Legal Sidebar

UPDATE: Fourth Circuit Upholds District Court's Nationwide Injunction against President Trump's Executive Order Concerning Travel from Six Predominantly Muslim Countries

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Update: Shortly after this Sidebar was published, a three-judge panel of the U.S. Court of Appeals for the Ninth Circuit issued a per curiam opinion in Hawaii v. Trump. The panel decision largely affirmed a nationwide preliminary injunction that had been issued by the U.S. District Court of Hawaii in March, which had barred implementation of two sections of Executive Order 13780, "Protecting the Nation From Foreign Terrorist Entry into the United States" (EO-2), until such time as the merits of plaintiffs' challenge to EO-2 have been adjudicated. Specifically, the injunction upheld by the Ninth Circuit bars implementation of those aspects of EO-2 which generally limit the entry of aliens from six specified countries into the United States; temporarily suspend the entry of persons coming to the United States as refugees; and reduce the FY2017 cap on refugee admissions from 110,000 to 50,000.

The injunction upheld by the Ninth Circuit panel is broader in scope than the separate, nationwide injunction upheld by the U.S. Court of Appeals for the Fourth Circuit that is discussed in this Sidebar, as the injunction upheld by the Fourth Circuit did not address those aspects of EO-2 limiting refugee admissions. The Ninth Circuit panel's reasoning also differed somewhat not only from that of the lower district court, but also from the Fourth Circuit in upholding the separate injunctions. Whereas both the Fourth Circuit and the U.S. District Court of Hawaii held that E0-2 violated the Establishment Clause, the Ninth Circuit did not reach the constitutional question and based its ruling entirely upon statutory grounds. Specifically, the Ninth Circuit concluded that EO-2 exceeded the scope of authority conferred by Section 212(f) of the Immigration and Nationality Act (INA) because, in the court's view, the President failed to make the requisite finding that the entry of persons covered by EO-2 would be "detrimental to the interests of the United States." The Ninth Circuit also concluded that EO-2 conflicted with other provisions of the INA, including those prohibiting discrimination on the basis of nationality in the issuance of immigrant visas and those governing the number of refugees who may be admitted within a fiscal year.

A more detailed discussion of the Ninth Circuit ruling is forthcoming. The original post from June 12, 2017, is below.

This sidebar is part of a two-part series on President Trump's executive order imposing certain immigration restrictions. The accompanying sidebar can be found here.

In *International Refugee Assistance Project v. Trump*, the U.S. Court of Appeals for the Fourth Circuit (Fourth Circuit), sitting en banc, affirmed a lower court's order issuing a nationwide injunction against the implementation of a provision of President Trump's March 6, 2017 Executive Order 13780 (EO-2), which limits entry into the United States of aliens from six predominantly Muslim countries. EO-2 superseded a similar executive order issued in January that several courts had enjoined from taking effect in response to legal challenge. EO-2 itself has been subjected to preliminary injunctions by two district courts (Maryland and Hawaii), but the Fourth Circuit is the first appellate court to weigh in on the constitutionality of the order. The Fourth Circuit held that EO-2 likely violated the First Amendment's Establishment Clause, which prohibits government actions that favor or disfavor one religion over another. Proclaiming that EO-2's text "speaks with vague words of national security, but in context drips with religious intolerance, animus, and discrimination," the court rejected the Executive's defense of the order as a lawful exercise of the President's authority to protect the nation from terrorism. The Fourth Circuit's decision raises important questions regarding the extent to which the federal government may bar the admission of aliens in the interests of national security, as well as the type of evidence the courts may consider in construing the underlying motivation for the government's action. And on June 1, 2017, the Department of Justice filed a petition for *certiorari* seeking review of the Fourth Circuit's decision.

The order at issue in *International Refugee Assistance Project* would, among other things, temporarily suspend the entry of nationals from Iran, Libya, Somalia, Sudan, Syria, and Yemen for a period of 90 days, subject to limitations and waivers identified elsewhere in EO-2. As with the previous executive order issued in January, the primary legal authority cited in support of EO-2 is Section 212(f) of the Immigration and Nationality Act (INA), which authorizes the President to deny entry into the United States to "any aliens or . . . class of aliens" whose entry "would be detrimental to the interests of the United States." The stated purpose of EO-2's temporary suspension of entry (along with an accompanying halt on U.S. admissions of refugees generally, which was not addressed by the Fourth Circuit's ruling, but which has been preliminarily enjoined by a federal district court in Hawaii) is to "protect the Nation from terrorist activities by foreign nationals admitted to the United States."

EO-2 has prompted a number of legal challenges. The *International Refugee Assistance Project* plaintiffs argue, among other things, that EO-2 violates Section 202(a)(1)(A) of the INA, which prohibits discrimination based on nationality in the issuance of immigrant visas, as well as the First Amendment's Establishment Clause. In March, the federal district court for Maryland found that the plaintiffs were likely to succeed on the merits of their Establishment Clause claim, and the court granted a preliminary injunction on that basis.

On May 25, 2017, in a split decision, the Fourth Circuit affirmed the district court's preliminary injunction with regard to implementation of EO-2's provision suspending entry of aliens from designated countries. The seven-judge majority opinion, written by Chief Judge Gregory, initially determined that the plaintiffs had standing to bring the lawsuit on two grounds. First, the court found that the plaintiffs had

raised a cognizable claim of injury because EO-2's allegedly anti-Muslim message caused them "feelings of disparagement and exclusion." The court also concluded that one of the plaintiffs had a separate cognizable claim because EO-2 created a real and imminent threat of "prolonged family separation" from his wife in Iran, who had a pending visa application.

Turning to the merits of the case, the majority applied the test announced by the Supreme Court in *Kleindienst v. Mandel* for reviewing the federal government's decisions to deny admission to aliens. Using this test, the circuit court proceeded to decide whether the government had demonstrated a "facially legitimate and bona fide reason" for EO-2 that was sufficient to avoid a constitutional challenge under the Establishment Clause. Notably, the majority recognized that this standard "affords significant deference" to the government, but held that such deference did not prohibit a "more searching judicial review" in the present situation because the plaintiffs plausibly alleged that EO-2 had been issued in bad faith. Accordingly, the majority determined that, although the order's stated purpose—"to protect the Nation from terrorist activities"—was a facially valid reason for suspending entry of aliens, the plaintiffs sufficiently showed that the Executive's national security justification for such action was not genuine. The majority based this determination on its assessment of several actions taken by President Trump both during and prior to taking office, including his campaign statements promising a "Muslim ban"; the issuance of his first executive order addressing aliens from specified majority-Muslim nations; and the similarity of the stated policy goals of EO-2 to those of the previous order. Therefore, having concluded that the "facially legitimate" reason given in support of EO-2 was *not* "bona fide," the majority determined that it could "look behind" EO-2's stated purpose and address its constitutionality under the Establishment Clause.

The circuit court majority found that EO-2's primary purpose was religious rather than secular, in light of President Trump's previous campaign statements and executive actions. In the majority's view, these actions explicitly evinced a "desire to exclude Muslims from the United States" and an intent to maintain the original executive order's "core mission." Despite the Executive's efforts to imbue EO-2 with a secular, national security purpose, the majority contended that the evidence showed that the order's purported rationale was "secondary" to a religious purpose. Further, the majority rejected the argument that the judicial inquiry into EO-2's purpose should be limited to official government actions and pronouncements. The court reasoned that unofficial acts and statements—including past campaign statements by President Trump—could serve as evidence of governmental purpose when there is "a substantial, specific connection" with the government action.

The majority ruled that, because a "reasonable observer would likely conclude that EO-2's primary purpose is to exclude persons from the United States on the basis of their religious beliefs," the plaintiffs were likely to succeed on the merits of their Establishment Clause claim. The majority thus held that the district court did not abuse its discretion in granting a nationwide injunction.

Four judges wrote separate concurring opinions. First, Judge Traxler concurred in the court's judgment, but declined, without explaining why, to join the majority opinion. In their concurring opinions, Judges Keenan (joined by Judge Thacker in part) and Wynn agreed with the majority that EO-2 likely violated the Establishment Clause. But Judge Keenan would have gone further to find that EO-2 failed to satisfy the "threshold requirement" necessary to be a valid exercise of the authority conferred by INA Section 212(f), because the Executive failed to show adequately that the entry of aliens covered by EO-2 "*would be*

detrimental to the interests of the United States." Judge Wynn, on the other hand, argued that EO-2 was not supported by INA Section 212(f) because that provision did not expressly or impliedly authorize the President to deny entry "solely on the basis of nationality and religion," as he claimed would occur under EO-2. In his concurring opinion, Judge Thacker found that EO-2 likely violated the Establishment Clause, but based that determination only on evidence and statements *after* President Trump's inauguration. Further, he determined that EO-2 violated INA Section 202(a)(1)(A)'s prohibition against discrimination on the basis of nationality in the issuance of immigrant visas, because EO-2's suspension of entry provisions necessarily mandated the denial of immigrant visas to covered alien applicants.

Three judges authored dissents joined by the other dissenting judges. Judge Niemeyer declared that the majority failed to "faithfully" follow the Supreme Court's decision in *Mandel* by "looking behind the face of the government's action for facts to show the alleged bad faith, rather than looking for bad faith on the face of the executive action itself." Judge Niemeyer argued that, because EO-2 indisputably had a facially neutral purpose—to protect the nation from terrorism—the majority should not have looked past the text of that order to determine its meaning. He also criticized the majority's consideration of campaign statements "to impose a new meaning on an unambiguous Executive Order," finding that this "unbounded" approach lacked any practical application and inhibited political speech. Finally, Judge Niemeyer argued that, even if the court could consider campaign statements, EO-2's secular purpose of protecting national security overwhelmingly supplanted any religious motivation that could be derived from "extrinsic statements."

In a separate dissent, Judge Shedd argued that the lower court should have given wider latitude to the President regarding his national security assessment, rather than "cast aside the President's decision as nothing more than a sham based on its own ideas concerning the wisdom of the Executive Order." In another dissenting opinion, Judge Agee argued that the plaintiffs did not have standing to bring their legal challenge because their claims of stress or stigmatization as a result of EO-2 merely established "a subjective disagreement with a government action" rather than an actual injury impacting them personally, and they had no basis to bring a claim on behalf of relatives abroad whose fears of prolonged family separation was speculative.

In sum, the Fourth Circuit's decision raises fundamental questions about the extent to which courts may review the government's decision to exclude foreign nationals from the United States. Historically, the political branches have been recognized as having broad authority over the admission of aliens, particularly in circumstances implicating national security, and the government's decision to deny admission has escaped constitutional scrutiny so long as there is a "facially legitimate and bona fide reason" for the challenged action. The Fourth Circuit's decision recognizes limitations to this practice, permitting a court to "look behind" the stated purpose of a government action in circumstances where the government has allegedly acted in "bad faith." The court's decision, moreover, prompts questions regarding the evidence courts may examine when assessing the constitutionality of a challenged government action. Should a court generally be confined to examining the text of a statute or executive order to assess its compatibility with the Establishment Clause, or can the court look at other official statements? And even if a court can, for example, properly consider the President's official statements after he takes office, should it be permitted to delve deeper and examine campaign statements, private speeches, or other unofficial acts? Finally, the Fourth Circuit's decision highlights another important

issue—does INA Section 212(f) allow the President to deny entry to aliens based solely on their nationality, and, if so, under what criteria? Ultimately, the Supreme Court may address these questions, and provide guidance as to the authority the President has under current law with respect to the admission of foreign nationals and the scope of judicial review of decisions regarding the exercise of such authority.

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