

Understanding the Ninth Circuit's Decision on the Refugee and Muslim Ban

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On Thursday, Feb. 9, 2017, the Ninth Circuit Court of Appeals issued a decision *denying* the Trump administration's request that the court lift a temporary restraining order (TRO) which requires that the government *not* enforce most of the provisions of the executive order (EO) that President Trump signed on Jan. 27.¹ The TRO was issued by a federal district court in Seattle on Friday, Feb. 3, 2017.² The Ninth Circuit's decision converts the TRO to a *preliminary injunction*, which means that the freeze on implementing certain parts of the EO will remain indefinitely unless this Ninth Circuit decision is overturned on appeal.

What did the 9th Circuit decide?

- In its decision, the Ninth Circuit said that parts of the Jan. 27, 2017, executive order (EO) titled "Protecting the Nation from Foreign Terrorist Entry into the United States" are **likely to be found unconstitutional and to violate the law**.³ The court denied the Trump administration's request to lift the temporary restraining order that blocked implementation of the EO.

This means that, for now, **refugees**—including Syrians—**and immigrants whom the EO banned from entering the U.S.** (because they are from any one of the seven countries designated in the EO) **may now travel to the U.S.** without fear of being detained when they land here, or of having their lawful immigration status revoked, or of being immediately deported. (The seven countries designated in the EO are Iran, Iraq, Libya, Somalia, Sudan, Syria, and Yemen.)

How did the 9th Circuit explain its decision?

- The court held that **the judicial branch of government has the right to independently review the president's executive orders**, even when they pertain to immigration and national security. The court found that to conclude otherwise would be

¹ Washington v. Trump, __ F.3d __, 2017 WL 526497 (9th Cir. Feb. 9, 2017), www.nilc.org/wp-content/uploads/2017/02/2-9-17-9th-Circuit-Order.pdf.

² Washington v. Trump, 2017 WL 462040 (W.D.Wash., 2017), http://cdn.ca9.uscourts.gov/datastore/general/2017/02/03/17-141_TRO_order.pdf.

³ The full text of the executive order is available at www.whitehouse.gov/the-press-office/2017/01/27/executive-order-protecting-nation-foreign-terrorist-entry-united-states.

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contrary to our principles of democracy and to the necessary checks and balances embedded in our three-branch system of government. The court’s decision says,

The Government indeed asserts that it violates separation of powers for the judiciary to entertain a constitutional challenge to executive actions such as this one.

There is no precedent to support this claimed unreviewability, which runs contrary to the fundamental structure of our constitutional democracy.⁴

- The Ninth Circuit found that the Trump administration is not likely to win its appeal and that **individuals and states affected by the EO have valid claims that the EO resulted in violations of their right to due process.** The court said that the government was not able to show how “failure to enter a stay [of the TRO issued by the court in Seattle] would cause irreparable injury.” And it noted the expansive harm that implementation of the EO caused to individuals:

The impact of the Executive Order was immediate and widespread. It was reported that thousands of visas were immediately canceled, hundreds of travelers with such visas were prevented from boarding airplanes bound for the United States or denied entry on arrival, and some travelers were detained.⁵

The court also cited **specific hardship that the EO caused to the states.** For example, as a result of the EO’s banning of certain immigrants’ and visa-holders’ travel to the U.S., states faced disruption to their work forces, including at universities, to which current and prospective faculty and students were unable to travel.

The court said that, in its challenge to the TRO against the ban,

[t]he Government has not shown that the Executive Order provides what due process requires, such as notice and a hearing prior to restricting an individual’s ability to travel.⁶

- On the other hand, in its appeal of the TRO, **the government had failed to show that blocking implementation of the executive order would cause harm.** According to the Ninth Circuit’s decision,

The Government has pointed to no evidence that any alien from any of the countries named in the Order has perpetrated a terrorist attack in the United States.⁷

- The court **raised concerns about the ability of agencies within the executive branch to understand how to interpret the executive order’s provisions and apply them properly.** (The Trump administration’s incompetence in applying the order was immediately evident, for example, in its grossly inconsistent and unpredictable

⁴ Washington v. Trump, ___ F.3d ___, *supra* note 1, at 13–14.

⁵ *Id.* at 4–5.

⁶ *Id.* at 19.

⁷ *Id.* at 26–27.

treatment of travelers with dual citizenship and travelers who are lawful permanent residents.) According to the court:

Nor has the Government established that the White House counsel's interpretation of the Executive Order is binding on all executive branch officials responsible for enforcing the Executive Order. The White House counsel is not the President, and he is not known to be in the chain of command for any of the Executive Departments. Moreover, in light of the Government's shifting interpretations of the Executive Order, we cannot say that the current interpretation by White House counsel, even if authoritative and binding, will persist past the immediate stage of these proceedings.⁸

What does the 9th Circuit's decision mean for people affected by the EO?

- For now, **every refugee, immigrant, or visa-holder to whom the EO applies should be able to enter the U.S. without complications.** The provisions of the executive order that block the entrance into the U.S. of all refugees for 120 days, of all Syrians, and of people from the seven designated countries—Iran, Iraq, Libya, Somalia, Sudan, Syria, and Yemen—*remain on hold*. **People affected by the executive order who are still outside the U.S. should try to enter the U.S. as quickly as they can**, because the situation could change again as all the litigation brought against the EO moves forward.
- The **order issued by the court in Seattle in effect applies specifically to the EO provisions** that (a) bar the entrance of people from the seven designated countries (Iran, Iraq, Libya, Somalia, Sudan, Syria, and Yemen); (b) suspend the entire refugee resettlement program for 120 days; (c) bar the entry of Syrian refugees indefinitely; (d) prioritize refugee claims based on religious persecution over other types of persecution (e.g., persecution based on race, political opinion, etc.); and (d) “prioritize refugee claims of certain religious minorities”⁹ over the claims of people who are members of the majority religion in their home countries.
- The U.S. State Department has said that **revoked visas will be automatically reinstated**,¹⁰ though we are monitoring to see if this is actually happening. Since the EO was issued, U.S. Customs and Border Protection has told international airlines that U.S. government authorities **would reinstate visas that were previously canceled** and that **refugees in possession of visas would be admitted into the U.S.**¹¹ On Feb. 4, 2017, the U.S. Department of Homeland Security (DHS) press secretary issued a statement that begins,

⁸ *Id.* at 22.

⁹ Washington v. Trump, 2017 WL 462040 (W.D.Wash., 2017), *supra* note 2, at 5.

¹⁰ *Practice Alert: DHS and DOS Implementation of Executive Order Imposing Travel and Refugee Ban* (American Immigration Lawyers Association, update of Feb. 4, 2017), www.aila.org/File/DownloadEmbeddedFile/70538.

¹¹ “Airlines Allow Passengers After Judge Blocks Travel Ban,” *CNN*, Feb. 4, 2017, www.cnn.com/2017/02/04/politics/airlines-airports-trump-travel-ban/index.html.

In accordance with the judge's ruling, DHS has suspended any and all actions implementing the affected sections of the Executive Order entitled, [sic] "Protecting the Nation from Foreign Terrorist Entry into the United States."

This includes actions to suspend passenger system rules that flag travelers for operational action subject to the Executive Order.¹²

What's next?

- The **Trump administration will decide whether to appeal the Ninth Circuit's decision.** It is possible that the decision might be appealed to the U.S. Supreme Court. At this time, it is unclear when that may happen, nor is it certain that the Supreme Court would agree to accept an appeal of this case. Currently there are only eight Supreme Court justices (normally there are nine); it is possible that the Trump administration might wait for a ninth justice to be confirmed before it appeals this case to the Court.

¹² "DHS Statement on Compliance with Recent Court Order," Dept. of Homeland Security press release, Feb. 4, 2017, www.dhs.gov/news/2017/02/04/dhs-statement-compliance-recent-court-order.