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TRUMP'S EXPANDED TRAVEL BAN AND OTHER IMMIGRATION MADNESS

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President Trump has done it again. On January 31, 2020, he used his extraordinary broad powers under INA § 212(f) to expand his travel ban to six additional countries. The affected countries are Nigeria, Eritrea, Sudan, Tanzania, Kyrgyzstan and Myanmar. The expanded ban comes about three years after the first ban. Most of the countries targeted in this ban, like the first ban, are countries with significant Muslim populations. Even Myanmar, where Buddhists constitute the majority, has a significant minority population comprising Muslims including the persecuted Rohingya people. The administration has spuriously argued that the new travel ban is vital to national security and the ban will remain "until those countries address their identified deficiencies" related to security and information-sharing issues. Even if this is the case, it is not sufficient justification to impose a travel ban on unsuspecting countries without warning and on those who have applied to immigrate to the US.

Unlike the first ban, the new ban only restricts immigrants from Burma, Eritrea, Kyrgyzstan and Nigeria. The restrictions on Sudan and Tanzania are narrower as they only apply to immigrants who have won green cards under the diversity program. The new ban does not apply to nonimmigrants who visit the US temporarily such as tourists, students or workers under specialized work visa programs such as the H-1B for specialty occupations or L-1 for intracompany transferees. It will also not apply to special immigrants who have been helpful to the US such as employees of US consular posts. Banning immigrants and not nonimmigrants does not make sense at all. If the administration is so concerned about US security, then those granted immigrant visas are more vetted than those who travel on temporary nonimmigrant visas. A terrorist is more likely to quickly get into the US on a temporary visa to cause harm. The

justification that the administration has provided is that it is harder remove immigrants from the US is also spurious from a security perspective since all noncitizens are subject to the same removal process, able to contest the charges against them and are eligible for relief from removal. People placed in removal can remain in the US until they exhaust all their appeals. Also the justification to restrict immigrants from Tanzania and Sudan who have won green card lotteries makes even less sense. Why would one who has won the lottery in Sudan and Tanzania pose more of a risk than someone who is immigrating on another basis?

In 2018 the Supreme Court in *Trump v. Hawaii* upheld a third version of the ban, after the previous versions were challenged in court, on the ground that the third version was neutral as it did not violate the First Amendment Clause of the Constitution despite Trump's utterances in favor of banning Muslims. For instance, in his presidential campaign he called for a "total and complete shutdown of Muslims entering the United States. " He also said, among other derogatory statements, that "Islam hates us." This expanded ban too targets Muslim countries, and allows Trump to fulfill his campaign promise to his supporters to ban nationals from Muslim countries. This is why the first ban was rightly called the Muslim ban, and the new ban, also ought to be called the expanded Muslim ban.

Before Trump, one could hardly imagine that an American president would use INA § 212(f) to rewrite immigration law in a manner he saw fit and with whatever prejudices might be harboring in his mind. While INA § 212(f) does give extraordinary power to a president, Trump has exploited these powers beyond what could have been imagined when Congress enacted this provision. INA §212(f) states:

> *Whenever the President finds that the entry of any aliens or of any class of aliens into the United States would be detrimental to the interests of the United States, he may by proclamation, and for such period as he shall deem necessary, suspend the entry of all aliens or any class of aliens as immigrants or nonimmigrants, or impose on the entry of aliens or any class of aliens as immigrants or nonimmigrants, or impose on the entry of aliens any restrictions he may deem to be appropriate*

In the expanded ban, Trump has blocked people who have won green card

lotteries under the DV program. This is a program that Trump and immigration restrictionists in his administration clearly disfavor, but he has used INA § 212(f) to obliterate the green card provisions in the INA for Tanzanians and Sudanese. Trump has also openly indicated his animosity towards immigrants who come from "shi*hole" countries. It is hardly surprising that Trump, bolstered by a Republican dominated Senate that will likely acquit him for brazen corruption, is abusing his power under INA § 212(f) to reshape immigration law as he sees fit. Congress in enacting INA § 212(f) would have never conceived that a future president could use the provision to block green card lottery winners. Trump can decide, based on whatever prejudice he has, that anything is "detrimental to the interests of the United States." It is eerily uncanny that Trump's lawyers have mounted a similar defense in his impeachment trial, especially Alan Dershowitz, who nonsensically argued that "If a President does something which he believes will help him get elected in the public interest, that cannot be the kind of quid pro quo that results in impeachment."

Trump has used INA § 212(f) to reshape immigration laws enacted by Congress that have nothing to do with travel bans and national security. On November 9, 2018, he issued another Proclamation invoking INA § 212(f), which banned people who cross the Southern border outside a designated port of entry from applying for asylum in the United States. The Department of Justice and Department of Homeland Security followed by jointly issuing a rule implementing the proclamation. The key issue is whether INA § 212(f) allowed a president like Trump with authoritarian impulses to override entire visa categories or change the US asylum system? INA § 208(a)(1) categorically allows any alien who is physically present in the United States to apply for asylum regardless of his or her manner of arrival in the United States "whether or not at a designated port of arrival." Trump attempted to change that by virtue of the authority given to him in INA § 212(f) by not allowing people who cross outside a port of entry from applying for asylum. Never mind that the administration had virtually closed the designated ports of entry for asylum seekers, which forced them to cross the border through irregular methods. In *East Bay Sanctuary Covenant v. Trump*, 932 F.3d 742 (2018), the Ninth Circuit concluded that the Trump administration had unlawfully done what the "Executive cannot do directly; amend the INA". Indeed, even in *Trump v. Hawaii*, the administration successfully argued that INA § 212(f) only supplanted other provisions that allowed the administration to bar aliens from entering the

United States, but did not expressly override statutory provisions. Thus, INA § 212(f) could not be used as a justification to override INA § 208. The Supreme Court has temporarily stayed the injunction in a related case that prohibits asylum seekers on the Southern border from applying for asylum in the US if they have not applied in Mexico or Guatemala - and thus by implication *East Bay Sanctuary Covenant v. Trump* - from taking effect until the government's appeal in the Ninth Circuit and Supreme Court is decided. There has been no ruling on the merits of the case.

On October 3, 2019, Trump yet again invoked INA § 212(f) by issuing a Proclamation to ban intending immigrants from entering the United States if they did not have health insurance within 30 days of their arrival in the United States. Under the Proclamation, an intending immigrant who has satisfied all statutory requirements set out in the INA will nevertheless be permanently barred from entering the United States if that person cannot show, to the satisfaction of a consular officer, that he or she either "will be covered by approved health insurance" within 30 days of entering the United States, or "possesses the financial resources to pay for reasonably foreseeable medical costs." A federal district court in Oregon temporarily blocked the health insurance proclamation through a nationwide injunction by relying on *East Bay Sanctuary Covenant v. Trump*, supra, which specifically held that a president cannot rely on INA § 212(f) to amend the INA. In the health insurance case, Trump's proclamation contradicts the public charge provision under INA 212(a)(4), which does not have a health insurance requirement. The Ninth Circuit has upheld the temporary order of the Oregon district court, although it has a strong dissent by Judge Bress criticizing the Oregon district court's finding that INA $ 212(f) was unconstitutional under the nondelegation doctrine. Under this doctrine, associated with separation of powers, Congress cannot delegate legislative powers to the president under INA § 212(f). This argument needs to be watched more closely as it is bound to play out further when the administration defends its authority under INA § 212(f) in this case and other cases. The Supreme Court has not yet intervened in this case.

The new travel ban is bound to be challenged in federal district courts, and one or more courts may issue nationwide injunctions. The Trump administration, like in other instances, will likely take this to the Supreme Court and request a stay of the injunction. Most recently, the conservative majority in the Supreme Court stayed the injunction of a New York district court, which was confirmed

by the Second Circuit, against the public charge rule. Justice Gorsuch wrote a concurring opinion along with Justice Thomas that was critical of nationwide injunctions of this sort. The concurrence complained that a single judge enjoined the government from applying the new definition of public charge to everyone without regarding to participation in this lawsuit, and that they are "patently unworkable" and sow chaos. It could also be argued that Justice Gorsuch's lifting of a nationwide injunction would sow chaos if a law that is potentially inconsistent with a statute or unconstitutional is implemented until it is found so by the Court. And here, in the instant case, there is even further chaos as the public charge rule is being implemented everywhere after the stay of the injunction expect in Illinois. Nationwide injunctions, according to Mila Sohoni, a professor at the University of San Diego law school, are not a recent phenomenon and this practice goes all the way back to the 19th century.

Notwithstanding all the barriers and obstacles, including the admonition against nationwide injunctions by Justice Gorsuch and the prior *Trump v. Hawaii* ruling, it is imperative that the limits to INA § 212(f) be challenged as Trump can use this provision to radically transform immigration laws enacted by Congress, and without going through Congress to amend laws that he does not like. A challenge to the expanded ban will again give courts the ability to examine INA § 212(f). The Supreme Court, disappointingly, held in *Trump v. Hawaii* that INA § 212(f) "exudes deference to the President" and thus empowers him to deny entry of noncitizens if he determines that allowing entry "would be detrimental to the interests of the United States." One should however still give credit to prior lower federal court decisions that blocked the first and second versions of the travel ban, on the grounds that Trump exceeded INA § 212(f), which were far worse than the watered down third version that was finally upheld. Although the Supreme Court may have stayed the injunction in *East Bay Sanctuary Covenant v. Trump*, it has not ruled on the merits of the Ninth Circuit's reasoning that Trump could not use INA § 212(f) to rewrite asylum law in the INA. The Supreme Court is yet to hear any challenge to the health insurance proclamation. The Ninth Circuit in both these cases did not disapprove of the reasoning by district court judges that Trump overstepped his authority notwithstanding the powers given to him under INA § 212(f).

In issuing the expanded travel ban, which takes effect on February 21, 2020, Trump has abused his authority in selectively blocking immigrants from predominantly African nations. This ban too, like the last one, will equally

impact US citizens who have legitimately sponsored family members under the law as they will not be prevented from reuniting in the US. The ban also arbitrarilyy, and without foundation, blocks green card lottery winners from two nations. Nigerians will be most impacted by the new ban as they by far make up the largest number of African immigrants in the US, numbering approximately 327,000. A connection between Trump's ban and Nigeria can be made to a meeting in the Oval Office in June 2017 when Trump told his advisers in the Oval Office in June 2017 that Nigerians who set foot in the US would never "go back to their huts" in Africa. This ban will result in the isolation of the US while other countries will benefit. The new ban also does nothing to enhance US national security. Since it does not apply to nonimmigrant visa entries, US citizens who are not yet married to their spouses in any of the newly banned countries may file a nonimmigrant K-1 visa fiance petition. Once the fiance enters the US on a K-1 fiance visa, they can marry the US citizen and adjust status to permanent residence. It makes no sense for a person from a banned country to delay a marriage with a US citizen in order to be eligible for a K-1 fiance visa, but this is what Trump's illogical ban forces them to do in addition to making every national of the banned country a suspect.

In approving Trump's first travel ban, the majority in *Trump v. Hawaii* made reference to *Korematsu v. United States*, 323 U.S. 214 (1944). This was the shameful Supreme Court case that allowed the internment of Japanese Americans after the attack on Pearl Harbor in 1941. Justice Sonia Sotomayor referencing this decision in her powerful dissent in *Trump v. Hawaii*. Justice Sotomayor found striking parallels between *Korematsu* and Trump's travel ban. For example, they were both based on dangerous stereotypes about particular groups' inability to assimilate and their intent to harm the United States. In both cases, there were scant national security justifications. In both cases, there was strong evidence that there was impermissible animus and hostility that motivated the government's policy. The majority rejected the dissent's comparison of Trump's supposedly facially neutral travel ban to *Korematsu*, but still took this opportunity to overrule *Korematsu*. Yet, when one carefully reviews Trump's motivations behind the travel bans, especially after the second one, they are not too different from the motivations that resulted in the forced internment of Japanese Americans. Indeed, Justice Sotomayor astutely reaffirmed that "he United States of America is a Nation built upon the promise of religious liberty." In her rejection of the legality of the travel ban, she

observed that “he Court’s decision today fails to safeguard that fundamental principle. It leaves undisturbed a policy first advertised openly and unequivocally as a ‘total and complete shutdown of Muslims entering the United States’ because the policy now masquerades behind a façade of national-security concerns.”

It is time to revisit the Supreme Court’s overruling of *Korematsu* in *Trump v. Hawaii*. In that case, the Supreme Court opined that the first travel ban was facially neutral and took pains to distinguish it from the repugnant *Korematsu* decision. The second travel ban confirms that the first ban was not neutral, and this ban, along with the first one is strikingly similar to *Korematsu*. Since the first ban took effect, thousands of intending immigrants from the banned countries, from infants to elderly parents, have been needlessly impacted and they pose no threat to national security. The waivers in the first ban are a sham and are seldom granted. The waivers incorporated in the second ban will also be a sham. INA § 212(f) must have limits, courts must hold, including the Supreme Court someday. Otherwise, Trump’s travel bans and other sorts of immigration madness will have no limits.