State of Washington, et al v. Donald J. Trump, et al Doc. 143

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No. 17-35105

**UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

STATE OF WASHINGTON, et al.,
Plaintiffs-Appelles

v.

DONALD TRUMP, President of the United States, et al.,
Defendant-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON

**BRIEF OF AMICUS CURIAE KIM BLANDINO, PRO SE
IN SUPPORT OF DEFENDANT-APPELLANTS URGING IMMEDIATE ACTION TO VACATE THE TRO OR IN THE ALTERNATIVE TO TREAT THIS SUBMISSION AS AN EXTRAORDINARY WRIT OF MANDAMUS, PROHIBITION OR ANY OTHER EXTRAORDINARY WRIT AS KIM IS AN AFFECTED PERSON THAT IS EXPOSED TO DANGER BY THE TRO ISSUED BY THE DISTRICT COURT**

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RELEVANT FACTS

The facts have been reiterated numerous times in this case, so Kim will not repeat A updated summary is all that bis required that a restraining Order was granted in the district court against the Executive Order 13769 "Order". The defendants appealed to this court. A three judge panel denied relief. On Feb. 10, 2017 an en banc call was made by unknown "Judge Doe" on this court and briefing was was ordered to be completed by Feb. 16, 2017

ARGUMENT

BOTH THE DISTRICT COURT AND THIS CIRCUIT COMMITTED STRUCTURAL ERROR THAT REQUIRE THE EXECUTIVE ORDER TO BE PUT BACK INTO FULL FORCE AND EFFECT IMMEDIATELY

in **Neder v U.S.** 527 U.S. 1 (1999) the supreme court established that there are classes of errors that do not lend themselves to harmless error analysis, that require reversal. These structural errors in numerous cases it has been held, cannot have been waived for failure to raise them in the lower courts.

The structural error that both the district court and this court made revolves around presumptions, which are absolutely essential in law.Also, what is the status quo? It is with this status quo issue that the late and great Justice Scalia (may God rest his soul!) speaks to us clearly and precisely as though he were still here in person.

In **Planned Parenthood v Abbott** 134 S.Ct 506 (2013):

> "The Court of Appeals concluded that the fourth factor also favored the stay, reasoning that the State's interest in enforcing a valid law merges with the public interest. See *Nken, supra*, at 435. The dissent declines to criticize that reasoning, though we are presumably meant to infer from its disapproving comments about the stay's "seriou[s] **disrupt[ion** of the] **status quo,**" *post,* at 3, **that the dissent believes preservation of the status quo—in which the law at issue is not enforced**—is in the public interest. Many citizens of Texas, whose elected representatives voted for the law, surely feel otherwise. But their views go unacknowledged by the dissent, which again fails to cite any "'accepted standar[d]'" requiring a court to delay enforcement of a state law that the court has determined is likely constitutional on the ground that the law threatens disruption of the **status quo.** " at 507 (emphasis added)

Here, Scalia is absolutely correct the statute that was passed **IS THE STATUS QUO!** In this case the Executive Order "Order" as well, **IS THE STATUS QUO!** Despite what this court or the lower court state. The TRO issued by the lower court admits on page 2-3 lines 16 – 1 that the purpose of a TRO is to preserve the status quo. This ultimately means that the lower court presumed the Order to be legal garbage and gave the Order no effect, just as the dissent in **Abbott** above wanted to do with the statute at issue in that case.

Because of the above wrongful presumption, the entire theory of this case is upside down. In point of fact the plaintiffs in the district court were asking for a **STAY OF THE ORDER** by the president and thus the plaintiffs should be subject to **Nken v Holder**, 566 U.S. 418, 433 (2009) "a stay is not a matter of right, **even if**

irreparable injury might result" (emphasis added) See per curiam order of this court page 18 3rd paragraph. This reversed position is like "Alice through the looking glass" and just as Scalia saw things in **<u>Abbott</u>** vs. the dissenters.

Before, President Trump issued the order pursuant to 8 U.S.C. and 8 U.S.C. 1182 the **status quo** was one thing, then Trump "**<u>altered the status quo"</u>** with the order which became the **<u>new status quo</u>**. Because it must be presumed by law that the executive order, or proclamation is regular and lawful See **<u>Dames and Moore v Regan</u>** 453 U.S. 654 (1981) "Long continued executive practice ...... raises a presumption that the President's action has been taken pursuant to Congree' consent." id. At 657

Also, "President's action ...... taken pursuant to specific congressional authorization it is supported by the **<u>strongest presumptions</u>** and the **<u>widest latitude of judicial interpretation</u>**" id at 656 (emphasis added) The district court nor this court treated the order with this respect as required in **<u>Dames.</u>** It must be pointed out that that in **<u>Dames</u>** there was only financial ramifications. President Trump's order involves matters of life or death thus Kim argues the presumption must be even stronger.

With the above being said, the President "**<u>altered the status quo</u>**" with his order which became the new status quo. So the plaintiffs in point of fact wanted to "suspend the [presidential] alteration of the status quo" This foregoing language should be familiar to the court, because in **<u>Nken</u>** at 429 " **A stay "simply suspend[s]**

judicial alteration of the status quo."" Also, "(By seeking an injunction, applicants request that I issue an order altering the legal status quo") **<u>Nken</u>** at 429 citing **<u>Turner Brodcasting System</u>**, Inc. v. FCC 507 U.S. 1301, 113 S.Ct. 1806

It is of no small importance that the president gets a daily Presidential briefing. See Amicus brief filed by Daniel Escamilla page 3-4 lines 15- 22. The 8 U.S.C. 1182 section 212(f) **requires a finding** by the President. It therefore, must be presumed that the President bases his findings in part on classified information that was not available to the lower court or this court when the order was examined. It cannot be overstated either that section 212(f) **<u>does not</u>** even require a **<u>written order</u>** The President can merely **<u>proclaim</u>** suspension for such period as **<u>he deems</u>** necessary.

It must be judicially noticed by this court that the lower court stated:

> "the **<u>court is mindful</u>** of the **considerable impact** its order may have on the **<u>parties before it</u>**, the executive branch of our government, and the country's citizens and residents. The court concludes....... that it must intervene to fulfill its constitutional role in our tripart government." TRO at pg 7 lines 7-12

With all due respect to Judge Robart the foregoing statement is ridiculous and foolish unless Judge Robart gathered all of the intelligence data that the President has been made aware of since the President first started being briefed by intelligence agencies. The statement is an absolute insult to all of the men and women that risk

their lives in many cases gathering necessary information about threats to America and its allies around the world!!

If Kim can be allowed to "channel" Justice Scalia for a moment, (and Kim can because Kim's last name also ends in a vowel). Justice Scalia in response to Judge Robart would ask this, "Suppose that President Trump was briefed by intelligence agencies by corrborated information that, within days weeks or months from one of the countries at issue in the Order there was a high probability that individuals from said countries were going to detonate "dirty" nuclear bombs in several major cities including Seattle and that the President should suspend travel under 8 U.S.C.?" Can there be any doubt in light of Scalia's reasoning in **Abbott** above that Scalia would not give proper deference to the President and be astounded By Judge Robart's presumption that he is "mindful" of the impact of ignoring classified information.

The lower court nor this court can satisfy themselves with the fact that since Judge Robart's TRO no terrorists attacks have happened in America so far. Justice Scalia's fast friend Justice Ginsburg herself in **Muscarello v U.S.** 524 U.S. 125 (1998) cited the original movie The Magnificent Seven. So Kim will do so here to prove the point. Steve Mcqueen playing Vin says in response to the questions "Are you ready for him [refers to Calvera played by Eli Wallach]? What if he comes now huh?" :

> "McQueen says: Reminds me of that fellow back home that fell off a ten story building. .... Well, as he was falling people on each floor kept hearing him say, "So far, so good." Tch...so far so good!"

The lower court and this court have "fallen off a judicial cliff" so to anyone that says, "so far so good" gives no comfort whatsoever. Kim requests this court take judicial notice that for days after 911, the airspace above Canada and the U.S. was restricted to military aircraft just by **proclamation,** obviously for safety reasons. It should go without saying that had the air flight restriction been on September 10, 2001, for days thousands of lives would have been spared. President Trump is **presumptively** trying to save lives from a demonstrable threat to people and property that is ever present. Neither the lower court nor this court have knowledge of the classified information , nor does Kim. In fact, Kim doubts that the Justice department lawyers that briefed and argued the case had such classified information. This court states in its order:

> "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." at page 26-27 (emphasis added)

Again, Justice Scalia would be saying in response: "the Order is based on classified intelligence that a **future** threat exists not what has been done, before December 7, 1941 there was no evidence of a japanese attack before September 11 2001 there was no evidence of an attack by Saudis ......"

This court wants to hang its hat on 28 C.F.R. 17.17 (c) which reads in pertitnent

part:

> **(c)** In judicial proceedings other than Federal criminal cases where CIPA is used, the Department, through its attorneys, shall seek appropriate security safeguards to protect classified information from unauthorized disclosure, including, **but not limited to**, consideration of the following: (emphasis added)

In other words the Department is given almost unlimited power to determine what safeguards the Department needs in order to protect the classified info. Moreover this court ignores 17.17(a) which states:

> **"(1)Any Department official or organization receiving an order or subpoena** from a federal or state court to produce classified information, required to submit classified information for official Department litigative purposes, or receiving classified information from another organization for production of such in litigation, shall immediately determine from the agency originating the classified information whether the information can be declassified. **If declassification is not possible, the Department official or organization and the assigned Department attorney in the case shall take all appropriate action to protect such information pursuant to the provisions of this section**.
>
> **(2)** If a determination is made to produce classified information in a judicial proceeding in any manner, the assigned Department attorney shall take all steps necessary to ensure the cooperation of the court and, where appropriate, opposing counsel in safeguarding and retrieving the information pursuant to the provisions of this regulation."
>
> (emphasis added)

Sec.17.17 therefore **requires an order** or subpoena from a federal or state court to produce the classified information. Moreover, as seen above, sec 17.17(a) contemplates that it is possible that the information cannot be declassified. This court seems to take the subject of classified information very casually, which is very very

disturbing. This court must know, that often if classified information is leaked it can directly cause deaths of hundreds of people that were the source of such classified information as the information itself can lead to the source.

Had the Department without a subpoena or an order and/or sufficient safeguards given over classified information the supplying party could well have been prosecuted criminally. Further, the plaintiffs were the parties that should have sought a subpoena or order. The plaintiffs by all appearances were not interested in seeking a subpoena or order for the classified information. By all appearances the parties opposing President Trump were "forum shopping". And successful the opponents to the President have been. "so far so good"! Kim is certain that the infamous Bernie Madoff right up to before he was arrested, was saying "so far so good".

As stated above as to presumptions, this court is clearly not giving the President the **presumption** under **Dames** that the President properly relied on classified information to make his decision. In fact it appears that the lower court and this court **presumed** that the President had **no support** in the classified information for the Order. In **U.S. v. Chemical Foundation** 272 U.S. 1 (1926) the court said:

> **The presumption of regularity supports the official acts of public officers**, and, **in the absence of clear evidence to the contrary**, courts presume that they have properly discharged their official duties. Confiscation Cases, 20 Wall. 92, 108, 22 L. Ed. 320; United States v. Page, 137 U. S. 673, 679-680, 11 S. Ct. 219, 34 L. Ed. 828; United States v. Nix, 189 U. S. 199, 205, 23 S. Ct. 495, 47 L. Ed. 775. **Under that presumption,** it will be taken that Mr. Polk acted upon knowledge of the

> material facts. **The validity of the reasons stated in the orders, or the basis of fact on which they rest will not be reviewed by the courts.** Chemical at 14-15 (emphasis added)

Therefore the lower court and this court are obligated by law, by case law to **presume** that the Presdident acted on the basis of valid facts and reasons and intelligence information to protect the safety of all persons within America in suspending some travel. The burden must be on the plaintiffs all around.

It is therefore irresponsible and reckless to basically pronounce the President as guilty without any evidence or even requiring the plaintiffs to meet their burden of at least presenting evidence. To again channel Scalia he would ask: "If President Trump had intelligence that demonstrated a high probability of the deaths of hundreds or thousands within the U.S. if a temporary suspension was not instituted ? Are you seriously stating that the balance of hardships and the public interest tips toward the plaintiffs?"

If this situation regarding the Order were a movie by an ironic screen writer Seattle and San Francisco would see a terrorist attack that kills thousands or more in each city from persons from the countries listed, who came in after the TRO in the Order.In the aftermath the actor plating Judge Robart would read how the court "is mindful of the considerable impact its order may have on the parties......" Please, God do not let that scenario occur in real life. "So far so good" is not good enough.

This circuit has granted stronger presumption toward criminal defendants than to

President Trump. In **Mclean v. Moran** 963 F.2d 1306 (1992) "Mandatory presumptions, however, pose greater potential for constitutional problems because they may affect not only the strength of the "beyond a reasonable doubt" burden but also the placement of that burden." **Moran** at 1309.

Under **Dames** the president is entitled to the strongest of presumptions that the Order was proper and necessary to protect against terrorism and the safetl and lives of those within the U.S.

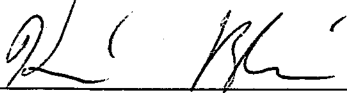
CONCLUSION

Kim believes that President Trump sincerely is very concerned with the safety of all persons within America's borders and that the President is acting in accord with information gathered from intelligence agencies and that there is a real threat from entities within the listed countries. That Kim believes his sons lives, and his life are in greater danger because of the TRO.

That if the plaintiffs want to actually examine the classified information that the President relied on for his order let the plaintiffs ask for a subpoena or an order to try and examine that classified information under 28 C.F.R. 17 and have Robart rule.

For the foregoing reasons this court must immediately vacate the TRO issued in the court below immediately and modify or vacate the denial filed on Feb, 9, 2017. In the altenative grant an extraordinary writ or grant such other relief as returns full force and effect to the Order until a full hearing can be made in the District Court

DATED this 13th day of February, 2017.



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CERTIFICATE OF COMPLIANCE

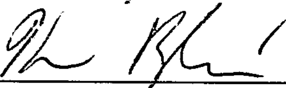
Pursuant to FRAP 32(a)(7)(C)(i) the undersigned individual, appearing pro se, certifies that this submission:

(i) Complies with the typeface requirements of Rule 32(a)(5) and the type style requirements of Rule 32(a)(6). It has been prepared using OpenOffice Writer and is set in Times New Roman with a font size of 14-point,

(ii) Complies with the length requirement of Rule 29(a)(5) because it is 11

pages absent the exclusions and Kim has filed a motion for leave to file in accord with the FRAP

DATED this 13th day of February, 2017.



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CERTIFICATE OF SERVICE

I hereby certify that on February 13, 2017, a true and correct copy of the foregoing: BRIEF OF *AMICUS CURIAE KIM BLANDINO, PRO SE* IN SUPPORT OF DEFENDANT-APPELLANTS with first class postage prepaid has been deposited in the U.S. Mail in Santa Ana, California, and properly addressed to the persons whose names and addresses are listed below.

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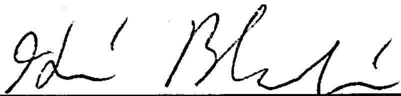

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