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The Revised Refugee EO: Reports Show a Clear Turn Toward Legal Compliance

By Peter Margulies Wednesday, March 1, 2017, 1:18 PM

The *Washington Post*'s Matt Zapotosky has reported on forthcoming revisions of President Trump's Executive Order (EO) on refugees that place the administration in a materially better legal position. Based on the Post's reporting, the revised order seems "tailored" to the Ninth Circuit decision denying the government's request for a stay of the Temporary Restraining Order (TRO) granted by the Seattle district court of the original EO (for a critique of the Ninth Circuit decision, see Josh Blackman's analysis [here](#) and [here](#)). The changes address Due Process and Establishment Clause issues. In addition, an interlude prior to the revised EO taking effect will reduce disruption that the revised EO causes.

On due process, the revised EO reportedly excludes from coverage both lawful permanent residents (LPRs) and previously admitted nonimmigrant visa-holders (VHs). These groups have the clearest reliance interests in maintenance of the pre-EO status quo. By respecting those reliance interests, the revisions remove the two most significant due process concerns cited by the Ninth Circuit. As I explained in an earlier post and Rick Hills observed [here](#), the remaining group covered by the EO—noncitizens who have not been previously admitted to the United States—has far less compelling due process arguments, since the Constitution generally does not protect noncitizens abroad who have no previous ties to the U.S., and the EO in any case only entails a *pause* in admissions, not a permanent bar.

The revisions also address the Establishment Clause issues with the initial EO. The changes to the EO reportedly exclude Iraqis, make Syrian refugees subject to a 120-day bar (not the indefinite halt decreed by the initial EO), and delete any mention of a priority for religious minorities. Taken together, these changes make the EO even less focused on Muslims per se than the initial EO (which itself excluded 80 percent of the world's Muslims) and remove concerns that the EO was skewed toward other religions such as Christianity. The gentler treatment of Syrian refugees at least recognizes the humanitarian equities of this group. Although I continue to believe that even a pause in admissions is counterproductive, these changes may well move the dial toward the judicial deference that the political branches' measures on immigration have frequently received.

Finally, the revised EO reportedly builds in an interlude before the new EO's provisions become effective. That interlude should help prevent a recurrence of the chaos that resulted from the initial EO's precipitous roll-out. In short, the reported revisions would place the new Administration on far firmer legal footing, though it remains unclear when the order itself will be signed.

Topics: Refugees, Immigration

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