U.S. Court of Appeals Unanimously Refuses to Reinstate Travel Ban Executive Order

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As described in our January 30 and February 7 Immigration Alerts, on January 27, 2017, President Trump issued an Executive Order ("EO") entitled "Protecting the Nation from Foreign Terrorist Entry into the United States." Among other things, the EO essentially prohibited aliens from seven majority-Muslim countries (Iraq, Iran, Libya, Somalia, Sudan, Syria and Yemen) from entering the United States for a period of 90 days. The EO has written in it a mechanism to extend this travel ban indefinitely, as well as to add additional countries to the list. The EO also suspended the U.S. Refugee Admissions program for 120 days and Syrian Refugee program indefinitely.

The EO prompted litigation all over the country on behalf of affected individuals, organizations and states. The plaintiffs allege, among other things, that the EO is unconstitutional because it is intended to discriminate against Muslims (largely based on then-candidate Trump's call for a "Muslim ban") and violates due process rights. Federal courts throughout the U.S. responded to these claims by entering orders restricting the federal government's ability to enforce the EO. One of the most notable cases was filed in Washington State.

In that case, Judge James Robart of the U.S. District Court for the Western District of Washington entered a Temporary Restraining Order ("TRO") prohibiting implementation of the EO nationwide. On February 4, the federal government appealed this TRO to the U.S. Court of Appeals for the 9th Circuit and requested that the TRO be immediately stayed pending resolution of the merits of the appeal. On February 7, a three-judge panel of the Court of Appeals heard argument on the federal government's request to stay the TRO.

On February 9, the appellate panel issued a unanimous order denying the federal government's request, such that the TRO, will remain in effect pending resolution of the overall appeal (which is likely to take several months).

Initially, the appellate panel addressed three jurisdictional matters. First, it ruled that the TRO was the functional equivalent of a preliminary injunction, and therefore that the federal government's appeal fell within the jurisdiction of the appellate court (which cannot ordinarily review TROs). Second, it ruled that the State of Washington had standing to raise an objection to the EO, largely because the EO prevented students, faculty, and employees at state universities from attending or fully participating in academic programs. Third, it ruled that, while the President's decisions concerning immigration are entitled to "substantial deference" from the courts, those decisions can nevertheless be reviewed in court for compliance with constitutional rights and protections.

Having resolved these jurisdictional questions, the appellate panel turned to whether the TRO should be stayed pending resolution of the appeal. To secure the requested stay of the TRO, the federal government was required to show, among other things, that it would likely prevail in the appeal (i.e., ultimately show that the district court should not have entered the TRO) and that it would suffer irreparable injury if the TRO remains in effect until the appeal is decided. The appellate panel ruled that the federal government failed to make either showing. As to success on the merits, the appellate panel ruled that the government was, at a minimum, unlikely to show that the EO complied with constitutional requirements for procedural due process. (The appellate panel notably did not make a determination as to whether the claim of religious discrimination was likely to succeed, but strongly suggested that President Trump's statements advocating a "Muslim ban" would be considered as evidence of prohibited discriminatory intent.) As to irreparable injury, the appellate panel ruled that the federal government had failed to show that the continued admissions of visa holders from the affected counties would result in any such harm. Thus, because the federal government had failed to satisfy two requirements to obtain the requested stay of the TRO, the stay was denied.

As a result of this decision by the 9th Circuit, Judge Robart's TRO remains in effect, and it appears that the EO will not be enforced. DHS has directed its agency to adjudicate applications and petitions filed for or on behalf of individuals in the United States regardless of their country of origin, and applications and petitions of lawful permanent residents outside the U.S. and also continues to adjudicate

applications and petitions for individuals outside the U.S. whose approval does not directly confer travel authorization. Also, all ports will resume admission of non-immigrant and immigrant visa holders, including refugees, according to existing policies and procedures, for applicants who are nationals of countries designated in the Jan. 27, 2017 Executive Order.

As to the litigation, the next steps remain to be seen. Because the TRO has been ruled the equivalent of a preliminary injunction, there will be no further request to the trial court for preliminary injunctive relief. Briefing on the appeal in the 9th Circuit will not be completed until late March. Consequently, unless the federal government convinces the Supreme Court to intervene, it appears that the TRO will continue to block the operation of the EO until at least early April. We will keep you posted on the pending litigation.

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