

Déjà Vu—President Trump’s New Asylum Rule Raises Questions About Presidential Authority Similar to the Travel Ban

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A federal judge has blocked the Trump administration’s recent immigration policy barring individuals from seeking asylum if they entered the United States anywhere other than at an official port of entry. Judge Jon S. Tigar of the United States District Court for the Northern District of California issued a temporary restraining order blocking the enforcement of the president’s policy until December 19, 2018. In his order, Judge Tigar wrote, “Whatever the scope of the President’s authority, he may not rewrite the immigration laws to impose a condition that Congress has expressly forbidden.”

On November 8 and 9, 2018, President Trump and his administration issued a presidential proclamation entitled “[Addressing Mass Migration Through the Southern Border of the United States](#)” and its counterpart, an [interim final rule \(IFR\)](#), which was published in the *Federal Register*, that work together to create a bar to asylum for those who enter the United States unlawfully. The new rule appears to contradict the asylum provisions of the [Immigration and Nationality Act \(INA\)](#), which allow noncitizens who are physically present in the United States to apply for asylum, regardless of where they entered the United States. The new policy relies heavily on the [Supreme Court’s ruling in *Trump v. Hawaii*](#) (the travel ban case) to support the administration’s position that the asylum bar is a lawful exercise of the president’s authority to limit the entry of noncitizens into the United States if in the national interest.

Under the president’s asylum bar, only those individuals who present themselves for inspection at a port of entry may apply for asylum. According to the presidential proclamation, “The entry of large numbers of aliens into the United States unlawfully between ports of entry on the southern border is contrary to the national interest.” The proclamation cites the so-called “caravan” of migrants from Central America that recently travelled through Mexico to the U.S. border as an example of the “continuing and threatened mass migration” that has “precipitated a crisis” at the southern border. The administration’s intent behind the new policy is to channel those with “legitimate” asylum claims to the ports of entry.

Judge Tigar appeared to agree with critics who challenged the asylum bar based on the plain language of the INA, which, they say, makes clear that Congress did not intend for an individual’s manner of entry into the United States to act as a bar to asylum. According to Judge Tigar, not only does the INA specifically state that noncitizens *may* apply for asylum, regardless of whether they

arrived at a port of entry, it also describes specific circumstances that would trigger a mandatory denial of an asylum claim. If Congress intended the manner or location of entry to act as a bar to asylum, the critics say, it would have been included on the list.

The Trump administration says the INA gives the president the authority to prescribe additional limits and restrictions on those who seek to enter the United States when their entry would be detrimental to the interests of the country. But critics of the asylum bar argue that the INA does not grant the president the power to restrict the types of relief available to noncitizens who are already present in the United States, as opposed to those seeking to enter, as was the case with the travel ban. Thus, they say, the arguments used to successfully support the imposition of the travel ban do not apply to the asylum bar.

In addition to questions concerning presidential authority, the rule is also likely to face challenges under the Administrative Procedure Act, which prohibits “arbitrary and capricious” agency decisions and typically requires public notice and comment before a rule is implemented. President Trump’s asylum bar went into effect immediately because the administration said that a delay in implementation would encourage noncitizens to enter the United States illegally during the notice and comment period.

The president’s asylum bar is expected to follow a legal path similar to that of the travel ban. Comments made by those within the Trump administration suggest that the administration anticipated the filing of lower court challenges and expects the Supreme Court of the United States to find in its favor.

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