dead letter. There simply is no reasonable way to harmonize the two." Similarly, the court concluded that, even though the Attorney General has considerable discretion under the statute to deny asylum relief, his discretionary power allows him to create categorical bars to asylum eligibility "only when Congress has not spoken to the precise issue and the statute contains a gap." Here, because INA § 208(a)(1) leaves no gap concerning the relationship between illegal entry and asylum eligibility—and, in the court's view, unambiguously establishes that illegal entry should not bar asylum claims—the court concluded that the Attorney General lacked the authority to categorically deny asylum based on unlawful entry.

The court further rejected the Administration's claim that the new regulations do not create an asylum bar for aliens who enter unlawfully, but instead for aliens who enter unlawfully *in violation of a presidential proclamation*. This distinction matters, according to the Administration, because a presidential

proclamation "generally reflect[s] sensitive determinations regarding foreign relations and national security" and, as such, "[a]liens who contravene such a measure have not merely violated the immigration laws, but have also undercut the efficacy of a measure adopted by the President." But the court saw no meaningful distinction, for purposes of rendering an alien ineligible for asylum, between a violation of the proclamation and an "'ordinary' entry violation." More broadly, the court disagreed with the notion that the Administration could employ a combination of entry restrictions issued under INA § 212(f) and Attorney General regulations to override "Congress's clearly expressed legislative intent" that unlawful entrants may apply for asylum. The President's authority to suspend entry under INA § 212(f), the court determined, "governs admissibility, not asylum." The court expressed concern that if the executive branch could combine presidential proclamations and asylum regulations in this manner, then the President could "halt asylum claims entirely along the southern border" simply by extending the entry restriction in the November 9 Proclamation to cover aliens arriving at ports of entry. The court concluded that INA § 212(f) was not intended to give the President such broad authority.

The court's discussion of INA § 212(f) raises an interesting question about the extent to which the President's extremely broad power to restrict entry under that statute bears upon the legality of the asylum restriction adopted by DOJ and DHS. In its brief to the district court, the Trump Administration took the position that the agency regulations—not the proclamation—are the source of the asylum restriction. As such, in the Administration's view, the restriction is predicated on the Attorney General's authority to restrict asylum eligibility under INA § 208(b)(2)(C) and not upon the President's INA § 212(f) authority. The Administration does not argue, in other words, that INA § 212(f) authorizes the President to directly impose restrictions on the relief available to physically present aliens; it argues only that the Attorney General has adequate authority to impose such restrictions under INA § 208(b)(2)(C). This Administration position comports with prior presidential exercises of that INA § 212(f) authority, which have suspended the entry of aliens abroad without purporting to affect physically present aliens or to "limit the ability of an individual to seek asylum." Yet, as the district court points out, the Administration does argue that the Attorney General has authority to convert the restriction on unlawful entry imposed by the President under § 212(f) into a categorical bar on asylum relief for physically present aliens. The Administration makes this claim, the court observes, even though the proclamation's unlawful entry restriction tracks INA prohibitions on unlawful entry and even though § 208(a) suggests that violation of those INA prohibitions should not foreclose asylum relief. Thus, although the Administration does not contend that § 212(f) authorizes the asylum restriction, the provision appears nonetheless relevant to the issue of the restriction's legality. The Administration's ultimate success in defending the restriction may turn upon how courts view the argument that a presidential decision to suspend illegal entry under § 212(f) is of such consequence to foreign relations and national security that the suspension is meaningfully distinct from the INA prohibitions on illegal entry that the suspension appears to mirror.

Other Issues

The lawsuit challenging the new asylum policy raises other issues, including whether advocacy groups have standing to bring such challenges and whether the Trump Administration should have subjected the new regulations to notice and comment procedures under the Administrative Procedure Act (APA). The district court ruled that the plaintiff organizations had standing because, among other reasons, the asylum restriction would bar their clients from accessing the core legal and social services that the organizations provide and would impact the groups' funding and allocation of resources. In addition, although the court's decision granting a TRO rested primarily on the conclusion that the new regulations conflicted with the INA, the court also analyzed the notice and comment claim. In determining that the rule was subject to notice and comment requirements, the court rejected the government's invocation of exceptions for the involvement of foreign affairs functions and the existence of good cause to forgo notice and comment.

For now, the Trump Administration may not implement the new asylum regulations. Therefore, aliens who unlawfully enter the United States at the southern border following the date of the proclamation and related regulations will not be barred categorically from asylum. Under the district court's order, the TRO is to remain in effect until December 19, 2018. The district court may extend the TRO before it expires or convert it into a preliminary injunction to preserve the status quo pending final resolution of the plaintiffs' claims. The government has appealed the TRO, and the district court has denied the government's motion to stay the TRO pending that appeal. The government has also requested an emergency stay of the TRO before the Ninth Circuit. As such, an initial ruling from the Ninth Circuit about the lawfulness of the asylum restriction could come relatively quickly.