

THE WALL STREET JOURNAL.

VIRGINIA JUDGE'S IMMIGRATION RULING INCREASES PRESSURE ON WHITE HOUSE

Judge Leonie Brinkema determined that President Trump's executive order likely violated constitutional protections against religious discrimination

By Aruna Viswanatha and Brent Kendall
February 14, 2017

A Virginia judge's sharply worded ruling against President Donald Trump's executive order on immigration this week, which focused on the question of religious discrimination, is increasing pressure on the White House as it seeks to rewrite the order or find another legal path forward.

In a 22-page ruling late Monday, U.S. District Judge Leonie Brinkema said Mr. Trump's executive order likely violated constitutional protections against religious discrimination, and she barred enforcement of part of the order in Virginia while the case continues.

The White House has said it is working toward rewriting the executive order to make it more legally palatable, and the Virginia decision adds another layer of complexity to the effort. That decision follows one last week from the Ninth U.S. Circuit Court of Appeals in San Francisco, which said Mr. Trump's temporary travel ban on people arriving from seven Muslim-majority countries should remain on hold nationwide.

The White House has said the ban is necessary to thwart terrorist attacks. The Justice Department declined to comment on whether it would appeal the Virginia judge's ruling.

The Ninth Circuit ruling, however, followed different reasoning than the Virginia judge, saying the White House order appeared to violate constitutional due process protections.

That leaves the administration with at least two major legal challenges to address in any new order, as well as uncertainty as to whether the more than 20 existing court cases against the ban will stand if a new order is issued.

The White House faces political pressure to move quickly on a new order to show it is on the offensive after the court defeats. That could conflict with a typical legal strategy, which counsels a slower, more deliberate approach.

The Ninth Circuit's focus on due process gave the Trump administration a road map to write a narrower order that might withstand legal scrutiny. It could perhaps take aim at restricting the travel of individuals who previously haven't been cleared to enter the U.S., as opposed to green card holders and those who already have received visas for work, travel or education.

"The further they get from people who have applied to or been granted admission to the country, the easier it gets" for the government to argue that the order is constitutional, said Timothy Heaphy, a former U.S. Attorney in Virginia who represented a visa-holder initially affected by the travel ban.

The Virginia ruling potentially presents a thornier problem, because Judge Brinkema found that the executive order improperly targeted Muslims without any evidence of a national security threat that might justify a travel ban.

The executive order also suspended the U.S. refugee program for four months and indefinitely blocked entry by Syrian refugees. Those sections of the order were covered by the Ninth Circuit ruling, but not by Judge Brinkema's decision.

None of the court rulings so far have considered the underlying legality of the executive order, but have weighed whether it should be suspended while the arguments on its fundamental legality make their way through the courts. In suspending the order, the judges have found that the underlying legal challenges are likely to succeed.

The Trump administration vigorously denies that the order was a Muslim ban and argued that the president has a clear right to make decisions regarding national security and immigration that shouldn't be second-guessed by the court.

Judge Brinkema, in questioning those denials, cited previous statements from Mr. Trump and his aides about seeking to bar Muslims from entering the U.S., linking those statements to the executive order.

"The specific sequence of events leading to the adoption" of the executive order supports the claim that the order "was not motivated by rational national security concerns," she wrote.

Mr. Heaphy said Judge Brinkema's ruling could make it more difficult for the administration to issue a new order "because she found as fact (that) the president wants to ban Muslims." That issue is likely to be hotly litigated even if a new and narrower executive order is put in place, he said.

Vikram Amar, dean of the University of Illinois College of Law, said Judge Brinkema's ruling raises important legal questions that are likely to get a further look by the courts, such as how much judges should be able to look beyond the text of an executive order to outside evidence that could shed light on the president's intent.

Mr. Amar said there also is a question about whether courts should be examining comments Mr. Trump made before he won the White House, "particularly in such informal venues such as Twitter or in campaign statements." It's not clear that a majority on the Supreme Court "would want judges going down that road," he said.

The trajectory of the current court cases on the travel ban will depend heavily on what any new Trump administration order says, and whether the White House wants to continue its defense of the existing executive order.

If Mr. Trump simply modifies the current order without withdrawing it, “then the current cases stay alive,” with judges taking into account the changes to the order, said Boston College law professor Kari Hong.

If the White House fully withdraws the Jan. 27 order, however, the batch of cases pending could become moot, with any challenges starting anew against the rewritten directive.

If the government seeks a stay of Judge Brinkema’s injunction, that request would go to the Fourth U.S. Circuit Court of Appeals in Richmond, meaning another federal appeals court would weigh in on the order.

So far, the Ninth Circuit in San Francisco is the only appeals court to consider a travel-ban case. The federal appeals courts are one step below the U.S. Supreme Court and are the final word on many legal matters, as the high court only accepts about 70 cases a year.

The likelihood of near-term Supreme Court action in this case may be even slimmer, because the court has had eight members since the death of Justice Antonin Scalia. If the justices divide 4-4, the appeals court decisions would stand, which could create confusion if those decisions are in conflict.