

## Court of Appeals Blocks Travel Ban Executive Order

May 25, 2017

On May 25, 2017, the U.S. Court of Appeals for the Fourth Circuit issued an opinion affirming a lower court's preliminary injunction prohibiting enforcement of the "travel ban" provision of President Trump's March 6, 2017 Executive Order entitled "Protecting the Nation from Foreign Terrorist Entry into the United States" (the "new EO").

By way of background, the new EO purported to "revok[e]" and "replac[e]" the President's prior January 27, 2017 Executive Order of the same name (the "original EO"). The substance of the original EO, the new EO, and prior related litigation were previously addressed by our Immigration Alerts of January 30, February 7, February 10, February 17, March 6 and March 16.

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 had 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 alleged, among other things, that the original EO was unconstitutional because it was intended to discriminate against Muslims. The plaintiffs relied largely upon then-candidate Trump's express call for a "Muslim ban." 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.

In light of those orders, the new EO purported to revoke the original EO and to impose similar, but narrower, restrictions. Entry of nationals of Iran, Libya, Somalia, Sudan, Syria and Yemen (but not Iraq) was to be suspended for 90 days beginning March 16, 2017, but only to the extent such people did not already have a visa or permanent status. In addition, the new EO contained mechanisms to extend this ban indefinitely, and to add additional countries over time. It further suspended the U.S. Refugee Admissions program for 120 days (subject to case-by-case exceptions), and capped refugee entry into the United States at 50,000 people for this fiscal year.

Like the original EO, the new EO also prompted numerous lawsuits, which generally alleged that it was merely a thinly disguised continuation of the President's same discriminatory travel policies. The operation of the new EO was blocked to varying degrees by preliminary injunctions issued by the U.S. District Courts in both Hawaii and Maryland. The Maryland injunction focused on the "travel ban" section of the new EO (i.e., the ban on entry of nationals of Iran, Libya, Somalia, Sudan, Syria and Yemen). Both cases were appealed. The Maryland appeal was argued to the full Fourth Circuit on May 8. The Hawaii appeal was argued to a three-judge panel of the Ninth Circuit on May 15.

On May 25, the Fourth Circuit issued an opinion that essentially affirmed the lower court's preliminary injunction. Seven judges joined the opinion, with three judges concurring with it to varying degrees, and three others dissenting. The court held that, in light of statements made by President Trump and his staff both during and following his campaign for President, the new EO likely discriminates against Muslims and, therefore, violates the Establishment Clause of the First Amendment to the U.S. Constitution. As the court explained:

These statements, taken together, provide direct, specific evidence of what motivated both [the original EO] and [the new EO]: President Trump's desire to exclude Muslims from the United States. The statements also reveal President Trump's intended means of effectuating the ban: by targeting majority-Muslim nations instead of Muslims explicitly. And after courts enjoined [the original EO], the statements show how President Trump attempted to preserve its core mission: by issuing [the new EO]—a "watered down" version with "the same basic policy outcomes." These statements are the exact type of "readily discoverable fact[s]" that we use in determining a government action's primary purpose. They are explicit statements of purpose and are attributable either to President Trump directly or to his advisors. We need not probe anyone's heart of hearts to discover the purpose of [the new EO], for President

Trump and his aides have explained it on numerous occasions and in no uncertain terms.

The court also rejected President Trump's proffered anti-terrorism rationale for the travel ban, explaining that the "Plaintiffs have more than plausibly alleged that [the new EO's] stated national security interest was provided in bad faith, as a pretext for its religious purpose."

The Fourth Circuit did modify the lower court's injunction in one respect: the injunction no longer names the President personally. However, it appears that this modification has no practical impact, as all Executive officers who would implement the ban remain enjoined from doing so.

The Hawaii appeal remains pending.

Foley Hoag participated in the Hawaii action, and in both the 4th Circuit and 9th Circuit appeals, by assisting the Massachusetts Technology Leadership Council (MassTLC) in the preparation and filing of amicus briefs. Foley Hoag attorneys Michael Keating, Christopher Escobedo Hart, Kristyn Bunce DeFilipp, and Daniel McFadden prepared the brief (available [here](#)).

As always, we will keep you updated as the case further develops.

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