1987 WL 61013
United States Court of Appeals, Ninth Circuit.

CATHOLIC SOCIAL SERVICES, INC., et al.,
Plaintiffs-Appellees,
v.
Edwin MEESE, III, Attorney General of the United States of America, Defendant-Appellant.

No. 86-2907. | April 3, 1987. | Withdrawn from 813 F.2d 1500. | Decision withdrawn and vacated June 15, 1987. | See 820 F.2d 289.

Opinion

ANDERSON, Circuit Judge:

***1** The heart of this matter concerns whether aliens apprehended for illegal reentry into the United States after November 6, 1986, who may otherwise be eligible for legalization under the Immigration Reform and Control Act of 1986, are deportable because they interrupted the requirement of continuous physical presence by leaving the United States without INS authorization.

I. [Facts]

This is a class action challenging the Attorney General's implementation, through the Immigration and Naturalization Service, of the Immigration Reform and Control Act of 1986 ("IRCA" or "Act"), Pub.L. No. 99-603. The President signed the Act into law on November 6, 1986, and it became effective on that date. The Immigration and Naturalization Service (INS) interpreted the Act to require illegal aliens who were in the United States after November 6, 1986 and who were prima facie eligible to apply for legalization under the Act, to obtain INS advance authorization before leaving the country. Accordingly, the INS apprehended a number of individuals, including some of the named plaintiffs, who had been in the country and were eligible for legalization under the Act except that they had departed and reentered the United States illegally after November 6, 1986. The INS sought to exclude these individuals from reentering the country, or if they had reentered, to deport them.

Plaintiffs filed this class suit on November 12, 1986, asking the district court to enjoin the INS from deporting aliens who could, but for their unauthorized departure and reentry, establish a prima facie claim for legalization under the Act. The district court provisionally certified the suit as a class action and plaintiff Catholic Social Services ("CSS"), et al. as the class representatives.[1] On November 24, 1986, the district court issued a temporary restraining order restraining the INS from: (1) removing an alien from the United States who otherwise was prima facie eligible for legalization, (2) accepting a departure record from an alien with a claim to legalization who wished to leave the country or, in the alternative, accepting such records if the INS posted signs informing the aliens of their rights, and (3) deporting any alien with a claim to legalization until rules implementing the Act were published in the Federal Register.[2]

1 The district court provisionally certified the suit as a class action under Fed.R.Civ.P. 23(b)(2) with members consisting of:

> "All persons who have been or may be apprehended and have been or may be deported or issued voluntary departure by defendant (1) who are believed by defendant to be deported aliens who can establish a prima facie claim for adjustment of status to temporary resident under § 245A(e)(1) of the INA, as amended, *or;* (2) who are believed by defendant to be deportable or excludable aliens who can establish a nonfrivolous claim for adjustment of status to temporary resident under § 210(d)(i) of the INA, as amended."

2 Specifically, the temporary restraining order stated as follows:

> It is Ordered that defendant, and all persons acting by, through, or under him, or subject to his control or supervision, is restrained as follows:
> 1. From removing or causing the removal of any alien from the United States who is otherwise prima facie eligible for legalization under § 245A or who presents a nonfrivolous claim for legalization under § 210 of the Immigration and Nationality Act as amended by the Immigration Reform and Control Act ("IRCA"), on the basis of a brief, innocent and casual unauthorized departure from the country and subsequent re-entry without inspection on or after the date of the enactment of the IRCA, November 6, 1986. This order is stayed for five (5) days.
> 2. Accepting an INS Form I-94, or other departure

> record, from any alien who is prima facie eligible for legalization under §§ [sic] 245A or who presents a nonfrivolous claim for legalization under § 210 of the Immigration and Nationality Act, as amended by the Immigration Reform and Control Act. In the alternative, the agents may accept the departure forms without further inquiry or duty if at the place of depositing or collecting such forms found at the ports of entry and departure of Mexico, there is present a sign sufficiently large so that it may be read easily from a distance of five feet in English and Spanish which reads as follows:
> "IF YOU ARE DEPARTING FROM THE UNITED STATES UNDER A DEPORTATION ORDER OR VOLUNTARY DEPARTURE ORDER OF THE IMMIGRATION AND NATURALIZATION SERVICE, AND EITHER:
> (1) HAVE BEEN PHYSICALLY IN THE UNITED STATES SINCE JANUARY 1, 1982, EXCEPT FOR BRIEF, CASUAL, AND INNOCENT DEPARTURES; OR
> (2) WORKED IN SEASONAL AGRICULTURAL SERVICES IN THE UNITED STATES FOR AT LEAST 90 MAN-DAYS DURING THE TWELVE MONTH PERIOD ENDING ON MAY 2, 1986, YOU MAY NOT HAVE TO DEPART THE UNITED STATES.
> YOU MAY WISH TO REMAIN AND CONTACT THE IMMIGRATION AND NATURALIZATION SERVICE, AN IMMIGRATION LAWYER, OR AN ORGANIZATION WHICH HELPS PEOPLE WITH IMMIGRATION PROBLEMS."
> This order is stayed for ten (10) days to permit implementation.
> 3. From removing or causing the removal of any alien from the United States who is otherwise prima facie eligible for legalization under § 245A or who presents a nonfrivolous claim for legalization under § 210 of the Immigration and Nationality Act, as amended by the IRCA, until he publishes in the Federal Register substantive rules of general applicability adopted as authorized by law, and statements of general policy or interpretations of general applicability, and rules of procedure that impact substantial rights, relating to §§ 245A and 210.

The Attorney General appealed the district court's issuance of the temporary restraining order and sought an emergency stay pending appeal. A motions panel of this court construed the restraining order as a preliminary injunction, finding it appealable under 28 U.S.C. § 1292(a)(1). The motions panel then stayed enforcement of the district court's order pending resolution of this appeal, and set the case for an expedited appeal.[3] Subsequently, on January 15, 1987, the INS issued a "telegram" to give aliens notice of the advance parole authorization requirement if they intended to leave the United States.

[3] The motions panel heard oral argument on the stay by telephone conference on December 3, 1986 and filed its decision on the same day.

II. [Review of Order]

1. Jurisdiction

***2** The motions panel construed the temporary restraining order as a preliminary injunction appealable under 28 U.S.C. § 1292(a)(1). While we give deference to motions panel decisions made in the course of the same appeal, this court has an independent duty to decide whether we have jurisdiction. *See United States v. Houser,* 804 F.2d 565, 568 (9th Cir.1986) (reviewing a motions panel decision as establishing the law of the case with respect to jurisdiction). Thus our initial inquiry is to determine whether we have jurisdiction over this appeal.

On November 24, 1986, the district court issued a temporary restraining order ("TRO"). Ordinarily, a TRO is not an appealable order over which we have jurisdiction. *St. Helen v. Wyman,* 222 F.2d 890 (9th Cir.1955). The reason for nonappealability is that a temporary restraining order is not a final decision under 28 U.S.C. § 1291.[4] 7-Pt.2 Moore's Federal Practice ¶ 65.05 (2d ed. 1986). *See also Kimball v. Commandant Twelfth Naval District,* 423 F.2d 88, 89 (9th Cir.1970); *St. Helen,* 222 F.2d at 890.

[4] The statute, 28 U.S.C. § 1291, provides:
> The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. The jurisdiction of the United States Court of appeals for the Federal Circuit shall be limited to the jurisdiction described in sections 1292(c) and (d) and 1295 of this title.

However, jurisdiction will lie in this court where the TRO can be considered a preliminary injunction for purposes of 28 U.S.C. § 1291(a)(1).[5] *See Northern Stevedoring & Handling Corp. v. Int'l Longshoremen's & Warehousemen's Union Local No. 60,* 685 F.2d 344, 347 (9th Cir.1982). The terminology used to characterize the district court's order "does not control whether an appeal

is permissible under § 1292." *Northern Stevedoring,* 685 F.2d at 347. Instead, we look to the substance of the proceeding below.

[5] The statute, 28 U.S.C. § 1292(a)(1), provides:
(a) Except as provided in subsections (c) and (d) of this section, the courts of appeals shall have jurisdiction of appeals from:
(1) Interlocutory orders of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, or of the judges thereof, granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions, except where a direct review may be had in the Supreme Court.

We find the reasons for nonappealability of a TRO do not apply here. The order directed the Attorney General to take drastic action, i.e., not deport otherwise illegal aliens who entered the United States without inspection. Such action goes beyond merely preserving the status quo and impairs the Immigration and Naturalization Service's ability to control the borders and prevent illegal immigration. *Cf. Fernandez-Rogue v. Smith,* 671 F.2d 426, 429 (11th Cir.1982) (construction of a TRO as a preliminary injunction is determined by considering whether the order merely preserves the status quo or grants the relief requested); *Adams v. Vance,* 570 F.2d 950, 953 (D.C.Cir.1978) ("When an order directs action so potent with consequences so irretrievable, we provide immediate appeal to protect the rights of the parties"). We find these circumstances justify treating the TRO as a *de facto* preliminary injunction appealable under § 1292(a)(1).

2. Standard of Review

A preliminary injunction is subject to limited review. The grant or denial of a preliminary injunction is within the discretion of the district court and must be affirmed unless that discretion was abused. *Zepeda v. I.N.S.,* 753 F.2d 719, 724 (9th Cir.1983). Our inquiry is confined to considering the balance of hardships and the plaintiffs' likelihood of success on the merits. *National Center for Immigrants Rights v. I.N.S.,* 743 F.2d 1365, 1369 (1984) (citing *Benda v. Grand Lodge of the Int'l Ass'n of Machinists,* 584 F.2d 308, 315 (9th Cir.1978), *cert. denied,* 441 U.S. 937 (1979)), *aff'd on other grounds,* 791 F.2d 1351 (9th Cir.1986), *petition for cert. filed* (Jan. 20, 1987).

***3** The Attorney General urges us to decide the merits of the case because interpretation of the Act is a question of law reviewable *de novo. See, e.g., Graham v. Teledyne-Continental Motors,* 805 F.2d 1386, 1388 (9th Cir.1986). We decline to do so. The posture of this case is the reviewal of a preliminary injunction. Neither party has had the opportunity to fully present their arguments to the district court. Also, the district court did not make a final decision on the merits. Moreover, we believe a complete factual determination needs to be made before a final decision on the merits can be made.[6] We therefore limit our review to determining whether the district court abused its discretion by concluding CSS was likely to succeed on the merits. *National Center,* 743 F.2d at 1369.

[6] Factual determinations which may need to be made include findings on the administrative burdens placed upon the INS in administering parole authorization and the impact upon aliens affected by the Attorney General's interpretation, including seasonal agricultural workers entering the United States for the season of 1987.

III. [IRCA Provisions]

The IRCA changed immigration law as it historically existed in a very important respect. It gives, as a one-time only program, certain aliens the opportunity to become legalized United States citizens. The major purpose behind the Act was to increase control over illegal immigration by allowing a controlled legalization program for illegal aliens and thereby enable the INS to target its enforcement efforts on stemming the new flows of undocumented aliens into the country rather than seeking out those who had been in the United States for some length of time. *See* H.R.Rep. No. 99-682, 99th Cong., 2nd Sess. 1, *reprinted in* 1986 U.S. Code Cong. & Admin. News 5649-5653.

There are two provisions under the IRCA whereby aliens may become legalized. The first is contained in Section 245A. (Section 201 of the Act). Under section 245A, persons who have been in the United States illegally since January 1, 1982, may apply for legalization by acquiring temporary resident status, and then, after one year, by applying for permanent residency. The second legalization provision is contained in section 210 (section 302 of the Act), which permits application for legalization for seasonal agricultural workers who have been in the United States at least 90 man-days during the 12-month period ending May 1, 1986.

To apply for temporary residence under section 245A, an alien must establish that he "resided continuously" in the United States in an unlawful status since January 1, 1982, and has maintained "continuous physical presence" since the date of enactment. Sections 245A(a)(2)(A), (a)(3)(A) and (B). An alien must establish "continuous physical presence" except for "brief, casual, and innocent" absences. Section 245A(a)(3)(C). If an alien is outside the United States, he may not be admitted into this country to apply for adjustment of status under section 245A. Section 245A(a)(3)(C).[7]

[7] In setting out the presence requirement for adjustment of status to lawful temporary residence, the Act provides in § 2454(a)(3)(A), (B) and (C):

> "(3) CONTINUOUS PHYSICAL PRESENCE SINCE ENACTMENT.-
> "(A) IN GENERAL.-The alien must establish that the alien has been continuously physically present in the United States since the date of the enactment of this section.
> "(B) TREATMENT OF BRIEF, CASUAL, AND INNOCENT ABSENCES.-An alien shall not be considered to have failed to maintain continuous physical presence in the United States for purposes of subparagraph (A) by virtue of brief, casual, and innocent absences from the United States.
> "(C) ADMISSIONS.-Nothing in this section shall be construed as authorizing an alien to apply for admission to, or to be admitted to, the United States in order to apply for adjustment of status under this subsection."

Similarly, to apply for temporary residence as a seasonal agricultural worker under section 210, the alien must establish that he has "resided in" the United States and worked in agricultural service during the 12-month period ending on May 1, 1986. Section 210(a)(1)(B)(i) and (ii).

***4** What is at issue here, then, is whether the district court erred in finding CSS likely to succeed on the merits of its contention that the Act (under § 245A or § 210) allows an alien with a prima facie claim to legalization to depart from and reenter the country after November 6, 1986 without INS authorization, i.e., illegally, without destroying the "continuous physical presence" requirement. While this contention resolves the first paragraph of the TRO, because the contention also is the basis for paragraphs two and three of the TRO, we believe it necessarily resolves them as well.

The essence of this case becomes whether an illegal reentry into the United States, i.e., one made without INS parole authorization, is "brief, casual, or innocent" under section 245A(a)(3)(B). The Attorney General argues that an illegal reentry breaks the "continuous physical presence" and "resided in" requirements of section 245A and section 210. In short, he suggests an illegal reentry is not "innocent." On this basis, he argues he must exclude or deport any alien who left the country without INS parole authorization since by leaving, they forfeited the possibility of applying for legalization.

IV. [Statutory Interpretation]

We find the Attorney General's argument persuasive. Essentially, the question is one of statutory interpretation. Our starting point is the truism that Congress has plenary power to make rules for admission of aliens. *Fiallo v. Bell,* 430 U.S. 787, 792 (1977); *Kleindienst v. Mandel,* 408 U.S. 753, 766 (1972); U.S. Const. art. I, § 8, cl. 4. Such power is necessary since the sovereignty of our nation depends upon control of our borders. In this, Congress has delegated implementation of the IRCA to the Attorney General, through the INS, and it is the Executive Branch's duty to enforce the Act Congress sought to pass. *See, e.g.,* Section 245A(b)(3)(A) (directing the Attorney General to authorize travel abroad during the period of lawful temporary residency).

Where the language of a congressional statute is unclear or ambiguous, we ordinarily look to congressional intent for direction in determining the correct interpretation. *Train v. Colorado Pub. Int. Research Group,* 426 U.S. 1, 9-10 (1976). The legislative history, however, is devoid of direction as to the meaning of "brief, casual, and innocent" as Congress intended it to be used in the IRCA.[8] We must therefore consider the Attorney General's interpretation of the statute, recognizing that his interpretation, while not binding, is "entitled to great deference and should be accepted unless demonstrably irrational or clearly contrary to the plain and sensible meaning of the statute." *Olivares v. I.N.S.,* 685 F.2d 1174, 1177 (9th Cir.1982). Applying this standard, the legislative history, and the purpose behind the IRCA, we find the Attorney General's interpretation to be a reasonable construction of the statute. *Id.*

[8] The House Report merely restates the language used in the Act.

> "In order to be eligible for legalization under this bill an individual must show unlawful immigration status as of January 1, 1982, continuous residence in the United States since January 1, 1982, and compliance with most of the 33 grounds of exclusion in

> current law applicable to all persons seeking to come to the United States. The Committee requires the applicant to have been continuously physically present in the United States since the date of enactment except for brief, casual, and innocent absences."
>
> H.R.Rep. No. 99-682, 99th Cong., 2nd Sess. 1, *reprinted in* U.S.Code Cong. & Admin.News 5649, at 5675-76.

1. Consistency in Construction

***5** First, we strive to view the language in one section of the Act consistently with other sections. *See Adams v. Howerton,* 673 F.2d 1036 (9th Cir.) *cert. denied,* 458 U.S. 1111 (1982). In doing this, we find the Attorney General has reasonably construed the Act. The purpose of the Act is to enable the INS to control the borders. *See supra,* U.S. Code Cong. & Admin News at 5649-55. For this reason, Congress did not allow aliens to present themselves at a port of entry and make a claim of or apply for legalization. *See* Section 245A(a)(3)(C). Aliens within the United States are required to apply with the Attorney General under section 245A for temporary residence. *See* Section 245A(a). Seasonal agricultural workers may apply for legalization under section 210 to the Attorney General if they are within the United States or to an appropriate consular office if they are outside the United States. *See* Section 210(b)(1)(A) and (B).

From this, it is reasonable to conclude that departure from the United States followed by unlawful reentry after enactment, could not be deemed "innocent" under section 245A(a)(3)(B). If, as the Attorney General suggests, the alien obtained authorization from the INS to leave the United States and reenter lawfully, the reentry could be considered "innocent." In short, it is reasonable to interpret the Act consistently. Congress would therefore not be expected to prohibit admission to apply for legalization while allowing unauthorized departure and illegal reentry to apply for legalization. *See* Section 245A(a)(3)(C).

2. Legislative Purpose

Second, we point out that the purpose of the IRCA is to control our borders and enable the INS to target its enforcement efforts. To do this, the INS is attempting to concentrate on stemming new flows of undocumented aliens attempting to cross the United States borders rather than ferreting out aliens in the interior who may have lived within the country for some time. *See, supra,* U.S.Code Cong. & Admin. News at 5653. The congressional purpose would be frustrated if an undocumented alien apprehended by the INS could avail himself of the potential for legalization under the IRCA by claiming that he had resided in the United States but merely departed after November 6, 1986, and was presently returning. This is particularly the case in light of the "policy" of the INS in administering the Act to allow minimal criteria for establishing prima facie eligibility for legalization, namely, a sworn affidavit by the alien that he or she meets the legalization criteria.[9]

[9] While the Attorney General represents that it is the policy of the INS to accept affidavits at face value, we point out that such representation appears to be contrary to the mandate of the IRCA. *See, e.g.,* section 245A(g)(2)(D) (requiring documents and independent corroboration to establish continuous residence and physical presence).

3. Deference to the Agency

Finally, a reading of the IRCA shows that the Attorney General is directed to provide regulations in implementing section 245A with respect to residency periods, periods of absence and advance parole procedures as a result of a departure and reentry before November 6, 1986. *See* Sections 245A(g)(1), (g)(2) and (g)(3). From this, we believe the Act can reasonably be read as allowing the Attorney General to provide rules with respect to departure and reentry after November 6, 1986. *See* Section 245A(b)(3). Such a reading necessarily carries with it the proposition which the Attorney General argues here, i.e., that departure and illegal reentry (one without INS parole authorization) after November 6, 1986, is not an "innocent" absence from the United States. Therefore, the opportunity to apply for legalization would be forfeited and the Attorney General could properly deport or exclude aliens entering the country without parole authorization.

V. [Conclusion]

***6** For these reasons, we hold the district court erred in issuing the TRO. At the same time, we acknowledge that

CSS has a number of arguments which are persuasive in its construction of the IRCA. Among others, these include: (1) prior judicial interpretations and their possible indirect incorporation into the Act in establishing the meaning of "innocent," (2) the fact that the Attorney General asked Congress to include explicit language within the IRCA on the meaning of "brief, casual and innocent," but Congress refused to do so, (3) the suggestion that "innocent" is determined by the purpose for the departure, not the nature of the reentry, and (4) the fact that aliens may not have notice of the parole authorization requirement and the Attorney General did not publish the INS authorization requirement and rules concerning parole authorization in the federal register.

However, while we acknowledge these arguments, we need not address them here. We only point them out to demonstrate that both the Attorney General and CSS can present reasonable arguments which support their respective interpretations of the IRCA.

In light of this, we find the district court erred in issuing the TRO. The Attorney General has presented us with a reasonable construction of the IRCA. The district court therefore abused its discretion by concluding CSS was likely to succeed on the merits.

Reversed and Remanded.[10]

[10] The motion of CSS to supplement the record is denied. None of the material presented to us has been considered by the district court in connection with the issues raised on this appeal.

The mandate shall issue forthwith.

HALL, Circuit Judge, dissenting.

***6** I do not believe that we have jurisdiction to review the temporary restraining order (TRO) entered by the district court in this case. Therefore, I respectfully dissent.

The majority treats the TRO as a "*de facto* preliminary injunction appealable under [28 U.S.C.] § 1292(a)(1)." *Ante* at 5. However, all of the Ninth Circuit cases cited in the opinion base appealability on the fact that the TRO in question effectively decided the merits of the case. Here, as the majority concedes, the TRO did not decide the merits of the case. *Id.* at 6.

In *Northern Stevedoring and Handling Corp. v. International Longshoremen's and Warehousemen's Union, Local No. 60,* 685 F.2d 344 (9th Cir.1982), we considered whether a TRO enforcing an arbitration award was an appealable order under 28 U.S.C. § 1292(a)(1). We noted that "[w]hen a temporary restraining order *decides the merits of the case,* the appellate court will not require an appellant to go through additional proceedings for a permanent injunction." *Id.* at 347 (emphasis added). We went on to find the TRO appealable, relying on the fact that the TRO "*dispose[d] of the merits of the case.*" *Id.* (emphasis added).

Likewise, in *Graham v. Teledyne-Continental Motors,* 805 F.2d 1386, 1388 (9th Cir.1986) (emphasis added), we held that the denial of a TRO was immediately appealable because it "*effectively decided the merits of the case:* should the NTSB and Teledyne proceed with the disassembly and inspection of the engines, appellant's claims will be rendered moot." *See also Kimball v. Commandant Twelfth Naval Dist.,* 423 F.2d 88, 90 (9th Cir.1970) (TRO held appealable because trial judge "decided the merits of the case after hearing thorough argument by both sides").

***7** Commentators are in agreement with our decisions. According to Wright and Miller: "The only situations in which an appeal is available from an order under Rule 65(b) is when the denial of the temporary restraining order actually decides the merits of the case or is equivalent to a dismissal of the claim, thereby rendering moot the underlying request for an injunction." 11 C. Wright & A. Miller, *Federal Practice and Procedure* § 2962, at 616-17 (1973) (footnotes omitted). Moreover, they note that "[t]he fact that injunctive relief is being sought is not sufficient in and of itself to bring a court order issued during the course of an action within the scope of the interlocutory appeals statute." *Id.* at 622.

The proposed opinion creates an exception to well-established rules of appealability by allowing the appeal of a TRO which does not dispose of the merits of the case. Such an unwarranted exception will only serve as an invitation to others to file premature appeals.

The majority attempts to justify its result by citing *Fernandez-Roque v. Smith,* 671 F.2d 426 (11th Cir.1982), and *Adams v. Vance,* 570 F.2d 950 (D.C.Cir.1978), for the proposition that construction of a TRO as a preliminary injunction is determined by considering whether the order merely preserves the status quo or grants the relief requested. *Ante* at 5. These cases do not support the majority's conclusion that the TRO in this case is appealable. In *Fernandez-Roque,* the court held that a TRO enjoining the Immigration and Naturalization Service (INS) from deporting aliens pending a determination of their legal rights was "intended merely to preserve the status quo in the face of the stated intention of the government to deport the appellees

without notice to the court." 671 F.2d at 429. The court stated that such a TRO was "nonappealable." *Id.* at 430. Similarly, the TRO in this case merely preserves the status quo by enjoining the INS from deporting aliens who are already present in this country pending a determination of their legal rights under the Immigration Reform and Control Act of 1986 (the Act). It is therefore, nonappealable.

There are strong policy reasons for not allowing appeals from TRO's:

The practical reasons for not generally allowing appeals from temporary restraining orders are that (1) they are usually effective for only very brief periods of time, far less than the time required for an appeal ... and are then generally supplanted by appealable temporary or permanent injunctions, (2) they are generally issued without notice to the adverse party and thus the trial judge has had opportunity to hear only one side of the case, and (3) the trial court should have ample opportunity to have a full presentation of the facts and law before entering an order that is appealable to the appellate courts.

Connell v. Dulien Steel Products, Inc., 240 F.2d 414, 418 (5th Cir.1957), *cert. denied,* 356 U.S. 968 (1958); *see also* C. Wright & Miller, *supra* p. 2, at § 2962. All of these factors are present here. As the majority notes, "[n]either party has had the opportunity to fully present [its] arguments to the district court." *Ante* at 6. Furthermore, the district court had scheduled a preliminary injunction hearing for December 18, 1986, well within the twenty-day period allowed by Fed.R.Civ.P. 65(b).

***8** The majority compounds its error by applying an improper standard of review. It cites *National Center for Immigrants Rights, Inc. v. INS,* 743 F.2d 1365 (9th Cir.), *aff'd on other grounds,* 791 F.2d 1351 (9th Cir.1986), *petition for cert. filed,* 55 U.S.L.W. 3536 (U.S. Jan. 20, 1987) (No. 86-1207), for the proposition that review is limited to determining whether the district court abused its discretion in concluding that the plaintiffs were likely to succeed on the merits. *Ante* at 6. In fact, *National Center* stands for the proposition that review is limited to determining whether the district court abused its discretion in balancing the hardships against the plaintiffs' probability of success. 743 F.2d at 1369. The majority does not undertake a balancing of the hardships required by *National Center.* The majority is unable to balance the hardships without more facts on the administrative burdens on the INS and the impact upon the aliens of the Attorney General's interpretation of the Act. The majority's inability to balance the hardships underscores the fact that the TRO in this case should not be treated as a "*de facto* preliminary injunction."

I would dismiss the appeal for lack of jurisdiction. The district court would then be free to consider whether a preliminary injunction is in order.

Parallel Citations

42 Empl. Prac. Dec. P 36,952, 55 USLW 2569