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Arab & Muslim Ban 2.0: Litigation Update

On March 6, 2017, the President issued a **revised Executive Order** titled [Protecting the Nation from Foreign Terrorist Entry into the United States](#) which sought to correct the legal defects of the previous one. Section 2 of the revised EO suspends entry for nationals of the following six countries for a period of 90 days: Iran, Sudan, Somalia, Syria, Libya and Yemen. Section 6 of the revised EO suspends the entry of all refugees for a period of 120 days and reduces the total number of refugees by half. The effective date of the Executive Order was 12:01am on March 16, 2017 **but key decisions by two federal courts have blocked the most controversial provisions of Muslim Ban 2.0**. Below is a summary of these decisions.

HAWAII

On March 15, 2017, a federal court in [State of Hawai'i and Ismail Elshikh v. Donald J. Trump, et al.](#) issued a **Temporary Restraining Order (TRO)** blocking Sections 2 and 6 of the revised EO. The TRO applied nationwide. The plaintiffs asserted several causes of actions including violations of the Establishment Clause in the First Amendment, protections contained in the Fifth Amendment, the Immigration and Nationality Act, among others. In discussing whether the Plaintiffs were likely to succeed on the merits, the court found they would likely succeed in showing how the revised EO violates the Establishment Clause. Citing to the Supreme Court case *Larson v. Valente*, the Hawaii court stated "The clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another." Said the court in attacking the government's arguments "Equally flawed is the notion that that the [EO] cannot be found to have targeted Islam because it applied to all individuals in the six referenced countries. It is undisputed, using the primary source upon which the Government itself relies, that these six countries have overwhelmingly Muslim populations that range from 90.7 % to 99.8%." In reviewing the anti-Muslim statements made by the President in months leading up to the signing of the EO, the court remarked "These plainly worded statements.... betray the Executive Order's stated secular purpose."

The court found that each requirement for a TRO was met and held: "Plaintiffs have met their burden of establishing a strong likelihood of success on the merits of their Establishment Clause claim, that irreparable injury is likely if the requested relief is not issued, and that the balance of the equities and public interest counsel in favor of granting the requested relief."

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.

MARYLAND

On March 16, a federal court in [International Refugee Assistance Project v. Donald J. Trump](#) issued a **Preliminary Injunction (PI)** blocking Section 2(c) of the revised EO. The Plaintiffs included three organizations and six individuals affected by the revised EO. They asserted several causes of action including but not limited to violations of the Establishment Clause in the First Amendment, the Fifth Amendment's Due Process Clause, the Immigration and Nationality Act, among others. The requirements for a PI require the parties to show: they are likely to succeed on the merits, likelihood of suffering irreparable harm if injunctive relief is not granted, balance of equity is in their favor, and that an injunction would be in the public interest.

The court found that Plaintiffs are likely to succeed on the claim that the revised EO violates INA Section 202(a)(1) as it relates to the issuance of visas. This section states, "No person shall receive any preference or priority or be discriminated against in the issuance of an immigrant visa because of his race, sex, nationality, place of birth, or place of residence[.]" The court reasoned that while on its face the revised EO does not prohibit the issuance of visas to nationals of the designated countries, the EO has the effect of denying nationals from the designated countries U.S. visas. The court also found that Plaintiffs would likely succeed on their Establishment Clause claim. The court highlighted direct statements made by President Trump during his campaign and concluded that the statements such as, "calling for a total and complete shutdown of Muslims entering the United States" on his campaign website "present a convincing case that the First Executive Order was issued to accomplish, as nearly as possible, President Trump's promised Muslim ban."

Additionally, the court acknowledged the changes made to the revised EO, but stated "Despite these changes, the history of public statements continues to provide a convincing case that the purpose of the Second Executive Order remains the realization of the long-envisioned Muslim ban." The court further held "The removal of the preference for religious minorities in the refugee system...does not cure the Second Executive Order of Establishment Clause concerns."

Notably, the court acknowledged that national security interests may be served by the travel ban, but stressed that "in this highly unique case, the record provides strong indications that the national security purpose is not the primary purpose for the travel ban." The court took note of the fact that the White House first introduced a travel ban without consulting any other agencies. The court also noted that the recommendation of a travel ban by the Attorney General and Secretary of Homeland Security came after the first EO and on the same day as the revised EO. Finally, in response to the argument by the Government that the Establishment Clause implicates the "plenary power doctrine" the court clarified and citing *Chadha* "Even when exercising their immigration powers, the political branches must choose 'constitutionally permissible means of implementing that power.'"

What Happens Next? A PI is more permanent than a TRO. However, the government can appeal the PI to a federal appellate court.