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February 12, 2017: The Ninth Circuit Decision

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2/12/2017—I told my students that fundamentally the President has the authority to exclude entry of foreign nationals from countries he considers dangerous. So, why did the ninth circuit panel uphold the temporary injunction (how it treated the TRO)? First, the procedural stage—the government was asking for a stay of an injunction pending appeal of the underlying decision below. Burden on the government. And while the harms of the Executive Order were vividly plain, the government purportedly refused to introduce evidence of the threats to national security—maybe because there aren't any, but in any event, that made continuing the injunction easy. Second, executive overreach. The government argued that the EO was essentially unreviewable—did the government really argue that or did the ninth circuit misinterpret? No court in America is going to accept that argument in the absence of an obvious emergency. Then there was the fact that the government acknowledged that some of the people excluded by the EO had a statutory or other legal right to stay—permanent residents—or at least established legal process—persons in the US without documentation. That established law cannot be overturned by an EO. Mostly the government acknowledged this but the panel held that statements to that effect by the White House counsel are not binding. All of that could easily be fixed by limiting the EO in a formal way. But the ninth circuit also made what seem like obvious errors. If a ban on entry from a country is valid—within the President's authority—then the only due process issue there could be is the issue of where a person is actually from. There would be no due process rights in general. But due process was the main ground the court relied on. Think of it this way. If the government fires you for your performance, you might get a hearing. But if the government closes your department, you don't get an individual hearing. Because your performance is not the issue. Also, the ninth circuit repeated the error that the President's personal feelings about Islam and Muslims could be legally relevant. That cannot be right when the order is not applicable to most Muslims and cites matters that are not discriminatory in principle—the threat of terrorism. If President Trump eliminates Obamacare, that action cannot be challenged on the basis that the program helps people of color and he hates people of color. That is not a valid legal basis for challenging a general rule. The entry ban is terrible in so many ways and self-defeating. And discriminatory. But legal? Probably. Eventually.