CURRENT DEVELOPMENT

THE NINTH CIRCUIT'S DECISION TO STRIKE DOWN THE PORT OF ENTRY BAR: *EAST BAY SANCTUARY COVENANT V. TRUMP*

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I. FACTS AND PROCEDURAL HISTORY

The Presidential Proclamation Addressing Mass Migration Through the Southern Border of the United States provides, in part, that "aliens who seek to lawfully enter the United States must do so at ports of entry. . . . [A]liens who enter the United States unlawfully through the southern border in contravention of this proclamation will be ineligible to be granted asylum . . . ."[1] The president elaborated on this new rule by writing that this port-of-entry bar would allow the asylum system to operate in a more "orderly and controlled manner" and gave reassurances that additional resources would be committed to support ports of entry as they deal with the anticipated surge of arrivals.[2] Boldly ignoring the Administrative Procedure Act's ("APA") typical thirty-day waiting period the Attorney General ("AG") proposed and immediately put into effect a new rule allowing asylum to be limited via presidential proclamation.[3] The port-of-entry bar was shocking for the speed with which the administration planned to implement it, and the rule's novelty. Never before had an alien's choice of border-crossing site affected their eligibility for asylum.

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1. Proclamation No. 9822, 83 Fed. Reg. 57,661 (Nov. 15, 2018), https://www.whitehouse.gov/presidential-actions/presidential-proclamation-addressing-mass-migration-southern-border-united-states/.

2. *Id.*

3. Aliens Subject to a Bar on Entry Under Certain Presidential Proclamations; Procedures for Protection Claims, 83 Fed. Reg. 55,934, 55,953 (Nov. 9, 2018) (to be codified at 8 C.F.R. §§ 1003, 1208, 208). To follow the court's logic, we review the combined effect of the presidential proclamation and the AG's proposed rule together.

The American Civil Liberties Union ("ACLU"), representing various immigration organizations ("the Organizations"),[4] challenged the port-of-entry bar in court the same day it was announced. Ten days later, the United States District Court for the Northern District of California issued a temporary restraining order ("TRO") blocking the port-of-entry bar from going into effect because it exceeded the executive branch's authority. The government then asked the Supreme Court for an emergency stay of the lower court's ruling while it appealed. The request was denied by a slim majority; the order states that Justices Thomas, Alito, Gorsuch, and Kavanaugh would have granted it.[5] On December 7, 2018, the Ninth Circuit upheld the lower court's TRO.[6]

II. THE PRACTICAL EFFECT OF THE PORT-OF-ENTRY BAR

Discerning the effect of the port-of-entry bar requires considering the on-the-ground realities and how they affect the categories under which aliens can be admitted into the US and avoid deportation. Almost immediately, the busiest ports of entry became overcrowded.[7] Ports are processing only 4 to 100 applications per day.[8] The asylum system is already inundated with a backlog of over 200,000 asylum applications; it can take years for a case to be resolved.[9] Furthermore, "the government has an established policy of limiting the number of people who may present asylum claims at ports of entry – called 'metering.' . . . [T]his policy currently results in lengthy delays, some eclipsing six weeks."[10] During this time the applicants wait in dangerous Mexican cities. They are especially vulnerable to gang-orchestrated kidnapping, extortion, death threats, and forced conscription into drug smuggling

4. The named plaintiff, East Bay Sanctuary Covenant, is a nonprofit organization that serves individuals fleeing persecution. The other plaintiffs are similar in nature. E. Bay Sanctuary Covenant v. Trump, No. 18-CV-06810-JST, 2018 WL 6660080 at *4-5 (N.D. Cal. Dec. 19, 2018).

5. 96 No. 1 Interpreter Releases Art. 7 (Dec. 20, 2018), Trump v. E. Bay Sanctuary Covenant, No. 18A615 (U.S. Dec. 20, 2018) (available at ACLU, https://www.aclu.org/legal-document/east-bay-sanctuary-covenant-v-trump-order).

6. E. Bay Sanctuary Covenant v. Trump, 909 F.3d 1219 (9th Cir. 2018) (Dec. 17, 2018).

7. Christine Murray, *Conditions are So Dire at the US-Mexico Border That Migrants are Getting Sick and Contracting Lice and Chicken Pox*, REUTERS (Nov. 29, 2018), https://www.businessinsider.com/r-at-us-mexico-border-central-american-migrants-sicken-in-dire-conditions-2018-11 (reporting that asylum-seekers in Tijuana waiting to apply at the official US port of entry are being housed in facilities designed to hold one-third as many people).

8. Camilla Domonoske & Richard Gonzales, *Fact Check: What's Happening on The U.S.-Mexico Border?* NATIONAL PUBLIC RADIO (Nov. 27, 2018), https://www.npr.org/2018/11/27/670807343/fact-check-whats-happening-on-the-u-s-mexico-border (reporting that the busiest land border crossing in Mexico was limiting asylum requests to between 40 and 100 people per day); Dara Lind, *The US Has Made Migrants at the Border Wait Months to Apply for Asylum. Now the Dam is Breaking*, VOX (Nov. 28, 2018), https://www.vox.com/2018/11/28/18089048/border-asylum-trump-metering-legally-ports (reporting that in October the CBP was generally only allowing between four and six people to enter the border from a shelter in Nuevo Laredo); *U.S. Military Sends 200 Troops to Eagle Pass, Texas, to Reinforce Port of Entry*, NATIONAL PUBLIC RADIO (Feb. 6, 2019), https://www.npr.org/templates/transcript/transcript.php?storyId=692115929 (reporting that the small border town of Eagle Pass is able to process only sixteen application for asylum per day).

9. E. Bay Sanctuary Covenant 909 F.3d at 1230.

10. E. Bay Sanctuary Covenant v. Trump, No. 18-CV-06810-JST, 2018 WL 6660080 (N.D. Cal. Dec. 19, 2018).

because "no one will stand up for them."[11] Migrants also risk apprehension, extortion, and forcible deportation by Mexican immigration authorities, and aid agencies report that this appears to be a common practice with regard to unaccompanied minor applicants.[12] In reality, waiting an indeterminate amount of time at the border to enter the United States legally is not a viable option.

The other option for aliens is to cross the border without presenting themselves at a port of entry. After crossing they will probably be detained by officials. While the port-of-entry bar would make them ineligible for asylum, they could still apply for withholding of removal and protection under the Convention against Torture. However, only asylum allows them to bring over their families, travel outside of the country, receive the full range of government assistance, and begin on a path towards permanent citizenship.[13] All three categories require an initial eligibility screening interview. If the applicant passes, they proceed to a full hearing in front of an immigration judge. In order to pass the screening interview, asylum applicants must show a well-founded fear (10% chance) of persecution,[14] withholding of removal applicants must show a "clear probability" (greater than 50% chance) of persecution, and applicants filing under the Convention against Torture must show they face almost certain torture or death if they return but they do not have to show that the harm results from persecution. The port-of-entry bar, by closing off the asylum category, would make the initial screening interview at least five times harder to pass, subjecting many more applicants to expedited removal and deportation procedures.

Ratcheting up the burden of proof during initial determinations would solve a problem that the current administration has frequently lamented in its immigration speeches and policies. Currently, almost 90% of asylum seekers are passing their initial eligibility interviews.[15] The government has viewed this statistic as proof of a broken system, while immigration advocates view it as proof of the increasingly dire conditions in Guatemala, Honduras, and El Salvador. As heavily-armed, transnational criminal groups obtain power in these

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11. For example, in 2018, the border city of Matamoros reported that 480 migrants were kidnapped. Declaration of Jeremy Slack, Ph.D. at 10–21, E. Bay Sanctuary Covenant v. Trump, 349 F. Supp. 3d 838, 844 (N.D. Cal. 2018) (No. 3:18-cv-06810) (available at ACLU, https://www.aclu.org/legal-document/east-bay-sanctuary-covenant-v-trump-declaration-jeremy-slack-phd).

12. Corrected Supplemental Declaration of Erika Pinheiro, E. Bay Sanctuary Covenant v. Trump, 349 F. Supp. 3d 838, 844 (N.D. Cal. 2018) (No. 3:18-cv-06810) (available at https://www.aclu.org/legal-document/east-bay-sanctuary-covenant-v-trump-supplemental-declaration-erika-pinheiro).

13. 8 U.S.C. §§ 1158(b)(3)(A), 1158(c)(1)(c), 1157(c)(2)(A).

14. INS v. Cardoza-Fonseca, 480 U.S. 421, 440 (1987) ("There is simply no room in the United Nations' definition for concluding that because an applicant only has a 10% chance of being shot, tortured, or otherwise persecuted, that he or she has no "well-founded fear" of the event happening.").

15. Proclamation No. 9822, 83 Fed. Reg. 57,661 (Nov. 15, 2018), https://www.whitehouse.gov/presidential-actions/presidential-proclamation-addressing-mass-migration-southern-border-united-states/; *Attorney General Jeff Sessions Delivers Remarks to the Executive Office for Immigration Review*, DEP'T OF JUSTICE, JUSTICE NEWS (Oct. 12, 2017), https://www.justice.gov/opa/speech/attorney-general-jeff-sessions-delivers-remarks-executive-office-immigration-review.

countries, authorities are often unable to curb the violence or offer any protection.[16] Citizens report having to deal with regular death threats, rape, gunfights and having to watch their children be forcibly recruited into those groups.[17]

III. SUMMARY OF THE COURT'S DECISION IN *EAST BAY SANCTUARY COVENANT V. TRUMP*

In *East Bay Sanctuary Covenant v. Trump*, the Ninth Circuit rules on three issues: standing, the unconventional process by which the policy change was made, and whether the President and AG have the authority to make the policy change. The issue of standing (covering injury in fact, causation, and redressability) is resolved in two parts: First, the court disagrees with the lower court regarding injury in fact, and holds that the Organizations did not have third-party standing because their clients did not have a legally protected interest to illegally cross the border. [18] Second, the Ninth Circuit finds that the Organizations have standing because the policy change caused them to incur additional expenses and frustrated their fundamental mission of providing legal aid.[19]

The validity of the policy's unconventional expediency is more of a side issue in the TRO and Motion to Stay. Under the APA, government agencies are typically required to promulgate new rules using a thirty-day waiting period and a notice-and-comment procedure. Here, the government does not contest that the regulation was a rule or that the required notice-and-comment procedure was not used. Instead, it argues that given the exigency of the situation and its significance with respect to negotiations with Mexico, the foreign affairs exception and the good cause exception should apply.[20] The APA wholly exempts any rules which pertain to "a military or foreign affairs function" of the US.[21] The Ninth Circuit clarifies that the foreign affairs exception has only been approved where the international consequences are obvious or the government has thoroughly explained the connection.[22] Additionally, the good cause exception allows a federal agency to skip notice-and-comment requirements if, after a fact-specific inquiry, they show that the traditional procedures are "impracticable, unnecessary, or contrary to the public interest."[23] The Ninth Circuit does not find arguments for either exception compelling. The court rules that the harm is not apparent and the government failed to meet its evidentiary burdens, but suggests that if more information about negotiations with Mexico comes to light it will review its conclusion.[24]

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16. UNHCR, *Foreward* to WOMEN ON THE RUN, FIRST-HAND ACCOUNTS OF REFUGEES FLEEING EL SALVADOR, GUATEMALA, HONDURAS, AND MEXICO (Oct. 2015).
17. *Id*. at 12–27
18. E. Bay Sanctuary Covenant v. Trump, 909 F.3d 1219, 1240–41 (9th Cir. 2018).
19. *Id*. at 1241–46.
20. *Id*. at 1251.
21. 5 U.S.C. § 553(a).
22. E. Bay Sanctuary Covenant, 909 F.3d, at 1251–53.
23. 5 U.S.C. § 553(b)(3)(B).
24. E. Bay Sanctuary Covenant, 909 F.3d at 1253.

IV. HIGHLIGHTED ISSUE: THE EXECUTIVE BRANCH'S POWER OVER IMMIGRATION

The case explores the limits of the executive branch's power over immigration, both doctrinally in case law and statutorily under the Immigration and Nationality Act ("INA"). For the doctrinal argument, both sides refer to *Trump v. Hawaii* (the "travel ban decision") to support their positions and urge the court to pick up where the travel ban decision left off in describing the plenary power doctrine. In their statutory interpretation arguments, both sides take a textualist approach in reconciling three provisions of the INA. Section 1158(b) gives the AG the power to establish general limitations on asylum,[25] and section 1182(f) gives the president the power to impose entry restrictions on classes of aliens by proclamation.[26] However, Congress amended the INA in 1996 to explicitly state that aliens may apply for asylum regardless of "whether or not [they arrive] at a designated port of arrival," a phrase that appears four times in the statute.

A. *Balancing the Power in the Plenary Power Doctrine*

The plenary power doctrine asserts that the government's power over immigration resides with the executive and legislative branches. Immigration cases are studded with implications for foreign relations and international decision-making, spheres typically reserved to the political branches. The court enthusiastically agrees with this doctrine, quoting the travel ban decision twice: first its cite of *United States v. Shaughnessy*, "The exclusion of aliens is 'a fundamental act of sovereignty' by the political branches,"[27] and then its cite of *Fiallo v. Bell*, "We review the immigration decisions of the political branches 'only with the greatest caution' where our action may 'inhibit [their] . . . to respond to changing world conditions.'"[28]

The court is less heavy-handed in determining how power over immigration should be distributed between the legislative and the executive branches. Turning to the Constitution, it deduces that the legislative branch's power arises from (1) the Naturalization Clause, (2) the Commerce Clause, and (3) the power to declare war, while the president's power stems from (1) being commander in chief, (2) his right to receive ambassadors and other public ministers, and (3) the Take Care Clause.[29] This simplistic list view impresses upon us that Congress's constitutional mandate is more squarely in the realm of immigration. The court bolsters this by quoting an early 1900s Supreme

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25. 8 U.S.C.A. § 1158 (West 2009) ("The Attorney General may by regulation establish additional limitations and conditions, consistent with this section, under which an alien shall be ineligible for asylum under paragraph (1).").

26. "Whenever the President finds that the entry of any aliens . . . would be detrimental to the interests of the United States, he may by proclamation . . . impose on the entry of aliens any restrictions he may deem to be appropriate."

27. 909 F.3d at1232.

28. *Id.*

29. *Id.* at 1231–32.

Court decision, rarely cited but popular in the Ninth Circuit it states: "[O]ver no conceivable subject is the legislative power of Congress more complete than it is over the admission of aliens."[30] Finally, the Ninth Circuit reminds us that the executive's power to admit or exclude aliens is shared with Congress, yet congressional power over naturalization is not shared.

The Ninth Circuit holds the view that the president's rule-making power granted by Congress in section § 1182(f) should be narrowly construed and limited by the other provisions of the INA. That is precisely what the Ninth Circuit held in its review of the travel ban, one year before *East Bay*.[31] The notion was later swept aside by the Supreme Court, which held that "§1182(f) exudes deference to the President in every clause . . . [and] vests the President with 'ample power' to impose entry restrictions in addition to those elsewhere enumerated in the INA."[32]

B. *A Textualist View of the President's Power under the INA*

The president has the power to suspend entry of aliens and impose entry restrictions.

> 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.[33]

Mostly this has been used to categorically deny specific groups entry visas in response to current events.[34] The ACLU argues that this power is meant to bar certain categories of persons who are outside the United States and attempting to enter.[35] It is not meant to authorize the president to dictate if a person already inside the US can apply for asylum or for relief under withholding of removal or the Convention Against Torture.[36] The government

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30. Oceanic Steam Nav. Co. v. Stranahan, 214 U.S. 320, 339–40 (1909). A case search shows that the Ninth Circuit relied on this case twelve times in the last ten years. Other federal appellate courts relied on it an average of once in the same period.

31. Hawaii v. Trump, 878 F.3d 662, 689–90 (9th Cir. 2017), *cert. granted*, 138 S. Ct. 923, (2018), *and rev'd and remanded*, 138 S. Ct. 2392 (2018) ("To avoid the inescapable constitutional concerns raised by the broad interpretation the Government urges us to adopt, we interpret § 1182(f) as containing meaningful limitations.").

32. Trump v. Hawaii, 138 S. Ct. 2392, 2408 (2018).

33. 8 U.S.C. § 1182(f).

34. Examples of presidents using the suspension power include Reagan suspending members of the Communist Party of Cuba, Clinton suspending members of the military junta in Sierra Leone, and Obama (the most frequent invoker of section 1182(f)) suspending categories of people as broad as those "determined to have 'contributed to the situation in Venezuela . . . .'" CRS REPORT, EXECUTIVE AUTHORITY TO EXCLUDE ALIENS: IN BRIEF 6–10, tbl. I (Jan. 23, 2017).

35. Respondents' Opposition to Application for Stay at 1, E. Bay Sanctuary Covenant v. Trump, 349 F. Supp. 3d 838 (N.D. Cal. 2018) (No. 3:18-cv-06810).

36. *Id.*

argues that the power is much broader, citing *Sale v. Haitian Ctrs. Council, Inc.*, which affirmed the constitutionality of a presidential proclamation prohibiting Haitian migrants from disembarking on US shores.[37] The Ninth Circuit sides with the ACLU, relying on the INA's wording to affirm that "our immigration laws have long made a distinction" between aliens who are seeking admission and those who are already inside the United States.[38]

C. *A Textualist View of the AG's Power under the INA*

The AG has the power to create new asylum ineligibility conditions, but those new conditions must be "consistent with" the section of the INA setting forth the asylum laws. The first sentence of the section reads, "Any 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 . . .) may apply for asylum."[39] Furthermore, the 1996 amendment was in response to *Sale v. Haitian Ctrs. Council, Inc.*, on which the government relies. The government argues that if the AG is prevented from creating any new limitation that conflicts with the "[a]ny alien . . . may apply" clause, the power that Congress granted the AG will be nullified.[40] The Ninth Circuit finds that a new asylum limitation based on the port of entry would contravene the first sentence of the section in direct contrast to Congressional intent. Furthermore, the court notes, it would be difficult to show precedential support for such a limitation since no AG has ever created an additional "'limitation or condition' beyond those Congress enumerated in § 1158(a)(2) and (b)(2)."[41]

V. FUTURE IMPLICATIONS

The court could opt to avoid the substantive issue and instead decide the case on the basis of standing or due process. Though the statutory interpretation question in *East Bay Sanctuary Covenant v. Trump* presents a novel issue. A decision that allows the executive branch to limit asylum eligibility by port of entry would represent a dramatic policy change and overturn law that has been settled for over three decades.

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37. Application for a Stay Pending Appeal to the United States Court of Appeals for the Ninth Circuit and Pending Further Proceedings in this Court at 33, n.7, E. Bay Sanctuary Covenant v. Trump, 349 F. Supp. 3d 838 (N.D. Cal. 2018) (No. 3:18-cv-06810) (available at ACLU, https://www.aclu.org/legal-document/east-bay-sanctuary-covenant-v-trump-stay-application).

38. E. Bay Sanctuary Covenant v. Trump, 909 F.3d 1219, 1250 (9th Cir. 2018).

39. 8 U.S.C. §§ 1158(b)(3)(A).

40. Defendants' Opposition for Temporary Restraining Order at 27–28, E. Bay Sanctuary Covenant v. Trump, 349 F. Supp. 3d 838 (N.D. Cal. 2018) (No. 3:18-cv-06810) (available at ACLU, https://www.aclu.org/legal-document/east-bay-sanctuary-covenant-v-trump-defendants-opposition-temporary-restraining-order).

41. E. Bay Sanctuary Covenant v. Trump, 909 F.3d 1219, 1235 (9th Cir. 2018).