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Peter Margulies

Roger Williams University School of Law

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Ninth Circuit Argument Turns on Whether the Ban Clashes with the Immigration Act

By Peter Margulies Thursday, December 7, 2017, 2:00 PM

On Dec. 6, the Ninth Circuit heard oral argument in *Hawaii v. Trump*, in which the plaintiffs are challenging President Trump's Proclamation (EO-3). The argument centered on the same statutory issues the court addressed in June, when it held that the earlier temporary ban violated the Immigration and Nationality Act (INA). Judges Ronald M. Gould, Michael D. Hawkins and Richard A. Paez reprised their roles. Overall, the tenor of the argument suggested that the panel would find that EO-3, like its predecessor, violates the statute. Judge Gould indicated that the panel would heed the Supreme Court's request and rule quickly; thus the case may return to the Supreme Court by early 2018.

This installment of the travel ban saga was notable for the government's claim of uncabined executive discretion under the INA. Department of Justice lawyer Hashim Moopan argued that the INA provides no basis for reviewing the merits of EO-3 or any other action taken under § 1182(f) of the INA (which authorizes the president to deny entry to any foreign national or group of foreign nationals whose entry would be "detrimental to the interests of the United States"). According to Moopan, EO-3 merits deference because it emerged from a "multi-agency" process that found problems with vetting in the listed countries—even though the Cato Institute's David Bier has reported that several of the listed countries had addressed the government's concerns, while scores of other states around the world had not. Moopan argued that, following this logic, a decision by the president to exclude "any person from any place in the world," excepting only returning U.S. citizens would not be reviewable under the INA, although it might be reviewable under the Constitution.

Hawkins and Paez asked whether § 1152(a)(1)(A) of the INA, which bars discrimination "in the issuance of an immigrant visa," supplies any check on the president's authority. They implied that the government's position would allow the president to unilaterally re-establish the quotas that Congress had decisively rejected in 1965.

Arguing for Hawaii, Mitchell Reich noted that the Supreme Court had reviewed an earlier exercise of authority under § 1182(f) in the 1993 case *Haitian Centers Council v. Sale*. In *Sale*, the court found that the president had authority to interdict inadmissible foreign nationals navigating the high seas in unsafe vessels aided by smugglers. Distinguishing *Sale* on the merits because of the exigent situation at its core, Reich suggested that the doctrine of nonreviewability under the INA concerned only individual consular decisions about particular foreign nationals, not the broad programmatic decisions at issue in *Sale* or in this challenge to EO-3. Reich, and co-counsel Neal Katyal, also highlighted the marked and contradictory underinclusiveness of EO-3, noting that it allowed entry by *nonimmigrants* (such as students) from many of the listed countries despite the fact that these nonimmigrants generally receive *less* vetting than EO-3's excluded immigrants.

Katyal argued that Congress had crafted a more balanced relationship between the authority delegated in § 1182(f) and § 1152(a)(1)(A)'s nondiscrimination mandate. Rather than authorizing the executive to take a "wrecking ball" to the INA's carefully calibrated scheme of visa categories and grounds for inadmissibility, Katyal argued that § 1182(f) only authorizes presidential actions in exigent situations like that of *Sale*, President Ronald Reagan's cessation of immigration from Cuba or President Carter's actions against Iran during the hostage crisis.

Katyal noted that § 1182(f) traces its origins to a provision that President Franklin Roosevelt had asked Congress to enact in the months before America's entry into World War II, after administration officials assured Congress that the measure would only authorize exclusion of saboteurs and foreign agents injurious to U.S. security. The Supreme Court noted in *Noel Canning v. NLRB* that past practice is highly probative in assessing Congress's implied or tacit delegation to the executive. That practice has generally followed the tailored approach that Roosevelt initiated. As argued in the immigration scholars' amicus curiae brief filed in the Fourth Circuit and Ninth Circuits by Alan Schoenfeld of Wilmer Hale and me, past episodes involved far more tailored uses of presidential authority. Applied to an exigent case mentioned above, President Reagan's suspension of Cuban visas was part of a prolonged bilateral dispute prompted by Cuba's encouragement of entry into the U.S. during the Mariel Boatlift of inadmissible individuals with criminal records. Cuba had renewed that dispute by reneging on an agreement to accept the return of its nationals. President Reagan was merely responding to Cuba's bad faith. The exigency of this situation, the Iranian hostage crisis, or the interdiction on the high seas in *Haitian Centers Council v. Sale* are a far cry from the patina of national security cited to justify EO-3.

Katyal also cited the immigration scholars' amicus when pointing out that EO-3 ominously echoes the national origin quotas that Congress rejected in 1965 (after presidents from Truman to Johnson denounced the quotas as unfair, inefficient and inimical to U.S. interests). Johnson made this point in his State of the Union message shortly after President Kennedy's assassination, echoing an iconic passage from Kennedy's Inaugural Address: "a nation that was built by the immigrants of all lands can ask those who now seek admission: 'What can you do for our country?' But we should not be asking: 'In what country were you born?'" Katyal argued that EO-3 had revived that discredited

question. Indeed, Katyal argued, Congress enacted the nondiscrimination provision in § 1152(a)(1)(A) to prevent the executive from reviving the quota system. According to Katyal, the scope and indefinite duration of EO-3 highlights its unmooring from past practice, or coherent national security or foreign policy rationales.

The panel appears to be leaning toward finding that EO-3 is inconsistent with the INA. That ruling may be joined with a similar ruling from the Fourth Circuit, which hears argument on a companion case this Friday. An early rendezvous with the Supreme Court may be the next stop for this challenge to EO-3.

Topics: Immigration

Peter Margulies is a professor at Roger Williams University School of Law, where he teaches Immigration Law, National Security Law and Professional Responsibility. He is the author of *Law's Detour: Justice Displaced in the Bush Administration* (New York: NYU Press, 2010).