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A NON-POLITICAL, UNEMOTIONAL SUMMARY OF THE NINTH CIRCUIT'S ORDER IN STATE OF WASHINGTON V. TRUMP

February 10, 2017

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Last night, in a unanimous opinion by the Ninth Circuit Court of Appeals, the Court denied the United States government's (President Trump, the U.S. Department of Homeland Security, the Secretary of State, and the Secretary of the Department of Homeland Security) motion to stay the lower court's temporary restraining order enjoining enforcement of Executive Order 13769.

Three aspects of the Executive Order were at issue in the opinion: First, the suspension of the entry into the U.S. of aliens from seven countries (Iraq, Iran, Libya, Somalia, Sudan, Syria and Yemen); second, the 120-day suspension of the United States Refugee Admissions Program; and third, the suspension of the entry into the U.S. of all Syrian refugees indefinitely. The State of Washington filed suit, alleging that the Executive Order was unconstitutional and illegally stranded its residents abroad, damaged the state's economy and public universities, and violated a number of Constitutional provisions and federal laws. The State of Washington also alleged that the true purpose of the Executive Order was to ban Muslims and argued that this supposition was supported by President Trump's pre-election statements. The State of Minnesota joined the lawsuit shortly after it was filed.

The lower court enjoined enforcement of the Executive Order, finding that "significant and ongoing harm was being inflicted on substantial numbers of people, to the detriment of the States, by means of an Executive Order that the States were likely to be able to prove was unlawful." The Government appealed the District Court's decision to the Ninth Circuit.

After confirming that it had jurisdiction to hear the appeal, the Ninth Circuit considered three primary arguments from the Government: first, that the States lacked standing to contest the Executive Order because they had not suffered a particularized injury; second, that the judicial branch lacks authority to review the Executive Order and such review is an encroachment on executive authority; and third, whether the Government has made a strong showing that it would likely succeed on the merits of its opposition to the injunction.

The Ninth Circuit concluded that the States have standing to bring the claims based on alleged harms to their proprietary interests – that is, that nationals of seven countries cannot enter Washington and Minnesota and as a result some will not join public universities as faculty, or would not be permitted to perform research for those universities. This finding was based on declarations filed by the States in which, for example, two visiting scholars who had planned to spend time at Washington State University were not permitted to enter the United States. Similarly, medicine and science interns from the banned countries intending to work at the University of Washington were prohibited from so doing. Accordingly, the Court found that the Executive Order caused a concrete and particularized injury to the public universities of the state, and therefore the State properly alleged standing.

Second, the Ninth Circuit found that the Executive Order was reviewable. The Court rejected the Government's argument that the President has "unreviewable authority to suspend admission of any class of aliens," regardless of the constitutional implications of that action. The Court found that although the political branches will be afforded deference on matters of immigration and national security, that deference is not unqualified, even in times of conflict.

Finally, the Court considered the four questions that govern the enforceability of any injunction, noting the first two are more heavily weighed: is the Government likely to succeed on the merits; it the Government irreparably injured absent a stay; will the issuance of a stay substantially injure the other parties interested in the proceeding; and where does the public interest lie.

The Court found that the Government failed to make a "strong showing" that it would likely succeed on the merits (and the stay would be lifted), particularly in consideration of the States' due process claim and religious discrimination claim. With respect to the due process claim, the Court found that the Government did not show that the Executive Order provided adequate notice or a hearing prior to restricting an individual's right to travel. Further, the Court noted that these due process rights apply to aliens attempting to reenter the United States after travelling abroad, and may potentially apply to non-immigrant visaholders who were in the United States but temporarily departed, refugees, and applicants who have a relationship with a U.S. resident or an institution that might have rights of its own to assert.

The Court also found that the States' claims raise "serious allegations and present significant constitutional questions" concerning a potential violation of the Establishment and Equal Protection Clauses. In support of this contention, the States offered evidence of numerous statements by the President about his intent to implement a "Muslim ban." The Court reserved consideration of these questions until the merits of the appeal were fully briefed.

Next, the Court determined that the Government has not shown that a stay is necessary to avoid irreparable injury considering that the district court's order "merely returned the nation temporarily to the position it has occupied for many previous years." The Government offered no evidence, according to the Court, that any alien from any of the countries named has perpetrated a terrorist attack in the United States.

Last, the Court held that aspects of the public interest in the Executive Order favor both sides. The public has both a powerful interest in national security and the ability of a president to enact policies, and in the free flow of travel, avoiding the separation of families and freedom from discrimination. The Court did not believe that these competing public interests justified as stay.

Next up – the Supreme Court. The Government will likely file an application to the Supreme Court in the next 48 hours, and the Supreme Court will likely require expedited briefing to reach a decision in the next week. In the event the Supreme Court deadlocks 4-4, the opinion of the Court of Appeals will remain in place.

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