# Immigration / Travel Ban EO[1]

**Policy Brief ::: Last Updated June 26, 2017**

## TL;DR

On March 6 President Trump signed an executive order (EO2) replacing the prior order (EO1) that was essentially invalidated by several federal courts. Since then, two federal appeals courts have struck down the bulk of the new order and the U.S. Supreme Court has issued a partial stay of those decisions, pending a ruling on the merits in the fall.

The two appellate courts have enjoined EO2 on two separate grounds: Violation of the Establishment Clause of the First Amendment (the 4th Circuit) and violation of the non-discrimination clause of the Immigration and Nationality Act (the 9th Circuit). These decisions follow the 9th Circuit Court of Appeals in a case ruling on EO1, which had upheld the Washington Court's stay of Trump's original immigration order on February 9 on Due Process and Establishment Clause grounds.

## THE EXECUTIVE ORDER

The original Executive Order 13769, "Protecting the Nation From Foreign Terrorist Entry Into the United States" (Jan 27, 2017) (EO1) attempted to:

- Suspend for 90 days the entry of immigrants and nonimmigrants[2] from Iraq, Syria, Iran, Sudan, Libya, Somalia, and Yemen. It does exempt a few visa types from the Order: foreign nationals traveling on diplomatic visas, North Atlantic Treaty Organization visas, and other foreign official visas.
- Put processing refugees on hold for three months and suspend vetting of Syrian refugees indefinitely.
- Cap refugee resettlement for fiscal year 2017 lowered from 110,000 to 50,000.

The administration, through Chief of Staff Priebus, and White House counsel Donald F. McGahn II, had asserted that the Order did not apply to permanent residents (immigrants/green card holders). However, this was not evident from the language of the Order. And the 9th Circuit Court refused to modify the Order on behalf of the administration.

[1] There is a separate policy brief covering potential changes coming to H-1B visas.
[2] Immigrants are lawful permanent residents (green card holders). Nonimmigrants are people with visas.

President Trump amended the original order on March 6, 2017 in response to the many legal challenges to EO1. EO2 attempted to do the following:

- Exempt existing visa holders (and green card holders).
- Remove Iraq from the list, leaving Iran, Libya, Somalia, Sudan, Syria and Yemen.[3]
- Stop refugee admissions worldwide for 120 days (no singling out of Syrian refugees).

EO2 went into effect March 16 to provide time for planning at the borders. EO2 also attempted to make a stronger case for choosing those six countries, describing the conditions in those countries as significantly compromised by terrorism.[4]

Good summary from HuffPo
Full text of the new Order (from Lawfare)
Tracked changes against the prior Order
Tech:NYC statement | ACLU statement

## The Supreme Court's Partial Stay

On June 26, 2017, the U.S. Supreme Court agreed to hear the government's appeal in the case during its October session. In the meantime, the Court partially granted the government's request for a stay of the lower court injunctions by limiting the effect of the government's temporary ban to "foreign nationals who lack any bona fide relationship with a person or entity in the United States." According to the Court, immigrants from the six majority-Muslim countries coming to the U.S. for business, to visit family, or to attend school are not affected. Here is what the Court said about the sort of relationship that qualifies as bona fide:

> For individuals, a close familial relationship is required. A foreign national who wishes to enter the United States to live with or visit a family member, like Doe's wife or Dr. Elshikh's mother-in-law, clearly has such a relationship. As for entities, the relationship must be formal, documented, and formed in the ordinary course, rather than for the purpose of evading EO2. The students from the designated countries who have been admitted to the University of Hawaii have such a relationship with an American entity. So too would a worker who accepted an offer of employment from an American company or a lecturer invited to address an American audience. Not so someone who enters into a relationship simply to avoid §2(c): For example, a nonprofit group devoted to immigration issues may not contact foreign nationals from the designated countries, add them to client lists, and then secure their entry by claiming injury from their exclusion.

[3] Due to "enhanced screening and reporting measures" put in place by Iraq since the original ban, according to the administration.
[4] Section 1(d)–(e) of the Order.

Given that refugees are less likely to have existing connections to the United States, it goes without saying that the Supreme Court's decision impacts the refugee population more than immigrants.

In granting this partial stay, the Court appears to have placed more emphasis than the lower courts did on President Trumps' national security justification. This hints at a possible rebalancing of the equities in this case should the Court reach the merits this fall. However, because the 90-day immigrant ban and the 120-day refugee ban will both expire prior to the Court's next session, there's a good chance that the Supreme Court will never reach a decision on the merits in this case, deeming it moot.[5] The Trump administration may attempt to issue extensions to the review periods in the order but this would likely undercut the government's arguments regarding the temporary nature of the review period. The Court's decision appeared to hinge, in part, on the relatively short duration of the travel ban.

Regarding renewed enforcement of this decision, the Department of Homeland Security will have some discretion to determine whether a refugee has a "bona fide" connection to the U.S. And this may result in further legal challenges. However, many immigration lawyers think that refugees with an existing relationship with a U.S. resettlement agency should not be negatively impacted by the decision. We'll find out once the intact portions of the reinstated ban go into effect on Thursday, June 29th.

## The 4th Circuit: *Int'l Refugee Assistance Project v. Trump*

On May 25, 2017, the Court of Appeals for the Fourth Circuit, finding that EO2 "drips with religious intolerance, animus, and discrimination, upheld the lower court's nationwide preliminary injunction with respect to the travel ban section of EO2 (with one narrow exception regarding President Trump personally).[6] The Court relied on the Establishment Clause of the First Amendment in reaching its decision, holding that, even though EO2 was neutral on its face with respect to religious discrimination and characterized the six affected countries as terrorist safe havens, its primary purpose was to discriminate based on religion.[7]

The Court relied heavily on President Trump's and his advisor Rudolph Giuliani's statements about Muslims—both before and after Mr. Trump was sworn in as President—in reaching its conclusion that the intent of EO2 remained discrimination against Muslims.[8] Referencing the President's Tweets

[5] In fact, the Court explicitly requested that the parties address the mootness issue in their briefs.
[6] Thirteen judges, sitting *en banc*, heard the case.
[7] Note that the lower court had granted the preliminary injunction based on both the INA's prohibition on nationality-based discrimination and the Establishment Clause of the First Amendment.
[8] E.g., President Trump's interview with NBC: "People were so upset when I used the word Muslim. Oh, you can't use the word Muslim. Remember this. And I'm okay with that, because I'm talking territory instead of Muslim. Our Constitution is great. . . . Now, we have a religious, you know, everybody wants to be protected. And that's great. And that's the wonderful part of our Constitution. I view it differently." President Trump's campaign website: "[O]ur country cannot be the victims of horrendous attacks by people that believe only in Jihad, and have no sense of reason or respect for human life." And a March 9, 2016 interview: "Islam hates us."

from 2016, the Court took Trump at his word that he would "attempt to circumvent scrutiny of the Muslim ban by formulating it in terms of nationality, rather than religion.[9]

Three judges dissented (and joined each other's dissenting opinions). They took issue with the Court's heavy reliance on the President's campaign statements, citing a line of cases holding that courts are precluded from looking behind "facially legitimate and bona fide" exercises of executive discretion in the immigration context. The dissenting judges also took issue with the Court's finding that the plaintiffs had standing to bring the case in the first place.

## The 9th Circuit: *State of Hawaii v. Trump*

On June 12, 2017, the Court of Appeals for the Ninth Circuit, acknowledging that the Immigration and Nationality Act (INA) gives the President broad authority but, declaring that it is not "a one-person show," mostly upheld the lower court's preliminary injunction on EO2, which had temporarily banned visas for travelers from six majority-Muslim countries and suspended the refugee resettlement program. In relying on the INA rather than the First Amendment to reach its decision, the 9th Circuit distinguished itself from the 4th Circuit and teed up a separate line of inquiry for the Supreme Court.

A recurring theme in the 9th Circuit's decision was the lack of any justification for the directive from the Trump administration in the form of detailed findings. Instead, the Court concluded, the President relied primarily on conclusory statements:[10] "National security is not a 'talismanic incantation' that, once invoked, can support any and all exercise of executive power." The government provided no evidence of any threat or harm to justify suspension of USRAP or any indication that existing vetting and screening procedures are inadequate.[11] Furthermore, the Court seemed to agree with an argument put forth by several amici contending that EO2 may harm national security by feeding the narrative that the United States is at war with Islam.[12]

In addition, the Court found that the majority of EO2 violates the INA's prohibition on nationality-based discrimination, making this is the first appellate decision on the travel ban executive orders that reached its holding based on the INA instead of a clause in the Constitution (Establishment Clause, Due Process).

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[9] *Int'l Refugee Assistance Project v. Trump* (4th Circuit, May 25, 2017), p. 57.

[10] Like the 4th Circuit above, the Court here cited the Department of Homeland Security (DHS) report released after EO1, a report that undermined the conclusions of EO2, finding citizenship "is unlikely to be a reliable indicator of potential terrorist activity" and that citizens of countries affected by EO1 are "[r]arely [i]mplicated in U.S.-[b]ased [t]errorism."

[11] The Court quoted from an argument made by former national security officials in an amicus brief that refugees receive the most thorough vetting of all travelers to the U.S. in a process that takes 18 to 24 months. "By the time refugees are approved for resettlement in the United States, they have been reviewed by the United Nations High Commissioner for Refugees, the National Counterterrorism Center, the Federal Bureau of Investigation, the Department of Homeland Security, the Department of Defense, the Department of State, and the U.S. intelligence community."

[12] E.g., Brief of Former National Security Officials as Amici Curiae, Dkt. No. 108.

The one piece of EO2 that the Court reinstated was the section directing the study, review, upgrade and revision of existing vetting procedures.[13]

### The 9th Circuit Appeal to EO1: *State of Washington v. Trump*

After the District Court in Seattle issued a stay of enforcement of the Order (Jan 29) there were some reported instances of CBP officials not honoring the stay. However, it appeared that no immigration officers enforced the Order after those tumultuous first few days.

The 9th Circuit Court (February 9, 2017) relied primarily on the following to find that the State of Washington was likely to succeed on the merits:

1. Violation of immigrants' ***due process rights under the 5th Amendment*** (aliens do have some constitutional rights)
2. Improper ***establishment of religion under the First Amendment*** (relying in part on statements made by President Trump and his advisors about the Order)[14]

Given the second holding, a fair question is whether it would be possible to draft a new Order that achieves essentially the same effect on non-immigrants and refugees without running afoul of the Establishment Clause once again. Because the federal courts owe great deference to the executive branch some think that the new Order has a chance of remaining in force because it no longer exempts religious minorities. As outlined above, most courts appear to be finding Establishment Clause issues with the revised Order. We'll see what happens if and when these proceedings reach the merits.

# BACKGROUND

- By some estimates the original Order initially affected up to 500,000 green card holders.
- The United States is currently home to more than 2.9 million foreign-born entrepreneurs, a group whose companies generated $65.5 billion in business income in 2014 alone.[15]
- Businesses owned by immigrants employed more than 5.9 million workers in 2007.
- In 2016, 40.2 percent of firms on the Fortune 500 list had at least one founder who either immigrated to the United States or was the child of immigrants.
- The **Immigration and Nationality Act** gives the president authority to ban any "alien or class of aliens" but it also prohibits the executive branch from discriminating against

[13] Although, as the 9th Circuit pointed out, the existing procedures seem fairly robust already.
[14] The Court reached other somewhat novel legal conclusions but those are beyond the scope of this debrief.
[15] New American Economy.

someone applying for a visa because of "race, sex, nationality, place of birth, or place of residence."

- On January 30, 2017, more than 2000 NYC tech leaders signed on to a letter, organized by **Tech:NYC**, to President Trump opposing the ban.

# FURTHER READING

1. Americans are more split on the Trump travel ban than you might think — WaPo, February 13, 2017
2. The 9th Circuit's opinion (February 9, 2017)
3. Wisconsin judge fast-tracks legal challenge (February 14, 2017)
4. Litigation Documents & Related Resources from Lawfare
5. How Diversity in Metropolitan Areas Helps Grow the Wages of Low- and High-wage Workers - New American Economy
6. Undocumented tech workers brace for Trump's next move - The Verge (February 14, 2017)
7. Despite Trump's Tough Talk on Travel Ban, Few Changes to Vetting, New York Times (June 11, 2017)
8. Poll: Courts are right in blocking Trump's travel ban, ABC News, June 20, 2017