

President Trump Issues New Travel Ban Executive Order

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March 6, 2017

On March 6, 2017, President Trump issued a new Executive Order entitled, “Protecting the Nation from Foreign Terrorist Entry into the United States” (the “New EO”). The New EO expressly “revok[es]” and “replac[es]” the President’s January 27, 2017 Executive Order of the same name (the “Original EO”). As described below, the New EO effectively bans the issuance of new visas to nationals of six countries for at least 90 days.

The substance of the Original EO and resulting litigation were previously addressed by our Immigration Alerts of January 30, February 7, February 10 and February 17. In summary, the Original EO essentially prohibited aliens from seven majority-Muslim countries (Iraq, Iran, Libya, Somalia, Sudan, Syria, and Yemen) from entering the United States for a period of 90 days. The original EO has written in it a mechanism to extend this travel ban indefinitely, as well as to add additional countries to the list. The original EO also suspended the U.S. Refugee Admissions program for 120 days; and the Syrian Refugee program indefinitely.

The original EO prompted litigation all over the country on behalf of affected individuals, organizations, and states. The plaintiffs allege, among other things, that the original EO is unconstitutional because it is intended to discriminate against Muslims (largely based on then-candidate Trump’s call for a “Muslim ban”) and violates due process rights. Several federal courts throughout the U.S. responded to these claims by entering orders restricting the federal government’s ability to enforce the original EO.

One of the most notable cases was filed in Washington State, where a federal judge issued a Temporary Restraining Order (“TRO”) blocking enforcement of the original EO nationwide. The federal government has appealed that TRO. On February 9, a three-judge panel of the U.S. Court of Appeals for the 9th Circuit issued a unanimous order denying the federal government’s request to stay the TRO pending the outcome of the appeal. The TRO remains in place.

The New EO “revoke[s]” the Original EO and imposes similar, but narrower, restrictions. Entry of nationals of Iran, Libya, Somalia, Sudan, Syria and Yemen (*but not Iraq*) is suspended for 90 days beginning March 16, 2017. However, this suspension does not apply to such people who:

- Are lawful permanent residents of the United States;
- Are dual citizens who are travelling on the passport of a country that is not designated for exclusion;
- Are in the United States or are later admitted or paroled into the United States;
- *Had* either a valid visa or other entry document (such as an advance parole document) at 5:00 p.m. on January 27, 2017 or *will have* obtained a valid visa or other entry document by 12:01 a.m. (EST) on or before March 16, 2017;
- Have certain diplomatic or military visas;
- Have been granted asylum, or been admitted already to the United States as a refugee, or have been granted withholding of removal, advance parole, or protection under the Convention Against Torture; or
- Demonstrate on a case-by-case basis that denying entry would cause undue hardship and that entry would not pose a threat to national security and would be in the national interest.

Immigrant and non-immigrant visas that are valid as of March 16, 2017 will not be revoked pursuant to the New EO. Any visa revocations made pursuant to the Original EO are also now officially rescinded.

In addition to the new 90-day travel ban described above, the New EO contains mechanisms to extend the ban indefinitely, and to add additional countries over time. It further suspends the U.S. Refugee Admissions program for 120 days (subject to case-by-case exceptions), and caps refugee entry into the United States at 50,000 people for this fiscal year.

It is unclear why this suspension was ordered to last for an additional 90 days after March 16. The Original EO ordered a 90-day suspension starting in January “while existing screening and vetting procedures were under review.” Presumably that review would be mostly complete by mid-March. If, in fact, no such review was ever undertaken, or no substantial progress was made, the plaintiffs in the litigation may assert that this is evidence that the purported national security justifications for the two EOs are pretext for religious discrimination.

The New EO is unlikely to end the pending litigation concerning these travel bans. The plaintiffs will likely argue that the New EO violates the Establishment Clause because it is motivated by the same anti-Muslim animus as the Original EO, and that the various security justifications contained in the New EO are mere *post hoc* justifications for discriminatory behavior and carry little persuasive value. The plaintiffs will also likely argue that, because the New EO orders many of the same people excluded as the Original EO, the New EO violates the restraining orders entered by various courts to block operation of the Original EO. The plaintiffs may also argue that litigation concerning the Original EO should continue until the courts enter a permanent injunction against it, because otherwise the President could simply re-institute the Original EO as soon as the lawsuits were dismissed.

We will continue to provide updates as the situation develops.

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