

Confusion worse confounded: Trump's Muslim ban fails, for now

It is highly likely that the courts will overturn this EO, but in the meanwhile people affected by the EO are being detained and may continue to be detained by the Customs and Border Protection.

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Updated: Tuesday, January 31, 2017, 14:59 [IST]

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Four federal courts in [New York](#), Virginia, Washington and Massachusetts have issued temporary restraint on the operation of an executive order, issued on January 27, 2017, that barred [Muslims](#) from certain countries to enter the USA. The Hill reported on the political background of the order and the comments from American Civil Liberties Union, which represents the New York plaintiffs.



The EO, issued most inopportunistly on Holocaust Memorial Day, bars Syrian nationals from entering the [United States](#) as refugees indefinitely. It also halts all refugee resettlement in the US or 120 days, ostensibly to give the administration time to review its vetting processes. It imposes a 90-day US entry ban on people from seven countries -- Iran, Iraq, Syria, Yemen, Libya, Sudan and Somalia.

[The New York court decision](#)

Judge Ann M Donnelly of the US district court for the eastern district of New York acted on an Emergency Motion for Stay of Removal in a putative class action complaint (Darweesh, et al. v. [Trump](#), et al). against the EO. In her ruling **dated [January 28, 2017](#)**, the Judge granted temporary stay of removal proceedings in the case before her.

It is important to understand what this ruling is and is not.

In issuing the stay, as required by the law, the judge performed an evaluation whether or not the petitioners ultimately have a strong probability of winning the case. The judge noted that they do indeed have a high likelihood of prevailing on their claims of violation of their rights to Due Process and Equal Protection guaranteed by the US Constitution.

Additionally, the judge evaluated whether or not the affected people will suffer "substantial and irreparable" injury if the stay is not granted; and she found that they would. The Judge noted that the issuance of stay will not injure the government.



Protesters chant slogans against President Donald Trump's executive order on immigration in Miami. Image credit: PTI

Accordingly, the judge ordered a stay of government action against:

- Individuals who have their refugee status applications already approved by the United States Citizenship and Immigration Services;
- Other individuals from the barred countries who hold valid immigrant visas (green cards) and non-immigrant visas (such as tourists, students, temporary workers, etc); and
- Other individuals from the barred countries who are already otherwise legally authorised to enter the USA.

The stay will be in effect until the case is finally decided. This, however, does not mean that the government has already lost the case. The judge has not allowed the affected people to enter the US, nor has she said anything against the government on the merits. But, this order does portend a strong likelihood that the Trump administration will lose this case on the merits.

Even though the court ruling is broad enough to cover the entire USA, the government can probably choose to consider itself bound by this ruling only in the jurisdiction of each court and not nationally.

There is precedent for that. The USCIS, Customs and Border Protection and other implicated agencies can claim that being national agencies, they are restrained only locally by local orders. However, the local-effect argument would no longer be legally tenable if the court accepts that the requested class consists of all the people nationally who are suffering from similar harm (class certification).

A ruling in a class action would be binding upon the government in relation to the entire class of people covered by the class certification, irrespective of where they are located.

[The Virginia, Washington and Massachusetts court rulings](#)

On 28 January, Judge Leonie M. Brinkema of the US district court for the eastern district of Virginia (**Alexandria Division**) ruled that the green card holders being held at the Dulles airport must be permitted access to lawyers and that they cannot be sent back for a period of seven days (Aziz, et al. v. Trump, et al.). This ruling does not cover and protect all the categories of people or to the same extent and duration as does the New York Order.



Demonstrators sit down in the concourse and hold a sign that reads

On January 28, Judge Thomas Zilly of the US District Court for the western district of Washington also **granted a stay** of removal for two unnamed plaintiffs (John Doe, et al. v. Trump, et al.).

Similarly, On January 29, Judge Allison D. Burroughs of the US district court for the district of **Massachusetts granted a stay** of removal for two plaintiffs (Pourabdollah, et al. v. Trump, et al.). This ruling followed the same analysis as the New York court. In addition to granting stay, the Mass. Court directed:

- The government to disregard the EO and use the screening standards that existed prior to the issuance of the EO;
- The government not to apply the EO against any people who already possessed the legal right to enter the US (same as New York ruling above) before the EO was issued;
- The CBP to instruct the airlines that at Logan Airport no person shall be returned or detained (the prohibition against detention is a step forward from the NY ruling) based upon the EO; and
- That the stay will remain in effect for 7 days within which a hearing on the merits of the lawsuit will be held.

All the four court rulings so far hint strongly at the infirmities in the EO, which appears to be as ill-conceived as it is ill-received.

Overruled by the Trump admin

CNN reported that the Pentagon staff audience was largely clueless about what Trump meant when he announced on Friday, January 27 that he would be taking strict new measures to prevent domestic terror attacks. The EO was shown to the homeland security career staff only after it was signed. When DHS tried to exempt green card holders (as legally required) from this order, they were overruled by the Trump administration.

Despite Trump's assurances that his administration was fully prepared to implement his order, government agencies were obviously unprepared to administer this ban. It was quite obvious that the Trump administration had not briefed its agencies. The hurriedly posted notice from the state department dated

January 27 is indicative of a scramble to change their procedures in compliance with the EO.

Even the US attorney's office that appeared to defend the New York lawsuit proceedings was unable to answer the questions asked by the judge, because they had not been adequately briefed by the administration.

Trump's Executive Orders remain

As of Sunday, 29 January morning, Trump administration is still issuing conflicting and confusing statements. On the same afternoon, the DHS has issued a press release entitled "Department Of Homeland Security Response To Recent Litigation:"

The department of homeland security will continue to enforce all of President Trump's Executive Orders in a manner that ensures the safety and security of the American people. President Trump's Executive Orders remain in place-prohibited travel will remain prohibited, and the U.S. government retains its right to revoke visas at any time if required for national security or public safety.

That appears to be clear enough. They will do what the president directs. But what about the various court rulings? DHS throws in this nugget at the end of the press release:

The department of homeland security will comply with judicial orders; faithfully enforce our immigration laws, and implement President Trump's Executive Orders to ensure that those entering the US do not pose a threat to our country or the American people.

Apparently, the DHS will obey the courts, congress and the president. So, do they intend to follow the given court rulings nationally or just locally? Unfortunately, this is still far from clear.

In the interim, the New York plaintiffs have moved the court for a clarification of the court order. They are seeking the court "to immediately clarify that its January 28 order is nationwide and order Respondents to enforce the stay of removal."

Strongly-opposed EO

Objectively assessing, there appears to be little rational justification for the EO. The citizens of the seven banned countries have not been implicated in any domestic terrorism in the USA. The countries whose citizens were so implicated are not on the banned list.



Protesters assemble at John F. Kennedy International Airport in New York to protest Trump's immigration order. Image credit: PTI

People from all walks, including concerned public, politicians, and civic groups, have strongly opposed this EO. Several businesses and business groups such as

Google, Apple, Microsoft, Netflix, Box, Inc., The Internet Association (a coalition of tech companies), etc. have condemned the EO.

The EO is under legal challenge on the grounds of being discriminatory, violative of due process, and in contravention of several statutes and international law.

The Immigration and Nationality Act of 1965 provides that "no person shall receive any preference or priority or be discriminated against in the issuance of an immigrant visa because of the person's race, sex, nationality, place of birth, or place of residence" 8 U.S.C. §1152(a)(1)(A). In addition to the Constitutional Fifth amendment prohibition, this is a statutory prohibition against discrimination. Rewriting the Constitution and our nation's law is beyond a President's authority.

The Immigration and Nationality Act also provides that "[a]ny alien who is physically present in the United States or who arrives in the United States...irrespective of such alien status, may apply for asylum...." 8 U.S.C. §1158(a)(1). The right to apply for political asylum is also a statutory right and a due process constitutional protection. This too is beyond the power of presidential action.

It is highly likely that the courts will overturn this EO, but in the meanwhile people affected by the EO are being detained and may continue to be detained by the CBP. It is well within the authority and the power of the hand that signed the EO to withdraw the order or at least spare these people, who range from infants to octogenarians, the discomfort and the indignity of confinement while the legality of the order is under consideration.

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