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TRUMP'S TWEET ON "EXTREME VETTING" MAY HAVE OPENED THE DOOR TO A COURT CHALLENGE

Posted on June 12, 2017 by Cyrus Mehta

The Trump administration has begun to apply extreme vetting on visa applicants, even though tourism has dropped this year. A new form, DS-5535, asks visa applicants extremely detailed questions about travels, work history and their presence on social media, as follows:

- Travel history during the last fifteen years, including source of funding for travel;
- Address history during the last fifteen years;
- Employment history during the last fifteen years;
- All passport numbers and country of issuance held by the applicant;
- Names and dates of birth for all siblings;
- Name and dates of birth for all children;
- Names and dates of birth for all current and former spouses, or civil or domestic partners;
- Social media platforms and identifiers, also known as handles, used during the last five years; and
- Phone numbers and email addresses used during the last five years.

It is going to be extremely difficult for anyone who doesn't keep meticulous records to accurately complete Form DS-5535. The form also warns that failing to provide the information may delay or prevent the application's processing. It is not clear who will be subject to these additional questions. The US Department of State in its May 4, 2017 notice in the Federal Register has indicated that consular officers will ask visa applicants to complete the new form to “resolve an applicant's identity or to vet for terrorism or other national security related visa ineligibilities when the consular officer determines that the circumstances of a visa applicant, a review of a visa application, or responses in

a visa interview indicate a need for greater scrutiny." The notice goes on to further state, "Failure to provide requested information will not necessarily result in visa denial, if the consular officer determines the applicant has provided a credible explanation why he or she cannot answer a question or provide requested supporting documentation, such that the consular officer is able to conclude that the applicant has provided adequate information to determine the applicant's eligibility to receive the visa. The collection of social media platforms and identifiers will not be used to deny visas based on applicants' race, religion, ethnicity, national origin, political views, gender, or sexual orientation." Notwithstanding this assurance, it is quite likely that those who inadvertently fail to include all the information may be penalized later when applying for subsequent immigration benefits. A simple error could also create a false suspicion of fraud. The government has estimated that at least 65,000 people will be subject to the extreme vetting procedure.

As more and more visa applicants subjected to DS-5535 are likely to either face actual or constructive denials (such as where an application remains pending for an indefinite period of time), what recourse would one have? A consular officer has unbridled discretion over visa decisions. A visa applicant has no right to appeal. Courts are reluctant to review a consular officer's decision. There may however be a sliver of an opening thanks to President Trump's obsessive use of Twitter. Trump's recent tweets might have provided a legal basis for challenging a visa denial under the new extreme vetting procedure, especially if a visa applicant has been denied from one of the countries contemplated under the executive order that bans travel of nationals of six Muslim majority countries.

On June 5, 2017, following the latest terror attack in London, Trump issued a series of tweets that may have undercut his travel ban case. The first executive order banning nationals of seven Muslim majority countries was blocked because it was found to have animus against Muslims based on Trump's campaign statements, and thus violated the Establishment Clause of the First Amendment of the US Constitution. The Trump administration subsequently issued the current executive order to overcome the infirmities in the first one, but even that was blocked. The Fourth Circuit's decision in *International Refugee Assistance Project v. Trump* upholding the preliminary injunction against the second travel ban stated that even this ban "in context drips with religious intolerance, animus, and discrimination."

The administration has asked the Supreme Court to remove the block on the ban. The key issue on appeal is whether the second version is merely a watered-down version of the first ban. If that is so, then the second version is no different from the first version, which was found infirm as it displayed an animus towards one religion, namely. Trump did not help his case when he actually admitted that the second travel ban is a watered-down version of the first ban:

> The Justice Dept. should have stayed with the original Travel Ban, not the watered down, politically correct version they submitted to S.C."

David Isaacson has astutely commented that the usage of the term "politically correct" at "Trump's end of the political spectrum" implies that "it is unnecessarily or inappropriately tailored to avoid speaking of a minority group in a way that liberals would consider offensive." In other words, this is a dog whistle to Trump's base that the watered-down more "politically correct" version demonstrates the same animus against Muslims like the first one. There is also growing commentary that agrees that Trump's tweets may have undercut his case in favor of the travel ban. Here are other damaging tweets that were part of Trump's tweet storm on the travel ban on June 5:

> The Justice Dept. should ask for an expedited hearing of the watered down Travel Ban before the Supreme Court - & seek much tougher version!
>
> and
>
> People, the lawyers and the courts can call it whatever they want, but I am calling it what we need and what it is, a TRAVEL BAN!

Later in the evening on June 5, Trump tweeted this:

> That's right, we need a TRAVEL BAN for certain DANGEROUS countries, not some politically correct term that won't help us protect our people!

It is thus no surprise that Neal Katyal, the lawyer who argued for the plaintiffs in Hawaii v. Trump in the 9th Circuit, tweeted, "Its kinda odd to have the defendant in Hawaii v. Trump acting as our co-counsel. We don't need the help but will take it!" Even George Conway, the husband of Trump's adviser Kellyanne Conway, who took himself out of the running to lead the Justice Department's Civil Division tweeted: "These tweets may make some ppl feel better, but they certainly won't help OSG get 5 votes in SCOTUS, which is what

actually matters. Sad," he wrote, using abbreviations or Office of Solicitor General and the Supreme Court."

There is one tweet of Trump as part of the June 5 tweet storm that did not get noticed as much as the others, which potentially opens the door for one who may wish to seek judicial review over a visa denial under the new extreme vetting procedures:

> In any event we are EXTREME VETTING people coming into the U.S. in order to help keep our country safe. The courts are slow and political!

This tweet can be interpreted to mean that "EXTREME VETTING", capitalized by Trump, is in effect a substitute for the travel ban, which the courts have blocked. If DS-5535 is used to wholesale deny visa applicants from Muslim countries in the executive order entry into the United States, then Trump's animus against Muslims will also be evident in Form DS-5535. On its face, the government has every right to apply extreme vetting procedures on travelers to the United States and it would be difficult to overturn a consular denial as a result. However, as a result of Trump's tweet implying that he has deployed extreme vetting as a substitute for the blocked travel ban, it may have created an opening for challenging the procedure.

Courts have continuously applied the "facially legitimate and bona fide" test of *Kliendienst v. Mandel* to challenges to individual visa denials. Justice Kennedy's concurring opinion in *Kerry v. Din* affirms this standard. Although *Mandel* sets a high bar to plaintiffs, the Fourth Circuit's majority opinion in *IRAP v. Trump* emphasized that the government's action must both be facially legitimate as well as be bona fide. The government's action, such as with the executive order banning nationals from six Muslim majority countries in the name of national security may have been facially legitimate, but may not have been bona fide as the President used it as a cover to fulfill his promise to ban Muslims from the United States. This constituted bad faith, according to the majority opinion, and thus the executive order was not bona fide. Where the good faith has "seriously been called into question," the court concluded it should be allowed to "look behind the stated reason for the challenged action." The court used the test in *Lemon v. Kurtzman* to establish that the travel ban violated the Establishment Clause of the US Constitution by disfavoring Muslims. Relying on statements that President Trump made both during his campaign and after he became President, the travel ban was in effect a legal attempt to effectuate Trump's

promised Muslim ban rather than advance national security. The Fourth Circuit opinion broke new ground by challenging the long-held notion that the courts must always defer to the government on national security concerns, especially when the government acts in bad faith.

Trump's recent tweets seem to suggest that the new travel ban, as a watered down and "politically correct" version of the original travel ban, was intended to fulfill his campaign promise of banning Muslims from the United States. Thus, one can infer that even the second ban was issued in bad faith, which the Supreme Court will soon review. The same could be said about Trump's tweet on extreme vetting, as it appears to be a substitute for the travel ban, which was found to have been done in bad faith. If there is pattern of nationals from the blocked countries in the travel ban being denied visas under the extreme vetting procedures pursuant to DS-5535, applicants could potentially challenge such denials as being done in bad faith. As suggested in my prior blog, *IRAP v. Trump* provides a basis to challenge visa refusals if they are done in bad faith even beyond the travel ban. One can see this happening if applicants from the countries cited in the travel bans are routinely refused admission as a pretext for blocking Muslims. Admittedly, a challenge of this sort would be difficult, and the plaintiff would also need to assert standing. Standing would be easier to assert, though, when there is a constitutional claim, especially if extreme vetting like the travel ban violates the Establishment Clause, and when cases are brought by US citizens or when the interests of US citizens may be jeopardized as a result of the visa refusal.

At the time of going to press, the Ninth Circuit also issued a decision in Hawaii v. Trump that upholds the block of the lower district court, but on statutory grounds. The Ninth Circuit did not even need to get into the constitutional argument on whether the executive order displayed animus towards Muslims and thus violated the Establishment Clause, and instead ruled that the executive order violates INA 212(f). By suspending the entry of 180 million nationals of the six blocked countries, the Ninth Circuit ruled that the President did not show a sufficient justification that their suspension would be "detrimental to the interests of the United States" under INA 212(f). Although the Ninth Circuit in making a statutory argument did not feel the need to analyze Trump's tweets, footnote 14 in on page 40 of the slip opinion mentioned one of the tweets:

> Indeed, the President recently confirmed his assessment that it is the

> "countries" that are inherently dangerous, rather than the 180 million individual nationals of those countries who are barred from entry under the President's "travel ban." *See* Donald J. Trump (@realDonaldTrump), Twitter (June 5, 2017, 6:20 PM), https://twitter.com/realDonaldTrump/status/871899511525961728 ("That's right, we need a TRAVEL BAN for certain DANGEROUS countries, not some politically correct term that won't help us protect our people!") (emphasis in original); *see also* Elizabeth Landers, White House: Trump's tweets are "official statements", CNN (June 6, 2017, 4:37 PM), http://www.cnn.com/2017/06/06/politics/trump-tweets-official-statements/ (reporting the White House Press Secretary's confirmation that the President's tweets are "considered official statements by the President of the United States").

Ultimately, the Supreme Court will be the final arbiter and may either affirm the reasoning of the Fourth Circuit or the Ninth Circuit, or reverse. If the Supreme Court lifts the block, then that would end the matter and this blog may become moot. If the Supreme Court affirms the block, then Trump's tweet on extreme vetting might still be relevant if a plaintiff decides to challenge a visa denial and especially if the Supreme Court upheld the Fourth Circuit's constitutional argument rather than the Ninth Circuit's statutory argument. One can see the Trump administration deploying extreme vetting with full force as a substitute to the blocked travel ban. If extreme vetting harms the image and economy of the United States by dissuading bona fide travelers form Muslim-majority countries, and does nothing to enhance national security interests, it is incumbent on those who view the United States as a great nation because of its welcoming attitude towards visitors and immigrants to find creative ways to challenge DS-5535.