

## Representing Muslims and Arab-Americans in Challenging Times

Date: January 26, 2018

Time: 12:45 pm – 4:30 pm

Location: University of Richmond School of Law  
19 Crenshaw Way  
Richmond, VA 23173

Speakers: Miriam Airington, Esq.  
Airington, Andraos, & Rockecharlie PLLC

Manzoor Cheema  
Southern Regional Organizer  
Project South

Erin Collins  
Assistant Professor of Law  
University of Richmond School of Law

Leslie Mehta  
Legal Director  
ACLU of Virginia

Azadeh Shahshahani  
Legal & Advocacy Director  
Project South

Jacob Tingen, Esq.  
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### Description:

The Carrico Center is proud to partner with the Legal Aid Justice Center and Project South to present this program that will highlight the legal issues currently facing Muslims and Arab-Americans in our community and our country. Experts will address topics ranging from religious discrimination to delays in the immigration process, as well as other civil and human rights concerns afflicting the Muslim and Arab-American populations in particular. Speakers include legal experts from academia, advocacy

groups, as well as the private bar. The program is free, and lunch will be provided. However, registration is required.

### Biographies of Presenters

#### **Miriam Airington, Esq. Airington, Andraos, & Rockecharlie PLLC**

Miriam Airington practices criminal defense and immigration defense. Her criminal defense practice includes all types of criminal cases in both Virginia state courts and federal courts. Her immigration practice is centered on deportation defense, including withholding of removal under the Convention Against Torture and asylum claims. Miriam is fluent in Spanish, and represents clients with related criminal and immigration issues. She also defends clients faced with civil commitment under the Sexually Violent Predator Civil Commitment Act, and has successfully defended against the Hague Convention on International Child Abduction. Miriam handles appellate and post-conviction representation, including direct appeals, writs of actual innocence, and petitions for writ of habeas corpus. She argues cases in Virginia appellate courts and federal courts, including the Fourth Circuit Court of Appeals. In addition to her private defense practice, Miriam is regularly appointed as defense counsel in courts throughout central Virginia, and is certified by the Virginia Supreme Court as a guardian ad litem to represent the interests of children. She also serves as local counsel for foreign attorneys, and consults on matters related to Virginia criminal law, local procedure, and federal immigration law.

Miriam was licensed to practice law in Virginia in 2009, and worked as a legal aid attorney prior to entering private practice in 2010. Prior to founding Airington, Andraos & Rockecharlie, she was an associate attorney at the law firm of Bowen, Champlin, Foreman & Rockecharlie. She received her undergraduate degree from George Washington University, and her law degree from the University of Miami. She is a member of the American Immigration Lawyers Association, Virginia Association of Criminal Defense Lawyers, and her local bar associations. Miriam presents at legal seminars on topics related to immigration and criminal law, and is a regular guest speaker at University of Richmond Law School.

#### **Manzoor Cheema Southern Regional Organizer Project South**

A resident of Raleigh, NC, Manzoor Cheema has been an active member of social justice movements for over 15 years. In 2004, he launched a grassroots social justice TV show, Independent Voices that ran for five years. He went on to co-found Muslims for Social Justice, an organization dedicated to pursuing Muslim liberation theology in 2013. In 2015, he launched the Movement to End Racism and Islamophobia (MERI), a network of organizations to fight racism and Islamophobia. Manzoor is the recipient of the 2014 International Human Rights Award awarded by the Human Rights Coalition of North Carolina, and the 2016 Self-Determination Award by Black Workers for Justice. Manzoor Cheema's work on social justice has been covered in the local, national, and international media.

**Erin Collins**  
**Assistant Professor of Law**  
**University of Richmond School of Law**

Erin R. Collins joined the Richmond Law faculty in 2016, previously serving as the Executive Director of the Clemency Resource Center at the New York University School of Law. She is a former acting assistant professor in the NYU Lawyering Program and previously worked for five years as a public defense attorney at Appellate Advocates in New York City. She has written and presented extensively in the areas of criminal law, evidentiary rules, and both's intersection with immigration practices and procedures. Professor Collins holds a J.D. from NYU Law and a B.A. from Wesleyan University.

**Leslie Mehta**  
**Legal Director**  
**ACLU of Virginia**

Leslie oversees the Legal department, including management of intakes and all casework for the ACLU of Virginia. A North Carolina native, she lived in the San Francisco Bay Area for nearly a decade before joining the ACLU of Virginia. She has more than a decade of litigation, civil rights and public advocacy experience, devoting her career to advocacy for the disenfranchised. From successfully lobbying state senators to pass consumer protection laws, to advocating for a class of consumers whose privacy rights were breached, to advocating on behalf of prisoners' rights and litigating on behalf of victims of police brutality, she has spent her career focused on social justice civil liberties, and civil rights through litigation, legislation and lobbying. Following a successful career in the private sector, Leslie joined a San Francisco civil and prisoners' rights law firm, where she handled prisoner wrongful death actions against private prisons, harassment cases, and police brutality matters. Through impact litigation and working with community leaders, she worked to secure voting rights for underrepresented groups. She holds a B.A. in English Literature from the University of North Carolina at Chapel Hill and a J.D. from the Howard University School of Law.

**Azadeh Shahshahani**  
**Legal & Advocacy Director**  
**Project South**

Azadeh has worked for a number of years in the Southeast to protect the human rights of immigrants and Muslim, Middle Eastern, and South Asian communities. She previously served as National Security/Immigrants' Rights Project Director with the ACLU of Georgia. Azadeh is a past president of the National Lawyers Guild. Through the NLG, Azadeh has participated in international delegations, including to post-revolutionary Tunisia and Egypt, a delegation focused on the situation of Palestinian political prisoners, and election monitoring delegations to Venezuela and Honduras. She has also served as a member of the jury in people's tribunals on Mexico, the Philippines, and Brazil. Azadeh also serves as Chair of Georgia Detention Watch, Co-chair of the US Human Rights Network Working Group on National Security, and on the Advisory Council of the American Association of Jurists. She is the author or editor of several human rights reports, including a 2017 report titled "Imprisoned Justice: Inside Two Georgia Immigrant Detention Centers," as well as law review articles and book chapters focused on racial profiling, immigrants' rights, and surveillance of Muslim-Americans. Her work has also appeared in the Guardian, the Nation, MSNBC, Aljazeera, the Atlanta Journal Constitution, and the Huffington Post, among others. Azadeh received her JD from the University of Michigan Law School where she was

Article Editor for The Michigan Journal of International Law. She also has a Master's in Modern Middle Eastern and North African Studies from the University of Michigan. Azadeh is the recipient of the 2016 Georgia WAND Peace and Justice Award, American Immigration Lawyers Association 2012 Advocacy Award, and the University of Georgia Law School 2009 Equal Justice Foundation Public Interest Practitioner Award. She has been recognized as one of 100 Influential Georgia Muslims and as an attorney who is "On the Rise" by the Fulton County Daily Report. In 2016, Azadeh was chosen by the Mundo Hispanico Newspaper as an Outstanding Person of the Year for her activism on behalf of the Latino community and defending the rights of immigrants in Georgia. In 2017, she was chosen by Georgia Trend Magazine as one of the 40 under 40 notable Georgians.

**Jacob Tingen, Esq.**  
**Tingen & Williams PLLC**

Jacob graduated from the University of Richmond School of Law and was accepted to the Virginia Bar in 2012. Shortly thereafter Jacob published "How to Register Your Federal Trademark," an Amazon.com ebook bestseller in Trademark and Business law. This success allowed Jacob to start his own law practice helping business and trademark owners strengthen their brand online. In addition, Jacob regularly leverages his Spanish language skills to provide pro bono service to the local Hispanic community. An opportunity in 2013 allowed Jacob to take over the client load of another attorney, and make immigration law the largest area of practice at Tingen & Williams. Jacob has personally assisted thousands of clients with immigration consultations, deportation defense, DACA, U visas, permanent residency (green cards), work visas, EB-5 visas and Regional Center applications, and much more. Jacob Tingen is the Managing Partner of Tingen & Williams.

## What to do When Public Institutions Engage in Religious Discrimination?

- I. Unfortunately, this topic arises in a lot of different ways:
- a. **General trend:** Civil rights complaints filed with Council on American Islamic Relations (CAIR) rose from 366 in 2000 to 2,467 in 2006, an increase of 674%.<sup>1</sup>
  - b. Contexts in which these appear
    1. Limitations on Muslim garb in athletic facilities, swimming pools
      - a. For example, in 2005, the ACLU-Nebraska settled a 14<sup>th</sup> Amendment suit on behalf of a Muslim woman who wasn't allowed to enter a public swimming pool wearing religious clothing: <https://www.aclu.org/news/city-omaha-and-aclu-nebraska-announce-settlement-lawsuit-over-muslim-woman-barred-public-pool>
    2. Government agencies
      - a. Denial of permits to build a mosque. On February 13, 2017, along with the national ACLU, we filed an amicus brief in support of DOJ in which, after receiving anti-Muslim complaints from the public, Culpeper County had refused to grant the Islamic Center of Culpeper a permit necessary to build and operate a mosque: <https://acluva.org/en/news/virginia-county-denied-necessary-permit-build-mosque-and-it-doesnt-pass-smell-test>
      - b. Facts  
After a five-year search, the Islamic Center of Culpeper ("ICC") entered into a purchase contract for land in Culpeper County to build a mosque. That land was properly zoned for such religious uses as a matter of right. There is currently no other land in the County that is available for purchase and suitably located for ICC's worship community that ICC can afford.

However, there was an outcry among residents who inundated officials with opposition and emails.

All the other permit applications were essentially automatically approved while this was not. When the permit application was initially set for hearing, the board received an email from a prominent civil leader stating, "I understand the Islamic Center of Culpeper

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<sup>1</sup> Obviously, anti-Muslim discrimination occurs outside of the government context as well. Last year, a woman was fired from a dental clinic when her boss allegedly said her hijab would not be in keeping with a "neutral environment." <http://www.independent.co.uk/news/world/americas/woman-fired-hijab-virginia-fairfax-dentist-cair-anti-muslim-discrimination-a7172531.html>; see also <https://www.nytimes.com/2016/09/18/us/politics/hate-crimes-american-muslims-rise.html> <https://www.nytimes.com/2016/09/18/us/politics/hate-crimes-american-muslims-rise.html>.

wishes to rehabilitate the existing home and use it on a weekly basis as a place of prayer. Hmm...” and asked that the board “please pull this item from the March meeting agenda and give citizens a detailed briefing pronto.” At the meeting, the County attorney insisted for the first time ever that she needed to review the application prior to the board’s consideration, prompting the board to postpone its decision.

The County then asked ICC to complete a further application.

The County administrator and board chairwoman assured ICC’s director at that time that the pump and haul applications were “routine matters” and that his application would be approved – but it was anything but routine.

Before the second meeting on ICC’s application, board members received number emails and phone calls “that disparaged Muslims and made references to terrorism and the 9/11 attacks.”

The board chairwoman and County administrator spoke openly to each other about how ICC’s application was subject to greater scrutiny than all previous requests.

At that meeting, the vote to deny the application “received cheers from the audience.”

So the County denied the “pump and haul” permit that would be required to remove sewage from the site, even though it had approved every other pump and haul permit for commercial or religious use since 1992 – 25 in total, including nine for churches.

- c. Background and Legal Claims
  - i. Congress passed the Religious Land Use and Institutionalized Persons Act (“RLUIPA”) in 2000 in response to widespread evidence of discriminatory practices by local authorities against religious organizations seeking to establish places of worship in their communities. Lawmakers were concerned that these intolerant actions – often occurring in the application of discretionary local land use regulations – prevented religious groups from fully exercising their constitutional right to

assemble and worship. RLUIPA was enacted to give heightened protection to these fundamental rights by prohibiting governments from discriminating against or placing a substantial burden on religious organizations when imposing or implementing local land use regulations.

- ii. Section 2000cc(b)(2) of RLUIPA provides that “[n]o government shall impose or implement a land use regulation that discriminates against any assembly or institution on the basis of religion or religious denomination.” 42 U.S.C. § 2000cc(b)(2). A determination of whether a government’s actions constitute discrimination under RLUIPA “requires a ‘sensitive inquiry into such circumstantial and direct evidence of intent as may be available.’” In making this determination, courts should consider a number of factors including: the series of events leading up to a land use decision, the context in which the decision was made, whether the decision or decisionmaking process departed from established norms, statements made by the decisionmaking body and community members, reports issued by the decisionmaking body, whether a discriminatory impact was foreseeable, and whether less discriminatory avenues were available.
- iii. Substantial burden on ICC’s religious exercise violating RLUIPA, 42 U.S.C. § 2000cc(a)(1) RLUIPA prohibits not only overt religious discrimination but also land use and zoning actions that “impose[] a substantial burden on the religious exercise of a person” unless the imposition of that burden “is in furtherance of a compelling governmental interest” and “is the least restrictive means of furthering that compelling governmental interest.” Part of RLUIPA’s function is to protect a person’s “reasonable expectation to use real property for religious purposes.”

**d. QUESTIONS CONCERNING CULPEPER MATTER**

- i. What types of factual factors should be considered in determining whether the government’s actions constitute discrimination under RLUIPA?

- ii. What facts support a RLUIPA claim under the substantial burden provision?
3. Public accommodations
  - a. For example, security guard at Louisiana shopping mall in 2008 told a 54-year-old she had to remove headscarf; kicked her out of the mall when she failed to do so:  
<http://www.cair.com/press-center/cair-in-the-news/5446-cair-muslim-woman-forced-to-leave-mall-over-headscarf.html>
4. Prisons
  - a. For example, in 2013 the ACLU of Michigan successfully represented Muslim and Seventh-Day Adventist prisoners in a religious class action challenging two Michigan Department of Corrections policies, including one which accommodated Jewish inmates by providing kosher meals while denying Muslim inmates halal meals:  
<http://www.aclumich.org/article/aclu-michigan-corrections-settles-religious-freedom-lawsuit>
5. Public Schools
  - a. General trend (not just in the school context): CAIR reported that, in 2006, there were 154 cases of discrimination or harassment in which a Muslim woman's headcovering was identified as the factor that triggered the incident.
  - b. Bullying/Harassment/Other Anti-Muslim Discrimination
    - i. September 2015: Muslim high school student in Texas arrested for bringing a homemade clock to class: <http://www.cnn.com/2015/09/17/us/texas-student-ahmed-muslim-clock-bomb/index.html>
    - ii. December 2015: middle-school teacher in Gwinnett County, Georgia, asked a Muslim student if she was carrying a bomb in her backpack:  
<http://www.ajc.com/lifestyles/muslim-student-upset-after-gwinnett-teacher-asks-she-has-bomb/oNZiqN7Qh9xaWGMnRZNzjM/>
    - iii. In March 2015 in Florida, a high school French teacher called a Muslim student a “rag-head Taliban” last year:  
<http://www.miamiherald.com/news/local/community/broward/article11924603.html>
    - iv. The ACLU of Virginia wrote a letter to the Chesterfield County Public Schools after a report that a student who was fasting during the month of

Ramadan was forced to run in her physical education class with no consideration for the special needs based on her religious practice. In response to our letter, the school completed an investigation:

<https://acluva.org/en/press-releases/aclu-va-chesterfield-county-public-schools-forcing-fasting-student-run-violation>

- v. The ACLU of Virginia wrote a letter to Prince William County Public Schools after hearing reports that two students were denied the right to wear their hijab at school:

<https://acluva.org/en/press-releases/aclu-va-reminds-prince-william-county-public-schools-students-have-right-wear-hijab>

c. General Reference to Islam in Classroom

- i. Uproar in many places across the country whenever public schools mention Islam, for example, in a comparative religion class, without instantly denigrating the entire faith.
- ii. In a sad irony, many of the loudest and angriest protests are coming from folks who have been pushing the teaching of the Bible in public schools.

d. What are options in the school setting?

- i. Title VI of Civil Rights Act
  - 1. Prohibits discrimination in public schools on the basis of race and national origin, but not religion.
  - 2. Religion may be included in complaint when it is related to someone's actual or perceived shared ancestry or ethnic characteristics.
- ii. Department of Education
  - 1. In September 2016, the Department of Education Office of Civil Rights announced that it would begin tracking religious bullying and harassment of students.
  - 2. What will this look like in a Department of Education led by Betsy DeVos?

II. What are options for seeking redress for discrimination?

a. Constitutional Protections

i. Establishment Clause

- 1. Text: prevents government from making any law "respecting an establishment of religion"

2. Effect: prevents governmental favoritism of certain religions over others (e.g. schools cannot mistreat students based on their faith)
- ii. Free Exercise Clause
  1. Text: government shall not “prevent the free exercise” of religion
  2. Employment Division v. Smith: Free Exercise Clause does not allow a person to use a religious motivation as a reason not to obey laws of general applicability.
    - a. Upheld denial of unemployment benefits to Native American fired because they ingested peyote, which all agreed was part of his religious ceremonies.
    - b. Makes it harder to challenge government action, but targeted action against one faith might qualify.
- iii. State Constitutional Protections
  1. Virginia Code Section 2.2-3900 (known as the Virginia Human Rights Act):

Safeguard all individuals within the Commonwealth from unlawful discrimination because of race, color, religion, national origin, sex, pregnancy, childbirth or related medical conditions, age, marital status, or disability, in places of public accommodation, including educational institutions and in real estate transactions; in employment; preserve the public safety, health and general welfare; and further the interests, rights and privileges of individuals within the Commonwealth; and

Protect citizens of the Commonwealth against unfounded charges of unlawful discrimination.

2. There is no enforcement mechanism. *See* Virginia Code Section 2.2-3903 (causes of action not created).

# When the American Dream is Denied to Some

Challenging Naturalization and Green Card Delays



# Are There Discriminatory Policies?

## Visa Waiver Program (VWP) as an example

Since 2015, the Visa Waiver Program treats differently individuals who have traveled to or been present in Iraq, Syria, Iran, Sudan, Libya, Somalia, or Yemen after March 1, 2011; and nationals of VWP countries who are also nationals of Iraq, Syria, Iran, or Sudan. These are all majority Muslim countries.

<https://www.cbp.gov/travel/international-visitors/visa-waiver-program/visa-waiver-program-improvement-and-terrorist-travel-prevention-act-faq>



# Green Card & Naturalization Process

## PETITION



A family member / employer petitions for you as the immigrant beneficiary.

## APPLICATION



You apply for the green card either via a consulate or a USCIS service center.

## INTERVIEW



You attend a green card interview. The green card is typically mailed afterwards.

## 3-5 YEARS



You must meet the residence requirement prior to applying for citizenship.

## APPLICATION



You apply for citizenship. Study English and Civics.

## OATH CEREMONY



Swear to defend the Constitution... become a citizen!

**UNITED STATES OF AMERICA** **PERMANENT RESIDENT**

**SPECIMEN TEST V 01 JAN 1920**

**Surname**  
**SPECIMEN**

**Given Name**  
**TEST V**

**USCIS#**  
**000-000-001**

**Category**  
**RE8**

**Country of Birth**  
**Utopia**

**Date of Birth**  
**01 JAN 1920**

**Sex**  
**F**

**Card Expires:** **08/21/07**

**Resident Since:** **08/21/07**

*Test V. Specimen*

# Inadmissibility: INA 212(a)

Classes of Aliens Ineligible for Visas or Admission

1. Health-related grounds
2. Criminal and related grounds
3. Security and related grounds
4. Public Charge
5. Labor Certification/Employment violations
6. Illegal entrants and immigration violators
7. Documentation requirement violators
8. US Military Evaders, Draft Dodgers
9. Previously Removed
10. Miscellaneous (polygamists, international child abductors, unlawful voters)

# Terrorism-Related Inadmissibility Grounds

More: <https://www.uscis.gov/laws/terrorism-related-inadmissability-grounds/terrorism-related-inadmissability-grounds-trig>

Congress has determined that some individuals should not be allowed entry into the United States. The reasons individuals are denied admission vary and can be found in INA section 212, codified as Title 8 of the U.S. Code, section 1182.

Terrorism-related inadmissibility grounds (TRIG), exclude persons who have participated in various kinds of activity, including activity that is generally illegal and/or violent. The grounds for inadmissibility include, but are not limited to, individuals who:

- Engaged in ‘terrorist activity;’”
- Are engaged or are likely to engage in terrorist activity after entry;
- Incited terrorist activity with intent to cause serious bodily harm or death;
- Are representatives or current members of a terrorist organization;
- Endorsed or espoused terrorist activity;

- Received military-type training from or on behalf of a terrorist organization; or
- Are spouses or children of anyone who has engaged in terrorist activity within the last five years (with certain exceptions).

The term terrorist activity covers various actions commonly associated with terrorism such as kidnapping, assassination, hijacking, nuclear, biological, or chemical agents, the use of firearms or other dangerous devices etc.

The INA defines terrorist activity quite expansively such that the term can apply to persons and actions not commonly thought of as terrorists and to actions not commonly thought of as terrorism. Significantly, there is no exception under the law for “freedom fighters,” so most rebel groups would be considered to be engaging in terrorist activity even if fighting against an authoritarian regime.

# CARRP

Controlled Application Review and Resolution Program

More: <https://www.uscis.gov/refugeescreening>

During the process of adjudicating any USCIS benefit, if any national security concerns are raised, either based on security and background checks or personal interviews or testimony, USCIS conducts an additional review through the internal CARRP process. CARRP is an internal USCIS process that a case can go through to ensure that immigration benefits or services are not granted to individuals who pose a threat to national security and/or public safety, or who seek to defraud our immigration system.

# CARRP

Unfair impacts of this program

More: <https://www.youtube.com/watch?v=Nqfzc6DW9EM>

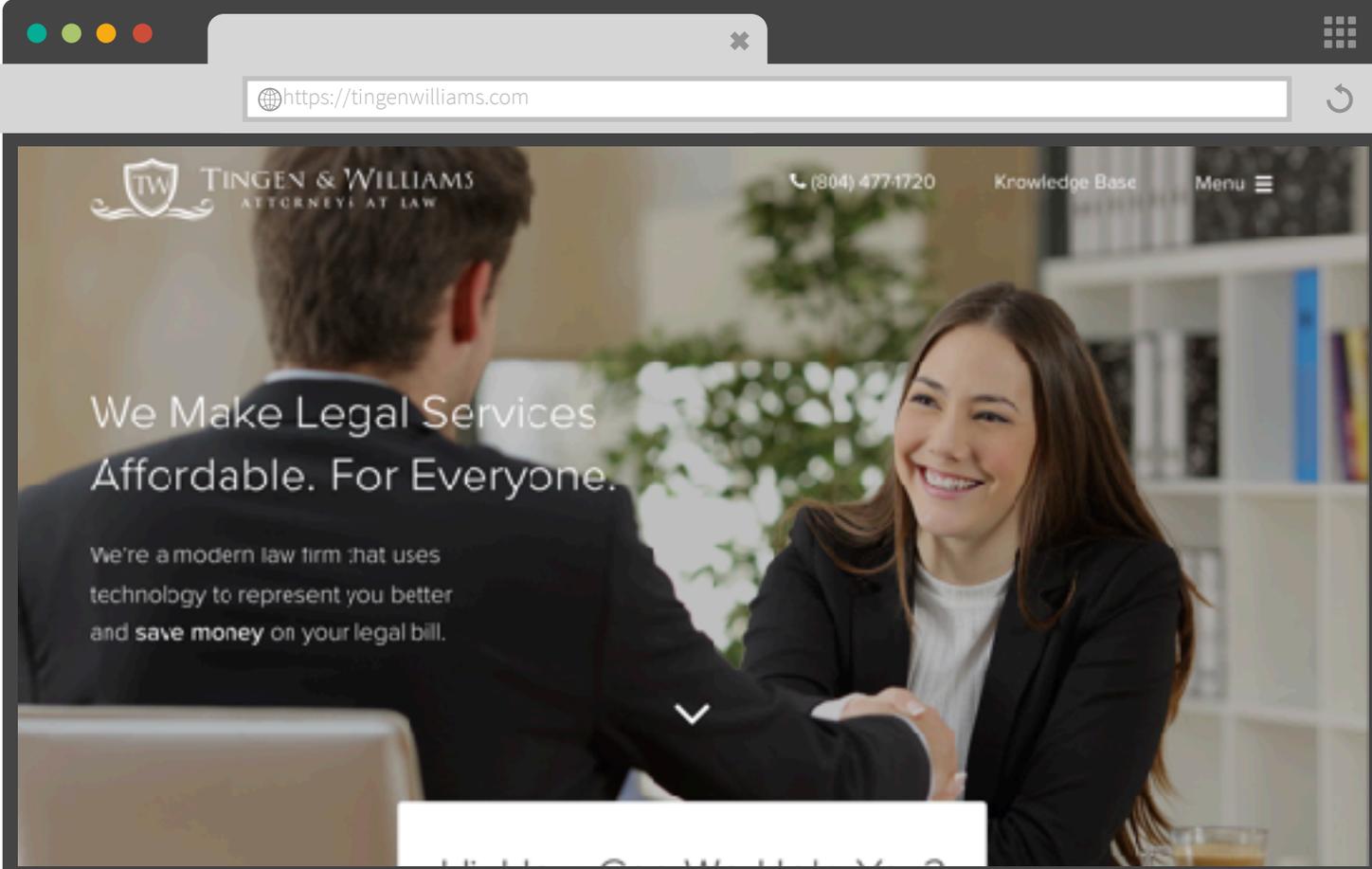
# Discussion & Questions

## Jacob Tingen

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# **Executive Orders 13769, 13780 (Muslim Ban) and Current Litigation**

Azadeh Shahshahani

Legal and Advocacy Director, Project South

## **I. Introduction:**

- a. Executive Order 13769 (EO-1) passed on January 27, 2017
- b. Executive Order 13780 (EO-2) passed on March 6, 2017

## **II. Executive Order (EO-1):**

### **a. Main Aspects:**

- i. Executive Order 13769 (EO-1): Protecting the Nation from Foreign Terrorist Entry into the United States
  1. EO-1 suspended entry into US from 7 countries identified as heightened “terrorism risk” (§2)
    - a. Iran, Iraq, Libya, Somalia, Sudan, Syria. And Yemen
    - b. Suspension of entry for 90 days
- ii. Executive officials would review visa adjudication practices during those 90 days
- iii. Stated purpose of EO-1 was to “protect the American people from terrorist attack by foreign nationals admitted to the US” requiring government to be “vigilant during the visa issuance process” (EO-1 preamble, §1)
- iv. EO-1 also suspended Refugee Admission Program for 120 days (§6a)
  1. And put cap on number of refugees allowed to enter in 2017 fiscal year (§6b)
  2. Cap is 50,000 people
- v. Waivers
  1. No explicit waiver option in EO-1; however, in initial days (end of January), “waivers” were granted for over 1,000 LPRs, 75 persons with immigrant and nonimmigrant visas, and 872 refugees
  2. Exemptions allowed on “case-by-case” basis when “in the national interest” §3(g)
- vi. Refugee provisions:
  1. Capped refugee entry for fiscal 2017 at 50,000
    - a. Because it would be “detrimental to the interest of the US” §5(d)
  2. Immediately suspended USRAP (US Refugee Admission Program) for 120 days and instituted an indefinite ban on Syrian refugees
  3. Provided exemption/ prioritized refugee claims for religious minorities among the 7 countries (on basis of religious persecution) §5(b)

### **b. Implementation:**

- i. Chaotic
- ii. Trump signed order without letting key officials review
  1. No traditional interagency review
- iii. Dept. of Homeland Security, Border Protection, etc. struggled to interpret order
  1. Confusion about application to lawful permanent residents
  2. DHS and White House contradicting each other on whether lawful permanent residents were included

- a. Initially, White House said LPRs would go through case-by-case waiver process
    - 3. Ultimately, White House issued statement saying LPRs not included, though some individuals had spent long hours in detention
    - 4. Also confusion about dual citizens
  - iv. Protests across country
- III. **Litigation Surrounding EO-1:**
  - a. W.D. of Washington Decision *Washington v. Trump* (Feb. 3, 2017)
    - i. Background:
      - 1. Washington and Minnesota challenged EO-1, arguing that it violated 1<sup>st</sup>, 5<sup>th</sup>, 10<sup>th</sup> Amendments, INA, RFRA, and the APA
    - ii. WD Washington Court granted Temporary Restraining Order and denied motion for stay
      - 1. Court noted that each of 7 countries has predominantly Muslim population (Iraq, Iran, and Yemen are more than 99% Muslim)
      - 2. Problems with “case-by-case” exemptions when “in the national interest” b/c too vague
    - iii. Federal government appealed
  - b. Court of Appeals, 9<sup>th</sup> Cir. (Feb. 9, 2017)
    - i. Holding:
      - 1. Constitutionality of EO-1 was reviewable
      - 2. Federal government failed to show likelihood of success that EO-1 did not violate non-citizens’ due process rights
      - 3. Federal government failed to show necessity of emergency stay
- IV. **Second Executive Order- 13780 (EO-2):**
  - a. Main Aspects/ Changes from EO-1:
    - i. Countries identified as heightened risk changes from 7 to 6
      - 1. Iraq no longer on list
        - a. Because of Iraq’s “close cooperative relationship” with US and recent efforts to enhance travel documentation procedures
      - 2. Gives further “explanation” for ban. “Rationale” is that ban:
        - a. Ensures dangerous individuals don’t enter while executive is establishing adequate standards
        - b. Reduces “investigative burdens” on agencies
        - c. Says conditions in “Designated Countries” present heightened threats because each country is a “state sponsor of terrorism, has been significantly compromised by terrorist organizations, or contains active conflict zones” §1(d)
          - i. Thus governments are less willing/ able to provide necessary vetting information
        - d. Expressly states that EO-1 was motivated by religious animus
      - 3. Removes exemption for religious minorities in banned countries
      - 4. Official Waiver Option

- a. Said EO-2 would only apply if individual was outside the US on effective date of EO-2, did not have valid visa on date of promulgation of EO-1 (Jan. 27), and did not have valid visa on effective date of EO-2
- b. Further exempted:
  - i. LPRs
  - ii. Anyone admitted into US after EO-2s effective date
  - iii. Anyone with a document other than a visa permitting travel (advance parole doc) valid on or after EO-2 effective date
  - iv. Any dual national traveling on passport from non-designated country
  - v. Anyone traveling on diplomatic, NATO, C-2, G-1,2,3,4 visas or to the UN
  - vi. Anyone granted asylum, admitted as refugee, granted withholding of removal, advance parole, or protection under the Convention Against Torture
- 5. In addition to exemptions, EO-2 provides consular officer or CBP official with authority to grant discretionary waivers on case-by-case basis, under circumstances such as:
  - a. One previously admitted for work, study, other long-term activity who seeks to resume that activity and would be impaired by denial
  - b. One seeking to enter for significant business obligations which would be impaired
  - c. Infant, young child needing urgent medical care
  - d. One who can prove valuable service to the US government
  - e. One traveling for purposes related to international organizations
  - f. One traveling as a US government-sponsored exchange visitor
- ii. EO-2 directs Secretary of Homeland Security to conduct “global review” to determine whether foreign governments provide adequate info about nationals applying for US Visas
  - 1. EO-2 directs Secretary to report findings to President w/in 20 days of order effective date
  - 2. Deficient nations have 50 days to correct practices
- iii. EO-2 suspends decisions on refugee applications into US for 120 days following effective date
  - 1. During 120 days, Sec of State to review USRAP procedures and implement new procedures
- iv. EO-2: Caps entry of refugees in 2017 to 50k
- v. EO-2: Establishes effective date as 3/16/17

V. **District Court Litigation of EO-2:**

- a. District of Maryland (16-1436): *Trump v. IRAP*
  - i. Main facts of case:
    - 1. Plaintiffs, 6 individuals and 3 organizations, all assert religious discrimination

- a. All individuals are Muslim and organizations represent Muslim clients/ members
    - b. Individuals argue harm in being separated from loved ones
    - c. Organizations (IRAP, HIAS, Inc., Middle East Studies Association) argue harm in lost revenue necessitating staff reductions and harm to clients generally
  - ii. District Court decision: Respondents likely to succeed in Constitutional Establishment Clause Claim b/c targeting 6 specific countries is religious discrimination
    - 1. Applies nationwide
    - 2. Cites Trump's public statements
    - 3. Cites affidavit from former national security, foreign policy and intelligence officials stating that there is no national security purpose for such a ban and no precedent for suspending admission for such a broad class of people
    - 4. For Establishment claim, no need to show economic, tangible harms
- b. Hawaii: (16-1540): *Trump v. Hawaii*
  - i. Main facts of case:
    - 1. Hawaii filed suit to protect its residents, its employers, its educational institutions and its sovereignty
    - 2. Dr. Elshikh, the Imam of the Muslim Association of Hawaii, joined b/c the Order inflicts "grave injury on Muslims in Hawaii, including Dr. Elshikh, his family, and members of his Mosque"
      - a. Dr. Elshikh's wife filed I-130 on behalf of her mother, a Syrian national who wished to enter US
  - ii. Broader than MD decision
    - 1. Also enjoins §6a and §6b and provisions of §§2 and 6 re executive review
      - a. §6a- suspension of refugee admission
      - b. §6b- refugee admission cap for 2017 at 50k
  - iii. Court issues preliminary injunction on all of §2 and §6 citing Establishment Clause

VI. **Appellate Litigation of EO-2:**

- a. Government appealed both MD and HI decisions
- b. 4<sup>th</sup> Circuit: (*IRAP*)
  - i. May 25, 2017 decision largely upholds lower court's decision enjoining enforcement of EO-2
    - 1. Said primary purpose of §2c is religious discrimination, violating First Amendment Est. Clause
      - a. Looking at Trump's campaign and public statements, a reasonable observer can conclude that EO-2 was motivated by a desire to exclude Muslims rather than national security concerns
      - b. Court cites statements Trump posted on his campaign website ("Statement on Preventing Muslim Immigration") and many other public statements since

- i. Which called for total and complete shutdown of Muslims entering US
    - ii. June 1, 2017: Government files petition for cert to review 4<sup>th</sup> Circuit decision and also files application seeking stay of both injunctions
  - c. 9<sup>th</sup> Circuit: (*Hawaii*)
    - i. Dr. Elshikh has standing (mother-in-law affected by EO-2, causing prolonged separation from him and his family)
    - ii. Hawaii has standing
      - 1. Harm to University of Hawaii (faculty, staff, and students from 6 countries) in preventing ability to recruit and enroll individuals from 6 countries, hampering diversity of students and faculty; additionally, University won't get their tuition
      - 2. Also harm to Hawaii in exercising sovereign power to enforce laws and policies
        - a. Ex: resettlement of refugees through Hawaii' Office of Community Services
    - iii. June 12, 2017 decision upholds lower court's decision to enjoin enforcement BUT different rationale than 4<sup>th</sup> Circuit
      - 1. Ruled that portions of EO-2 exceeded Presidential authority under INA
        - a. INA gives President broad powers to control entry of immigrants but "immigration, even for the President, is not a "one-person show."
          - i. In §212(f) of INA, Congress grants President authority to suspend entry of immigrants, or class of immigrants, or impose restrictions on entry *when he finds that entry would be detrimental to the interests of the US*
        - b. §2c, §6a, and §6b all exceed presidential authority under INA
          - i. actions that exceeded authority: suspending 180 million nationals from 6 countries and reducing cap on refugees, and suspending entry of all refugees
          - ii. In acting, President did not meet essential precondition of showing that entry of "these classes of people" would be "detrimental to the interests of the US" → no evidence/ rationale to support this contention
            - 1. EO-2 doesn't tie these nationals in any way to terrorist organizations
            - 2. EO-2 makes no finding that nationality alone renders entry of broad class a heightened security risk
            - 3. EO-2's discussion of country conditions is not a valid rationale
            - 4. EO-2 does not make finding that current screening processes are inadequate

5. EO-2 does not reveal threat or harm to warrant suspension of USRAP for 120 days
6. EO-2 does not provide any evidence that current refugee vetting processes are inadequate
- c. And runs afoul of INA provision that prohibits nationality-based discrimination (§1152(a)(1)(A))
  - i. EO-2 is an effective ban on issuance of immigrant visas for 6 listed countries
  - ii. Government's argument that barring entry is not the same as barring issuance of visas ignores reality
  - iii. Presidential power cannot circumvent this section
    1. §1152(a)(1)(A)'s non-discrimination mandate "cabins Presidential authority" and under §1182(f) is reinforced by canons of statutory construction
    2. Court "need not address Establishment Clause claim to resolve this appeal" (Constitutional avoidance doctrine)
    3. However, less broad than 4<sup>th</sup> Circuit in that does not bar government from conducting internal executive review
- iv. Similar to 4<sup>th</sup> Circuit, injunctions should bar enforcement across the board
- v. Court rejected government's assertion of consular nonreviewability doctrine
  1. because Plaintiffs do not seek to review an individual officer's decision to grant or deny visa
  2. Instead, Plaintiffs challenge the President's promulgation of sweeping immigration policy
- d. IRAP case also presents new issue:
  1. IRAP argues 90-day suspension of entry for 6 listed countries should expire on June 14 (because 90 days after effective date); even if never enforced, time still expired, and issue is moot
  2. In response, Trump issues memo to executive branch declaring new effective date as date injunctions are lifted (*Presidential Memorandum for the Secretary of State, Attorney General, Secretary of Homeland Security, and Director of National Intelligence*)
    - a. Memo says it amends executive order
    - b. Basically, an attempt to fix mootness problem

**VII. Supreme Court of the United States:**

- a. Grants Certiorari on June 26, 2017; combines 4<sup>th</sup> Circuit and 9<sup>th</sup> Circuit cases AND grants stay applications in part
- b. Issues:
  - i. IRAP Case:
    1. Does Respondent Doe lack standing to challenge 2c?
    2. Does Respondents' Establishment Clause claim fail on the merits?
  - ii. Hawaii Case:
    1. Does Respondent Elshikh lack standing?

2. Does EO-2 violate provisions of INA?
- c. Arguments for Government:
  - i. *IRAP*:
    1. Doe lacks standing b/c wife received immigration visa on June 24
    2. EO-2 has a facially legitimate purpose of protecting national security, and Court should not further inquire into purpose by evaluating Presidential media statements
    3. Injunction is overbroad
  - ii. *Hawaii*:
    1. Injunction is overbroad
    2. Statutory provision of INA allows President to suspend all, or any class of, non-citizens when he finds that their entry would be “detrimental to the interests of the US”
    3. 90 day ban is necessary to prevent dangerous individuals from entering US while procedures are being updated
- d. Arguments for Respondents:
  - i. *IRAP*:
    1. Doe still has standing
    2. Purpose of EO-2 is religious discrimination and thus is violation of Establishment Clause of 1<sup>st</sup> Am of Constitution
  - ii. *Hawaii*:
    1. EO-2 does not comply with certain provisions of INA (Immigration and Nationality Act)
    2. No evidence that entry of nationals from 6 countries listed would be “detrimental to the interests of US”
- e. Holding of SCOTUS:
  - i. Procedural:
    1. Grants petitions for cert
    2. Consolidates cases
    3. To be heard first session in October (Oct. 10)
    4. New issue to be addressed:
      - a. Whether the challenges to 2c became moot on June 14, 2017
  - ii. Preliminary Injunctions:
    1. SCOTUS grants the government application to stay injunctions to the extent that the injunctions prevent the enforcement of §2c against foreign nationals WHO LACK ANY BONA FIDE RELATIONSHIP WITH A PERSON OR ENTITY IN THE US
    2. Holding leaves injunction in place for respondents AND others similarly situated (who have bona fide relationship with person or entity in US)
    3. SCOTUS applies same distinction for §6a and §6b with respect to refugee admission and cap (bona fide relationship)
      - a. If refugee has bona fide relationship with individual or entity in US, injunction applies
      - b. 50k cap can be exceeded for individuals who have established bona fide relationship
- f. Rationale for holding:

- i. In deciding on Preliminary Injunction issues, the Court's role is not to conclusively determine the rights of parties but to balance equities as litigation moves forward
  - 1. Court must find remedy tailored to balance interests
- ii. Court must balance interests of respondents, applicant, and public at large
- iii. In conducting this balancing of interests, SCOTUS says there are big differences between foreign nationals with ties/ relationships and those who have no ties → must balance differently
  - 1. Preventing entry of those with ties burdens and harms citizens already here
  - 2. Preventing entry of those with no ties does not harm any citizens
    - a. Thus executive authority at peak in this situation
- g. Concurring in Part and Dissenting in Part- Thomas, Alito, Gorsuch
  - i. Injunction should be stayed in full
  - ii. Balance of equities favors the government b/c of national security concerns
  - iii. Court's remedy is unworkable
    - 1. "bona-fide" requirement will be lacking clarity
- h. Going forward (from SCOTUS decision):
  - i. What constitutes a bona fide relationship?
    - 1. Families:
      - a. "close familial relationship"
      - b. live or stay with
    - 2. Entities:
      - a. Relationship must be "formal, documented, and formed in the ordinary course"
      - b. Not to skirt EO-2
      - c. Examples:
        - i. students admitted to University of Hawaii have formal relationship
        - ii. worker who has accepted offer of employment from American company
        - iii. a lecturer invited to address an American audience
      - d. Examples not covered:
        - i. nonprofits seeking out foreign nationals and adding them as clients NOT bona fide relationship

#### **VIII. Interpretation of "bona-fide" relationship since decision:**

- i. Since SCOTUS ruling, disputes have arisen over how to interpret what qualified as a "bona fide" relationship (and thus, who is exempt from the ban)
  - 1. Government began enforcing non-enjoined portions of EO-2 on June 29, 2017 (after SCOTUS ruling)
  - 2. Family relationships:
    - a. Trump Administration published guidance to agencies saying that "bona fide" relationship exemptions for families would only cover: parent, parent-in-law, spouse,

- fiancé, child, adult son or daughter, son-in-law, daughter-in-law, sibling and step relationships
    - b. Said cousins, aunts, uncles, nieces, nephews, grandparents, grandchildren, brothers-in-law, sisters-in-law would not be exempt
    - c. Opposition challenged this narrow construction
  - 3. Refugee Programs:
    - a. Trump Administration argued that resettlement agencies formal assurances were not sufficiently “bona-fide”
      - i. And government had not determined whether refugees with bona-fide relationship would be permitted to travel after July 6
        - 1. Later said no new ABN’s (advanced booking notifications) for travel may be requested at this time
    - b. Plaintiffs challenged, arguing that refugees with formal assurance can credibly claim bona-fide relationship
- ii. Hawaii District Court Litigation:
  - 1. July 13 decision – District Court Judge Derrick Watson
    - a. Issue 1: Do grandparents qualify as “close familial relation?”
      - i. DOJ says no; need to draw line somewhere
        - 1. DOJ only includes abovementioned relationships
      - ii. Plaintiffs argued that there is no difference between grandparent and mother-in-law (allowed under SCOTUS decision)
    - b. Issue 2: Do refugees assigned to resettlement agencies have a close enough tie (formal, documented, formed in the ordinary course)?
      - i. DOJ says exempting 24,000 refugees currently assigned to resettlement agencies from ban would nullify its effects
      - ii. Resettlement agencies argue they will be hurt if refugees not allowed to enter (loss of money, resources spent)
      - iii. Refugee cap is 50,000 for fiscal year (ends at end of September)
        - 1. Currently 50,900 refugees have entered this year
          - a. Questions about whether Trump can reduce mid-year
  - 2. District Court Ruling:
    - a. Grandparents are close familial relations, along with uncles, aunts, cousins, nephews, nieces, parents-in-law
      - i. In context of SCOTUS ruling, Government’s narrowly-defined list “finds no support in the careful language of the Supreme Court or even the

immigration statutes on which the Government relies”

1. Government can’t “cherry-pick”
- ii. This interpretation contradicts SCOTUS June ruling
- b. Government may not exclude refugees covered by a formal assurance between government and a US refugee resettlement agency
  - i. 24,000 refugees awaiting resettlement are exempt from ban b/c they have formal, documented ties with entity
  - ii. However, Court denied categorical relief for Iraqi Direct Access Program and Central American Minors Program
    1. But granted categorical relief for refugees in USRAP through Lautenberg Program
3. Government appealed to 9<sup>th</sup> Circuit
4. SCOTUS issued unsigned order on July 19, 2017 denying government’s motion seeking clarification of June ruling
  - a. But stated that Hawaii District Court’s decision modifying preliminary injunction with respect to refugees was stayed pending 9<sup>th</sup> Circuit resolution
- iii. 9<sup>th</sup> Circuit Litigation:
  1. Ruling on September 7, 2017
    - a. Affirmed district court’s decision
    - b. Court says the district court “carefully and correctly balances the hardships and the equitable considerations as directed by the Supreme Court and did not abuse discretion”
  2. Families:
    - a. Ruled that grandparents, grandchildren, brothers-in-law, sisters-in-law, aunts, uncles, nieces, nephews and cousins are exempt from EO-2
      - i. Government did not meaningfully show that above-mentioned individuals can be considered to have “no connection” to or “lack any bona fide relationship” with persons in the US
      - ii. “Government does not offer persuasive explanation for why a mother-in-law is clearly a bona fide relationship but a grandparent, grandchild, aunt, uncle, niece, nephew is not”
        1. no evidence that technical, and different, definitions in the INA guided SCOTUS
        2. Also look to case law on how SCOTUS has defined “close family relationship” in other circumstances
  3. Refugees:

- a. Ruled that category of refugees that have contractual commitments from resettlement organizations are also exempt from EO-2
  - i. Refugees in this situation would be “in vulnerable limbo” if not exempted
    - 1. Because of precise time requirements for medical, security, and medical checks
    - 2. Refugees must go through long and arduous process that is indicative of formal, documented relationship
    - 3. Agencies will suffer tangible and intangible harm if refugees are barred entry:
      - a. Loss of invested resources and financial support
      - b. Inability to effectuate spiritual and moral missions
  - 4. Allowing of ~24,000 refugees (based on this ruling) was set to take effect Tuesday, Sept. 12
- iv. Justice Kennedy’s Temporary Order
  - 1. September 11, 2017
  - 2. Trump Administration filed emergency application to SCOTUS only challenging 9<sup>th</sup> Circuit’s decision regarding refugees
    - a. (Whether or not refugees with commitments from refugee resettlement agencies—who have agreements with the government—were exempted from EO-2 or not)
    - b. Administration argues that “refugees do not have any free-standing connection to resettlement agencies, separate and apart from refugee-admissions process itself, by virtue of the agencies’ assurance agreement with the government.”
  - 3. Justice Kennedy signed order staying 9<sup>th</sup> Circuit Appeals Court ruling with respect to refugees
    - a. Meaning that the ~24,000 refugees with commitments from resettlement agencies are NOT exempt from EO-2 and the order is still effective against them
    - b. Hawaii argues that refugee resettlement agencies will be harmed by this decision
      - i. Ex: financial investments that were made
    - c. And refugees do not pose security threat—these refugees have already been approved by DHS
  - 4. This Order halting the entry of refugees will likely stay in place until SCOTUS rules in October

**IX. Presidential Proclamation- September 24, 2017 (Muslim Ban 3.0)**

- a. “Presidential Proclamation Enhancing Vetting Capabilities and Processes for Detecting Attempted Entry In to the United States by Terrorists or Other Public-Safety Threats”
  - i. Is allegedly a result of July policy report from DHS, State Department, and AG’s office.
    - 1. Said they reviewed security travel policies of over 200 countries

- a. Found 47 did not adequately meet standards
  2. Revised order allows these 47 countries 50 days to meet requirements
- b. Amends/ alters EO-2
  - i. Effectively bans all immigration from the following countries: Chad, Iran, Libya, Syria, Venezuela, Yemen, Somalia, and North Korea
    1. Changes of "list" from EO-2:
    2. Chad, Venezuela, and North Korea added;
      - a. Sudan no longer on list
  - ii. Ban is indefinite
    1. No longer set for 90 days
  - iii. Ban is more specific
    1. Refugees and foreign nationals separated in proclamation
    2. Doesn't affect permanent residents or those with diplomatic visas
    3. Those already issued visas not affected, but won't be able to renew
    4. Case-by-case waivers available
    5. Dual citizens can travel to US on passport from non-listed country
    6. Specifics by country:
      - a. Nationals from Chad, Yemen, Libya are banned outright
      - b. Iranian citizens also banned except for those with valid student and visitor visas; they will be "subject to enhanced screening and vetting requirements"
      - c. Somali immigrants banned but non-immigrants (seeking business or tourist visas) must undergo additional screening
      - d. Venezuelan government officials and families are banned; nationals with valid visas subject to additional screening
      - e. Syrian and North Korean nationals banned outright
  - iv. Further criticism:
    1. North Korea and Venezuela only included to make it seem like it's not a Muslim Ban
    2. Restrictions on many countries may discourage future cooperation with US
    3. Lack of proper security procedures not defined clearly; countries not able to know how to come into compliance
- c. Impact:
  - i. Supreme Court has cancelled oral arguments originally set for October 10, 2017
  - ii. Both sides must now file new briefs on the impact this new, permanent policy would have by October 5
    1. SCOTUS has also asked both sides to address the ban's suspension of the national refugee program and explain whether that issue would soon be moot
      - a. This is no longer relevant as Trump passed new EO re refugees (see below)
  - iii. New Muslim ban set to take effect October 18
- d. Court rulings on Muslim Ban 3.0
  - i. Maryland District Court

1. October 17- Judge Chuang issued opinion and order re implementation of Travel Ban
  - a. Justiciability claims satisfied:
    - i. Found that individual Plaintiffs and organization Plaintiffs had standing
    - ii. Visa ineligibility alone was sufficient for case to be ripe
  - b. Statutory Claims:
    - i. Discrimination based on nationality under §1152a of INA; Judge finds this section only covers immigrants, not nonimmigrants
    - ii. Plaintiff's claim President failed to show entry of foreign citizens would be "detrimental to interest of US" – Judge sides with government here, says President doesn't have to prove it's narrowly tailored
    - iii. Plaintiff's argue EO-3 conflicts with Congressional policy; Judge says this claim fails too
  - c. Constitutional Claims:
    - i. Judge rules a violation of establishment clause because reasonable person would view EO-3's primary purpose as to impose a Muslim Ban
  - d. Thus, Judge Chuang issued a nationwide injunction; however, it did not apply to nationals from North Korea or Venezuela (b/c no Establishment Clause violation here)
  - e. An appeal in the Maryland case will be heard on December 8 by 4<sup>th</sup> Circuit court
- ii. Hawaii District Court
  1. October 17, 2017
  2. Judge Derrick Watson in Hawaii issues opinion placing injunction on ban with respect to the 6 Muslim countries, stating that EO-3 "suffers the same maladies as its predecessor" and "plainly discriminates based on nationality"
  3. Watson did not rely on constitutional argument
- iii. Ninth Circuit (San Francisco)
  1. Monday November 13
  2. Allows ban to go into effect for all listed countries HOWEVER
  3. If foreign national can show "bona fide" relationship to US citizen or entity, he/she is exempt from ban
    - a. Bona fide, again is "family relationship" or "formal documented relationship" with entity
  4. Trump Administration plans to appeal, arguing that EO-3 should be allowed to take effect in its entirety

**X. Executive Order re Temporary Refugee Ban**

- a. Signed on October 24, 2017
- b. Ends 120-day suspension of refugee processing from travel ban/ resumes US refugee program
- c. Names 11 countries to face 90-day review in refugee admissions

- i. During 90 days, no entry from these countries
  - ii. Goal of 90-day ban is to “determine additional safeguards necessary to ensure the admission of refugees from these countries of concern does not pose a threat to the security and welfare of the US”
  - iii. Allegedly, resettling of refugees from these countries will resume once “enhancements have been implemented”
  - iv. However, it has been a de-facto ban on the listed countries
- d. Listed countries:
  - i. Egypt, Iran, Iraq, Mali, North Korea, Somalia, South Sudan, Sudan, Syria, and Yemen, and Palestinians
  - ii. All are majority Muslim, except South Sudan and North Korea
- e. Executive order also places hold on programs that allow for family reunification for some refugees resettled
  - i. In a separate memo, administration also laid out additional screening requirements for all refugees (details of whereabouts going back a decade, more detail about family members)
- f. Legal Challenges:
  - i. November 13
  - ii. A group of refugee organizations and individuals filed suit in Seattle federal court challenging this executive order
- g. The 9<sup>th</sup> Circuit will hear oral arguments in this case on December 6