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DONALD TRUMP

The Ninth Circuit on the Refugee EO: The Government's Least Bad Option

By Peter Margulies Friday, February 10, 2017, 4:14 PM

Faced with the Ninth Circuit decision declining to stay the Temporary Restraining Order (TRO) against President Trump's EO, the government must now choose between an array of bad options. To that end, the "least bad" option would be to rescind the current EO and replace it with a new EO that clearly exempts both lawful permanent residents (LPRs) and previously admitted nonimmigrant visa-holders (VHs), such as students and medical residents. (In fact, NBC News reports that White House lawyers have been busy rewriting the EO for several days.)

From the government's standpoint, the cardinal virtue of the approach I recommend is the opportunity to preserve portions of the EO that *are* legally defensible, including its pause in admission of noncitizens who have not already been admitted into the United States. Josh Blackman has urged the same path.

The government had previously indicated that the EO doesn't cover LPRs, so making that clear on the face of a new EO sacrifices nothing. In addition, the Justice Department's reply brief in the Ninth Circuit signaled flexibility on the status of previously admitted nonimmigrant VHs. There are strong arguments that this group has recourse against arbitrary government action via the Administrative Procedure Act (APA) (see my post here on the EO as arbitrary action that violates the structure and purpose of the Immigration and Nationality Act [INA]). So the government loses little here, except perhaps a bit of pride. However, losing pride is better than making bad law, which is what the government risks if it fails to take the course urged above.

I. The Government's Predicament

If the government fails to rewrite the EO along these lines, it will be "in a box," albeit one that it has made for itself (see Jane Chong's post here). To seek a stay from the Supreme Court, the government would have to ask Justice Kennedy, the Circuit Justice for the Ninth Circuit. According to long-standing Supreme Court case law, Justice Kennedy would have to find a "fair prospect" that a majority of the Court would vote to reverse the lower court. Here's the problem: the Court would likely split 4-4 in this case.

We know that because the four liberal Justices (Breyer, Ginsburg, Sotomayor, and Kagan) dissented from the Court's deferential decision in *Kerry v. Din* (2015). They wanted stronger Due Process protections for a U.S. citizen whose spouse was denied an immigrant visa based on an unspecified terrorism-related subsection of the Immigration and Nationality Act (INA). Since these four Justices might view due process concerns in the EO case the same way, Justice Kennedy would have difficulty finding a "fair prospect" of reversal (even if Justice Kennedy himself would vote that way, which is unclear in this case).

Moreover, whether the government could get a stay from Justice Kennedy is actually beside the point, given the current Court's 4-4 configuration. If the four liberal Justices sided with the EO's challengers on the merits, the result would be a 4-4 per curiam affirmation of the Ninth Circuit with no opinion—an anticlimactic result ironically reminiscent of last Term's disposition in *United States v. Texas*, which resulted in upholding the Fifth Circuit's invalidation of President Obama's immigration initiative, Deferred Action for Parents of Americans.

II. Why the Ninth Circuit's Decision Creates Bad Law

There's a lot of bad law and superficial analysis in the Ninth Circuit's opinion (see Ben's discussion here). The court started off on the right foot: the states have standing and the EO is reviewable. However, the court's analysis of the due process issues unduly inflated protections for noncitizens who have not yet been admitted to the United States. The court's reasoning on due process protections for this group would hamstring visa determinations here and abroad. The result would be a loss of flexibility that the Supreme Court has never endorsed, well beyond anything suggested by Justice Breyer's dissent in *Kerry v. Din*.

Following the analysis that Justices Kennedy and Alito assumed without deciding and that the four liberal Justices accepted in *Kerry v. Din*, the Ninth Circuit found "potential" due process claims based on U.S. citizens' family ties with noncitizens abroad who had not previously been admitted to the United States. The Ninth Circuit also suggested that a U.S. institution, such as a university in Washington State, might have "rights of its own to assert" in the establishment of certain procedures for processing of visa applications for noncitizens abroad.

However, beyond noting these “potential” claims, the court said little about the claims’ content. The “likelihood of success” standard required that the Ninth Circuit analyze those claims far more concretely. That comprehensive analysis would have revealed the weakness of the due process claims for noncitizens not previously admitted.

At most, *Kerry v. Din* suggests that a consular official should provide an “adequate reason” (to use Justice Breyer’s term) for the *denial* of a visa application from a noncitizen abroad with a close family relationship with a U.S. citizen. Even for the dissenters in *Din*, the “adequate reason” requirement would have been fulfilled if the official could point to a specific subsection of the INA governing terrorism-related bases for inadmissibility. In *Washington v. Trump*, however, the issue at stake is the very different question of whether a *delay* of ninety days or 120 days (the pauses the EO requires for the seven countries designated as “areas of concern” and for refugee admissions, respectively) would trigger due process protection.

The fact that the EO arguably requires a delay in admissions, rather than curtailing admissions entirely, is key. United States consular officials process *millions* of visa applications annually (see the State Department’s latest statistics here). Delays are frequent in the complex and overburdened visa processing system, and can arise from a daunting array of factors, including hardware problems, software problems, and requests for more information from consular officials.

In this case, the stated purpose of the EO’s delays is the need for more information about visa applicants. That purpose meets the facially legitimate and bona fide standard set out in *Kerry v. Din*. Here’s why: information deficits affect *everyone* in visa processing, including applicants and officials. For example, as former principal deputy general counsel at DHS (and University of Virginia law professor) David Martin noted in a classic article, bona fide applicants for refugee status encounter difficulties in obtaining information on conditions in their countries of origin, but applicants also have “substantial incentives ... to embroider the truth.” David and I agree that most applicants are truthful. But separating embroidery from an objective fear of persecution can be a formidable task. Consider a composite case from my practice: A client claimed to be a youth from Rwanda’s Tutsi minority, targeted for genocide, but turned out to be a deserter from the Nigerian army. I surely missed some warning signs in that case, but my core point is that this uncertainty pervades visa processing, making delays inevitable. While I don’t favor the ninety-day pause in refugee determinations in the EO, that aspect of the EO passes muster under the “facially legitimate and bona fide” standard.

Moreover, though the Ninth Circuit asserts that visa applicants abroad have “potential” due process protections, the protections are not an unmixed blessing in visa processing. Due process protections could chill consular officials who do difficult work under trying conditions. They could also be counterproductive for applicants or U.S. citizen or LPR sponsors, leading to a procession of formalities that would further delay visa outputs. The Ninth Circuit fails to acknowledge these knotty issues.

Even more distressingly, the Ninth Circuit’s decision seems appallingly casual about the risk of harm that noncitizens abroad could pose to the U.S., given the pervasive information asymmetry in visa processing. According to the court, the government must show that a noncitizen from one of the seven countries listed in the EO (Iran, Iraq, Libya, Somalia, Sudan, Syria, and Yemen) has “perpetrated a terrorist attack in the United States.” But that requirement unduly discounts the government’s interest in public safety. Six of the seven countries are immersed in bloody conflicts (five involving U.S. forces), in which conditions on the ground further complicate the quest for accurate data about visa applicants. The seventh country, Iran, has been designated by Congress as a state sponsor of terrorism. In this volatile neighborhood, ramped-up vigilance on the part of the U.S. government is not beyond executive authority. While I view the EO’s measures regarding the seven countries’ nationals not yet admitted to the U.S. as ill-advised, it would also be inadvisable to frame the U.S. Constitution as categorically barring the government from taking such steps.

III. The Path Forward

The good news for the government is that revising the EO will put it in the best possible position to highlight the flaws in the Ninth Circuit’s decision and preserve the executive branch’s legitimate statutory and constitutional prerogatives. The revised EO should clearly and expressly exempt both LPRs and previously admitted nonimmigrant VHS. The government should also include in the EO clear procedures for waivers available to individuals from the residual group of noncitizens, including refugees, who have not yet been admitted to the United States.

Moreover, the EO should include clear and specific procedures for training DHS personnel in these new criteria (which of course are criteria that DHS has followed for years regarding LPRs and VHS, prior to the EO’s issuance). Relatedly, the EO should detail procedures for monitoring DHS personnel’s compliance with the revised EO and promptly reporting violations. This is especially important because it appears that violations of the already-operative exemption of LPRs occurred early in the EO roll-out, per Faiza Patel’s post here.

Armed with that new EO, the government can seek modification of the Seattle district court’s TRO (now a preliminary injunction) in light of changed circumstances. An injunction, as the Supreme Court observed in *Monsanto Co. v. Geertson Seed Farms* (2010) is a “drastic and extraordinary remedy.” Because an injunction is so intrusive, in *Horne v. Flores* (2009), the Court indicated in an opinion by Justice Alito that

courts need to carefully review the need for injunctive relief when circumstances intervene. The government will regain the initiative it has lost in the chaos that attended the EO's roll-out, and the ball will be in Judge Robart's Seattle court. In that posture, the government will be best situated to argue that Judge Robart's original TRO is overbroad.

Topics: Donald Trump, Refugees, Executive Power, Immigration

Tags: Washington v. Trump

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