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Federal court blocks enforcement of Trump's Travel Ban 3.0

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Earlier today, the US District Court for the District of Hawaii issued a ruling granting a temporary restraining order blocking enforcement of the most recent version of President Donald Trump's travel ban order, often referred to as "Travel Ban 3.0." The new travel ban supersedes its predecessor (often called "Travel Ban 2.0"), which was the subject of legal challenges that the Supreme Court was going to hear until it decided that they were moot because of the expiration of that order, which included a 90 day travel ban excluding nearly all citizens of six Muslim-majority nations from entering the United States. The Court recently dismissed one of the two travel ban cases before it, and is likely to soon do the same with the other one.

In today's ruling, Judge Derrick Watson (the same judge who issued an earlier ruling against Travel Ban 2.0) concluded that the new travel ban exceeds the authority granted to the president by Congress, for much the same reasons as its predecessor did. Here is his summary of his conclusions:

Professional athletes mirror the federal government in this respect: they operate within a set of rules, and when one among them forsakes those rules in favor of his own, problems ensue. And so it goes with EO-3.

On June 12, 2017, the Ninth Circuit affirmed this Court's injunction of Sections 2 and 6 of Executive Order No. 13,780, 82 Fed. Reg. 13209 (Mar. 6, 2017), entitled "Protecting the Nation from Foreign Terrorist Entry into the United States" ("EO-2"). *Hawaii v. Trump*, 859 F.3d 741 (9th Cir. 2017). The Ninth Circuit did so because "the President, in issuing the Executive Order, exceeded the scope of the authority delegated to him by Congress" in 8 U.S.C. § 1182(f). *Hawaii*, 859 F.3d at 755. It further did so because EO-2 "runs afoul of other provisions of the [Immigration and Nationality Act ('INA')] specifically 8 U.S.C. § 1152,] that prohibit nationality-based discrimination." *Hawaii*, 859 F.3d at 756.

Enter EO-3. Ignoring the guidance afforded by the Ninth Circuit that at least this Court is obligated to follow, EO-3 suffers from precisely the same maladies as its predecessor: it lacks sufficient findings that the entry of more than 150 million nationals from six specified countries would be "detrimental to the interests of the United States," a precondition that the Ninth Circuit determined must be satisfied before the Executive may properly invoke Section 1182(f). *Hawaii*, 859 F.3d at 774. And EO-3 plainly discriminates based on nationality in the manner that the

Ninth Circuit has found antithetical to both Section 1152(a) and the founding principles of this Nation. *Hawaii*, 859 F.3d at 776–79.

Accordingly, based on the record before it, the Court concludes that Plaintiffs have met their burden of establishing strong likelihood of success on the merits of their statutory claims, 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.

Travel Ban 3.0, like its predecessor, forbids nearly all entry into the United States by citizens of six Muslim-majority nations (though substituting Chad for Sudan). The new order also bans entry by citizens of North Korea, and by certain Venezuelan government officials. Today’s ruling does not block this latter part of the order, because the plaintiffs (led by the State of Hawaii, which also spearheaded one of the main lawsuits against Travel Ban 2.0) did not ask for it. However, the restrictions on North Koreans and Venezuelan officials have virtually no practical significance because they would not have the effect of blocking more than a tiny number of people who could otherwise have gotten in.

Judge Watson’s ruling follows nearly the same reasoning as the earlier Ninth Circuit decision against Travel Ban 2.0 (which is still on the books, in part because the Supreme Court has not yet dismissed that case, as it has done with the companion Fourth Circuit decision against Travel Ban 2.0). But it seems clear that Judge Watson would have reached much the same conclusion even if the Ninth Circuit ruling was no longer binding precedent. As immigration law scholar Peter Margulies (who believes that Travel Ban 2.0 was legal) explains, the new order is actually more vulnerable to these statutory objections than the old one, because of its more sweeping nature.

Technically, today’s decision is just a preliminary ruling granting a restraining order against enforcement of the travel ban, until the court considers the case further and reaches a final decision on its legality. But it is clear that Judge Watson would almost certainly rule the same way in any final decision. Indeed, one of the criteria for granting the temporary restraining order is whether the plaintiffs are likely to prevail on the merits.

The Hawaii ruling focuses solely on the statutory argument against Travel Ban 3.0, which asserts that the president lacked congressional authorization for his actions. It does not address claims that the new travel ban order is unconstitutional because it is motivated by the president’s desire to discriminate against Muslims, as indicated by his numerous statements to that effect. But Travel Ban 3.0 is vulnerable on this front, as well. This issue, too, is likely to come up as the litigation over the new travel ban continues.

The inclusion of North Korea and Venezuela in the new order is pretty obviously a smokescreen for what remains an effort to target Muslims, with no genuine national security justification. As David Bier of the Cato Institute explains in an excellent post, the administration’s information-sharing rationale for the selection of countries covered by the new order makes no sense, and is internally contradictory.

Today's ruling is just the first step in what could well be a prolonged legal battle over Travel Ban 3.0. The administration will surely appeal, probably all the way up to the Supreme Court if (as seems likely) the Ninth Circuit affirms Judge Watson's decision. It would be foolish to make any firm predictions about the ultimate outcome. But, so far at least, I see no reason to change my view that the new order is open to most of the same legal objections as its predecessor, and that the legal struggle over Trump's travel bans is far from over.

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