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Immigration

Is Trump's Travel Ban On Fast Track to Supreme Court?

A federal appeals court's decision Feb. 9 to keep President Donald Trump's travel ban on hold while it's being litigated could be headed to the U.S. Supreme Court.

"They didn't have to go into as much detail as they did," Susan Cohen of Mintz Levin in Boston said of the three judges who issued the opinion. If the U.S. Court of Appeals for the Ninth Circuit merely had ruled on the administration's challenge to the lower court's temporary restraining order, the case "clearly" would have gone back down to that court, she told Bloomberg BNA Feb. 10.

"It's not clear that's going to happen now," she said.

Trump immediately indicated an intent to pursue an appeal, tweeting "SEE YOU IN COURT, THE SECURITY OF OUR NATION IS AT STAKE!" from his personal account. If the Supreme Court takes up the issue, it would face its second major case concerning the president's immigration powers in less than a year. The White House late Feb. 10 sent conflicting signals about how it might proceed, with Trump saying he may issue a new immigration order to revise the ban.

The justices in June 2016 split 4-4 in a case brought by Texas and 25 other states challenging President Barack Obama's programs protecting undocumented immigrants. That case also involved an appeals court's ruling on a preliminary stage of the case that went into great depth to justify its decision.

But the Supreme Court's inability to reach a majority left in place a lower court's ruling that blocked those programs from going into effect. Depending on the timing, the travel ban case could have a similar outcome. The Senate hasn't yet confirmed Judge Neil Gorsuch, Trump's pick to replace Justice Antonin Scalia. That means there are still only eight justices, setting up another potential tie vote.

Path to Supreme Court Uncertain. "Obviously we are headed to the Supreme Court," but the question is "by what exact path," William Stock, president of the American Immigration Lawyers Association, told Bloomberg BNA Feb. 10. It will be up to the administration to decide whether to appeal now or pursue the case in the federal district court that issued the temporary restraining order blocking the travel ban. The latter approach would allow more time for Gorsuch to be confirmed, Stock said.

But "there's no time limit on the effect of the circuit court ruling," nor is there a time limit on the temporary restraining order, said Cohen, who heads her firm's immigration practice. That means the travel ban isn't going to be up and running while the parties argue over its legality, and "President Trump isn't going to take this sitting down," she said.

The only question for appeal at this point would be whether courts have the authority at all to review a president's executive order related to immigration and national security, Cohen said.

The appeals court ruled against the president on that point. In fact, it appeared the judges wanted to "send a very clear signal" that "the president had not litigated this case very well," said Stock, who practices with Klasko Immigration Law Partners in Philadelphia.

The "government's dilemma" now is that it has boxed itself into a corner by focusing its argument on the courts' inability to review the executive order at all, Stock said. The administration can't add anything to the record if and when it goes to the Supreme Court, and the appeals court already found that the government didn't have any evidence to justify the order, he said.

'Will They Learn That Lesson?' Trump's first two immigration-related executive orders—addressing the border wall and interior enforcement—could have come from "any Republican president," Stock said. But the travel ban was "completely unprecedented, out of proportion to any real threat and implemented with almost no process inside the administration, which is what created such massive uncertainty about it," he said.

Now that the courts have shown the necessity of following the proper procedures for executive actions, "will they learn that lesson?" Stock asked. And that's not just in the context of the travel ban, but future executive orders and actions going forward, he said.

For example, there's been some concern in the business community about whether Trump will try to unilaterally change the way H-1B skilled guestworker visas are allocated, Stock said. Right now, U.S. Citizenship and Immigration Services holds a lottery if there are more applications than there are visas available. But Trump has suggested he'd like a different allocation so that the "best and the brightest" have access to the visas.

If the president "takes the time" to consult with employees in the USCIS and others with knowledge of the immigration law, he'd know a "unilateral restructuring" of the program "is not going to happen," Stock said. That's because the Immigration and Nationality Act requires that the applications be accepted in the order received, and certain applications can't be given preference over others, he said.

“Those are interesting and important discussions” that need to happen before an order is issued, he said.

That needs to happen if the administration wants the courts to give the executive orders and actions the deference it would like, Stock said.

‘It’s a Yellow Light.’ For now, “everyone has to be very watchful” despite the travel ban being lifted by the courts, Cohen said. “We’re telling everyone regardless of country, they need to make sure that they carry clear and convincing documentation of their right to enter the United States,” she said.

And everyone coming here would “expect significant grilling” from Customs and Border Protection, she said.

The appeals court’s decision isn’t a “green light” to proceed as if the travel ban hadn’t happened, Cohen said. “It’s a yellow light right now,” she said.

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