

Insights, News & Events

PRESIDENT'S IMMIGRATION BAN REMAINS BLOCKED

Federal Appeals Court Rejects Government Bid To Reinstate Travel Ban

Insights
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After hearing an emergency oral argument late Tuesday, the 9th Circuit Court of Appeals agreed with [a lower federal court judge](#) and late today upheld the nationwide temporary restraining order that blocks [the president's controversial immigration executive order](#). The executive order, which had prevented refugees from seven predominantly Muslim nations from entering the country, in addition to some green card and visa holders from those countries, continues to be temporarily enjoined from being enforced by border officials. Visas that had been revoked by the order have been reinstated, visa processing at U.S. consulates around the world continues to be administered as normal, and travelers from these nations, as well as vetted refugees from all nations, will continue to be permitted to enter the U.S.

It is all but assured, however, that the Trump administration will now turn to the Supreme Court to resolve the dispute once and for all. This situation continues to remain highly fluid with near-daily developments, so employers will want to remain up to speed with the case as its outcome could impact your workforce and require adjustments to your business practices.

BACKGROUND ON EXECUTIVE ORDER AND LOWER COURT RULING

By now, most are familiar with President Trump's January 27 [executive order](#) that created an immediate freeze on all entry for individuals from Syria, Iran, Libya, Somalia, Yemen, Iraq, and Sudan, placed a 120-day ban on the U.S. refugee

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program, and indefinitely suspended Syrian refugee admissions.

Last week, a federal court judge in Seattle issued a temporary restraining order that prohibited the federal government from enforcing several key portions of the executive order on a nationwide basis. Judge James Robart found that the states of Washington and Minnesota, which challenged the ban, met their burden of demonstrating that they face immediate and irreparable injury as a result of the signing and implementation of the executive order, and that they were likely to prevail on their claim that the president's order was unconstitutional. The federal government immediately appealed the ruling, and the appeals court arranged for an accelerated briefing schedule and a Tuesday oral argument.

9TH CIRCUIT: BLOCK OF ORDER WAS PROPER

The three-judge panel of the 9th Circuit Court of Appeals agreed with Judge Robart and upheld the temporary restraining order in a unanimous opinion. They first ruled that the states of Washington and Minnesota were proper parties to challenge the immigration ban and had "standing" at the court. The court found that the teaching and research missions of state universities were harmed by the travel ban, as students and faculty were unable to travel for research, academic collaboration, or personal reasons. Although the states cited additional justifications to prove proper standing, the court did not feel the need to address further arguments given their initial conclusion.

The court also agreed that the states proved they faced immediate and irreparable injury because of the executive order. The court noted that, during the weeklong period when the immigration ban was in effect, families were separated, state university students and faculty were stranded outside of the country, and travel was barred.

Although the Department of Justice argued that the president has broad discretionary authority to suspend the entry of immigrants under both Article II of the Constitution and the Immigration and Nationality Act, the court was not convinced that this power should go unchecked. While acknowledging that courts should generally defer to the president on matters of national security, it ruled that "the government's authority and expertise in such matters do not

automatically trump the court's own obligation to secure the protection that the Constitution grants to individuals." It said there was no precedent to support the Justice Department's position that the president's decisions in such areas were unreviewable, concluding that such a position would run "contrary to the fundamental structure of our constitutional democracy."

Turning to the merits, the 9th Circuit ruled that the states were very likely to succeed in their constitutional challenges to the president's executive order. It concluded that the executive order likely violated the Fifth Amendment's Due Process clause, because it ostensibly denies entry to the U.S. of all persons from the seven named countries regardless of whether they have lived legally in the country for years. Moreover, the court noted that all persons within the U.S. have constitutional rights, including aliens, "regardless of whether their presence here is lawful, unlawful, temporary, or permanent." Therefore, the court confirmed that lawful permanent residents, aliens attempting to reenter the country after traveling abroad, refugees, and visa applicants were all entitled to due process under the Constitution, and the president's executive order likely infringed upon these rights.

Although the administration subsequently clarified through White House counsel that the executive order was not intended to and should not impact green card holders and other lawful permanent residents, the court agreed with the states that this argument should fail. As the court noted, the text of the executive order remains unchanged despite the clarification, and the White House counsel had no authority to alter an executive order to begin with. Further, the court noted that it could not be sure whether the White House would change the current interpretation at any time.

The 9th Circuit next addressed whether the executive order violates the First Amendment's Establishment Clause. It noted that the states argued that the purpose and effect of the executive order appear to favor one religion over another, disproportionately preventing Muslims from entering the United States. The Department of Justice had attempted to justify the selection of the seven predominately Muslim countries by claiming the countries were selected for national security interests and without regard to religion. The 9th Circuit judges ducked the question for now, explaining that the states' claims "raise serious allegations"

that would be better determined after the legal proceeding had been fully briefed.

RESULT OF COURT RULING

As a result of this decision, all U.S. land and air ports of entry continue to be prohibited from enforcing the controversial travel ban portions of the executive order. All Customs and Border Protection (CBP) field offices will continue to inspect travelers under their standard policies and procedures. All airlines and terminal operators should continue to permit boarding of all passengers without regard to their nationality.

The Department of Homeland Security has also resumed its standard inspections of travelers as normal. This includes the inspection and admission of people from the seven listed countries and those in the U.S. refugee program. Similarly, the State Department has also reinstated any visas that had been provisionally revoked upon the issuance of the executive order, and, assuming no other issues exist, they are currently valid for travel.

WHAT'S NEXT?

This ruling is by no means the final word on this matter. For one thing, the decision simply upholds the *temporary* restraining order issued by the federal court judge. The parties will still litigate the matter at the U.S. District Court in Seattle to determine whether that restraining order should be transformed into a permanent injunction, adjusted in some manner, or scrapped altogether, and a return trip to the 9th Circuit seems possible as well.

But more importantly, it seems likely that the Trump administration will seek a final review of this issue before the U.S. Supreme Court. The Court has demonstrated its ability to move rapidly when necessary – recall the accelerated briefing, oral argument, and decision from the *Bush v. Gore* election case in 2000 – and this could be another situation where we see a quick determination from the SCOTUS.

WHERE DO EMPLOYERS AND THEIR AFFECTED EMPLOYEES STAND AT PRESENT?

The situation is very fluid and changing on a near-daily basis. Therefore, it is very important that your organization confers with legal counsel to ensure the current status and application of immigration laws and policies to your workforce.

Because normal travel has resumed, we recommend that employers with affected employees outside the U.S. have such employees return to the U.S. as quickly as possible. The legal status of the court order could change at any time, however, so immediate action is essential.

If you employ workers from any of the seven listed countries who are currently in the U.S., you should postpone international work-related travel and encourage them to refrain from personal travel outside the country, if at all possible. While their free travel might be permitted at present, their status could change without prior warning.

If you have affected employees with visas still in their passports, their travel should not be impaired. Their visas should have been electronically reinstated. For those employees with visas that were physically revoked, we recommend working with legal counsel to determine whether these employees should apply for a new visa or return to the country and apply for an I-193 (Application for Waiver of Passport and/or Visa) visa waiver for prompt admission to the U.S. Absent any other admissibility issues, these individuals should receive an I-193 waiver upon arrival to the U.S. For those traveling by air, airlines have been instructed to contact CBP to receive authorization to permit boarding.

CONCLUSION

We will continue to monitor the status of all immigration-related executive order activity, including ongoing and future litigation, and publish updates as additional actions are taken, or information is provided, by the White House or the judicial system.

If you have any questions about these developments or how they may affect your business, please contact any member of our [Global Immigration Practice Group](#), or your regular Fisher Phillips attorney.

This Legal Alert provides an overview of recent executive action and a federal court decision. It is not intended to be, and should not be construed as, legal advice for any particular fact situation.