Written by **Warren Mass** on December 10, 2015

Federal Judge Denies Texas Request to Block Syrian Refugee Settlement

U.S. District Judge David Godbey of the U.S. District Court for the Northern District of Texas issued an order on December 9 denying Texas Attorney General Ken Paxton's second application for a temporary restraining order to block the State Department, the International Rescue Committee, and other defendants from resettling Syrian refugees in Texas.

Godbey's decision was in response to a request filed by Paxton on December 9 on behalf of the Texas Health and Human Services Commission. In this request, Paxton noted that there was new "evidence" that refugees pose potential danger, and he cited evidence that included statements that "terrorist organizations have infiltrated the very refugee program that is central to the dispute."

Paxton included in his new evidence statements by Reresentative Mike McCaul (R-Texas), a member of the House Homeland Security Committee, as well as statements of "security concern" by the Texas Department of Public Safety's deputy director of Homeland Security.

The amended request replaced an earlier one that Texas had dropped on December 4. Prior to that, on December 2, the Texas Health and Human Services Commission filed a lawsuit in the same court asking for an immediate restraining order and a hearing by December 9 to petition for an injunction preventing the resettlement of the refugees within Texas.

In denying the state's request, Godbey wrote:

> The [Texas Health and Human Services] Commission argues that terrorists could have infiltrated the Syrian refugees and could commit acts of terrorism in Texas. The Court finds that the evidence before it is largely speculative hearsay.
>
> The Commission has failed to show by competent evidence that any terrorists actually have infiltrated the refugee program, much less that these particular refugees are terrorists intent on causing harm.
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> The Court does not downplay the risks that terrorism, as a general matter, may pose.
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> It must, however, assess the risk, if any, posed by these particular refugees. The Court also acknowledges that the kind of concrete information that would help in assessing that risk is the very sort of information the Commission complains the Federal Defendants should have — but did not — share with the Commission. Nonetheless, on the record before the Court, the Court finds that

> the Commission has failed to establish by a preponderance of the admissible evidence that there is a substantial threat of irreparable injury, and therefore denies the application for TRO [Temporary Restraining Order].

The defendants in the case to which Godbey referred included Secretary of State John Kerry, Secretary of Health & Human Services Sylvia Burwell, and Director of the Office of Refugee Resettlement Robert Carey.

The *Dallas Morning News* reported on December 9 that about 21 Syrian refugees are expected to be settled in Dallas and Houston by the end of the week.

Godbey's decision pertains only to the December 9 request for a a temporary restraining order and does not constitute a ruling on the December 2 lawsuit filed by the Texas Health and Human Services Commission. The *Dallas Morning News* reported:

> Despite the ruling, Texas' lawsuit over refugee resettlements is not over. A hearing is likely to come in January, said ACLU attorney Rebecca Robertson, who is representing a resettlement nonprofit [the International Rescue Committee that Texas also sued.]

As we noted in our article about the Texas lawsuit on December 3, there is a more effective strategy than filing lawsuits in federal court that the states can employ to exercise their right to determine which foreign refugees may cross their borders. Under the power of nullification, the states have the right to refuse to comply with not only federal actions pertaining to refugee resettlement, but in any area where the federal government attempts to usurp authority vis-à-vis the states that is not specifically granted to it by the Constitution.

We cited an article on the subject posted by *The New American* on November 30, in which constitutional attorney and contributor Joe Wolverton explored the arguments concerning whether state governors have the right to refuse entry into their states of refugees fleeing Syria.

The first point that Wolverton addressed was the assertion made by those claiming that federal authority supercedes the rights of the states on the matter — citing the "supremacy clause" of Article VI of the Constitution. He reminded readers that the Supremacy Clause does not declare that all laws passed by the federal government are the supreme law of the land, but only "laws of the United States made in pursuance" of the Constitution.

In other words: in pursuance thereof, *not in violation thereof*.

Wolverton also noted that the Constitution has little to say about immigration (although Article I, Section 8 empowers Congress to "establish an uniform Rule of Naturalization.") Naturalization, however, is not the same as immigration, since (he writes): "Immigration is the act of coming to a country of which one is not a native. Naturalization, however, is defined as the conference upon an alien of the rights and privileges of a citizen."

The article quoted a rare statement made by a president concerning which branch of government has the power to regulate immigration. President Ulysses S. Grant wrote in a memo to the House of Representatives: "Responsibility over immigration can only belong with the States since this is where the Constitution kept the power."

As Wolverton concluded his article:

> With respect to the difficult and potentially dangerous position in which [Arizona] Governor Ducey and the other 30 or so state executives find themselves, one wonders where in the Constitution

> states are required to ask the federal government's permission to exercise a power they specifically retain under the Bill of Rights, namely the power to grant or refuse permission for entry into their sovereign territory to an immigrant, no matter what label that immigrant is given by the federal government.

The right of states to nullify unconstitutional usurpations of power by the federal government is well documented in the writings of the Founding Fathers. As just one example, Thomas Jefferson wrote in 1798 in his Resolutions Relative to the Alien and Sedition Acts:

> Where powers are assumed which have not been delegated, a nullification of the act is the rightful remedy: that every State has a natural right in cases not within the compact, (*casus non foederis*,) to nullify of their own authority all assumptions of power by others within their limits: that without this right, they would be under the dominion, absolute and unlimited, of whosoever might exercise this right of judgment for them.

Though the Texas lawsuit is still pending, it is very optimistic to hope that a federal judge will decide in favor of the states in this matter in federal courts. However, by exercising the concept of nullification, the federal government could not so easily dismiss their resistance to federal usurpation, without triggering a constitutional crisis.

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