PennState Law Center for Immigrants' Rights Clinic

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 courts.

To date, both the Ninth Circuit and the Fourth Circuit have issued preliminary injunctions enjoining executive agencies from implementing the Proclamation. However, both Circuits stayed their injunctions pending a decision from the Supreme Court. This means that the Proclamation is currently fully in force.

NINTH CIRCUIT

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 that the Proclamation suffered various statutory and constitutional defects. The court reached its conclusion that the Proclamation was unlawful based on its analysis of three sections in the Immigration and Nationality Act: § 1182(f), regarding the President's power to suspend the entry of foreign nations; § 1185(a)(1), requiring lawful entry and exit of foreign nationals; and § 1152(a), prohibiting immigrant visas from being preferentially or discriminatorily issued based on nationality, among other categories. The Court stated that the INA "[does] not afford the president unbridled discretion to do as he pleases," and that by "singling out immigration visa applicants . . . on the basis of nationality," the Proclamation plainly violates § 1152(a).

On December 22, 2017, the Ninth Circuit Court of Appeals upheld the district court's preliminary injunction. The court agreed that the Proclamation circumvented the express will of Congress, and invalidated whole sections of statutory immigration law. The court first found that the language of the statute did not support the government's assertion that § 1182(f) allows the President the broad power to suspend visas indefinitely based on nationality alone. The court reasoned that the Government failed to provide any evidence that the suspension was necessary for national security, or that there existed an emergency that Congress would not be able to address in a timely manner. The court held that, absent such evidence, the Government could not claim authority under § 1182(f).

Furthermore, the court found that Congress already had extensive means to protect national security, such as making criminal and terrorist activity a bar to entry. The court found that the Proclamation required security measures from affected countries that were substantially similar to requirements set by the Visa Waiver Program. However, Congress did not choose to bar immigration from countries who do not participate in the Visa Waiver Program. Therefore, the Proclamation circumvents the will of Congress to allow immigration from nonparticipants in the Visa Waiver Program, albeit at a higher level of scrutiny. For these reasons, the court upheld the injunction, though limited it to those foreign nationals "with a

credible bona fide relationship with the United States," and then stayed its own decision pending a decision by the Supreme Court.

FOURTH CIRCUIT

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 nationwide 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."

Plaintiffs challenged the Proclamation on various statutory and constitutional grounds, including violations of § 1152(a) of the INA and the Establishment Clause of the Constitution. In issuing the preliminary injunction, the court found that the plaintiffs were likely to succeed on the merits on both claims. The court reasoned that the effect of the Proclamation was to effectively impose "a permanent, rather than a temporary, ban on immigrants … based on nationality." The court also 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."

The preliminary injunction was challenged by the Government on appeal. On February 15, 2018, the Fourth Circuit Court of Appeals agreed with the district court that the ban likely violates the Establishment Clause of the Constitution. It found that the Proclamation is "unconstitutionally tainted with animus toward Islam." It further found that "an objective observer could conclude that the President's repeated statements convey the primary purpose of the Proclamation—to exclude Muslims from the United States. In fact, it is hard to imagine how an objective observer could come to any other conclusion when the President's own deputy press secretary made this connection express." Like the Ninth Circuit, the court limited the injunction to "foreign nationals with a bona fide relationship with an individual or entity in the United States," and also stayed its injunction pending the Supreme Court's decision.

WHAT HAPPENS NEXT?

On December 4, 2017, the Supreme Court stayed the preliminary injunction from the district court in the Ninth Circuit pending the decision in the Fourth Circuit, as well as its own decision to grant a writ of certiorari. On January 19, 2018, the Supreme Court agreed to hear the case. Oral argument before the Supreme Court for the Ninth Circuit case is scheduled for April 25, 2018.

On February 23, 2018, the Fourth Circuit plaintiffs petitioned the Supreme Court to allow them to consolidate their case with the Ninth Circuit case. On February 26, 2018, the Supreme Court ordered the administration to file a response to the petition for a writ of certiorari by noon of March 1, 2018. This will allow the Supreme Court to consider the petition to consolidate the cases during the March 2, 2018 conference. Since both circuit courts of appeal have stayed their preliminary injunctions pending a Supreme Court decision, the Proclamation is still fully in effect, and will remain so until the final decision of the Supreme Court.