

JEFFREY B. WALL
Acting Solicitor General
CHAD A. READLER
Acting Assistant Attorney General
ELLIOT ENOKI (No. 1528)
Acting United States Attorney
EDRIC M. CHING (No. 6697)
Assistant United States Attorney
JOHN R. TYLER
Assistant Branch Director
BRAD P. ROSENBERG (DC Bar No. 467513)
MICHELLE R. BENNETT (CO Bar No. 37050)
DANIEL SCHWEI (NY Bar)
Trial Attorneys
United States Department of Justice
Civil Division, Federal Programs Branch
20 Massachusetts Avenue, N.W.
Washington, D.C. 20530
Tel: (202) 514-3374; Fax: (202) 616-8460
E-mail: brad.rosenberg@usdoj.gov
Attorneys for Defendants

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII**

STATE OF HAWAII and
ISMAIL ELSHIKH,

Plaintiffs,

v.

DONALD J. TRUMP, in his official
capacity as President of the United States;
U.S. DEPARTMENT OF HOMELAND
SECURITY; JOHN F. KELLY, in his official
capacity as Secretary of Homeland Security;
U.S. DEPARTMENT OF STATE; REX
TILLERSON, in his official capacity as
Secretary of State; and the UNITED
STATES OF AMERICA,

Defendants.

No. 1:17-cv-00050-DKW-
KSC

**DEFENDANTS'
MEMORANDUM OF
LAW IN SUPPORT OF
MOTION FOR
CLARIFICATION OF
TRO**

Judge: Hon. Derrick K.
Watson

Hearing: None Requested

Related Documents:
Dkt. No. 219

**DEFENDANTS' MEMORANDUM OF LAW
IN SUPPORT OF THEIR MOTION FOR CLARIFICATION OF
THIS COURT'S TEMPORARY RESTRAINING ORDER**

On March 15, 2017, this Court entered a nationwide Temporary Restraining Order that enjoined Defendants from enforcing Sections 2 and 6 of Executive Order No. 13,780.¹ See Order Granting Motion for Temporary Restraining Order, ECF No. 219 ("TRO"). Although the Court's TRO says that it enjoins Sections 2 and 6, many of the provisions in those sections were not addressed in the briefs that Plaintiffs filed in support of their TRO motion. It is therefore unclear whether the Court intended its injunction to extend to all of those provisions. Accordingly, Defendants seek clarification from the Court that the TRO does not apply to the provisions of the Executive Order that Plaintiffs have failed to meaningfully challenge.

Specifically, Defendants request that the Court clarify the scope of its TRO in two key respects.² First, Plaintiffs' arguments in their TRO papers focused nearly exclusively on Section 2(c) of the Executive Order, which suspends the issuance of visas for certain nationals of six identified countries for a period of 90 days. This Court's decision similarly focuses on that suspension-of-entry

¹ 82 Fed. Reg. 13,209 (2017).

² Notwithstanding this motion for clarification, Defendants note that they immediately took steps to ensure full compliance with this Court's TRO.

provision. Plaintiffs addressed only in passing the lawfulness of the provisions contained in Section 6 of the Executive Order, which suspends adjudication of refugee applications on a global basis, and the Court's opinion did not squarely address other provisions of Section 6 regarding refugees—including, in particular, the provision that caps the number of refugees who can be admitted to the United States in fiscal year 2017. Defendants accordingly seek clarification from the Court that its TRO does not apply to Section 6.

Second, the TRO as currently written enjoins purely internal activities of the government as described in both Sections 2 and 6, such as Section 2's provisions addressing agency review of global vetting procedures that was to take place during the suspension-of-entry period. None of these internal activities—which could take place in the absence of an Executive Order—has any immediate impact on Plaintiffs, and enjoining them has the potential to disrupt government operations and create confusion regarding internal and deliberative governmental activities during the pendency of this litigation. Accordingly, Defendants seek clarity regarding that aspect of the Court's TRO as well.

BACKGROUND

As described below, both Sections 2 and 6 have numerous subparts, some of which have no impact on Plaintiffs at all and were not the focus of Plaintiffs' challenge.

Section 2 of the Executive Order concerns vetting procedures for immigration benefits. Section 2(c) contains the 90-day suspension-of-entry provision that was the near-exclusive focus of Plaintiffs' briefing. *See* Executive Order No. 13,780 § 2(c). The remainder of Section 2 sets forth a process by which the President will make an additional determination about whether any restrictions on entry are necessary for certain foreign nationals or categories of foreign nationals. To begin that process, Section 2(a) requires the Secretary of Homeland Security, in consultation with the Secretary of State and the Director of National Intelligence, to conduct a worldwide review of vetting procedures to ensure that foreign governments are providing information necessary to ensure that individuals seeking visas or other immigration benefits are not a security or public safety threat, while Section 2(b) requires the preparation and submission to the President of a report based upon that review. *See id.* § 2(a), (b). Section 2(d) provides that, following the submission of the report referenced in subsection (b), the Secretary of State shall request that foreign governments begin to supply additional, needed information. *Id.* § 2(d). Sections 2(e) and 2(f) contain various procedures that assist the President in making subsequent determinations about whether restrictions on entry are warranted for "appropriate categories of foreign nationals of countries that have not provided the information requested[.]" *Id.* § 2(e), (f). Finally, Section 2(g) provides that the Secretaries of State and Homeland Security shall submit

various joint reports on their progress in implementing the provisions of the Order. *Id.* § 2(g).

Section 6 of the Executive Order concerns certain aspects of the U.S. Refugee Admissions Program (“USRAP”). Section 6(a) suspends travel under USRAP and decisions on refugee applications for a period of 120 days after the effective date of the Executive Order, subject to waivers. *See* Executive Order 13,780 § 6(a). That subsection also provides that, during the suspension period, the government shall conduct an internal review of USRAP application and adjudication procedures; following that review and the resumption of USRAP, the government is to implement additional procedures identified by the review in order to ensure that decisions on applications for refugee status are made only for stateless persons and nationals of countries where adequate additional procedures to protect the security and welfare of the Nation are in place. *Id.* In Section 6(b), the President proclaimed “that the entry of more than 50,000 refugees in fiscal year 2017 would be detrimental to the interests of the United States” and, on that basis, “suspend[ed] any entries in excess of that number[.]” *Id.* § 6(b). Section 6(c) sets forth various waiver provisions to the 120-day suspension. *See id.* § 6(c). Finally, Section 6(d) sets forth a policy of coordinating refugee placement and settlement with state and local jurisdictions. *See id.* § 6(d).

ARGUMENT

Plaintiffs’ TRO briefing focused on the 90-day suspension-of-entry provision contained in Section 2(c) of the Executive Order and the alleged impact that the application of that provision would have on them. In significant contrast, Plaintiffs’ briefs spoke comparatively little to the refugee provisions in Section 6 of the Executive Order, and did not speak at all either to the internal review provisions in Sections 2 and 6 or to the 50,000-person cap on the number of refugees in Section 6(b). The Court’s opinion likewise focused almost exclusively on Section 2(c)’s entry suspension, and specifically on Plaintiffs’ challenge to that provision under the Establishment Clause. Defendants respectfully submit that the TRO should apply only to that provision.

Plaintiffs’ claims of harm principally relate to Section 2(c). For example, Hawaii claimed that its university system would be harmed by the Executive Order because it would not be able to recruit and retain foreign students and faculty from the six countries subject to the suspension of entry. *See* Mem. in Supp. of Plaintiffs’ Mot. for a Temporary Restraining Order (ECF No. 65-1) (“Pl. Mem.”) at 14-15. Hawaii also claimed that the Executive Order would harm the State’s economy including, in particular, tourism. *See id.* at 17-18. This Court concluded that Hawaii has Article III standing “[f]or purposes of” this early stage of the proceedings because “(1) its universities will suffer monetary damages and

intangible harms; (2) the State's economy is likely to suffer a loss of revenue due to a decline in tourism; (3) such harms can be sufficiently linked to the Executive Order; and (4) the State would not suffer the harms to its proprietary interests in the absence of implementation of the Executive Order." TRO at 21. None of these alleged harms, however, has anything to do with the Executive Order's refugee provisions, let alone provisions regarding internal review of the Nation's screening and vetting procedures to identify ways to improve those procedures.³

Plaintiffs' merits arguments likewise focused on the application of Section 2(c). Neither Plaintiffs' Due Process nor Establishment Clause arguments address Section 6 of the Executive Order, save for a characterization by Plaintiffs of prior statements by the President "that the original Order was intended to favor Christian over Muslim refugees," Pl. Mem. at 43, as well as a passing reference to refugee claims in Plaintiffs' reply, *see* Reply in Support of TRO (ECF No. 191) at 14.⁴ The

³ Plaintiff Elshikh similarly asserts that he will be harmed by the application of Section 2(c), which he claims will preclude his mother-in-law from entering the United States. *See* Pl. Mem. at 20.

⁴ Plaintiffs' statutory arguments similarly focused on the entry suspension provision. Indeed, one of the two statutory provisions primarily relied upon by Plaintiffs, 8 U.S.C. § 1152(a)(1)(A), does not even apply to the refugee program and thus has no bearing on Section 6 of the Executive Order. Plaintiffs' statutory argument regarding the refugee provision is otherwise relegated to an aside regarding "applicant[s] for refugee status," Pl. Mem. at 29-30, as well as a conclusory assertion that Section 6 exceeds the President's statutory authority under 8 U.S.C. §§ 1182(f) and 1185(a), *see id.* at 50.

Court—like Plaintiffs—similarly focused its Establishment Clause analysis on the suspension of entry provisions contained in Section 2(c) of the Executive Order. In concluding that Plaintiffs are likely to succeed on their Establishment Clause claim, the Court focused on the six countries affected by Section 2(c). *See* TRO at 31 (discussing the makeup of those countries and noting that it would not be a “paradigmatic leap to conclude that targeting these countries likewise targets Islam”). That analysis can apply only to Section 2(c), as only Section 2(c) contains operative provisions regarding the six countries. By contrast, the refugee provisions contained in Section 6 of the Executive Order do not target any countries at all: The 120-day suspension of USRAP and the 50,000 refugee cap both apply on a global basis to all refugees, regardless of country of nationality.

To the extent that Plaintiffs’ briefs refer to the effects of the Executive Order on refugees, they only do so in a generalized manner with occasional references to the 120-day suspension of the refugee program, *see, e.g.*, Pl. Mem. at 12 (noting that Section 6(a) “suspends [USRAP] for a period of 120 days”), or vague predictions that the State’s “small” program “to resettle and assist refugees” will be hindered, Pl. Mem. at 16; *see id.* at 48 (alleging that Hawaii will be forced to “abandon” its refugee program).⁵ Plaintiffs’ briefs do not mention the 50,000

⁵ Plaintiffs did not submit any declarations in support of their TRO on this point or regarding refugees generally. *See* ECF No. 66.

person refugee cap at all. The Court’s opinion did not address these aspects of Plaintiffs’ allegations: it did not find standing based on Hawaii’s purported injury to its refugee program, TRO at 16-21; it did not discuss application of the Establishment Clause to provisions involving refugees, *id.* at 28-40; and it expressly reserved judgment on Plaintiffs’ other claims, *id.* at 29 n.11.

It is well settled that “[i]njunctive relief is an ‘extraordinary remedy’ [which] ‘must be tailored to remedy the specific harm alleged.’” *McCormack v. Hiedeman*, 694 F.3d 1004, 1019 (9th Cir. 2012) (quoting *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 24 (2008); *Park Vill. Apartment Tenants Ass’n v. Mortimer Howard Tr.*, 636 F.3d 1150, 1160 (9th Cir. 2011)). In that regard, “injunctive relief should be no more burdensome to the defendant[s] than necessary to provide complete relief to the plaintiffs.” *Califano v. Yamasaki*, 442 U.S. 682, 702 (1979); see *Price v. City of Stockton*, 390 F.3d 1105, 1117 (9th Cir. 2004) (noting that an injunction should “remedy only the specific harms shown by the plaintiffs, rather than ‘to enjoin all possible breaches of the law’”) (quoting *Zepeda v. INS*, 753 F.2d 719, 728 n.1 (9th Cir. 1983)).

In light of the focus of Plaintiffs’ briefing and the Court’s analysis, Defendants respectfully request that this Court clarify that its TRO only applies to Section 2(c) of the Executive Order. Tailoring a TRO to Section 2(c) of the Executive Order was the course taken in *International Refugee Assistance Project*

v. Trump, in which plaintiffs specifically challenged both Sections 2 and 6, including Section 6(b)'s cap on refugees for fiscal year 2017. *See* Civil Action No. TDC-17-0361, 2017 WL 1018235 (D. Md. Mar. 16, 2017). That court, however, declined the invitation to enter the injunction plaintiffs' sought, finding that "Plaintiffs' Establishment Clause and INA arguments focused primarily on the travel ban for citizens of the six Designated Countries in Section 2(c)" of that Order and, accordingly, "enjoin[ed] that provision only." *Id.* at *17. Because Plaintiffs here have neither challenged nor demonstrated any harms associated with Section 6, the Court should clarify that its injunctive order does not apply to those provisions.

In the alternative, if the Court clarifies that the TRO applies to Section 6, it should nonetheless decline to apply the TRO to the 50,000 person refugee cap contained in Section 6(b). Plaintiffs' briefing makes no mention of the cap, and this Court did not address it in its Order. Moreover, that cap—which has global applicability—draws no distinction whatsoever on the basis of religion, and none of the courts to analyze either the old or the new Executive Orders has called that cap into question.

At a minimum, the Court should clarify that its TRO does not apply to the provisions of Sections 2 and 6 that call for internal governmental activities. Substantial portions of Sections 2 and 6 involve only such activities, including

conducting reviews and updating policies. Others relate to inter-governmental diplomatic and official communications. Specifically, if this Court declines to limit its TRO to Section 2(c), Defendants request that the Court clarify that its TRO does *not* apply to the following provisions:

- Section 2(a) (requiring Secretary of Homeland Security to conduct worldwide review of vetting procedures to ensure that foreign governments are providing information necessary to ensure that individuals seeking visas or other immigration benefits are not a security or public safety threat);
- Section 2(b) (requiring the preparation and submission to the President of a report based upon review described in Section 2(a));
- Section 2(d) (providing that Secretary of State shall request that foreign governments begin to supply additional, needed information about its nationals);
- Section 2(e) (instructing the Secretary of Homeland Security to submit to the President, after the period in Section 2(d) expires, recommendations regarding future restrictions on entry of appropriate categories of foreign nationals of countries that have not provided the requested information);

- Section 2(f) (authorizing the Secretary of Homeland Security to make additional recommendations to the President following the initial recommendations); and
- Section 2(g) (providing that Secretaries of State and Homeland Security shall submit various joint reports on their progress in implementing the provisions of the Order).

Similarly, Defendants request that the Court clarify that its TRO does not apply to those portions of Section 6(a) of the Executive Order regarding the review of the USRAP application and adjudication procedures, including the implementation of those procedures, as well as Section 6(d), which encourages the coordination of refugee placement with state and local jurisdictions.

CONCLUSION

This Court should clarify that its TRO applies only to Section 2(c) of the Executive Order.

Dated: March 17, 2017

Respectfully submitted,

JEFFREY B. WALL
Acting Solicitor General

CHAD A. READLER
Acting Assistant Attorney General

ELLIOT ENOKI (No. 1528)
Acting United States Attorney
EDRIC M. CHING (No. 6697)
Assistant United States Attorney

JOHN R. TYLER
Assistant Director, Federal Programs Branch

/s/ Brad P. Rosenberg
BRAD P. ROSENBERG (DC Bar. No. 467513)
MICHELLE R. BENNETT (CO Bar. No. 37050)
DANIEL SCHWEI (NY Bar)
Trial Attorneys
U.S. Department of Justice
Civil Division, Federal Programs Branch
20 Massachusetts Avenue, N.W.
Washington, D.C. 20530
Tel: (202) 514-3374
Fax: (202) 616-8460
E-mail: brad.rosenberg@usdoj.gov

Attorneys for Defendants