Special Immigration Alert:
Ninth Circuit Refuses to Vacate TRO on Trump's Immigration Order

Late yesterday, in the case of *Washington v. Trump*, No. 17-35105 (9th Cir. Feb. 9, 2017), the U.S. Court of Appeals for the Ninth Circuit issued a "per curiam" opinion, which refused to vacate the temporary restraining order ("TRO") issued by a federal district court in Washington State that stayed three critical provisions of President Donald J. Trump's executive order entitled "Protecting the Nation from Foreign Terrorist Entry into the United States" ("EO"). These provisions of the EO (i) banned for 90 days the entry of foreign nationals ("FNs") from seven restricted countries, (ii) suspended the refugee program for 120 days, and (iii) indefinitely suspended the admission of Syrian refugees.

In its opinion, the Ninth Circuit rejected the government's claim that the plaintiffs, the states of Washington and Minnesota, lacked standing to challenge the EO, and dismissed the government's argument that federal courts lack the power to enjoin the President's authority to suspend the admission of any aliens or class of aliens. In this regard, the Ninth Circuit noted that "[t]here is no precedent to support this claimed unreviewability, which runs contrary to the fundamental structure of our constitutional democracy."[1]

Once the Ninth Circuit found that it had jurisdiction to hear the appeal, it addressed several legal issues to determine whether the lower court's TRO could remain in place. First, the Ninth Circuit found that the government had failed to demonstrate that it was likely to succeed on the merits of its position after a full evidentiary hearing. As such, the Ninth Circuit held that the EO appeared to violate the constitutional right to due process by failing to provide those FNs affected by the order sufficient notice and an opportunity to contest its application to them.[2]

Second, the Ninth Circuit found that the states had raised serious claims that the EO violated the First Amendment because it discriminated against Muslims. The Ninth Circuit pointed to the numerous statements by the President about his intent to implement a "Muslim ban," as well as evidence offered by the states that they claimed demonstrated that this EO was intended to be that ban.[3]

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[1] Slip op. at 14.
[2] Slip op. at 19-24.
[3] Slip op. at 24-26.

Finally, the Ninth Circuit noted that the government had not shown that a stay was required to avoid irreparable harm. On the other hand, the states offered "ample evidence" that, if reinstated, the EO would "substantially injure the States and multiple 'other parties interested in this proceeding.'"[4] In reaching its conclusion, the Ninth Circuit rejected the Trump administration's claim that the stay would increase the danger from terrorists by noting that the government submitted "no evidence" to support that claim. To the Ninth Circuit, the lower court's action "merely returned the nation temporarily to the position it has occupied for many previous years."[5]

The Ninth Circuit's decision is the beginning, not the end, of this litigation. Essentially, the Ninth Circuit only left the TRO in place until the district court could determine whether a preliminary injunction ("PI") should issue. The lower court already has asked the parties to submit motions by February 17, 2017, and plans to schedule a PI hearing shortly thereafter.

Nevertheless, the Ninth Circuit's decision places the government in a difficult position. The government could appeal to the entire Ninth Circuit for *en banc* review, but that would take more time and is not likely to succeed because the Ninth Circuit is one of the most liberal circuits in the country.

The government could also appeal to the Supreme Court of the United States, but this would take time, and a favorable result now is unlikely. The TRO is only a temporary order, and it is likely to expire, or be replaced by a PI, by the time the Supreme Court can address the issues. Moreover, the lack of evidence in the record, the discretion that lower courts typically have in issuing TROs, and the current 4-4 split on the Supreme Court may discourage an immediate appeal.

For the government, it might be better to regroup, review its position, and reframe its concerns into new executive or agency directives that take into account the legal issues that the Ninth Circuit found in this EO. Also, by participating in the lower court litigation, the government would have the opportunity to offer evidence supporting its position and the delay might allow the case to reach the Supreme Court after Judge Neil Gorsuch's nomination is confirmed by the Senate and when the case can be considered by nine justices. The irony, of course, is that President Obama faced a similar dilemma with his executive order that attempted to expand the protections from removal afforded to the parents of "dreamers."[6]

It will be interesting to see how the *Washington* case plays out. For now, however, the lower court's nationwide TRO prohibiting enforcement of three critical provisions of the EO remains in place.

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[4] Slip op. at 28.
[5] Slip op. at 26.
[6] See *Texas v. United States*, 809 F.3d 134 (5th Cir. 2015), *aff'd by an equally divided Court*, 136 S.Ct. 2271 (2016).

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