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REFUGEES

The Refugee EO in the Ninth Circuit: Rights, Wrongs, and Remedies

By **Peter Margulies** Wednesday, February 8, 2017, 9:08 PM

Staying a Temporary Restraining Order (TRO) is an arcane subject that took on new urgency Tuesday at the Ninth Circuit thanks to President Trump's Refugee Executive Order (EO). The court heard oral argument on the government's request to stay a lower court's TRO halting the EO's implementation (audio here). As the Ninth Circuit explained in *Golden Gate Restaurant Ass'n v. San Francisco* (2008), the test for a stay hinges on common sense: factors include the applicant's likelihood of success on the merits, the balance of hardships to the parties, and the public interest. Common sense supports the government's suggestion (discussed in my earlier post here) that the Ninth Circuit modify the TRO to cover only current nonimmigrant visa-holders (VHs) previously admitted to the United States and not noncitizens who have not yet been admitted. The former have clear expectation interests that the EO disrupted; the latter do not. However, the chaos that attended the EO's implementation may cloud the prospects for this common-sense solution.

Before I dive into the Ninth Circuit's arguments on the stay factors, I'll briefly summarize the overall direction of the hearing. The judges on the panel appeared to agree that Washington State had standing to challenge the EO, either as *parens patriae* on behalf of its residents or in its proprietary capacity as the operator of institutions, such as universities and hospitals, that the EO affected. On the merits and remedial issues, Judge Michelle Friedland's questioning of Department of Justice (DOJ) attorney August Flentje was vigorous. Moreover, Judge Friedland's questions to the Washington State Solicitor General Noah Purcell indicated that she was open to the EO challengers' Establishment Clause argument, which I critique below. Judge Richard Clifton, in contrast, seemed to believe that Washington State had not demonstrated the manifest intent to harm a religious group that the Supreme Court's Establishment Clause jurisprudence requires. Judge William Canby was robust in questioning DOJ attorney Flentje on the standing question, but largely kept his own counsel on the merits, although at one point he pointedly asked Flentje who had the burden of proof on the stay application (the government does). Now on to the argument's application of the stay standard – a mainstay of the practicing lawyer's craft with momentous ramifications for those affected by the EO.

I. Likelihood of Success on the Merits

As Judge Clifton's questions appeared to suggest, the government has a strong case on the merits regarding noncitizens who have not yet been admitted to the U.S., including those now applying for visas. While current nonimmigrant VHs may well have statutory rights, neither the Immigration and Nationality Act (INA) nor the Constitution offers relief in this case to noncitizens not yet admitted to the United States. Since I addressed Equal Protection and Due Process in my earlier post, the Establishment Clause is worthy of analysis here.

Establishment Clause precedent bars government action 1) taken with the intent to either harm or help a particular religious group, when 2) that action is not tailored to a compelling government objective and 3) has the effect of helping or harming the group. In *Larson v. Valente* (1982), a case relied on by Washington State in its challenge to the EO, the Court noted that the government action at issue could violate the Establishment Clause even if the measure did not expressly mention a particular religious organization. Accordingly, the Court struck down a Minnesota law that exempted religious groups from onerous state registration requirements only if the group could prove that it received more than 50% of its contributions from members. The Court found that legislators were seeking to impede the religious practices of particular groups, such as the Unification Church, that rely on soliciting donations from the public. As evidence, the Court cited remarks by one legislator, who observed that lawmakers were "hot to regulate the Moonies." The Court also found that the challenged measure was not tailored to achieve any compelling government objective, such as promoting transparency in fundraising and curbing charitable fraud.

As Judge Clifton noted, the exigencies that the government regularly confronts in the conduct of foreign policy makes it difficult to prove the intent that the Establishment Clause requires (along the same lines, *see* Judge Gorton's decision, *Louhghalam v. Trump*, in Massachusetts District Court here). Immigration decisions address a spectrum of factors, including national security, trade, and managing bilateral relations with other states. United States armed forces are participating in armed conflicts in five of the seven states covered by the EO (Iraq, Libya, Somalia, Syria, and Yemen). A sixth state, Sudan, has been the site of a bloody armed conflict that some have called genocidal. Congress has classified the seventh state, Iran, as a state sponsor of terrorism.

In part because of these disturbing developments, the Obama administration designated each country as an "area of concern" pursuant to 8 USC 1187(a)(12), requiring special scrutiny for individuals who had visited those countries, even if those individuals would otherwise be entitled to enter the U.S. without a visa. Admittedly, the Obama administration's designation and the manifest turbulence in each of the seven countries do not, as my previous post noted, deprive previously admitted VHs of all statutory rights. However, those factors make it difficult to attribute to the EO the intent to injure religion that Supreme Court cases like *Larson* demand.

Judge Clifton also indicated that the scope of the EO is inconsistent with the intent to target Muslims. While the EO addresses immigration from seven majority-Muslim countries with a total population of 215 million, that is *less than 15%* of the 1.6 billion Muslims in the world today. One could reasonably expect that an order targeting Muslims would be far more comprehensive. This would not let the government off the hook if the EO had expressly targeted Muslims (E.g., "This order applies to 15% of Muslims today, and we will consider expansion of the order to more Muslims as needed"). In that event, the relatively modest percentage of Muslims covered today would take a back seat to the facial inclusion of that particular faith. However, the EO does not contain such express language, and courts mindful of the executive's broad latitude in foreign affairs will be reluctant to read such language into President Trump's order. (That said, Carrie Cordero offers an insightful critique here of the framing of the national security arguments by the government in the EO case.)

In sum, the Establishment Clause is the only constitutional provision at issue here that operates as a structural check on government, independent of the persons actually affected by the EO. The government is likely to prevail on the merits. Therefore, the Establishment Clause claim here does not support the overbroad TRO of the court below, which also covers noncitizens who have *never* been admitted to the United States.

II. Balance of Hardships

The balance of hardships also favors limiting the TRO to previously admitted VHs. Permitting the entry of all previously admitted VHs and the travel abroad of VHs already in the U.S. would largely alleviate the hardship suffered by Washington State, VHs, and VHs' families. Student visa holders would be able to enroll at their respective institutions and attend classes. Medical residents would be able to resume work at hospitals. Employees would be able to resume their jobs, and travel as needed for business. A modified TRO would make it easy to achieve these salutary results: the Ninth Circuit would simply direct the government to restore the pre-EO status quo as it applied to these noncitizens.

III. The Public Interest

With these modifications to the EO in place, the public interest prong squarely favors the government. The Supreme Court has held that in determining the public interest for purposes of crafting relief, national security considerations should be paramount. In *Winter v. Natural Resources Defense Council*, Chief Justice Roberts, writing for the Court, held that the public interest in military training and readiness overcame concerns about compliance with procedural requirements in environmental law, such as the filing of environmental impact statements. Some scholars have critiqued Chief Justice Roberts' opinion as being unduly deferential (see my colleague Jared Goldstein's piece here). However, such deference is the touchstone of the current Court, which will not be inclined to second-guess the judgments made by the President. Moreover, a TRO that protects previously admitted VHs will not yield negative externalities that injure the public interest: noncitizen medical doctors will be able to treat patients, teachers will be able to teach, and students will be able to inform classroom discussions with their U.S. citizen and LPR peers (including discussions about the EO!).

Conclusion

As the discussion above shows**,** the stay standard supports issuance of a modified TRO that protects previously admitted VHs. However, to fashion this reasonable relief, the Ninth Circuit will need to act *despite* the bitter taste instilled by the government's headlong rush to implement the EO. The creation of chaos is never a good opening bid for judicial solicitude.

Giving voice to this sentiment, Judge Clifton asked why the government couldn't simply modify the EO itself, and then seek relief from the broad TRO issued by the court below. In response, the Justice Department's lawyer noted that the government's reply brief had expressly outlined how the court could get to this result. Although Washington State countered that such an order would be difficult to implement, that isn't necessarily the case: resuming the *status quo ante* would be relatively straightforward, since that is exactly what Department of Homeland Security personnel have been trained to do. Crafting such a remedy would restore order to a highly volatile situation, and allow further litigation to proceed in a methodical manner. Given the chaos left in the EO's wake, that outcome would be in the best tradition of equitable relief.

Topics: Refugees, Immigration

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