



Travel Ban 3.0: Litigation Update

On September 24, 2017, the President issued a proclamation titled [Enhancing Vetting Capabilities and Processes For Detecting Attempted Entry Into the United States by Terrorists or Other Public-Safety Threats](#) (Proclamation), building on a previous travel ban, [Protecting the Nation from Foreign Terrorist Entry into the United States](#) (Executive Order 13780). Section 2 of the Proclamation suspends the entry of certain nationals from Chad, Iran, Libya, North Korea, Syria, Venezuela, Yemen, and Somalia based on the perceived threat posed by each country and the measures used to prevent the spread of terrorism from these countries. For nationals of the eight countries named in the Proclamation the effective date is October 18, 2017 and the duration is indefinite. Following its release, the Proclamation was challenged in federal district courts.

HAWAII

On October 17, 2017, the federal district court in [State of Hawaii, Ismail Elshikh, John Doe 1 & 2, and Muslim Association of Hawaii, Inc. v. Donald J. Trump, et al.](#) issued a Temporary Restraining Order (TRO) blocking Elaine Duke, Acting Secretary of Homeland Security, Rex Tillerson, Secretary of State, and their respective employees from enforcing all travel suspensions under Section 2, except those pertaining to North Korea and Venezuela. The TRO is nationwide.

The Plaintiffs asserted violations of the Immigration and Nationality Act (INA): Sec. 1182(f), regarding the President's power to suspend the entry of foreign nationals; Sec. 1185(a)(1), requiring lawful entry and exit of foreign nationals; and Sec. 1152(a), prohibiting immigrant visas from being preferentially or discriminatorily issued based on nationality, among other categories. The Court found that the Plaintiffs were likely to succeed on the merits of these claims. The Court stated that Sec. 1182(f) and 1185(a) "do not afford the President unbridled discretion to do as he pleases" and that the Proclamation's purported reasoning was internally inconsistent. For example, the Proclamation allows entry of some foreign nationals, but not others, without any explanation that accounts for the difference. The Proclamation also failed to show why existing law is insufficient to ensure national security. The Court further explained that by "singling out immigration visa applicants seeking entry to the United States on the basis of nationality," the Proclamation plainly violates Sec. 1152(a) of the INA.

What happens next? The TRO is temporary. In the order, the court stated that it intends to set an expedited hearing to determine whether the TRO should be extended.

This document was prepared by Penn State Law's Center for Immigrants' Rights, Muslim Advocates, and the American-Arab Anti-Discrimination Committee on October 18, 2017. This document is selective and not a substitute for legal advice.

MARYLAND

On October 17, 2017, the federal district court in consolidated cases [*International Refugee Assistance Project, et al. v. Donald J. Trump, Iranian Alliances Across Borders, et al. v. Donald J. Trump, et al., and Eblal Zakzok, et al. v. Donald J. Trump*](#) issued a preliminary injunction blocking all defendants, with the exception of the President, from enforcing all travel suspensions under Section 2, except those pertaining to North Korea and Venezuela as well as those visa applicants with “no ties to the United States.” The injunction is nationwide.

Plaintiffs asserted several causes of action including violations of the INA, Sec. 1152(a), and the Establishment Clause. The Court stated that the Plaintiffs were likely to succeed on the merits of their Sec. 1152(a) and the Establishment Clause claims. In its rationale, the Court stated, “Where the Proclamation has effectively imposed a permanent, rather than a temporary, ban on immigrants from the Designated Countries, and has effectively stopped the issuance of immigrant visas indefinitely, the bar on entry is the equivalent of a ban on issuing immigrant visas based on nationality.” In explaining that the Plaintiffs would likely succeed on the merits of the Establishment Clause claim, the Court stated, “The ‘initial’ announcement of the Muslim ban, offered repeatedly and explicitly through President Trump’s own statements, forcefully and persuasively expressed his purpose in unequivocal terms.” The Court could not find that “a ‘reasonable observer’ would understand that the primary purpose of the Proclamation’s travel ban is no longer the desire to impose a Muslim ban,” and that therefore the Proclamation was not “sufficiently independent” of the second Executive Order.

What happens next? The preliminary injunction is effective pending any further orders from the Court. In the order, the Court declines to stay the ruling or hold it in abeyance should the parties file an emergency appeal of the order.