obsolescence.[51] Montenegro became NATO's twenty-ninth member state on June 5, 2017, at a ceremony that took place at the U.S. State Department.[52]

International Human Rights and Humanitarian Law

President Trump Issues Executive Orders Suspending Refugee Program and Barring Entry by Individuals from Specified Countries

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On January 27, 2017, President Trump issued an executive order that: (1) prohibited nationals from seven majority-Muslim countries from entering the United States for ninety days; and (2) prohibited individuals from entering into the United States as refugees for 120 days. Courts stayed the order on constitutional and statutory grounds. In response to these stays, President Trump replaced the initial order with a new order that eliminated preferential treatment for refugees fleeing from religious persecution and narrowed the scope of persons prohibited from entering into the United States. Courts again issued stays, holding that the new order violated the Establishment Clause and the Immigration and Nationality Act. The Trump administration appealed, and the Supreme Court agreed to hear the case in October. Along with its grant of certiorari, the Court kept the lower court stays in place except as to people with no connection to the United States either personally or through family.

During the 2016 presidential election, Donald Trump campaigned on a platform of revamping the process and substance of U.S. policy regarding immigrant and nonimmigrant visas. The particulars of his proposals evolved over time. In December 2015, Trump's campaign website called for "a total and complete shutdown of Muslims entering the United States . . . until our country's representatives can figure out what is going on."[1] This proposal remained on the campaign website until February 2017. Trump frequently discussed these views on the air and during stump speeches. During an interview with CNN in March 2016, Trump said that "Islam hates [America],"[2] and suggested that the United States should not "allow people coming into the country who have this hatred of the United States."[3] On Fox News, shortly after a terrorist attack in Brussels, Trump expressed his view that the country was "having problems with the Muslims."[4] These "problems," according to Trump, justified implementation of a more rigorous vetting process for entry into the United States:

[51] *See* Statement on Montenegro, *supra* note 41; *see also supra* note 35.

[52] NATO Press Release, North Atlantic Treaty Organization, Montenegro Joins NATO as 29th Ally (June 5, 2017), *at* http://www.nato.int/cps/en/natohq/news_144647.htm; U.S. Dep't of State Press Release, Notice to the Press, Office of the Spokesperson, U.S. Department of State, Montenegro Joins the NATO Alliance, U.S. Department of State (June 2, 2017), *at* https://www.state.gov/r/pa/prs/ps/2017/06/271540.htm.

[1] Jenna Johnson, *Trump Calls for 'Total and Complete Shutdown of Muslims Entering the United States,'* Wash. Post (Dec. 7, 2015), *at* https://www.washingtonpost.com/news/post-politics/wp/2015/12/07/donald-trump-calls-for-total-and-complete-shutdown-of-muslims-entering-the-united-states.

[2] *Donald Trump: 'I Think Islam Hates Us,'* CNN (Mar. 9, 2016), *available at* https://www.youtube.com/watch?v=C-Zj0tfZY6o.

[3] *Id.*

[4] Mark Hensch & Jesse Byrnes, *Trump: 'Frankly, We're Having Problems with the Muslims,'* The Hill (Mar. 22, 2016), *at* http://thehill.com/blogs/ballot-box/presidential-races/273857-trump-frankly-were-having-problems-with-the-muslims.

> The time is overdue to develop a new screening test for the threats we face today. In addition to screening out all members or sympathizers of terrorist groups, we must also screen out any who have hostile attitudes towards our country or its principles—or who believe that Sharia law should supplant American law.[5]

As the campaign continued, Trump began to suggest that his revision of U.S. policy on immigration and refugee admissions would focus on specific geographic areas. In response to Republican criticism of his previous call for barring Muslims from entering the country, Trump said: we "call it territories. OK? We're gonna do territories."[6] Trump's later commentary suggested that the new focus on geographical territories *expanded* the breadth of his initial proposal to prohibit Muslims from entering the country:

> I actually don't think [focusing on territories instead of religion is] a rollback. In fact, you could say it's an expansion. I'm looking now at territories. People were so upset when I used the word Muslim. Oh, you can't use the word Muslim. Remember this. And I'm okay with that, because I'm talking territory instead of Muslim.[7]

Trump further elaborated on his proposal during one of the presidential debates, when he explained that "[t]he Muslim ban is something that in some form has morphed into an extreme vetting from certain areas of the world."[8]

One week after his inauguration in January 2017, President Trump exercised his power pursuant to Section 212(f) of the Immigration and Nationality Act (INA) to issue an executive order implementing his "extreme vetting" proposal. Section 212(f) provides:

> 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.[9]

The order, which took immediate effect, contained three key provisions that banned immigrants and nonimmigrants from certain countries from entering the United for ninety days,[10] suspended the U.S. Refugee Admissions Program for 120 days,[11] and imposed a variety of reporting and vetting requirements.[12]

Section 1 of the executive order noted that "the visa-issuance process plays a crucial role in detecting individuals with terrorist ties and stopping them from entering the United States."[13] The text continues:

[5] Daniel White, *Read Donald Trump's Ohio Speech on Immigration and Terrorism*, TIME (Aug. 15, 2016), *at* http://time.com/4453110/donald-trump-national-security-immigration-terrorism-speech.

[6] Lesley Stahl, *The Republican Ticket: Trump and Pence*, CBS NEWS (July 17, 2016), *at* http://www.cbsnews.com/news/60-minutes-trump-pence-republican-ticket.

[7] *Meet the Press – July 24, 2016*, NBC NEWS (July 24, 2016), *at* http://www.nbcnews.com/meet-the-press/meet-press-july-24-2016-n615706.

[8] *Full Transcript: Second 2016 Presidential Debate*, POLITICO (Oct. 10, 2016), *at* http://www.politico.com/story/2016/10/2016-presidential-debate-transcript-229519.

[9] 8 U.S.C. § 1182(f) (2012).

[10] Exec. Order No. 13,769, 82 Fed. Reg. 8977, 8978 (Jan. 27, 2017), *available at* https://www.gpo.gov/fdsys/pkg/FR-2017-02-01/pdf/2017-02281.pdf.

[11] *Id.* at 8979

[12] *Id.* at 8978–89.

[13] *Id.* at 8977.

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> In order to protect Americans, the United States must ensure that those admitted to this country do not bear hostile attitudes toward it and its founding principles. The United States cannot, and should not, admit those who do not support the Constitution, or those who would place violent ideologies over American law. In addition, the United States should not admit those who engage in acts of bigotry or hatred (including "honor" killings, other forms of violence against women, or the persecution of those who practice religions different from their own) or those who would oppress Americans of any race, gender, or sexual orientation.[14]

Section 3 prohibited certain immigrants and nonimmigrants from entering the United States for ninety days. The order described the prohibition as a temporary pause to allow the Secretary of Homeland Security, in consultation with the Secretary of State and the Director of National Intelligence, to "immediately conduct a review to determine the information needed from any country to adjudicate any visa, admission, or other benefit under the INA (adjudications) in order to determine that the individual seeking the benefit is who the individual claims to be and is not a security or public-safety threat."[15] To "temporarily reduce investigative burdens on relevant agencies" during the pendency of this review, the order suspended "entry into the United States" for "immigrants and nonimmigrants"—excluding "foreign nationals traveling on diplomatic visas, North Atlantic Treaty Organization visas, C-2 visas for travel to the United Nations, and G-1, G-2, G-3, and G-4 visas"—from seven countries: Iraq, Syria, Sudan, Iran, Somalia, Libya, and Yemen.[16] The order also authorized the Secretaries of State and Homeland Security to waive the suspension "on a case-by-case basis, and when in the national interest," and to "issue visas or other immigration benefits to nationals of countries for which visas and benefits are otherwise blocked."[17] President Trump issued the temporary ban based on his determination that continued access to the United States for citizens of these countries "would be detrimental to the interests of the United States."[18]

Section 5 of the executive order related to the United States Refugee Admissions Program. The order immediately "suspend[ed] the U.S. Refugee Admissions Program (USRAP) for 120 days," during which time the president ordered that

> the Secretary of State, in conjunction with the Secretary of Homeland Security and in consultation with the Director of National Intelligence, shall review the USRAP application and adjudication process to determine what additional procedures should be taken to ensure that those approved for refugee admission do not pose a threat to the security and welfare of the United States, and shall implement such additional procedures.[19]

The order provided that 120 days after the date of the order, "the Secretary of State shall resume USRAP admissions only for nationals of countries for which the Secretary of State, the Secretary of Homeland Security, and the Director of National Intelligence have jointly determined that such additional procedures are adequate to ensure the security and welfare of the United States."[20]

[14] *Id.*
[15] *Id.*
[16] *See id.* at 8978.
[17] *Id.*
[18] *Id.*
[19] *Id.* at 8979.
[20] *Id.*

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Section 5 also provided that once the refugee program re-opened, it would be administration policy to: prioritize admission of refugees who were subject to religious persecution, but only if they belonged to a minority religion within the country of origin;[21] prohibit Syrian nationals from entering as refugees until "such time as [the president] determine[s] that sufficient changes have been made to the USRAP to ensure that admission of Syrian refugees is consistent with the national interest";[22] and cap the total number of refugees allowed per year at 50,000.[23] As with Section 3, the order created a waiver process:

> [T]he Secretaries of State and Homeland Security may jointly determine to admit individuals to the United States as refugees on a case-by-case basis, in their discretion, but only so long as they determine that the admission of such individuals as refugees is in the national interest—including when the person is a religious minority in his country of nationality facing religious persecution, when admitting the person would enable the United States to conform its conduct to a preexisting international agreement, or when the person is already in transit and denying admission would cause undue hardship—and it would not pose a risk to the security or welfare of the United States.[24]

During the announcement of the new executive order, Trump observed: "This is the 'Protection of the Nation from Foreign Terrorist Entry into the United States.' We all know what that means."[25] The next day, Rudy Giuliani—a former advisor to President Trump—gave the media some additional information regarding Trump's proposal: "I'll tell you the whole history of it. So when [the president] first announced it, he said 'Muslim ban.' He called me up. He said, 'Put a commission together. Show me the right way to do it legally.'"[26] Giuliani advised Trump to "focus[] on, instead of religion, danger—the areas of the world that create danger for us."[27]

Within days, both individual and state plaintiffs filed lawsuits to challenge the executive order.[28] Chief among their arguments was a claim that the order violated the Establishment Clause. The plaintiffs relied on statements made by Trump—over the course of his candidacy and during his time in office—to argue that the government "intended to disfavor Islam and favor Christianity."[29] They observed that Section 3 suspended entry into the United States from seven majority-Muslim countries, and that Sections 5(b) and 5(e) operated in conjunction to permit entry by Christian refugees but not Muslim refugees.[30] Section 5(b) provides:

[21] *Id.*
[22] *Id.*
[23] *Id.*
[24] *Id.*
[25] Craig McAndrew, *President Trump Signs Travel Ban Executive Order*, CSPAN, at 4:07 (Jan. 27, 2017), *at* https://www.c-span.org/video/?c4653208/president-trump-signs-travel-ban-executive-order.
[26] *Giuliani: Immigration Ban is Based on Danger, not Religion*, Fox News, at 3:41 (Jan. 29, 2017), *at* http://video.foxnews.com/v/5301869519001/?#sp=show-clips.
[27] *Id.*
[28] *See*, *e.g.*, Int'l Refugee Assistance Project v. Trump, No. 8:17-cv-00361-TDC, Complaint, at 150–52 (D. Md. Feb. 7, 2017), *available at* https://www.clearinghouse.net/chDocs/public/IM-MD-0004-0001.pdf [hereinafter IRAP Complaint]; Washington v. Trump, No. 2:17-cv-00141-JLR, Complaint, at 48–52 (W.D. Wash. Jan. 30, 2017), *available at* https://www.pacermonitor.com/view/M6A6GYA/State_of_Washington_v_Trump_et_al__wawdce-17-00141__0001.0.pdf [hereinafter Washington Complaint]; Sarsour v. Trump, No. 1:17-cv-00120, Complaint, at 67–73 (E.D. Va. Jan 30, 2017), *available at* https://www.cair.com/images/press_releases/Complaint-1.30.2017FOR-FILING.pdf.
[29] Washington Complaint, *supra* note 28, at para. 50.
[30] *See supra* note 28.

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> Upon the resumption of USRAP admissions, the Secretary of State, in consultation with the Secretary of Homeland Security, is further directed to make changes, to the extent permitted by law, to prioritize refugee claims made by individuals on the basis of religious-based persecution, provided that the religion of the individual is a minority religion in the individual's country of nationality.[31]

Section 5(e), for its part, authorized the Secretaries of State and Homeland Security to grant admission to refugees from the seven majority-Muslim countries notwithstanding Section 3 "so long as they determine that the admission of such individuals as refugees is in the national interest—including when the person is a religious minority in his country of nationality facing religious persecution . . . ."[32] Plaintiffs argued that these provisions effectuated President Trump's "intent to enact policies that exclude Muslims from entering the United States and favor Christians seeking to enter the United States"[33] by "discriminat[ing] between 'minority religions' and majority religions, [and by] explicitly granting official preference to foreign adherents of minority faiths in the refugee-application process."[34]

Some litigants raised procedural due process challenges,[35] citing reports that enforcement agencies were denying entry even to lawful permanent residents.[36] Litigants argued that barring lawful permanent residents from reentering the United States violated the Fifth Amendment's Due Process Clause by taking away rights without sufficient notice or opportunity to be heard.[37] On February 1, White House legal counsel—after acknowledging "reasonable uncertainty" concerning the scope of the Order—clarified that the Order did not "apply to lawful permanent residents of the United States."[38] This clarification came after then DHS Secretary John Kelly announced:

> In applying the provisions of the president's executive order, I hereby deem the entry of lawful permanent residents to be in the national interest. Accordingly, absent the receipt of significant derogatory information indicating a serious threat to public safety and welfare, lawful permanent resident status will be a dispositive factor in our case-by-case determinations.[39]

Other plaintiffs argued that the order violated the Equal Protection Clause.[40] Like the Establishment Clause claims, these arguments relied in part on "statements made by

[31] 82 Fed. Reg. at 8979.

[32] *Id.*

[33] IRAP Complaint, *supra* note 28, at para. 38.

[34] *Id.*, para. 152.

[35] *E.g.*, Darweesh v. Trump, No. 1:17-cv-00480, Complaint, at 57–62 (E.D.N.Y. Jan. 28, 2017), *available at* https://www.aclu.org/sites/default/files/field_document/1-_complaint.pdf; Loughalam v. Trump, No. 17-cv-10154, Complaint, at 40–43 (D. Mass. Jan. 28, 2017) [hereinafter Loughalam Complaint]. *See generally* University of Michigan Law School, Civil Rights Litigation Clearinghouse, *Civil Rights Challenges to Trump Refugee/Visa Order* (2017), *at* https://www.clearinghouse.net/results.php?searchSpecialCollection=44.

[36] *See* Dan Merica, *How Trump's Travel Ban Affects Green Card Holders and Dual Citizens*, CNN (Jan. 29, 2017), *at* http://www.cnn.com/2017/01/29/politics/donald-trump-travel-ban-green-card-dual-citizens/index.html.

[37] *See* Washington Complaint, *supra* note 28.

[38] Donald F. McGahn II, Counsel to the President, Memorandum to the Acting Secretary of State, the Acting Attorney General, and the Secretary of Homeland Security (Feb. 1, 2017), *available at* https://www.clearinghouse.net/chDocs/resources/new_DonaldFMcGahnIICounseltothePresident_1485982416.pdf.

[39] Dep't of Homeland Security Press Release, Statement by Secretary John Kelly on the Entry of Lawful Permanent Residents into the United States (Jan. 29, 2017), *available at* https://www.clearinghouse.net/chDocs/resources/778_DHSSecretaryJohnKelly_1485981132.pdf.

[40] *E.g.*, Washington Complaint, *supra* note 28, at paras. 41–47; Loughalam Complaint, *supra* note 29, at paras. 46–52.

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[Donald Trump] concerning [the] intent and application" of the Order.[41] These litigants asserted that the Order "target[ed] individuals for discriminatory treatment based on their country of origin and/or religion, without lawful justification."[42]

Some challenges to the order relied on statutory claims.[43] Title 8 U.S.C. § 1152(a)(1) 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."[44] Plaintiffs making this argument suggested that the mandate to "suspend entry into the United States" for ninety days should be construed, in effect, as a suspension of the "issuance of visas" under § 1152(a)(1).[45] These plaintiffs then alleged that the executive order violated this provision by singling out nationals of seven countries for disfavored treatment.[46]

Finally, some challengers argued that the executive order violated international law.[47] The United Nations Convention Against Torture—which the United States ratified in 1994[48]—prohibits states parties from involuntarily returning "a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture."[49] In a filing in the Western District of Washington, one group of plaintiffs argued that:

> The Foreign Affairs Reform and Restructuring Act of 1998, 8 U.S.C. § 1231 note, implements the United Nations Convention Against Torture, which the United States ratified in 1994. Pub. L. 105–277, div. G, subdiv. B, title XXII, § 2242. Under the Convention Against Torture, the United States may not involuntarily return any person to a country where there are substantial grounds for believing the person would be in danger of being subjected to torture . . . . As implemented, the executive order suspends all immigrant and nonimmigrant entry into Washington by individuals from seven countries and forecloses their ability to apply for relief under the Convention Against Torture.[50]

These plaintiffs did not include this claim in their second amended complaint.[51]

Most discussion of the executive order's international law ramifications has appeared in amicus briefs filed in the various cases.[52] In addition to raising Convention Against

[41] Washington Complaint, *supra* note 28, at para. 43.

[42] *Id.*

[43] Azad v. Trump, No. 2:17-cv-00706, Complaint, at 69–70 (C.D. Cal. Jan. 29, 2017), *available at* https://www.clearinghouse.net/chDocs/public/IM-CA-0084-0001.pdf; Aziz v. Trump, No.1:17-cv-116, Complaint, at 43–44 (E.D. Va. Jan. 28, 2017), *available at* https://www.clearinghouse.net/chDocs/public/IM-VA-0004-0003.pdf.

[44] 8 U.S.C. § 1152(a)(1) (2012).

[45] Exec. Order No. 13,769, *supra* note 10, at 8977.

[46] *E.g.*, Washington Complaint, *supra* note 28, at paras. 58–61.

[47] *E.g.*, *id.* paras. 66–69.

[48] *See generally* Michael John Garcia, Cong. Research Serv., RL 32276, The U.N. Convention Against Torture: Overview of U.S. Implementation Policy Concerning the Removal of Aliens (Jan. 21, 2009).

[49] Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Art. 3, Dec. 10, 1984, S. Treaty Doc. No. 20-100 (1988), 1465 UNTS 85, *available at* http://www.ohchr.org/Documents/ProfessionalInterest/cat.pdf.

[50] Washington Complaint, *supra* note 28, at paras. 67–68.

[51] Washington v. Trump, No. 2:17-cv-00141-JLR, Second Amended Complaint (W.D. Wash. Mar. 16, 2017), *at* https://www.clearinghouse.net/chDocs/public/IM-WA-0029-0107.pdf.

[52] *See infra* notes 53–56.

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Torture claims, amici have argued that the executive order might violate the International Covenant on Civil and Political Rights (CCPR). Specifically, one group of amici claimed:

> The substantive rights guaranteed by the CCPR, which must be protected without discrimination based on religion or national origin under article 2, include the protection of the family. Article 23 provides in relevant part: "The family is the natural and fundamental group unit of society and is entitled to protection by society and the State." The [Human Rights Council] has interpreted this right to include living together, which in turn obligates the state to adopt appropriate measures "to ensure the unity or reunification of families, particularly when their members are separated for political, economic or similar reasons."
>
> Restrictions on travel and entry caused by the EO that impose disparate and unreasonable burdens on the exercise of this right violate CCPR article 2 . . . . [T]he CCPR's nondiscrimination principles and protections for family life should be considered by courts in interpreting government measures affecting family unification. This treaty-based protection for family life is consistent with Supreme Court jurisprudence respecting the role of due process of law in governmental decisions affecting family unity.[53]

According to this brief, the executive order threatened to violate these principles of public international law by preventing persons with family members in the United States from being reunited.[54]

Other amicus arguments have suggested that the executive order violated the International Convention on the Elimination of All Forms of Racial Discrimination:

> The International Convention on the Elimination of All Forms of Racial Discrimination ("CERD") also bars discrimination based on national origin. The United States has been a party to the CERD since 1994. Under article 2, paragraph (1)(a), each state party commits to refraining from and prohibiting all forms of racial discrimination, and each further undertakes "to engage in no act or practice of racial discrimination . . . and to ensure that all public authorities and public institutions, national or local, shall act in conformity with this obligation." CERD defines "racial discrimination" to include distinctions and restrictions based on national origin. With regard to immigration practices, CERD makes clear that states are free to adopt only such "nationality, citizenship or naturalization" policies that "do not discriminate against any particular nationality." Like the nondiscrimination provisions of CCPR article 26, CERD article 2 does not limit its application to citizens or resident noncitizens . . . . Article 4 of CERD further provides that state parties "[s]hall not permit public authorities or public institutions, national or local, to promote or incite racial discrimination," which (as noted) includes discrimination based on national origin. The Committee on the Elimination of Racial Discrimination, the body of independent experts appointed to monitor CERD's implementation, interprets article 4 to require states to combat speech stigmatizing or stereotyping noncitizens generally, immigrants, refugees, and asylum seekers, with statements by high-ranking officials causing "particular concern."[55]

[53] Hawai'i v. Trump, No. 17-15589, Brief of International Law Scholars and Nongovernmental Organizations as Amici Curiae in Support of Appellees, at 8–9 (9th Cir. Apr. 20, 2017), *available at* http://cdn.ca9.uscourts.gov/datastore/general/2017/04/20/17-15589%20International%20Law%20Scholars%20Amicus.pdf (internal citations omitted) [hereinafter International Law Amici].

[54] *See also* Hawai'i v. Trump, No. 17-15589, 2017 WL 1457828, Brief of Amici Curiae Immigration Equality, the New York City Gay and Lesbian Anti-Violence Project, and the National Queer Asian Pacific Islander Alliance, at 23–24 (9th Cir. Apr. 21, 2017) (arguing that "the public has a strong interest in maintaining personal and familial relationships for persons within the United States and those seeking to immigrate to the United States").

[55] International Law Amici, *supra* note 53, at 11–12 (internal citations omitted).

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The amici urged the court to consider "[t]he legality of the EO in this case, and the proper interpretation of the statutes and constitutional provisions cited by the parties" with the international law "proscriptions in mind."[56]

In response to these suits, some district courts began issuing temporary restraining orders and preliminary injunctions—relying on a mix of statutory and constitutional grounds—that prevented enforcement agencies from detaining and deporting individuals during the pendency of the litigation.[57] The temporary restraining order in *Washington v. Trump*, in the Western District of Washington, was notable for its nationwide scope.[58] Although the district court did not specify which of the plaintiff's claims were likely to succeed, the court enjoined enforcement of "Section 3(c) . . ., Section 5(a) . . . [and] Section 5(b) of the Executive Order"; "proceeding with any action that prioritizes the refugee claims of certain religious minorities"; and enforcement of "Section 5(c) . . . [and] Section 5(e) of the Executive Order to the extent Section 5(e) purports to prioritize refugee claims of certain religious minorities."[59]

The temporary restraining order in *Washington v. Trump* was upheld on appeal. In a *per curiam* decision, the Ninth Circuit held that "[t]he Government has not shown that the Executive Order provides what due process requires, such as notice and a hearing prior to restricting an individual's ability to travel."[60] For that reason, the court "conclude[d] that the Government has failed to establish that it will likely succeed on its due process argument in this appeal."[61] Addressing the Plaintiffs' Equal Protection and Establishment Clause claims, the court said:

> The States' claims raise serious allegations and present significant constitutional questions. In light of the sensitive interests involved, the pace of the current emergency proceedings, and our conclusion that the Government has not met its burden of showing likelihood of success on appeal on its arguments with respect to the due process claim, we reserve consideration of these claims until the merits of this appeal have been fully briefed.[62]

The anticipated consideration of these claims never took place, because on March 6—twenty-six days after the Ninth Circuit's decision—President Trump rescinded his initial executive order and issued a second one.[63]

The introduction to this second executive order explained that it was issued to address "judicial concerns" about the first order as well as to "clarif[y] or refine[] the approach" of the first.[64] Like the first order, the second order imposed a "temporary pause on the entry of nationals from Iran, Libya, Somalia, Sudan, Syria, and Yemen, subject to categorical

[56] *Id.* at 13; *see also* Washington v. Trump, No. 17-35105, 2017 WL 553799, Amicus Brief of the Fred T. Korematsu Center for Law and Equality in Support of Appellees, at 6 (9th Cir. Feb. 5, 2017).

[57] *E.g.*, Aziz v. Trump, No. 1:17–cv–116 (LMB/TCB), 2017 WL 580855, at **11 (E.D. Va. Feb. 13, 2017) (preliminary injunction); Vayeghan v. Kelly, No. CV 17-0702, 2017 WL 396531, at *1 (C.D. Cal. Jan. 29, 2017) (temporary restraining order); Darweesh v. Trump, No. 17 Civ. 480 (AMD), 2017 WL 388504, at *1 (E.D.N.Y. Jan. 28, 2017) (temporary restraining order).

[58] Washington v. Trump, No. C17-0141JLR, 2017 WL 462040 (W.D. Wash. Feb. 3, 2017).

[59] *Id.* at *2.

[60] Washington v. Trump, 847 F.3d 1151, 1164 (9th Cir. 2017).

[61] *Id.* at 1167.

[62] *Id.* at 1168.

[63] Exec. Order No. 13,780, 82 Fed. Reg. 13209, 13209 (Mar. 6, 2017), *available at* https://www.gpo.gov/fdsys/pkg/FR-2017-03-09/pdf/2017-04837.pdf.

[64] *Id.* at 13212.

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exceptions and case-by-case waivers."[65] The new order also retained the first order's data collection requirements.[66]

The second order differed from the first order in several important respects. First, the new order did not include Iraq on the list of banned countries. Second, the new order was prospective, applying only to persons who "are outside the United States on the effective date of this order . . . did not have a valid visa at 5:00 p.m., eastern standard time on January 27, 2017 . . . and do not have a valid visa on the effective date of this order"[67] and excluding lawful permanent residents entirely.[68] Third, the new order eliminated preferential treatment on the basis of religious persecution. Fourth, the new order did not categorically bar Syrians from entering the United States as refugees. Finally, the new order contained a specific section discussing how the executive branch would process and resolve waiver requests under Section 2(c)'s ninety-day visa issuance suspension.[69] The new order authorized "a consular officer, or, as appropriate, the Commissioner, U.S. Customs and Border Protection (CBP), or the Commissioner's delegee" to decide whether to grant a waiver[70]—a power that the first order had vested in the Secretaries of State and Homeland Security. The new order also listed nearly a dozen circumstances where "[c]ase-by-case waivers could be appropriate."[71]

Former White House Press Secretary Sean Spicer explained that, although the text had been changed, "the principles of the executive order remain[ed] the same."[72] President Trump, in addition to stating that the new order imposed "EXTREME VETTING,"[73] also called it a "watered down, politically correct" version of the "first Travel Ban,"[74] noting at a rally that "[t]his is a watered-down version of the first one. And let me tell you something. I think we ought to go back to the first one and go all the way, which is what I wanted to do in the first place."[75]

The plaintiffs challenging the first order amended their complaints to update their constitutional and statutory arguments in light of the second order.[76] A district court in Maryland

[65] *Id.* at 13211.
[66] *Id.* at 13217–18.
[67] 82 Fed. Reg. at 13213–14.
[68] *Id.* at 13213.
[69] *Id.* at 13214–15.
[70] *Id.* at 13214.
[71] *Id.* at 13214–15. The circumstances specified include, for example, instances where "the foreign national seeks to enter the United States to visit or reside with a close family member (e.g., a spouse, child, or parent) who is a United States citizen, lawful permanent resident, or alien lawfully admitted on a valid nonimmigrant visa, and the denial of entry during the suspension period would cause undue hardship"; instances where "the foreign national is an infant, a young child or adoptee, an individual needing urgent medical care, or someone whose entry is otherwise justified by the special circumstances of the case"; and instances where "the foreign national has been employed by, or on behalf of, the United States Government (or is an eligible dependent of such an employee) and the employee can document that he or she has provided faithful and valuable service to the United States Government."
[72] White House Press Briefing, Press Gaggle by Press Secretary Sean Spicer (Mar. 6, 2017), *at* https://www.whitehouse.gov/the-press-office/2017/03/06/press-gaggle-press-secretary-sean-spicer.
[73] Donald J. Trump (@realDonaldTrump), TWITTER (June 5, 2017, 3:44 AM), https://twitter.com/realDonaldTrump/status/871679061847879682?ref_src=twsrc%5Etfw.
[74] Donald J. Trump (@realDonaldTrump), TWITTER (June 5, 2017, 3:29 AM), https://twitter.com/realDonaldTrump/status/871675245043888128.
[75] Laura Jarrett, *Trump Admin to Appeal Travel Ban Rulings 'Soon,'* CNN POLITICS, at 2:45 (Mar. 16, 2017), *at* http://www.cnn.com/2017/03/15/politics/travel-ban-blocked/index.html.
[76] *See, e.g.*, Int'l Refugee Assistance Project v. Trump, 8:17-cv-00361-TDC, Amended Complaint (D. Md. Mar. 10, 2017), *at* https://www.clearinghouse.net/chDocs/public/IM-MD-0004-0018.pdf; Hawai'i v. Trump,

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issued a nationwide preliminary injunction on March 16 on the grounds that the plaintiffs had established a likelihood of success "on the merits of their Establishment Clause claim."[77] The district court reasoned that, despite the changes between the first and second order,

> [T]he history of public statements continues to provide a convincing case that the purpose of the Second Executive Order remains the realization of the long-envisioned Muslim ban. The Trump Administration acknowledged that the core substance of the First Executive Order remained intact. Prior to its issuance, on February 16, 2017, Stephen Miller, Senior Policy Advisor to the President, described the forthcoming changes as "mostly minor technical differences," and stated that the "basic policies are still going to be in effect."[78]

The district court reached the constitutional question only after finding, regarding the alternative statutory claim, that the plaintiffs had failed to show "a likelihood of success on the merits of the claim that § 1152(a) prevents the President from barring entry to the United States pursuant to § 1182(f), or the issuance of non-immigrant visas, on the basis of nationality."[79] On May 25, the Fourth Circuit—sitting *en banc*—upheld the district court's preliminary injunction.[80] The court held in an 11–3 decision that the plaintiffs had "more than plausibly alleged that [the second order's] stated national security interest was provided in bad faith, as a pretext for its religious purpose."[81] After "look[ing] behind" the second order, the Court concluded:

> EO-2 cannot be divorced from the cohesive narrative linking it to the animus that inspired it. In light of this, we find that the reasonable observer would likely conclude that EO-2's primary purpose is to exclude persons from the United States on the basis of their religious beliefs. We therefore find that EO-2 likely fails *Lemon*'s purpose prong in violation of the Establishment Clause.[82]

The court did not reach the statutory question "[b]ecause the district court enjoined Section 2(c) [of the second order] in its entirety based solely on Plaintiffs' Establishment Clause claim . . . ."[83]

The next month, the Ninth Circuit upheld a similar nationwide temporary restraining order issued by a district court in Hawai'i. In that case, the district court temporarily prohibited enforcement of the second order on the grounds that plaintiffs had demonstrated "a strong likelihood of success on the merits of their Establishment Clause claim."[84] The Ninth Circuit affirmed the temporary restraining order on different grounds,[85] avoiding the constitutional question entirely and finding instead that President Trump exceeded the statutory authority vested in him by the Immigration and Nationality Act (INA).

The Ninth Circuit began by scrutinizing whether the president properly exercised his power under Section 212(f) of the INA,[86] which authorizes the president to suspend the

No. 1:17-cv-00050, Second Amended Complaint (D. Haw. Mar. 8, 2017), *available at* https://www.clearinghouse.net/chDocs/public/IM-HI-0004-0010.pdf.

[77] Int'l Refugee Assistance Project v. Trump, No. TDC-17-0361, 2017 WL 1018235, at **16 (D. Md. Mar. 16, 2017).

[78] *Id.* at **13.

[79] *Id.* at **10.

[80] Int'l Refugee Assistance Project v. Trump, 857 F.3d 554 (4th Cir. 2017) (en banc).

[81] *Id.* at 592.

[82] *Id.* at 601 (citing Lemon v. Kurtzmann, 403 U.S. 602 (1971)).

[83] *Id.* at 579.

[84] Hawai'i v. Trump, No. 17-00050 DKW-KSC, 2017 WL 1011673, at *1 (D. Haw. Mar. 15, 2017).

[85] Hawai'i v. Trump, 859 F.3d 741 (9th Cir. 2017).

[86] *Id.*

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entry of certain aliens provided he finds that admitting those aliens would be detrimental to the United States.[87] The court interpreted the statute to require as a "precondition" that the president "make sufficient findings" justifying a "conclusion that entry of all nationals from the six designated countries, all refugees, and refugees in excess of 50,000 would be harmful to the national interest."[88] After reviewing the text of the order, the court held that "[t]here [was] no sufficient finding in EO2 that the entry of the excluded classes would be detrimental to the interests of the United States."[89] Next, the court found that, because § 1152(a)'s nondiscrimination provision "cabins the President's authority under [Section 212(f)],"[90] the executive order violated the INA by "suspending the issuance of immigrant visas and denying entry based on nationality."[91]

The Trump administration filed petitions for certiorari in both cases and requested a stay of the preliminary injunction in Maryland and the temporary restraining order in Hawai'i. On June 26, the Court agreed to hear the case and—in a *per curiam* opinion—allowed the March 6 executive order to take partial effect.[92] Under the Court's decision, the second order may be enforced only against nationals of the six enumerated countries "who lack any bona fide relationship with a person or entity in the United States."[93] The Court elaborated on what constitutes a bona fide relationship:

> For individuals, a close familial relationship is required. A foreign national who wishes to enter the United States to live with or visit a family member, like Doe's wife or Dr. Elshikh's mother-in-law, clearly has such a relationship. As for entities, the relationship must be formal, documented, and formed in the ordinary course, rather than for the purpose of evading EO–2. The students from the designated countries who have been admitted to the University of Hawaii have such a relationship with an American entity. So too would a worker who accepted an offer of employment from an American company or a lecturer invited to address an American audience. Not so someone who enters into a relationship simply to avoid §2(c): For example, a nonprofit group devoted to immigration issues may not contact foreign nationals from the designated countries, add them to client lists, and then secure their entry by claiming injury from their exclusion.[94]

Two days after the Supreme Court's ruling, the State Department issued a cable to embassies and consulates around the world, updating the scope of the order in light of the "bona fide relationship" requirement.[95] The cable stated—consistent with the Court's ruling—that the order's "suspension of entry does not apply" to "[a]ny applicant who has a credible claim of a bona fide relationship with a person or entity in the United States."[96] For individuals, the order would not apply to those with a "close familial relationship" to a person in the United

[87] *Id.*
[88] *Id.* at 770, 776.
[89] *Id.* at 770.
[90] *Id.* at 778.
[91] *Id.* at 779.
[92] Trump v. Int'l Refugee Assistance Project, 582 U.S. ___ (2017) (per curiam).
[93] *Id.* at 9.
[94] *Id.* at 12.
[95] Gardiner Harris, Michael D. Shear & Ron Nixon, *Administration Moves to Carry Out Partial Travel Ban*, N.Y. TIMES (June 29, 2017), *at* https://www.nytimes.com/2017/06/29/us/politics/travel-ban-trump-muslims.html; *see also* U.S. Dep't of State Press Release, Executive Order on Visas (June 29, 2017), *at* https://travel.state.gov/con tent/travel/en/news/important-announcement.html.
[96] Quinta Jurecic, *State Department Cable on Implementing Travel Ban Executive Order*, LAWFARE (June 29, 2017), *at* https://lawfareblog.com/state-department-cable-implementing-travel-ban-executive-order.

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States.[97] Importantly, the State Department defined "close family" as a "parent (including parent-in-law), spouse, child, adult son or daughter, son-in-law, daughter-in-law, sibling, whether whole or half."[98] But "'[c]lose family does not include grandparents, grandchildren, aunts, uncles, nieces, nephews, cousins, brothers-laws and sisters-in-law, fiancés, and any other 'extended' family members."[99] For entities, the State Department clarified that:

> A relationship with a "U.S. entity" must be formal, documented, and formed in the ordinary course rather than for the purpose of evading the E.O. A consular officer should not issue a visa unless the officer is satisfied that the applicant's relationship complies with these requirements and was not formed for the purpose of evading the E.O.[100]

The State of Hawai'i—the lead plaintiff in the Ninth Circuit's *Hawai'i v. Trump* case—filed an emergency motion in federal district court seeking to clarify the scope of the preliminary injunction in light of the Supreme Court's June 26 decision and the State Department's updated interpretation of the executive order.[101] Hawai'i argued that the government's new interpretation violated the Supreme Court's prohibition against enforcing the ban with respect to persons having "bona fide" connections to the United States.[102] According to Hawai'i, the Supreme Court's "bona fide relationship" guidance could not be interpreted to exclude "fiancés, grandparents, grandchildren, brothers-in-law, sisters-in-law, aunts, uncles, nieces, nephews, and cousins of persons in the United States."[103] Initially, the district court refused to clarify the scope of the Supreme Court's decision:

> [T]he parties' disagreements derive neither from this Court's temporary restraining order, this Court's preliminary injunction, nor this Court's amended preliminary injunction, but from the modifications to this Court's injunction ordered by the Supreme Court. Accordingly, the clarification to the modifications that the parties seek should be more appropriately sought in the Supreme Court.[104]

The Ninth Circuit affirmed the district court's order refusing to "clarify" the Supreme Court's decision, but noted that the district court "possess[ed] the ability to interpret and enforce the Supreme Court's order."[105]

Hawai'i then filed a new emergency motion to "enforce" or "modify"—rather than "clarify"—the preliminary injunction.[106] The district court partially granted the plaintiff's

[97] *Id.*
[98] *Id.*
[99] *Id.*
[100] *Id.*
[101] Hawai'i v. Trump, No. 1:17-cv-00050-DKW-KSC, Emergency Motion to Clarify Scope of Preliminary Injunction (D. Haw. June 29, 2017), *available at* https://www.clearinghouse.net/chDocs/public/IM-HI-0004-0127.pdf.
[102] *Id.* at 3–4.
[103] *Id.* at 3.
[104] Hawai'i v. Trump, No. 1:17-cv-00050-DKW-KSC, Order Denying Plaintiffs' Emergency Motion to Clarify Scope of Preliminary Injunction, at 2 (D. Haw. July 6, 2017), *available at* https://www.clearinghouse.net/chDocs/public/IM-HI-0004-0131.pdf.
[105] Hawai'i v. Trump, No. 17-16366, Order, at 3 (9th Cir. July 7, 2017), *available at* https://www.clearinghouse.net/chDocs/public/IM-HI-0004-0133.pdf.
[106] Hawai'i v. Trump, No. 17-16366, Motion to Enforce or, in the Alternative, to Modify Preliminary Injunction (D. Haw. July 7, 2017), *available at* https://www.clearinghouse.net/chDocs/public/IM-HI-0004-0134.pdf.

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request.[107] First, the district court ruled that "the Government's narrowly defined list finds no support in the careful language of the Supreme Court or even in the immigration statutes on which the Government relies."[108] The district court modified the injunction to prohibit the government from enforcing the exclusionary provisions of the executive order against: refugees with "a formal assurance from an agency within the United States that the agency will provide, or ensure the provision of, reception and placement services to that refugee";[109] refugees "in the U.S. Refugee Admissions Program through the Lautenberg Program";[110] and persons with "grandparents, grandchildren, brothers-in-law, sisters-in-law, aunts, uncles, nieces, nephews, [or] cousins . . . in the United States."[111] The district court denied the plaintiff's request to expand the preliminary injunction to cover refugees affiliated with certain refugee admissions organizations.[112] The government then appealed the district court's modification of the injunction to the Supreme Court.[113]

Use of Force, Arms Control, and Nonproliferation

Trump Administration Maintains Nuclear Deal with Iran, Despite Persistent Skepticism

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Iran, the five permanent members of the UN Security Council, Germany, and the European Union agreed to the Joint Comprehensive Plan of Action (JCPOA) in July 2015. Under the JCPOA, Iran agreed to limit the scope and content of its nuclear program in exchange for relief from various nuclear-related sanctions imposed by the other signatories.[1] Throughout his campaign, President Donald Trump denounced the JCPOA. He said that, if elected, he would "renegotiate with Iran—right after . . . enabl[ing] the immediate release of our American prisoners and ask[ing] Congress to impose new sanctions that stop Iran from having the ability to sponsor terrorism around the world."[2] So far, however, the

[107] Hawai'i v. Trump, No. 17-16366, Order Granting in Part and Denying in Part Plaintiffs' Motion to Enforce, or, in the Alternative to Modify Preliminary Injunction (D. Haw. July 13, 2017), *available at* https://www.clearinghouse.net/chDocs/public/IM-HI-0004-0138.pdf.

[108] *Id.* at 12.

[109] *Id.* at 26.

[110] *Id.*

[111] *Id.*

[112] *Id.* at 20–22.

[113] Trump v. Hawai'i, No. 16-1540 (16A1191), Motion for Clarification of June 26, 2017, Stay Ruling and Application for Temporary Administrative Stay of Modified Injunction, (S. Ct. July 14, 2017).

[1] Joint Comprehensive Plan of Action, July 14, 2015, 55 ILM 98, 108 (2016) [hereinafter JCPOA]. *See also* Kristina Daugirdas & Julian Davis Mortenson, Contemporary Practice of the United States, 109 AJIL 649 (2015); Kristina Daugirdas & Julian Davis Mortenson, Contemporary Practice of the United States, 110 AJIL 789 (2016) [hereinafter Daugirdas & Mortenson, 110 AJIL].

[2] Donald Trump, *Donald Trump: Amateur Hour with the Iran Nuclear Deal*, USA Today (Sept. 8, 2015), *at* https://www.usatoday.com/story/opinion/2015/09/08/donald-trump-amateur-hour-iran-nuclear-deal-column/71884090; *see also, e.g.*, Donald Trump, Full text of Donald Trump's speech to AIPAC (Mar. 21, 2016), *available at* http://www.timesofisrael.com/donald-trumps-full-speech-to-aipac (indicating that his "number-one priority is to dismantle the disastrous deal with Iran").