

Immigration REPORT

FAIR's Efforts to Protect American Workers Reflected in Latest Trump Executive Order

What a difference three months makes!

In late April, as the country was coming to grips with the devastating impact of the COVID-19 pandemic on the economy and the labor market, President Trump signed the first of several executive orders limiting the admission of immigrants and temporary foreign workers. The intent of the April executive order, however, was derailed by powerful business interests that convinced the White House to exclude most categories of guest workers from the admissions ban.

In response to the sell-out of the interests of American workers, FAIR led an effort to convince the White House to make good on the president's promises to ensure that American workers would not lose jobs or job opportunities to foreign guest workers. Those efforts paid off. By June, the public pressure campaign led by FAIR convinced the Trump administration to strengthen the original order and limit admissions of guest workers.

But even the improved executive order did not provide American workers with all the protections they need, especially during a time of economic crisis. In July, it was revealed that the federally-owned Tennessee Valley Authority (TVA) (a public works project created by President Franklin Roosevelt

during the Great Depression) was planning to outsource some 20 percent of its jobs to cheaper overseas labor markets and, at the same time, access H-1B workers to replace many American workers in jobs that remained in this country.

It is these sorts of abuses of the H-1B program (which allows U.S. employers to bring in skilled workers) and other temporary worker programs that FAIR has fought for years to end. The TVA is hardly the first employer to abuse the program and use it to undermine the interests of American workers. But the fact that it is a quasi-government entity, and the timing of the TVA's action – in the midst of the greatest

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FAIR's Efforts

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unemployment crisis since the Great Depression – made its abuse of the H-1B programs impossible to ignore or excuse.

FAIR, working with a coalition of American tech workers whose interests have been harmed by H-1B abuses, reached out to the White House. In addition, the U.S. Tech Workers Coalition ran TV ads in Tennessee (where most of the jobs were being lost or outsourced) demanding that the president use his authority to curb these sorts of abuses. On August 3, the president responded with the most far-reaching executive order aimed at ending the practice of replacing American workers with foreign guest workers.

The order requires employers seeking guest workers to demonstrate that they are not replacing American workers. This restriction applies both to direct government employers, like the TVA, and to companies with federal contracts. Big high tech companies – most of which have government contracts – are among the largest H-1B employers of H-1B workers. Employers would be required to prioritize the hiring of U.S. citizens and green card holders to fill jobs that become available as the economy recovers.

To the surprise of no one, the tech giants responded with a lawsuit. Amazon, Google, Facebook and Microsoft are among more than 50 of the nation's biggest tech companies that have filed an amicus brief in the court case against the president's proclamation. Ignoring the millions of idled American workers wondering if they will be able to make their mortgage payments or put food on their tables, the titans of the multi-trillion dollar industry argued that the suspension of guestworker visas "does not further the interests of the United States" and that the requiring them to hire American workers "will stifle innovation, hinder growth, and ultimately harm U.S. workers."

Notwithstanding the tech industry's irrational claims, the August executive order provides some much needed relief for beleaguered American workers, but it does not represent a permanent fix for our broken guestworker programs. While the TVA's actions violated the intent of the H-1B program, they were technically not illegal (or unique). A permanent fix will require action by Congress to tighten requirements for accessing H-1B and other guestworker programs. Congressional action to prevent all U.S. employers

Immigration REPORT

The FAIR Immigration Report
(ISSN 1067-3337)

Published 10 times a year by the Federation for American Immigration Reform, a non profit membership organization.

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from hiring guest workers when qualified American workers are available, or from replacing existing workers with guest workers is long overdue. Likewise, Congress must act to prevent employers that outsource U.S. jobs to lower wage workers in other countries from accessing guest worker programs.

Congressional action, however, would require the two parties to work together – something that

is increasingly rare these days – and standing up to powerful business interests that have fought hard to keep their access to guest workers in preference to American workers. Until then, the executive orders signed by President Trump in June and August are important stopgap measures and represent an important victory for the American people. ■

House Approves the NO BAN Act, Which Blocks the President from Imposing Travel Restrictions

Recent executive actions restricting travel to the United States have likely saved American lives. During his first weeks in office in 2017, President Trump issued orders limiting entry of citizens of countries whose governments support or harbor international terrorists. That order was challenged by the open borders and mass immigration advocacy network, and the president's action was ultimately upheld by the Supreme Court.

In January of this year, President Trump imposed entry restrictions on travelers from China in response to the COVID-19 pandemic. Two months later, he

saved by these entry restrictions, but it is reasonable to assume that without them, the COVID-19 crisis in the United States would be worse than it already is.

In both the efforts to combat global terrorism and a global health crisis, the president was acting within his authority under the law. Section 212(f) of the Immigration and Nationality Act 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 any restrictions he may deem to be appropriate.”

Notwithstanding the fact that President Trump invoked this authority precisely in the manner in which the law intended, House Democrats acted in June to strip him of the power to act expeditiously in response to a national security threat. In a politically inspired party line vote, 233-183, the Democratic controlled House approved the National Origin-Based Antidiscrimination for Nonimmigrants (NO BAN) Act.

The House's action was delayed by three months, in what was a tacit admission that the existing law is essential to protecting public health and safety. Initially,



Image Credit: istock

issued a similar order limiting entry of travelers from Europe. Those executive orders were aimed at checking the spread of the disease, and similar to actions taken by leaders of nations all across the globe. No one knows, of course, how many American lives were

No BAN Act

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House Democrats staged the vote for the NO BAN Act in March, at the onset of the coronavirus health crisis in the United States. On the same day in March that the House debated the NO BAN Act, President Trump issued a similar temporary suspension on travel from Europe, citing the continent's rapid growth of coronavirus cases. Later on that same day, the Democrats quietly pulled the NO BAN Act from consideration.

Without the 212(f) authority that the House voted to remove, the Executive Branch would be helpless to act in a national emergency. The need for presidents to respond in real time to real threats was pointedly

articulated by then-Circuit Court Judge, now Supreme Court Justice Ruth Bader-Ginsburg in a 1986 case in which she sided with the Reagan administration's use of this authority. But leaving the president and the public helpless in such circumstances is precisely what the NO BAN Act would do.

In essence, the NO BAN Act amounts to a political effort on the part of House Democrats to curb abuses of 212(f) powers that do not exist, while leaving the nation vulnerable to national security and health threats that do exist. The bill will die in the Senate – because it is blatantly political and unnecessary – but it poses a dangerous challenge to what has heretofore been a bipartisan consensus that presidents should have the flexibility to act quickly to prevent dangerous people or diseases from entering the country, and that we should always err on the side of caution. ■

In Memoriam: Michael Hethmon



Mike Hethmon was a long-time attorney with the Immigration Reform Law Institute (IRLI), an affiliate of the Federation for American Immigration Reform (FAIR). Mike and his girlfriend were tragically killed in a car crash on July 25, at the hands of a criminally negligent driver.

Mike's sudden death is a blow for the cause of true immigration reform. For those of us who worked with him for years at FAIR and IRLI, the tragedy is personal and deeply painful. Mike, had been a dedicated and determined fixture around here going on 25 years, and was due to retire at the end of this year.

Mike was committed to the cause of true immigration reform to the extreme. His strength was in seeking creative opportunities to shake up the status

quo, to develop innovative litigation strategies, often framed by state legislative proposals he'd help craft. These strategies served to defend the traditional role that states have played in ensuring their policies aid and promote federal immigration enforcement priorities. Arizona's SB 1070 law would not have happened without his involvement, to be sure. His determined defense of the American worker was legendary.

That innovative work gave new hope to FAIR's ability to litigate in defense of citizens' rights. His efforts, begun so long ago, seem poignant now, in light of the radical left's determination to erect a permanent wall between the states and the Federal Government, and to render immigration law unenforceable.

Such is the unthinkable unfairness of life that he finally had plans to move with his girlfriend to Tennessee at the beginning of 2021 and begin a long-awaited retirement.

Mike, of course, was more than just a top notch lawyer. To those of us at FAIR and IRLI he was a dear colleague and a cherished friend who will be missed. Mike was also a father and a brother. Our hearts go out to his three children and his two brothers as they deal with this unimaginable personal loss. ■

Executive Order Takes Aim at Ensuring Fair Representation

The constitutionally-mandated Census is more than just a decennial head count of people residing in the United States. In many respects it is a road map to the next ten years, determining each state's representation in Congress, the number of electoral votes it casts in presidential elections, and its allocation of federal funds. For decades these real world consequences of the Census have been skewed by the inclusion of illegal aliens in the count.

In July, President Trump took an important step to prevent the 2020 Census from once again disenfranchising American citizens and denying them federal funds that are essential to address needs in their communities. The president's order instructs that, while every individual living in the United States should be counted, the Department of Commerce, which oversees the Census, should use available data to identify illegal aliens and subtract those numbers from each state's tally.

States that stand to benefit politically and financially from the inclusion of illegal aliens in their population counts, together with a massively funded coalition of immigration advocacy groups, indicated immediately that they would sue to prevent identifiable illegal aliens from being deducted for the purposes of congressional reapportionment.

The concern about including illegal aliens in the Census count for reapportioning congressional representation is not a new one to FAIR. As far back as the 1980 Census the organization attempted to prevent American citizens from losing representation and federal dollars to illegal aliens in other states. That attempt, and similar efforts in subsequent Censuses, were denied legal standing based on the courts' determination that the plaintiffs could not demonstrate that they would be uniquely harmed by the inclusion of illegal aliens.

In his executive order, President Trump argues that while the Constitution is clear about counting everyone, it is vague about who should be counted for the purpose of reapportionment. Supreme Court decisions have supported the idea that presidents have some discretionary authority to make such determinations.

There is no dispute that the inclusion of illegal aliens in the reapportionment count have repeatedly resulted in some states gaining representation in Congress at the expense of states with smaller illegal alien populations. California is estimated to have claimed at least three seats and three Electoral College votes in the 2010 Census due to its large illegal alien population. With the number of seats in the House of Representatives fixed at 435, one state's gain is another state's loss.



Image Credit: istock

In the past, states with large illegal alien populations have been passive beneficiaries of reapportionment. However, through the proliferation of sanctuary and other policies that attract illegal aliens to certain jurisdictions, some states stand to be rewarded by essentially putting their fingers on the scale.

In addition to the president's executive order, another challenge to including illegal aliens in the reapportionment tally is making its way through the courts. Alabama is one of the states that will almost certainly lose representation, federal funding, and electoral votes if illegal aliens are included in the reapportionment equation. A favorable ruling for Alabama would supersede the president's order and ensure that mechanisms be put in place for future censuses that the law-abiding citizens do not lose representation and federal dollars to illegal aliens and states that encourage illegal immigration. ■

News from our State and Local Operations



NEW JERSEY

Federal law expressly forbids illegal aliens from working in the United States. But the New Jersey state Senate did not let that “minor” detail deter it from approving a measure that would allow illegal aliens to obtain professional and occupational licenses. The more than 1.3 million New Jersians who are unemployed due to the COVID-19 crisis also proved to be another “minor” detail in the state’s relentless effort to reward and empower illegal aliens. SB 2455, passed the upper chamber by a 26-11 vote on June 29, with four Republicans joining 22 Democrats. The bill states that “Notwithstanding the provisions of any other law, rule, or regulation, lawful presence in the United States shall not be required to obtain a professional or occupational license provided that the applicant meets all other requirements for licensure.” The state Assembly quickly followed suit, approving the measure by 47-26 vote on July 30. As of the completion of this edition of the newsletter Gov. Phil Murphy (D) had not signed the measure into law, however, he is expected to. According to his spokeswoman, who blurred the distinction between immigrants and illegal aliens, “Governor Murphy believes that immigrants are a critical part of the fabric of life in New Jersey, and that they should not face unnecessary barriers as they seek to participate in our society and economy.”

FLORIDA

On June 30, Florida Governor Ron DeSantis (R) signed Senate Bill (SB) 664 into law significantly expanding the pool of Sunshine State employers who are required to use the federal E-Verify employment authorization check system. The bill falls somewhat short of Gov. DeSantis’ campaign pledge to institute a universal E-Verify requirement in the state, but it is nevertheless an important step in the right direction against fierce resistance from many cheap labor business interests. The new Florida law requires:

- All public employers – state, county, municipal and special districts – to use E-Verify, previously the law required only some state executive-branch agencies to use it.
- All public contractors to use E-Verify or lose their contracts.
- All recipients of state economic development incentives to use E-Verify or lose their incentive funding.
- Private employers to either use E-Verify to ensure the employment authorization of their new hires or if they don’t use E-Verify to keep their I-9 forms with all of their employee documentation which shows their eligibility to work in the United States for three years.
- Private employers to make all records and documents related to employment verification available on request to the Florida Attorney General, Florida Department of Law Enforcement, Office of Statewide Prosecution and their local state attorney’s office.
- A process for suspending and revoking the business licenses of private employers that fail to comply.

The newly enacted law is also a testament to the work of Floridians for Immigration Enforcement (FLIMEN), a local citizens’ activist group that works closely with FAIR. FLIMEN has pushed relentlessly for sensible state policies, like SB 664, which protect the interests and safety of Floridians.

State and Local

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MASSACHUSETTS

Both houses of the Massachusetts Legislature approved legislation that would dramatically expand illegal alien sanctuary policies in the Bay State under the guise of “police reform.” Senate Bill 2820 and its House companion, H. 4886, create “oversight boards” to monitor local police cooperation with federal immigration authorities. These boards would

include representatives from illegal alien advocacy groups. Among other powers, these unelected and unaccountable boards would have the power to punish law enforcement and corrections officers who cooperate with ICE. Local law enforcement departments would no longer have the authority to set their own policies in this regard. The legislation would also bar federal authorities from accessing Motor Vehicles records and its facial recognition software.

The two versions of the legislation will have to be reconciled by a conference committee. It is unclear at this point if Republican Gov. Charlie Baker would sign the bill if it came to his desk. ■

Supreme Court Green Lights Use of Defense Dollars for Border Wall; Appellate Court Allows Congress to Sue, However

The U.S. Supreme Court handed the American people an important victory on July 31, when it declined to block the Trump administration’s use of \$2.5 billion in Department of Defense (DOD) funds for border wall construction. The 5-4 decision rejected efforts by the American Civil Liberties Union (ACLU) and other groups to prevent the administration’s use of Pentagon funds.



Image Credit: istock

Congress, which authorized construction of a border wall in 2007 with overwhelming bipartisan support, more recently has refused to fund its construction with now near unanimous Democratic opposition. President Trump has pledged to add some 450-miles

of new wall by the end of the year. His opponent in the November election, former Vice President Joe Biden has pledged that not one more foot of wall would be constructed under his administration, even though he joined with the majority of Democrats who authorized the construction of the wall in 2007.

In response to Congress’ unwillingness to fund border wall construction, President Trump tapped about \$6 billion in defense construction funds from the DOD’s budget (to construct a security barrier for national defense) and money from the Treasury Department’s asset forfeiture fund.

Less than two weeks after the Supreme Court denied the ACLU’s effort to halt border wall construction, the D.C. Circuit Court of Appeals cleared the way for Congress to sue to prevent the administration from using DOD and Treasury money for wall construction. The Appellate Court’s ruling does not immediately block the administration from using these funds, but does clear the way for congressional Democrats to pursue a legal case aimed at stopping the president from using funds not specifically authorized for wall construction. ■

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Talk with your financial advisor and consider making a charitable contribution from your IRA to help FAIR continue our work for needed immigration reforms that benefit you and future generation to come.

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