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Refugee EO Stay: Ninth Circuit Dismisses Hawaii's Appeal But Draws a Roadmap for Future Litigation

By **Peter Margulies** Saturday, July 8, 2017, 11:29 AM

Acting quickly, the Ninth Circuit on Friday dismissed Hawaii's appeal of Hawaii District Judge Derrick Watson's denial of the state's motion to clarify the Supreme Court's stay regarding President Trump's revised refugee Executive Order (EO). (For more on Judge Watson's denial, see Ilya Somin's post here.) However, Hawaii lives to litigate another day, since the Ninth Circuit provided the state with a roadmap for future litigation. Indeed, Hawaii now seeks to follow that roadmap in a second motion in district court.

Recall that in response to the Supreme Court's June 26 decision to partially lift the Hawaii district court's injunction regarding Sections 2(c), 6(a), and 6(b) of the EO, Hawaii had sought to clarify two issues: (1) whether grandparents, grandchildren, and other relatives count as having a "bona fide relationship" with a U.S. person under the Supreme Court's stay and thus are not restricted by the EO; and (2) whether a refugee organization like the U.S. Conference of Catholic Bishops establishes a bona fide relationship with a refugee abroad when the aid group provides assurances to the U.S. government that it will assume responsibility for assisting the refugee's resettlement in the United States. The government's latest guidance answers "No" to both questions. Hence Hawaii's effort to clarify the stay's coverage.

After Judge Watson denied Hawaii's motion on Thursday, Hawaii appealed to the Ninth Circuit, setting the stage for Friday's Ninth Circuit ruling. On Friday, the Ninth Circuit dismissed that appeal, holding that it lacked jurisdiction because Judge Watson's denial of relief was not a final judgment and none of the exceptions applied.

However, the Ninth Circuit also furnished Hawaii with instructions for future stay litigation by going back to basics on a trial court's discretion to issue equitable remedies. The court noted that sitting as a court of equity, the Hawaii district court had the "ability to interpret and enforce" the Supreme Court's order, including the power to enjoin violations of the order. Exercising that power necessarily included addressing whether the Supreme Court's order included grandparents, grandchildren, and refugee agencies' assurances regarding resettling individual refugees.

In sum, the Ninth Circuit's denial was basically a hiccup for Hawaii. Armed with the Ninth Circuit's roadmap, Hawaii has now reframed its motion to the district court as a request for injunctive relief. The ball is back in Judge Watson's court.

Topics: Travel Ban

Tags: Derrick K. Watson, Ninth Circuit

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