

Shoba's Favorite Quotes from the Ninth Circuit Opinion: *State of Washington v. Trump*

<http://cdn.ca9.uscourts.gov/datastore/opinions/2017/02/09/17-35105.pdf>

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To rule on the Government's motion, we must consider several factors, including whether the Government has shown that it is likely to succeed on the merits of its appeal, the degree of hardship caused by a stay or its denial, and the public interest in granting or denying a stay. We assess those factors in light of the limited evidence put forward by both parties at this very preliminary stage and are mindful that our analysis of the hardships and public interest in this case involves particularly sensitive and weighty concerns on both sides. Nevertheless, we hold that the Government has not shown a likelihood of success on the merits of its appeal, nor has it shown that failure to enter a stay would cause irreparable injury, and we therefore deny its emergency motion for a stay.

We are satisfied that in the extraordinary circumstances of this case, the district court's order possesses the qualities of an appealable preliminary injunction.

The States argue that the Executive Order causes a concrete and particularized injury to their public universities, which the parties do not dispute are branches of the States under state law. Specifically, the States allege that the teaching and research missions of their universities are harmed by the Executive Order's effect on their faculty and students who are nationals of the seven affected countries. These students and faculty cannot travel for research, academic collaboration, or for personal reasons, and their families abroad cannot visit. Some have been stranded outside the country, unable to return to the universities at all. The schools cannot consider attractive student candidates and cannot hire faculty from the seven affected countries, which they have done in the past.

*Under the "third party standing" doctrine, these injuries to the state universities give the States standing to assert the rights of the students, scholars, and faculty affected by the Executive Order. See *Singleton v. Wulff*, 428 U.S. 106, 11416 (1976) (explaining that third-party standing is allowed when the third party's interests are "inextricably bound up with the activity the litigant wishes to pursue"; when the litigant is "fully, or very nearly, as effective a proponent of the right" as the third party; or when the third party is less able to assert her own rights). Vendors, for example, "have been uniformly permitted to resist efforts at restricting their operations by acting as advocates of the rights of third parties who seek access to their market or function." *Craig v. Boren*, 429 U.S. 190, 195 (1976). Likewise, doctors have been permitted to assert the rights of their patients.*

We therefore conclude that the States have alleged harms to their proprietary interests traceable to the Executive Order.

Although our jurisprudence has long counseled deference to the political branches on matters of immigration and national security, neither the Supreme Court nor our court has ever held that

courts lack the authority to review executive action in those arenas for compliance with the Constitution.

The Government moves to stay the district court's order pending this appeal. "Our decision is guided by four questions: "(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies." Lair v. Bullock, 697 F.3d 1200, 1203 (9th Cir. 2012) We conclude that the Government has failed to clear each of the first two critical steps. We also conclude that the final two factors do not militate in favor of a stay. We emphasize, however, that our analysis is a preliminary one. We are tasked here with deciding only whether the Government has made a strong showing of its likely success in this appeal and whether the district court's TRO should be stayed in light of the relative hardships and the public interest. The Government has not shown that it is likely to succeed on appeal on its arguments about, at least, the States' Due Process Clause claim, and we also note the serious nature of the allegations the States have raised with respect to their religious discrimination claims. We express no view as to any of the States' other claims.

The procedural protections provided by the Fifth Amendment's Due Process Clause are not limited to citizens. Rather, they "appl[y] to all 'persons' within the United States, including aliens," regardless of "whether their presence here is lawful, unlawful, temporary, or permanent." Zadvydas v. Davis, 533 U.S. 678, 693 (2001). These rights also apply to certain aliens attempting to reenter the United States after travelling abroad. Landon v. Plasencia, 459 U.S. 21, 33-34 (1982). The Government has provided no affirmative argument showing that the States' procedural due process claims fail as to these categories of aliens. For example, the Government has failed to establish that lawful permanent residents have no due process rights when seeking to re-enter the United States. ... Nor has the Government established that the Executive Order provides lawful permanent residents with constitutionally sufficient process to challenge their denial of re-entry. ... ("[T]he courts must evaluate the particular circumstances and determine what procedures would satisfy the minimum requirements of due process on the re-entry of a permanent resident alien.").

On this record, therefore, we cannot conclude that the Government has shown that it is "absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur."

Second, we decline to limit the geographic scope of the TRO. The Fifth Circuit has held that such a fragmented immigration policy would run afoul of the constitutional and statutory requirement for uniform immigration law and policy. Texas v. United States. ...Moreover, even if limiting the geographic scope of the injunction would be desirable, the Government has not proposed a workable alternative form of the TRO that accounts for the nation's multiple ports of entry and interconnected transit system and that would protect the proprietary interests of the States at issue here while nevertheless applying only within the States' borders.

The States' claims raise serious allegations and present significant constitutional questions. In light of the sensitive interests involved, the pace of the current emergency proceedings, and our conclusion that the Government has not met its burden of showing likelihood of success on appeal on its arguments with respect to the due process claim, we reserve consideration of these claims until the merits of this appeal have been fully briefed.

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. Rather than present evidence to explain the need for the Executive Order, the Government has taken the position that we must not review its decision at all. We disagree...

When the Executive Order was in effect, the States contend that the travel prohibitions harmed the States' university employees and students, separated families, and stranded the States' residents abroad. These are substantial injuries and even irreparable harms.

Aspects of the public interest favor both sides, as evidenced by the massive attention this case has garnered at even the most preliminary stages. On the one hand, the public has a powerful interest in national security and in the ability of an elected president to enact policies. And on the other, the public also has an interest in free flow of travel, in avoiding separation of families, and in freedom from discrimination. We need not characterize the public interest more definitely than this; when considered alongside the hardships discussed above, these competing public interests do not justify a stay.

Conclusion: For the foregoing reasons, the emergency motion for a stay pending appeal is DENIED.