



Different Path, Same Result: 9th Circuit Becomes Latest Appeals Court To Reject Trump's Travel Ban

Insights

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Several weeks ago, the 4th Circuit Court of Appeals upheld an injunction that blocks President Trump's second executive order attempting to institute a travel ban against those arriving from several specific Muslim countries (EO-2) from taking effect, largely basing its decision on a conclusion that the executive order violated the Establishment Clause of the Constitution. Today, the 9th Circuit Court of Appeals became the second federal appeals court to uphold the injunction blocking from the travel ban from taking effect, but this time basing the decision on a conclusion that the president exceeded his authority to act under the Immigration and Nationality Act (INA).

In affirming the injunction granted to the State of Hawaii, the 9th Circuit said that it prefers to avoid "unnecessary constitutional rulings," so it decided to tackle the state's parallel argument that President Trump's EO-2 violates the INA. The administration has argued that the federal statute affords him the power to suspend immigration as necessary and as he sees fit, but until now, no federal court has directly addressed this line of argument. Instead, the other federal courts that have ruled on his first and second executive orders have focused on the constitutional aspects of the matter.

Section 1182(f) of the INA provides broad immigration powers to the president. It states:

Whenever the President finds that the entry of any aliens or of any class of aliens into the United States would be detrimental to the interests of the United States, he may by proclamation, and for such period as he shall deem necessary, suspend the entry of all aliens or any class of aliens as immigrants or nonimmigrants, or impose on the entry of aliens any restrictions he may deem to be appropriate.

In examining this statute, the 9th Circuit acknowledged that it provides broad powers to control the flow of aliens into the country. "But immigration, even for the President, is not a one-person show," the court held. It said the president's authority is subject to "certain statutory and constitutional restraints," and that EO-2 exceeded the scope of the authority delegated to him by Congress because the president did not make a sufficient finding that the entry of these classes of people would be detrimental to the interests of the country prior to instituting the ban. This, it ruled, is an "essential precondition" to acting under the statute.

The court determined that the word “finds” in the statute requires the executive branch to first make findings supporting its decision, and in this case, found there was no evidence put forth by the White House to suggest a link between an individual’s nationality and their propensity to commit terrorist acts. It then found that EO-2 also discriminated on the basis of nationality, and did not even need to rule on the constitutional grounds also raised to block the order from taking effect.

In some ways this decision is not all that noteworthy; the 4th Circuit beat this court to the punch when it upheld another injunction blocking the travel ban from taking effect several weeks ago, and so even if the 9th Circuit had ruled with the president, it would not have been able to undo the blockade currently preventing EO-2 from being enforced. Regardless of how the 9th Circuit ruled today, this issue seems to be heading to the Supreme Court for a final and definitive ruling. However, the 9th Circuit’s ruling is significant in that it marked the first time a federal appeals court ruled on President Trump’s immigration actions in light of the INA, perhaps providing a suggested course of action for the Supreme Court.

We’ll continue to monitor events as the situation warrants and update as appropriate. For employers wondering how to proceed during this time of uncertainty and litigation, we recommend you follow the suggestions contained in the “What Does This Mean For Employers?” section of [this legal alert](#).

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