



Overview of “Travel Ban” Litigation and Recent Developments

Hillel R. Smith

Legislative Attorney

Ben Harrington

Legislative Attorney

January 19, 2018

This Sidebar provides an overview of the series of [three executive actions](#) (the first two taking the form of executive orders, and the third issued as a presidential proclamation) commonly referred to as the “Travel Ban,” which restrict the entry of specified categories of non-U.S. nationals (aliens) into the United States, and the litigation related to those executive actions. The Sidebar also addresses a fourth and more recent executive action—an [executive order issued on October 24, 2017](#)—which announced the general resumption of [refugee](#) admissions into the United States (subject to certain restrictions) following the expiration of a temporary suspension on such admissions.

The Sidebar will be updated to reflect ongoing developments.

Entry Restrictions Currently in Effect

The below summary of entry restrictions now in effect reflects the current Travel Ban and any federal court orders that currently limit its implementation.

Congressional Research Service

7-5700

www.crs.gov

LSB10017

Restrictions Generally Applicable to **Immigrants or Nonimmigrants** from Specified Countries

A [September 24, 2017 presidential proclamation](#) currently bars entry indefinitely to the following groups of aliens (subject to certain waivers and exceptions described in the proclamation):

- Nationals of six countries (Chad, Iran, Libya, Somalia, Syria, and Yemen) who are traveling on specified categories of visas (see the September 24 entry in the Table below for full details by country);
- Nationals of North Korea; and
- Certain Venezuelan government officials and their immediate family members seeking entry on temporary visitor visas (see the September 24 entry in the Table for additional details).

The Supreme Court has [granted review](#) to hear a case about the lawfulness of these restrictions. Oral argument will likely take place in March or April 2018.

Refugee Restrictions

An [October 24, 2017 executive order](#), in conjunction with an [October 23, 2017 agency memorandum](#) referenced therein and as limited by a [federal district court injunction](#), currently imposes the following restriction on refugee admissions:

- a 90-day pause (running from October 23, 2017) on the admission of refugees from eleven unlisted countries who lack a bona fide relationship with a U.S. person or entity, subject to waiver on a “case-by-case basis” for such refugees “whose admission is deemed to be in the national interest and poses no threat to the security or welfare of the United States.”

The term “bona fide relationship”—as originally defined in a [June 26, 2017 Supreme Court opinion](#) and interpreted and applied by lower courts in [subsequent litigation](#)—encompasses employment relationships and “close familial relationships,” including with extended family such as grandparents and cousins. “Bona fide relationship” does not include any relationship created simply to avoid the restrictions in the executive orders. It is unclear whether the term “bona fide relationship” includes refugees covered by a formal assurance from a U.S. resettlement agency. The most recent federal district court [opinion](#) on the issue concludes that the term does encompass such refugees, despite an earlier Supreme Court [summary order](#) allowing the government to apply a prior version of the Travel Ban against such refugees.

Background on Executive Actions and Related Litigation

[Several federal district courts enjoined](#) the implementation of the first two executive orders establishing the Travel Ban (referred to here as “EO-1” and “EO-2,” respectively, and summarized in the January 27 and March 6 entries of the Table) on statutory and constitutional grounds. After the U.S. Courts of Appeals for the [Fourth](#) and [Ninth](#) Circuits upheld nationwide injunctions against EO-2, which contained provisions barring the entry of nationals of six Muslim-majority countries for 90 days and suspending the entry of refugees for 120 days, the federal government petitioned for Supreme Court review. The Court [granted](#) certiorari to review the injunctions against EO-2 and partially stayed their effect pending the Court’s consolidated review of the Fourth and Ninth Circuit decisions. While those cases were pending

before the Supreme Court, President Trump issued a [presidential proclamation](#) (summarized in the September 24 entry of the Table), the most recent of the three “Travel Ban” orders. In short, the proclamation modified the scope and duration of travel restrictions on foreign nationals from five countries covered by earlier versions of the Travel Ban (Iran, Libya, Somalia, Syria, and Yemen) and imposed new travel restrictions on certain aliens from three additional countries (Chad, North Korea, and Venezuela).

On October 10, 2017, after having [canceled](#) oral argument in the pending EO-2 litigation, the Supreme Court [ruled](#) that the government’s appeal of the Fourth Circuit’s decision was moot because EO-2’s 90-day entry restrictions had expired on September 24, 2017, and the Court vacated the Fourth Circuit’s decision with instructions to dismiss the plaintiffs’ EO-2 challenge. Two weeks later, on October 24, 2017, the day that EO-2’s 120-day refugee suspension expired and hours before a [new executive order](#) announced the general resumption of refugee admissions, the Supreme Court [dismissed](#) as moot the government’s appeal of the Ninth Circuit’s decision (which involved a challenge to both EO-2’s 90-day entry restrictions on aliens from certain countries *and* the 120-day refugee suspension) and vacated the Ninth Circuit decision.

The October 24, 2017 [executive order](#) announced the resumption of the refugee admissions program under an “improved” vetting process, subject to additional “special measures” for the vetting of certain, unidentified categories of refugees “whose entry continues to pose potential threats and subject also to periodic agency review of the refugee admission process.” A [memorandum to the President](#) from three executive agencies (the Department of State, the Department of Homeland Security, and the Office of the Director of National Intelligence)—dated October 23, 2017 and referenced with approval in the October 24 executive order—specified that the ongoing “special measures” include two restrictions on refugee admissions: (1) an indefinite pause on the admission of “derivative” refugees (i.e., spouses and unmarried children “who are ‘following-to-join’ principal refugees that have already been resettled in the United States—regardless of nationality”); and (2) a 90-day pause on the admission of refugees from eleven unlisted countries, subject to certain waivers.

Plaintiffs in [Hawaii](#), [Washington](#), and [Maryland](#) filed lawsuits challenging the presidential proclamation on constitutional and statutory grounds, raising largely the same issues that they raised regarding EO-2 (these issues are analyzed in [CRS Report R44969](#)). Subsequently, federal district courts in [Hawaii](#) and [Maryland](#) preliminarily enjoined the implementation of most aspects of the presidential proclamation. In late December 2017, the Ninth Circuit [affirmed](#) in significant part the Hawaii district court injunction, and about a month later, on January 19, 2018, the Supreme Court [granted](#) the government’s petition for review of the Ninth Circuit decision. Oral argument will likely take place in March or April 2018. Meanwhile, the Maryland case remains before the Fourth Circuit. Under orders that the Supreme Court issued in [both cases](#) on December 4, 2017, the Hawaii and Maryland injunctions are to remain stayed until resolution of the government’s appeals to the Supreme Court. Thus, pending an eventual decision from the High Court or its issuance of a new order to the contrary, the government is allowed to continue enforcing the proclamation in full.

The lawfulness of the ongoing refugee restrictions is the subject of a separate lawsuit brought in federal district court in Seattle. On December 23, 2017, the district court [issued](#) a nationwide preliminary injunction against the enforcement of the refugee restrictions against any alien with a bona fide

relationship to a person or entity within the United States. The district court reasoned that the restrictions likely violate the Immigration and Nationality Act and the Administrative Procedure Act. The government is expected to appeal the decision to the Ninth Circuit and to seek a stay of the injunction in the meantime, as it did with the injunctions against the presidential proclamation.

Timeline

The following Table provides a timeline of the three Travel Ban orders and the course of litigation concerning those orders. In addition, EO-1 and EO-2 and their related litigation are discussed in detail in [CRS Report R44969](#) and in [these earlier Sidebars](#).

Travel Ban Timeline (all dates 2017 unless otherwise noted)

January 27	<p>Issuance of EO-1</p> <ul style="list-style-type: none"> Barred entry to the following classes of aliens: (1) persons from seven countries (Iran, Iraq, Libya, Somalia, Sudan, Syria, and Yemen) for 90 days; (2) refugees from any country other than Syria for 120 days; and (3) refugees from Syria, indefinitely. Lowered cap for refugee admissions for fiscal year 2017 from 110,000 to 50,000. For future refugee applications, instructed the State Department and the Department of Homeland Security (DHS) to prioritize claims of religious persecution “provided that the religion of the individual is a minority religion in the individual’s country of nationality.” Did not, by its terms, exempt lawful permanent residents (LPRs) or dual nationals who also held a passport issued by a nonlisted country. Provided for case-by-case waivers “in the national interest,” including for refugee adherents of minority religions fleeing religious persecution.
February 3	A federal district court in Washington issues temporary restraining order (TRO) barring implementation nationwide of all EO-1 entry restrictions.
February 3	A Massachusetts federal district court rules for the government in denying a motion to extend a TRO against EO-1 entry restrictions.
February 9	Ninth Circuit affirms the Washington district court’s TRO on due process grounds.
March 6	<p>Issuance of EO-2 (with effective date of March 16)</p> <ul style="list-style-type: none"> Removed Iraq from the list of restricted countries. Removed the indefinite restriction on Syrian refugees, placing them into the general 120-day bar for all refugees. Removed instruction to prioritize future refugee claims of religious persecution for adherents of minority religions. Also removed reference to minority religions in waiver provisions. Exempted from entry restrictions, <i>inter alia</i>, LPRs, dual nationals traveling on the passport of a nonrestricted country, and aliens already in the U.S. or already in possession of valid U.S. visa. Expanded waiver provisions for persons from the six countries to include numerous bases, including “significant contacts” with the United States and prevention of “undue hardship” from familial separation.
March 15	The Hawaii federal district court issues preliminary injunction barring implementation nationwide of all EO-2 entry restrictions.
March 16	The Maryland federal district court issues preliminary injunction barring implementation nationwide of entry restrictions against citizens of the six listed countries.

March 24	A Virginia federal district court rules for the government in declining to enjoin EO-2 entry restrictions.
May 25	Fourth Circuit affirms Maryland district court injunction on constitutional grounds (Establishment Clause).
June 12	Ninth Circuit affirms Hawaii district court injunction on statutory grounds.
June 26	Supreme Court issues per curiam opinion (1) agreeing to hear Fourth and Ninth Circuit cases in 2017 October Term; and (2) granting partial stay of injunctions, allowing the government to apply EO-2 to aliens who do not have a “bona fide relationship” with a U.S. person or entity.
July 13	The Hawaii federal district court rules that “bona fide relationship” includes (1) extended family members and (2) refugees covered by a formal assurance from a U.S. resettlement agency.
July 19	Supreme Court, in one-paragraph order , leaves part (1) of the July 13 Hawaii district court decision in place but stays part (2) pending the government’s appeal to the Ninth Circuit.
September 7	Ninth Circuit affirms both parts of the July 13 Hawaii district court decision.
September 12	Supreme Court, in a one-paragraph order , stays the September 7 Ninth Circuit decision with respect to refugees covered by a formal assurance from a U.S. resettlement agency, thus allowing the government to apply EO-2 to exclude such refugees but not extended family members during the pendency of the litigation.
September 24	<p>Presidential Proclamation 9645, issued on the day that EO-2’s 90-day entry restriction on persons from the six listed countries was set to expire, extends the entry restrictions on some persons from each of the six countries identified in EO-2 except Sudan. The proclamation also adds certain entry restrictions, effective October 18, 2017, against persons from North Korea, Chad, and Venezuela. The proclamation contains substantially the same waiver and exemption provisions as EO-2. All of the entry restrictions in the proclamation are indefinite, subject to periodic reassessment procedures.</p> <p>The restrictions in the proclamation bar entry of the following specific categories of persons:</p> <ul style="list-style-type: none"> • Yemen, Libya, Chad: all immigrants; nonimmigrants seeking entry on B-1, B-2, and B-1/B-2 temporary visitor visas. • Syria, North Korea: all immigrants and nonimmigrants. • Somalia: all immigrants. • Iran: all immigrants and nonimmigrants, except nonimmigrants seeking entry on valid student (F and M) or exchange (J) visas. • Venezuela: officials of certain government agencies, and the immediate family members of such officials, seeking entry on B-1, B-2, and B-1/B-2 temporary visitor visas. • Sudan: <i>no continuing restrictions</i>.
September 25	Supreme Court cancels oral argument, which was previously scheduled for October 10, 2017, and orders parties to submit supplemental briefings on mootness issue in light of the September 24 proclamation and the impending expiration of EO-2’s refugee restrictions.
October 10	Supreme Court rules in Fourth Circuit case (No. 16-1436) that the challenge to EO-2’s 90-day entry bar provision is moot because it expired on September 24, and the Court directs the Fourth Circuit to dismiss case as moot. Ninth Circuit case (No. 16-1540) remains pending before Supreme Court.
October 17	A Hawaii federal district court issues a TRO (converted to a preliminary injunction three days later) enjoining the implementation of the presidential proclamation’s entry restrictions except with respect to nationals of North Korea and Venezuela.
October 17	A Maryland federal district court grants a preliminary injunction enjoining implementation of the presidential proclamation’s entry restrictions except for nationals of North Korea

	and Venezuela, and other aliens covered by the proclamation who have no credible claim of a bona fide relationship with a person or entity in the United States.
October 23	Three executive agencies (the Department of State, the Department of Homeland Security, and the Office of the Director of National Intelligence) send a memorandum to the President recommending the resumption of refugee admissions, provided, however, that two restrictions remain in place: (1) an additional 90-day pause on the admission of refugees from eleven countries, which the memorandum does not identify, subject to case-by-case waivers; and (2) a pause on the admission of “following-to-join” refugees until the agencies implement new security measures to vet them.
October 24	Supreme Court rules in Ninth Circuit case (No. 16-1540) that the challenge to EO-2’s 90-day entry bar and 120-day refugee suspension provisions is moot because those provisions expired on September 24 and October 24. The Court vacates the Ninth Circuit decision and directs the Ninth Circuit to dismiss the case as moot.
October 24	Executive Order 13815 , issued on the day that EO-2’s 120-day refugee suspension expired, announces the resumption of the refugee admissions program under an “improved” vetting process to include additional “special measures” for certain, unidentified categories of refugees “whose entry continues to pose potential threats.” The order does not describe the “special measures” other than to reference the determinations made in the October 23 agency memorandum. Under the order, the refugee admission process will be subject to periodic agency review.
November 13	Pending resolution of the government’s appeal of the Hawaii district court injunction, the Ninth Circuit issues a partial stay of the injunction to allow the government to apply the presidential proclamation against nationals of Chad, Iran, Libya, Somalia, Syria, and Yemen who lack a bona fide relationship with a U.S. person or entity.
December 4	Supreme Court grants stay of injunctions issued by Hawaii and Maryland district courts pending disposition of appeals in the Fourth and Ninth Circuits and ensuing review in the Supreme Court, allowing the government to implement presidential proclamation in its entirety.
December 22	Ninth Circuit holds that the presidential proclamation likely violates the Immigration and Nationality Act (INA) and the Administrative Procedure Act (APA), and affirms the Hawaii federal district court preliminary injunction against enforcement of the proclamation with respect to any alien from Chad, Iran, Libya, Somalia, Syria, and Yemen with a bona fide relationship with the United States. In light of the December 4 Supreme Court order, however, the injunction remains stayed pending resolution of a likely appeal to the Supreme Court, meaning that the government may continue to enforce the proclamation in its entirety.
December 23	A Washington federal district court issues a nationwide preliminary injunction against enforcement of the restrictions on refugee entry in the October 23 agency memorandum, reasoning that the refugee restrictions likely violate the INA and APA. The injunction only protects aliens with a bona fide relationship to a person or entity within the United States.
January 19, 2018	The Supreme Court grants the government’s petition for review of the Ninth Circuit’s December 22, 2017 order. Oral arguments will likely take place in April at the latest. The October 17, 2017 Maryland district court injunction remains before the Fourth Circuit, and under the December 4, 2017 Supreme Court orders, the government may continue enforcing the proclamation in full while litigation continues in the Supreme Court.