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US IMMIGRATION & NATIONALITY LAW

GUILFORD COLLEGE V. WOLF: REFLECTING ON THE NATIONWIDE INJUNCTION IN IMMIGRATION CASES

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In a stunning victory for F, J, and M nonimmigrant students battling unlawful presence policy, a federal district court in North Carolina has granted a permanent injunction preventing USCIS from enforcing its problematic August 9, 2018 policy memo. The Trump Administration's August 2018 policy would have rendered students in F, J and M status unlawfully present for minor technical violations thus subjecting them to 3 and 10 year bars from reentering the United States.

The February 6, 2020 *Guilford College et al v. Chad Wolf et al* opinion, issued by the Honorable Loretta C. Biggs, is an extraordinary nationwide injunction holding the August 2018 policy unlawful not just for the Plaintiffs "but for all those subject to its terms." In addition to summarizing the Court's well-reasoned justifications for granting Plaintiff's summary motion in *Guilford College*, I also reflect on the Court's justification for granting a nationwide injunction shortly following Justice Gorsuch's disapproval of such nationwide injunctions in *Department of Homeland Security v. New York* on January 27, 2020.

As background, the August 2018 policy changed over 20 years of established practice by recalculating how 'unlawful presence' time is accrued for foreign students and exchange visitors. In doing so, USCIS blurred the line between established concepts of 'unlawful presence' and 'unlawful status', and instead made the two terms synonymous as it related to F, J, and M nonimmigrants.

Prior to the August 2018 policy, unlawful presence time would not begin to accrue until the day, or day after, a formal finding was found that the nonimmigrant was out of status. In contrast, under the new policy nonimmigrants would begin accruing unlawful presence time the moment any violation of status occurred. Further, nonimmigrants would not receive any

formal notice of a status violation, and any past violation that had been discovered would have begun accrual of unlawful presence. This drastic recalculation of unlawful presence time put many who would be unaware of any status violations at risk of being subject to 3-year or 10-year bars of admission should they accrue more than 180 days of unlawful presence. *See* INA §212(a)(9)(B)(i)&(II). Mistakes due to technicalities, human error, miscommunication, or ambiguity of rules would cause a nonimmigrant to fall out of status and accrue unlawful presence without their knowledge and without opportunity to cure the violation.

This decision makes permanent a preliminary injunction that was granted on May 3, 2019 on grounds that 1) USCIS had issued the August 2018 policy in violation of the Administrative Procedure Act (APA) for failure to observe the APA's notice and comment procedures, and 2) the August 2018 policy conflicted with statutory language of the Immigration and Nationality Act (INA).

The Court agreed with the Plaintiffs showing that the language, purpose, context, and effect of the August 2018 USCIS policy rendered it a legislative rule. For a legislative rule to be valid it must have been promulgated in compliance with the APA's notice and comment procedures under U.S.C. § 553. Thus, in failing to publish notice of its proposed policy change in the Federal Register, USCIS violated the APA, thus invalidating the policy. While acknowledging that the distinction between legislative and interpretive rules is "enshrouded in considerable smog", the Court found the August 2018 policy to be a legislative rule rather than an interpretive rule as it changed the policy for calculating unlawful presence. It established a binding norm for adjudicators to start calculating unlawful presence from the date of the status violation.

With respect to Plaintiff's contention that the August 2018 policy violated the statute at INA §212(a)(9)(B)(ii), the provision is reproduced in its entirety to better explain the Court's reasoning:

> *"Construction of unlawful presence – For purposes of this paragraph, an alien is deemed to be unlawfully present in the United States if the alien is present in the United States after the expiration of period of stay authorized by the Attorney General or is present in the United States without being admitted or paroled."*

The Court opined that it was clear that unlawful presence accrued "after the

expiration of the period of stay authorized" in §212(a)(9)(B)(ii). Since F, M and J nonimmigrants were admitted under "duration of status" there is no express expiration date. Under the August 2019 policy, the nonimmigrant "starts accruing unlawful presence…the day after he or she engages in an unauthorized activity." The August 2019 policy, according to the Court, "improperly dissolves the distinction between the 'expiration of the period of stay authorized' and the violation of lawful status." The second ground for setting aside the August 2019 is significant. Even if the administration promulgated a rule under the APA, as it appears to be proposing to do so, it may still potentially be set aside as violating §212(a)(9)(B)(ii).

On top of the Court's reasons for granting a permanent injunction, it also grants a nationwide injunction despite Justice Gorsuch's scolding against this practice in *DHS v. New York* a week earlier. Justice Gorsuch complained that a single judge enjoined the government from applying the new definition of public charge to everyone without regarding to participation in this lawsuit, and that they are "patently unworkable" and sow chaos. Earlier, Justice Thomas too complained in his concurrence in *Trump v. Hawaii* that universal injunctions are a recent phenomenon and that federal courts' equitable powers were constrained after the country's founding. Hence, nationwide injunctions are constitutionally suspect. Mila Sohoni, a professor at the University of San Diego law school, argues in the Harvard Law Journal that nationwide injunctions are not a recent phenomenon and this practice goes all the way back to the 19th century. Because nationwide injunctions have a long pedigree, moves today by judges, lawyers in the Trump administration, members of Congress and legal scholars to do away with the universal injunction would be a sharp departure from precedent and practice.

The Court in *Guilford College* properly reasoned that the scope of an injunction is dictated by "the extent of the violation established, and not by the geographical extent of the plaintiff class." The Court further held that "Plaintiffs seek a remedy that applies not just *anywhere*, but to *anyone* who would otherwise be subject to the policy implemented by the August 2018 PM." Moreover, as Professor Sohoni has argued, if the policy is violative of the APA, then it must be set aside under 5 USC 706(2). The Fourth Circuit has also explained in *IRAP v. Trump* that nationwide injunctions are especially appropriate in the immigration context, as Congress has made clear that federal immigration laws must be enforced vigorously and uniformly.

Moreover, the plaintiffs in *Guilford College* were dispersed throughout the US further justifying a nationwide injunction. And to counter Justice Gorsuch's point that nationwide injunctions sow chaos, could it also not be argued that the lifting of a nationwide injunction would sow even greater chaos if a law that is potentially inconsistent with a statute or unconstitutional is implemented until it is found so by a court – thus causing needless hardship to hundreds of thousands, even millions, of would be immigrants? Another legal scholar Amanda Frost agrees that "nationwide injunctions are the only means to provide plaintiffs with complete relief, or to prevent harm to thousands of individuals similarly situated to the plaintiffs who cannot quickly bring their own cases before the courts." As the executive has been steadily expanding its powers, a nationwide injunction can act as an important check against the executive branch especially when a polarized and ineffective Congress is unable to do so, according to yet another legal scholar Suzette Malveaux.

Finally, why are people in favor of restrictionist immigration policies within the Trump administration making a fuss about nationwide injunctions? It already happened the other way when Judge Hanen issued a nationwide injunction in *Texas v. USA* against President Obama's expansion of deferred action to parents of US citizen children. Judge Hanen justified the grant of a nationwide preliminary injunction on the ground that if millions began to benefit from a policy that was potentially in violation of the APA or the INA, there would be no effective way of "putting the toothpaste back in the tube should the plaintiffs prevail on the merits." When Judge Hanen issued a nationwide injunction, the very same people who are now in charge of implementing hurtful immigration policy cheered. Today, they are critical of the nationwide injunction when courts block their immigration policies. They cannot have it both ways!