

Supreme Court Narrows, But Declines to Stay, Injunctions Blocking Travel Ban Executive Order

June 26, 2017

On June 26, 2017, the U.S. Supreme Court entered an order that narrowed, but declined to stay, two preliminary injunctions prohibiting enforcement of various provisions of President Trump's March 6, 2017 Executive Order entitled "Protecting the Nation from Foreign Terrorist Entry into the United States" (the "EO-2"). Nationals of Iran, Libya, Somalia, Sudan, Syria and Yemen can continue to enter the U.S. to visit family, attend school, or work, but are probably banned for at least 90 days from entering the U.S. solely for tourism, unless they obtained the necessary visas before today.

EO-2 purported to "revok[e]" and "replac[e]" the President's prior January 27, 2017 Executive Order of the same name (the "EO-1"). The substance of the EO-1, the EO-2, and prior related litigation were previously addressed by our Immigration Alerts of January 30, February 7, February 10, February 17, March 6, March 16 and May 25.

In summary, EO-1 essentially prohibited aliens from seven majority-Muslim countries (Iran, Iraq, Libya, Somalia, Sudan, Syria, and Yemen) from entering the U.S. for a period of 90 days. EO-1 contained a mechanism to extend this travel ban indefinitely, as well as to add additional countries to the list. EO-1 also suspended the U.S. Refugee Admissions program for 120 days; and the Syrian Refugee program indefinitely.

EO-1 prompted litigation all over the country on behalf of affected individuals, organizations, and states. The plaintiffs alleged, among other things, that EO-1 was unconstitutional because it was intended to discriminate against Muslims. The plaintiffs relied largely on 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 EO-1.

In light of those orders, EO-2 purported to revoke the EO-1 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 on March 16, 2017, but only to the extent such people did not already have a visa or permanent status. EO-2 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 U.S. at 50,000 people for this fiscal year.

Like EO-1, EO-2 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 EO-2 was blocked to varying degrees by preliminary injunctions issued by the U.S. District Courts in both Hawaii and Maryland. On May 25, the Fourth Circuit issued an opinion that essentially affirmed the lower court's preliminary injunction. The court held that, in light of statements made by President Trump and his staff both during and following his campaign for President, EO-2 likely discriminates against Muslims and, therefore, violates the Establishment Clause of the First Amendment to the U.S. Constitution. The court also rejected President Trump's proffered anti-terrorism rationale for the travel ban "as a pretext for its religious purpose." On June 12, 2017, the Ninth Circuit largely affirmed the Hawaii injunction.

In both cases, the government petitioned the Supreme Court to review the injunctions, and also to stay the injunctions pending completion of that review. In the meantime, President Trump issued a memorandum to Executive officials that declared that the effective dates of the various enjoined provisions of EO-2 (including the March 16, 2017 effective date of the initial 90-day travel ban) are extended until the date upon which any injunctions prohibiting enforcement of such provisions are lifted or stayed. In other words, EO-2's 90-day travel ban did not begin to run in March, but rather only begins when the courts cease to enjoin it. In today's order, the Supreme Court took several actions:

First, the Court granted the government's request to review the two preliminary injunctions. It appears that the parties will submit

written briefs on this issue over the summer, followed by a hearing before the Supreme Court in October.

Second, the Court refused the government's request to stay the preliminary injunctions pending completion of that review. However, the Court did narrow them slightly based on the equitable balance of hardships to the parties. In other words, this decision is not a ruling on whether or not EO-2 actually violates the Establishment Clause or is otherwise illegal, but rather addresses the question of how to balance the parties' competing interests while that question is decided. The Court left the preliminary injunction in place to the extent that EO-2 "may not be enforced against foreign nationals who have a credible claim of a bona fide relationship with a person or entity in the United States." If the relationship is with an individual, then "a close familial relationship is required," an example being "[a] foreign national who wishes to enter the U.S. to live with or visit a family member." If the relationship is with an entity, then "the relationship must be formal, documented, and formed in the ordinary course," examples being a student who was admitted to a U.S. university or "a worker who accepted an offer of employment from an American company or a lecturer invited to address an American audience." It consequently appears that EO-2 remains enjoined as to most travelers. However, nationals of the six countries who are travelling purely for the purpose of tourism are likely at risk of being denied entry. Similarly, EO-2 can be enforced against refugees who lack sufficient ties to the U.S.

In summary, nationals of Iran, Libya, Somalia, Sudan, Syria and Yemen can continue to enter the U.S. to visit family, attend school, or work. However, such nationals will likely be denied entry if they are travelling to the U.S. solely for tourism, or if they are attempting to enter the U.S. as refugees with no prior connection to this country, unless they secured the necessary visas before June 26, 2017. As always, we will keep you updated as the case further develops.

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