

Testimony of Andrew R. Arthur

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At a Joint Hearing of the

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Committee on the Judiciary, Subcommittee on Immigration and Citizenship

and

Committee on Foreign Affairs, Subcommittee on Oversight and Investigations

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on

“Oversight of the Trump Administration’s Muslim Ban”

Chairman Lofgren, Ranking Member Buck, Chairman Bera, Ranking Member Zeldin, and Members of the Joint Subcommittees, I thank you for inviting me here today to discuss this important, but often misunderstood, issue.

### *Background*

In terms of sheer numbers, the United States is the most generous country in the world as it relates to admitting foreign nationals. For example, in 2017, 1,127,167 aliens received lawful permanent resident status (LPRs)<sup>1</sup>, “the status of having been lawfully accorded the privilege of residing permanently in the United States as an immigrant in accordance with the immigration laws . . . .”<sup>2</sup>

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<sup>1</sup> *Annual Flow Report, Lawful Permanent Residents*, U.S. DEP’T OF HOMELAND SECURITY, Aug. 2018, available at: [https://www.dhs.gov/sites/default/files/publications/Lawful\\_Permanent\\_Residents\\_2017.pdf](https://www.dhs.gov/sites/default/files/publications/Lawful_Permanent_Residents_2017.pdf).

<sup>2</sup> Section 101(a)(20) of the Immigration and Nationality Act (INA), available at: <https://www.uscis.gov/ilink/docView/SLB/HTML/SLB/0-0-0-1/0-0-0-29/0-0-0-101/0-0-0-195.html>.

In addition, approximately 28,052 refugees were admitted in FY 2019 as of August 31, 2019<sup>3</sup>, and 175,000 immigrants naturalized in the first quarter of FY 2019.<sup>4</sup> Further, there were 186 million admissions of nonimmigrants, that is, foreign nationals “who seek[] temporary entry to the United States for a specific purpose,”<sup>5</sup> during FY 2018.<sup>6</sup>

This openness has long been coupled with vigilance to protect the American people—citizens, non-citizen nationals, and lawfully admitted immigrants-- from threats to their institutions, safety, and wellbeing. That vigilance is reflected in Congress’ directives in section 212 of the Immigration and Nationality Act (INA).<sup>7</sup>

Although there had been concerns about a terrorist attack on the United States from abroad for decades, those concerns were heightened in the aftermath of the first World Trade Center bombing on February 6, 1993, in which six were killed and more than 1,000 injured.<sup>8</sup> Each of the terrorists who participated in that attack was an alien who had exploited the immigration system to remain in the United States.<sup>9</sup>

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<sup>3</sup> Refugee Admissions Report Aug. 31, 2019, REFUGEE PROCESSING CENTER, *available at*: <https://www.wrapsnet.org/admissions-and-arrivals/>.

<sup>4</sup> *Legal Immigration and Adjustment of Status Report Fiscal Year 2019*, Quarter 1, U.S. DEP’T OF HOMELAND SECURITY, Sept. 11, 2019, *available at*: <https://www.dhs.gov/immigration-statistics/special-reports/legal-immigration#Naturalizations>.

<sup>5</sup> *Nonimmigrant*, U.S. CITIZENSHIP AND IMMIG. SERVS., Mar. 2018, *available at*: <https://www.uscis.gov/tools/glossary/nonimmigrant>.

<sup>6</sup> *Legal Immigration and Adjustment of Status Report Fiscal Year 2019*, Quarter 1, U.S. DEP’T OF HOMELAND SECURITY, Sept. 11, 2018, *available at*: <https://www.dhs.gov/immigration-statistics/special-reports/legal-immigration#Refugee>.

<sup>7</sup> Section 212 of the Immigration and Nationality Act (INA), 8 U.S.C. § 1182(a)(1) et seq., *available at*: <https://uscode.house.gov/view.xhtml?req=granuleid%3AU.S.C-prelim-title8-section1182&num=0&edition=prelim>.

<sup>8</sup> *1993 World Trade Center Bombing Fast Facts*, CNN, Feb. 10, 2019, *available at*: <https://www.cnn.com/2013/11/05/us/1993-world-trade-center-bombing-fast-facts/index.html>.

<sup>9</sup> See Steven A. Camarota, *The Open Door, How Militant Islamic Terrorists Entered and Remained in the United States, 1993-2001*, CENTER FOR IMMIG. STUDIES, May 1, 2002, *available at*: <https://cis.org/Report/How-Militant-Islamic-Terrorists-Entered-and-Remained-United-States>.

Those fears increased on August 7, 1998 after terrorists struck American interests abroad when bombs exploded at the U.S. embassies in Nairobi, Kenya and Dar es Salaam, Tanzania almost simultaneously.<sup>10</sup> As my colleague, Steven A. Camarota has noted:

*Some 20 al Qaeda members are thought to have taken part in the bombings. At least three of those involved in the bombings were naturalized American citizens who lived and worked for Osama bin Laden's al Qaeda organization while in the United States. In addition, Essam al Ridi, who is also a naturalized American citizen, testified against several individuals involved in the plot. He also admitted to having worked for bin Laden while in the United States, including purchasing and personally delivering a jet plane to the al Qaeda leader. The plane was to be used for transporting missiles from Afghanistan to the Sudan.*<sup>11</sup>

There were subsequent alerts concerning a terrorist attack in the United States during the lead-up to millennium festivities in late 1999. Such an attack was narrowly averted when Ahmed Ressay—a 34-year-old Algerian national—was arrested at Port Angeles, Washington on December 14, 1999, “attempting to enter the U.S. with components used to manufacture improvised explosive devices.”<sup>12</sup> As the Federal Bureau of Investigation (FBI) explained: “Ressay subsequently admitted that he planned to bomb Los Angeles International Airport on the eve of the Millennium 2000 celebrations.”<sup>13</sup>

Of course, foreign terrorists<sup>14</sup> would again strike the United States on September 11, 2001, when:

*19 men trained by al-Qaeda carried out a coordinated terrorist attack on the United States that had been planned for years. The attackers simultaneously hijacked four large passenger aircraft with the intention of crashing them into major landmarks*

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<sup>10</sup> 1998 US Embassies in Africa Bombings Fast Facts, CNN, July 31, 2018, available at: <https://www.cnn.com/2013/10/06/world/africa/africa-embassy-bombings-fast-facts/index.html>.

<sup>11</sup> Steven A. Camarota, *The Open Door, How Militant Islamic Terrorists Entered and Remained in the United States, 1993-2001*, CENTER FOR IMMIG. STUDIES, May 1, 2002, available at: <https://cis.org/Report/How-Militant-Islamic-Terrorists-Entered-and-Remained-United-States>.

<sup>12</sup> *Millennium Plot/Ahmed Ressay*, Fed. Bureau of Investigation, undated, available at: <https://www.fbi.gov/history/famous-cases/millennium-plot-ahmed-ressam>.

<sup>13</sup> *Id.*

<sup>14</sup> See *September 11 Hijackers Fast Facts*, CNN (updated September 8, 2019), available at: <https://www.cnn.com/2013/07/27/us/september-11th-hijackers-fast-facts/index.html>.

*in the United States, inflicting as much death and destruction as possible. Three of the planes struck their targets; the fourth crashed into a field in Pennsylvania. In a single day, these deliberate acts of mass murder killed nearly 3,000 human beings from 57 countries. More than 400 of the dead were first responders, including New York City firefighters, police officers, and EMTs.*<sup>15</sup>

In response to those attacks, the U.S. government undertook a series of steps to address the threat of foreign terrorism. This included the passage of the USA PATRIOT Act,<sup>16</sup> which, among other things, facilitated the sharing of intelligence and law-enforcement information among government agencies. In addition, Congress thereafter passed the Homeland Security Act of 2002<sup>17</sup>, which consolidated many agencies with a national-security or law-enforcement mission within a new federal cabinet-level department.

In the years afterwards, as the ability of the United States government to respond to and prevent terrorist threats improved, fears of alien terrorism began to recede in the United States, with only sporadic exceptions.

Concerns about the terrorist exploitation of our immigration system were again heightened, however, following terror attacks<sup>18</sup> in Paris, France in November 2015 that left 130 people dead. Press reports stated that “[a]t least one Syrian refugee who had recently entered Europe was among the . . . terrorists who carried out” that attack.<sup>19</sup>

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<sup>15</sup> Alan Taylor, *9/11: The Day of the Attacks*, THE ATLANTIC, Sept. 8, 2011, available at: <https://www.theatlantic.com/photo/2011/09/911-the-day-of-the-attacks/100143/>.

<sup>16</sup> USA PATRIOT Act, Pub. L. 107-56 (Oct. 26, 2001), available at: <https://www.govinfo.gov/content/pkg/PLAW-107publ56/pdf/PLAW-107publ56.pdf>.

<sup>17</sup> Homeland Security Act of 2002, Pub. L. 107-296 (Nov. 25, 2002), available at: [https://www.dhs.gov/sites/default/files/publications/hr\\_5005\\_enr.pdf](https://www.dhs.gov/sites/default/files/publications/hr_5005_enr.pdf).

<sup>18</sup> See *Paris attacks: What happened on the night*, BBC, Dec. 9, 2015, available at: <http://www.bbc.com/news/world-europe-34818994>.

<sup>19</sup> Yaron Steinbuch, *A ‘refugee’ in killers’ ranks: Terrorist linked to Syrian refugee route*, N.Y. POST, Nov. 15, 2015, available at: <https://nypost.com/2015/11/15/two-syrian-refugees-among-seven-terrorists-in-paris-attacks/>.

This event was of particular concern in the United States, however, because French nationals are able to gain expedited entry into the United States under the visa waiver program (VWP).<sup>20</sup> As the State Department explains:

*The Visa Waiver Program (VWP) enables most citizens or nationals of participating countries to travel to the United States for tourism or business for stays of 90 days or less without obtaining a visa. Travelers must have a valid Electronic System for Travel Authorization (ESTA) approval prior to travel and meet all requirements . . . .*<sup>21</sup>

The possibility that potential terrorists might be able to use this truncated visa system to gain admission to the United States raised alarms about possible terrorist intrusions to carry out similar attacks against American domestic institutions.

Those concerns were heightened less than three weeks after that attack, when in early December 2015, Syed Rizwan Farook and his wife, Tashfeen Malik, killed 14 people attending a holiday party in San Bernardino, California.<sup>22</sup> The fact that Malik had been born in Pakistan, moved to Saudi Arabia, and entered the United States on a fiancée visa,<sup>23</sup> raised new fears about the vulnerability of our immigration system. Those fears were further exacerbated by then-President

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<sup>20</sup> See section 217 of the Immigration and Nationality Act (INA), 8 U.S.C. § 1187, available at: <http://uscode.house.gov/view.xhtml?req=granuleid%3AUSC-prelim-title8-section1187&num=0&edition=prelim>.

<sup>21</sup> *Visa Waiver Program*, U.S. DEP'T OF STATE, undated, available at: <https://travel.state.gov/content/travel/en/us-visas/tourism-visit/visa-waiver-program.html>.

<sup>22</sup> *San Bernardino shooting updates*, LOS ANGELES TIMES, Dec. 9, 2015, available at: <http://www.latimes.com/local/lanow/la-me-ln-san-bernardino-shooting-live-updates-htlmlstory.html>.

<sup>23</sup> Pat St. Claire, Greg Botelho and Ralph Ellis, *San Bernardino shooter Tashfeen Malik: Who was she?*, CNN, Dec. 8, 2015, available at: <https://www.cnn.com/2015/12/06/us/san-bernardino-shooter-tashfeen-malik/>.

Barack Obama’s (erroneous) assertion that Malik had entered the United States under the VWP<sup>24</sup>, of which he had ordered a review.<sup>25</sup>

These apprehensions about exploitation of the VWP by European nationals led to passage of the “Visa Waiver Program Improvement and Terrorist Travel Prevention Act of 2015,”<sup>26</sup> passed as part of the Consolidated Appropriations Act of 2016. That act barred nationals of Iran, Iraq, Sudan, and Syria<sup>27</sup>, as well as individuals who had travelled to those countries or to Libya, Somalia, or Yemen<sup>28</sup>, from accessing the VWP.

### *Trump Administration Travel Orders*

In order to further plug the holes in our national-security screening system and protect against foreign threats, between January 27, 2017 and September 24, 2017, President Donald Trump issued two executive orders (EOs) and one Presidential Proclamation restricting and limiting the entry of certain foreign nationals to the United States. While those actions were deemed “travel bans,” this is a misnomer, as each only applied to certain nationals from specified countries.

Each of these actions was subject to review and injunctions by numerous courts. As the ultimate Supreme Court decision upholding the president’s authority to issue the Presidential Proclamation

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<sup>24</sup> Jenny Stanton, *How Obama misspoke about San Bernardino suspect's visa: President incorrectly suggested Tashfeen Malik had entered the country without a visa*, DAILY MAIL, Dec. 7, 2015, available at: <http://www.dailymail.co.uk/news/article-3348984/How-Obama-misspoke-San-Bernardino-suspect-s-visa-President-incorrectly-suggested-Tashfeen-Malik-entered-country-without-visa.html>.

<sup>25</sup> *Id.*

<sup>26</sup> Consolidated Appropriations Act, 2016, div. O, tit. II, Pub. L. 114-113 (2015), available at: <https://www.congress.gov/bill/114th-congress/house-bill/2029/text?overview=closed>.

<sup>27</sup> *United States Begins Implementation of Changes to the Visa Waiver Program*, DEP’T OF HOMELAND SECURITY, Jan. 21, 2016, available at: <https://www.dhs.gov/news/2016/01/21/united-states-begins-implementation-changes-visa-waiver-program>.

<sup>28</sup> *DHS Announces Further Travel Restrictions for the Visa Waiver Program*, DEP’T OF HOMELAND SECURITY, Feb. 8, 2016, available at: <https://www.dhs.gov/news/2016/02/18/dhs-announces-further-travel-restrictions-visa-waiver-program>.

revealed, however, the president was well within the rights of his office to limit and restrict the entry of those foreign nationals into the United States in the interests of national security.

### *Rationale Behind the Trump Travel Orders*

The idea that travel restrictions or additional vetting should be applied to nationals of certain countries that are in conflict or are failed states predated the Trump administration.

For example, Obama Administration officials had made clear that the vetting of visa applicants is only as good as the information available to those doing the vetting. As former FBI Director James Comey testified in connection with the screening of Syrian refugees on October 21, 2015:

*We can only query against that which we have collected. And so if someone has not made a ripple in the pond in Syria on a way that would get their identity or their interests reflected in our databases, we can query our databases until the cows come home but nothing will show up because we have no record of that person . . . You can only query what you have collected. And with respect to Iraqi refugees, we had far more in our databases because of our country's work there for a decade. [The vetting of Syrian refugees] is a different situation.<sup>29</sup>*

Officials also made clear the possible danger posed by terrorist aliens who could exploit our immigration system to gain entry into the United States. For example, as then-Director of National Intelligence (DNI) James Clapper stated in September 2015:

*As [Syrian refugees] descend on Europe, one of the obvious issues that we worry about, and in turn as we bring refugees into this country, is exactly what's their background? We don't obviously put it past the likes of ISIL to infiltrate operatives among these refugees. That is a huge concern of ours.<sup>30</sup>*

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<sup>29</sup> *Nation's Top Security Officials Concerns on Refugee Vetting*, H. Committee on Homeland Security, Nov. 19, 2015, available at: <https://homeland.house.gov/press/nations-top-security-officials-concerns-on-refugee-vetting/>.

<sup>30</sup> *Id.*

It was in this context that President Trump attempted to assess the danger posed by, and limit the entry of, certain foreign nationals into the United States, at least temporarily until more thorough vetting could be completed.

*PP 9645*

The current iteration of those restrictions is set forth in Presidential Proclamation 9645 – Enhancing Vetting Capabilities and Processes for Detecting Attempted Entry into the United States by Terrorists or Other Public-Safety Threats (PP 9645).<sup>31</sup>

*Basis for the restrictions*

Those restrictions and limitations to entry resulted from a worldwide review that the president had previously ordered “of whether, and if so what, additional information would be needed from each foreign country to assess adequately whether their nationals seeking to enter the United States pose a security or safety threat.”<sup>32</sup> That review had been mandated by Section 2(a) of EO 13780 (EO-2) of March 6, 2017 (Protecting the Nation from Foreign Terrorist Entry into the United States).<sup>33</sup>

The report resulting from that review established a “baseline” for the types of information that were necessary to determine whether a foreign national should be allowed to enter the United States.<sup>34</sup> The baseline consisted of three categories of information relevant to the ability of

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<sup>31</sup> Presidential Proclamation 9645, “*Enhancing Vetting Capabilities and Processes for Detecting Attempted Entry into the United States by Terrorists or Other Public-Safety Threats*” (2017), available at: <https://www.whitehouse.gov/presidential-actions/presidential-proclamation-enhancing-vetting-capabilities-processes-detecting-attempted-entry-united-states-terrorists-public-safety-threats/>.

<sup>32</sup> *Id.*

<sup>33</sup> Exec. Order No. 13780 “*Protecting the Nation from Foreign Terrorist Entry into the United States*” (2017), available at: <https://www.whitehouse.gov/presidential-actions/executive-order-protecting-nation-foreign-terrorist-entry-united-states-2/>.

<sup>34</sup> See Presidential Proclamation 9645, “*Enhancing Vetting Capabilities and Processes for Detecting Attempted Entry into the United States by Terrorists or Other Public-Safety Threats*” §1(c) (2017), available at: <https://www.whitehouse.gov/presidential-actions/presidential-proclamation-enhancing-vetting-capabilities-processes-detecting-attempted-entry-united-states-terrorists-public-safety-threats/>.



United States officials “to confirm the identity of individuals seeking entry . . . and . . . assess whether they are a security or public-safety threat.”<sup>35</sup>

The first category is “identity-management information,” which “focuses on the integrity of documents required for travel to the United States,”<sup>36</sup> that is the travel documents (such as passports) presented by foreign nationals for entry into the United States. The basic purpose of such information is to determine whether applicants for visas are who they claim to be.

The second category is “national security and public-safety information.”<sup>37</sup> This category focuses on the country in question, and in particular on whether that country provides criminal and terrorist information to the United States about individuals seeking entry upon U.S. government request, and whether it provides exemplars of travel documents. Again, the ability of the United States to screen a foreign national seeking entry is only as good as the information that is available to the U.S. government officer making that determination, as former FBI Director Comey alluded to above. Most, if not all, of that information will be in the possession of the foreign national’s home government, and if that government is not forthcoming with such information, the U.S. officer adjudicating the visa request or determining whether to allow that alien to enter this country will not be able to make an accurate determination of the potential danger that individual poses to the United States.

The third category is “national security and public-safety risk assessment.”<sup>38</sup> This category is broader, and focuses on “whether the country is a known or potential terrorist safe haven” and

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<sup>35</sup> Proclamation No. 9645, “Enhancing Vetting Capabilities and Processes for Detecting Attempted Entry into the United States By Terrorists or Other Public-Safety Threats” (2017), at §1(c), *available at*: <https://www.whitehouse.gov/presidential-actions/presidential-proclamation-enhancing-vetting-capabilities-processes-detecting-attempted-entry-united-states-terrorists-public-safety-threats/>.

<sup>36</sup> *Id.* at cl. i.

<sup>37</sup> *Id.* at cl. ii.

<sup>38</sup> *Id.* at cl. iii.

whether it accepts its returned nationals. Again, if terrorist movements are active in a country, or if that country actively provides haven to such terrorists, members of those groups may seek to enter the United States to engage in terrorist activity. This category addresses that possibility, as well as this country's ability to remove aliens who are later found to pose a risk.

In summary, the conclusions of the report to which the proclamation responds are directly relevant to the protection of the American public from national-security and public-safety threats, and the restrictions and limitations to entry in the resulting proclamation are therefore essential to protecting the public from those threats. Simply put, to grant a visa to a foreign national, or allow that person entry, the United States must be able to identify that person and determine whether he or she specifically poses such a risk, and be able to remove that person once admitted if such a risk subsequently is identified.

As an aside, while that review led to the implementation of the restrictions in PP 9645 (as noted above) the review process itself led to increased cooperation from other nations in the visa-screening process, as the proclamation explains:

*As part of the review, the Secretary of Homeland Security established global requirements for information sharing in support of immigration screening and vetting. The Secretary of Homeland Security developed a comprehensive set of criteria and applied it to the information-sharing practices, policies, and capabilities of foreign governments. The Secretary of State thereafter engaged with the countries reviewed in an effort to address deficiencies and achieve improvements. In many instances, those efforts produced positive results. **By obtaining additional information and formal commitments from foreign governments, the United States Government has improved its capacity and ability to assess whether foreign nationals attempting to enter the United States pose a security or safety threat. Our Nation is safer as a result of this work.**<sup>39</sup>[Emphasis added]*

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<sup>39</sup> *Id.*

*Restrictions and limitations on entry*

The proclamation is clear, however, that notwithstanding the increased cooperation that has resulted from the worldwide review undertaken by the Secretary of Homeland Security, certain countries still have inadequacies under the parameters set forth above, and therefore their nationals are subject to restrictions and limitations on their entry until those inadequacies can be resolved.

As PP 9645 explains:

*[T]he Secretary of Homeland Security, in consultation with the Secretary of State and the Attorney General, has determined that a small number of countries — out of nearly 200 evaluated — remain deficient at this time with respect to their identity-management and information-sharing capabilities, protocols, and practices. In some cases, these countries also have a significant terrorist presence within their territory.<sup>40</sup>*

In particular, nationals of seven countries are currently subject to entry restrictions and limitations under PP 9645: the Islamic Republic of Iran, the State of Libya, the Democratic People’s Republic of [North] Korea, the Federal Republic of Somalia, the Syrian Arab Republic, the Bolivarian Republic of Venezuela, and the Republic of Yemen.<sup>41</sup> The restrictions imposed on nationals of those countries vary based on the situation in, and the cooperation provided by, each individual nation.

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<sup>40</sup> *Id.*

<sup>41</sup> Department of State Report: *Implementation of Presidential Proclamation 9645, December 8, 2017 to March 31, 2019*, U.S. DEP’T OF STATE, available at: <https://travel.state.gov/content/dam/visas/presidentialproclamation/Combined%20-%20Report%20on%20Implementation%20of%20PP%209645%20December%2007%202017%20to%20March%2031%202019.pdf>. Though the Republic of Chad had originally been included in PP 9645, on April 10, 2018, the president issued Presidential Proclamation 9723, which removed the visa restrictions imposed on nationals of that country after the Secretary of Homeland Security determined that country had made “marked improvements in its identity-management and information-sharing practices.”

For Iranian nationals, the restriction applies to nonimmigrant visas except in the F, M, and J categories (students and exchange visitors), and to immigrant and diversity visas.<sup>42</sup> For Libyan nationals, there are restrictions on nonimmigrant B-1 (visitor for business), B-2 (visitor for pleasure), B-1/B-2 (combined), and on immigrant and diversity visas.<sup>43</sup> With respect to nationals of the Democratic People’s Republic of Korea, there are restrictions on nonimmigrant, immigrant, and diversity visas.<sup>44</sup> There are no restrictions on nonimmigrant visas for Somali nationals, however, there are restrictions on immigrant and diversity visas.<sup>45</sup> For Syrian nationals, there are restrictions on all nonimmigrant visa categories, as well as on immigrant and diversity visas.<sup>46</sup> There are no restrictions on immigrant or diversity visas for nationals of the Bolivarian Republic of Venezuela, however, there are restrictions on B-1, B-2, and B-1/B-2 visas for officials of the Ministry of Interior, Justice, and Peace; the Administrative Service of Identification, Migration, and Immigration; the Corps of Scientific Investigations, Judicial and Criminal; the Bolivarian Intelligence Service; and the People’s Power Ministry of Foreign Affairs, and their immediate family members.<sup>47</sup> For Yemeni nationals, there are restrictions on B-1, B-2, and B-1/B-2 visas and on immigrant and diversity visas.<sup>48</sup>

*Limitations on restrictions*

These entry restrictions are limited. Specifically, they apply only to nationals of the designated countries who were outside the United States on the date of the effective date of PP 9645, did not have a valid visa on that date, and did not qualify for a visa or other valid document under section

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<sup>42</sup> *Id.*

<sup>43</sup> *Id.*

<sup>44</sup> *Id.*

<sup>45</sup> *Id.*

<sup>46</sup> *Id.*

<sup>47</sup> *Id.*

<sup>48</sup> *Id.*

6(d) of that proclamation (which entitled foreign nationals who had their visas revoked or marked cancelled under Executive Order 13769 (EO-1)<sup>49</sup> to seek entry under the terms and conditions of the visa marked revoked or canceled with a proper travel document).<sup>50</sup>

*Exceptions to restrictions*

Section 3(b) of PP 9645 also provides specific exceptions to the entry restrictions therein.<sup>51</sup> In particular, it states that the suspension of entry under section 2 therein does not apply to:

*(i) any lawful permanent resident of the United States;*

*(ii) any foreign national who is admitted to or paroled into the United States on or after the applicable effective date . . . of this proclamation;*

*(iii) any foreign national who has a document other than a visa — such as a transportation letter, an appropriate boarding foil, or an advance parole document — valid on the applicable effective date . . . or issued on any date thereafter, that permits him or her to travel to the United States and seek entry or admission;*

*(iv) any dual national of a country designated . . . when the individual is traveling on a passport issued by a non-designated country;*

*(v) any foreign national traveling on a diplomatic or diplomatic-type visa, North Atlantic Treaty Organization visa, C-2 visa for travel to the United Nations, or G-1, G-2, G-3, or G-4 visa; or*

*(vi) any foreign national who has been granted asylum by the United States; any refugee who has already been admitted to the United States; or any individual who has been granted withholding of removal, advance parole, or protection under the Convention Against Torture.<sup>52</sup> [Citation omitted]*

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<sup>49</sup> Exec. Order 13,769, "Protecting the Nation from Foreign Terrorist Entry into the United States" (2017), available at: <https://www.whitehouse.gov/the-press-office/2017/01/27/executive-order-protecting-nation-foreign-terrorist-entry-united-states>.

<sup>50</sup> Proclamation No. 9645, "Enhancing Vetting Capabilities and Processes for Detecting Attempted Entry into the United States By Terrorists or Other Public-Safety Threats" (2017), at §§ 3(a), 6(d)§1(c), available at: <https://www.whitehouse.gov/presidential-actions/presidential-proclamation-enhancing-vetting-capabilities-processes-detecting-attempted-entry-united-states-terrorists-public-safety-threats/>.

<sup>51</sup> *Id.* at § 3(b).

<sup>52</sup> *Id.*

*Waivers for nationals subject to restrictions*

In addition, PP 9645 provides for waivers of its entry restrictions for designated foreign nationals who demonstrate to the satisfaction of a consular officer or U.S. Customs and Border Protection (CBP) official that (1) denying them the entry would cause them undue hardship; (2) their entry would not pose a threat to either the United States' national security or public safety; and (3) their entry would be in the national interest.<sup>53</sup> Of course, those individuals would still need to prove that they were are not subject to the remaining grounds of inadmissibility in the INA.

That proclamation provides specific instances in which waivers “may be appropriate” (on a case-by-case basis in individual circumstances):

- The first instance described therein is where the foreign national had been previously “admitted to the United States for continuous period of work, study, or long-term activity,” but was outside of the United States on the effective date of that proclamation, and now “seeks to reenter the United States to resume that activity.” A waiver may be available if the denial of reentry would impair the activity.”<sup>54</sup>
- A second is where the foreign national “has previously established significant contacts with the United States” but was outside the United States on the effective date of the proclamation to work, study, or engage in some other lawful activity.<sup>55</sup>

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<sup>53</sup> *Id.* at § 3(c)(i).

<sup>54</sup> *Id.* at § 3(c)(iv)(A).

<sup>55</sup> *Id.* at § 3(c)(iv)(B).

- A third is where the foreign national is attempting to enter the United States “for significant business or professional obligations,” that would be impaired if that individual could not enter this country.<sup>56</sup>
- A fourth instance involves a foreign national attempting to enter this country “to visit or reside with a close family member,” such as a citizen, lawful permanent resident, or nonimmigrant “spouse, child, or parent,” where “the denial of entry would cause the foreign national undue hardship.”<sup>57</sup>
- Urgent medical care, or the status of the foreign national as an infant, young child, or adoptee is a fifth listed potential instance that could justify a waiver.<sup>58</sup>
- Proof that the foreign national has been an employee of, or on behalf of, the United States Government (or is the dependent of such an individual) and “has provided faithful and valuable service to the United States Government” is identified as a sixth instance possibly meriting a waiver.<sup>59</sup>
- A seventh described instance in which a waiver could potentially be granted would be where “the foreign national is traveling for purposes related to an international organization,” or is traveling for meetings or business with the United States government.<sup>60</sup>
- Another instance described is where the foreign national in question has permanent resident status in Canada, and is applying for a visa within that country.<sup>61</sup>

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<sup>56</sup> *Id.* at §3(c)(iv)(C).

<sup>57</sup> *Id.* at §3(c)(iv)(D).

<sup>58</sup> *Id.* at §3(c)(iv)(E).

<sup>59</sup> *Id.* at §3(c)(iv)(F).

<sup>60</sup> *Id.* at §3(c)(iv)(G).

<sup>61</sup> *Id.* at §3(c)(iv)(H).

- The ninth instance addressed in the proclamation relates to foreign nationals who are “traveling as a United States Government-sponsored exchange visitor.”<sup>62</sup>
- The tenth and final instance described therein in which a waiver could be considered relates to a foreign national who establishes he or she “is traveling to the United States, at the request of a United States Government department or agency, for legitimate law enforcement, foreign policy, or national security purposes.”<sup>63</sup>

One significant caveat to the waiver process is the fact that the same inadequacies in obtaining information about the identity of, and potential risk posed by, a national of one of the identified countries would also apply to any visa applicant from such country seeking a waiver.<sup>64</sup>

#### *Amendments and revisions*

PP 9645 also provides for possible amendments and revisions to the limitations and restrictions therein. The proclamation specifically calls on the Secretary of Homeland Security in consultation with the Secretary of State to devise a process by which they can assess whether the restrictions therein “should be continued, terminated, modified, or supplemented.”<sup>65</sup> In addition, it also requires those cabinet officials in consultation with the Attorney General (AG) and the DNI (as well as any other appropriate agency head) to submit a report every 180 days to the president on any interests of the United States that continue to require the restrictions to entry therein, as well

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<sup>62</sup> *Id.* at §3(c)(iv)(I).

<sup>63</sup> *Id.* at §3(c)(iv) (J).

<sup>64</sup> *See id.* at § 3(c)(ii) (“The guidance issued by the Secretary of State and the Secretary of Homeland Security under this subsection shall address the standards, policies, and procedures for: (C) addressing and managing the risks of making such a determination in light of the inadequacies in information sharing, Identity management, and other potential dangers posed by the nationals of individual countries subject to the restrictions and limitations imposed by this proclamation. . . .”).

<sup>65</sup> *Id.* at § 4(a).



as whether those restrictions should be “continued, modified, terminated, or supplemented,”<sup>66</sup> and whether similar restrictions should be placed on the entry of other classes of foreign nationals not identified in the proclamation.<sup>67</sup>

### *Application of the Exclusions and Waivers*

Guidance issued by DOS reveals that: “Exceptions and waivers listed in the Proclamation are considered for qualified applicants. In all visa adjudications, consular officers may seek additional information, as warranted, to determine whether an exception or a waiver is available.”<sup>68</sup>

DOS has expanded on this process in its most recent available guidance:

*If an applicant does not fall into an exception category, but is otherwise eligible for a visa but for PP 9645, a consular officer will automatically consider the applicant for a waiver based upon the three-part test set forth in PP 9645. . . . The applicant need not prepare any separate application for a waiver. Consular officers adjudicate waivers as part of the visa application process based on information provided in the standard visa application and an in-person interview. Aliens who are subject to the Proclamation’s entry restrictions may present evidence during their visa interview regarding their eligibility for a waiver pursuant to the regulations applicable to immigrant and nonimmigrant visa applicants. . . . The burden of proof is on the alien to establish that he or she is eligible for a visa and a waiver to the satisfaction of the consular officer. . . . There is no separate application for a waiver.*

*Consular officers have broad discretion to determine what, if any, information or documents may be necessary to assess applicant eligibility for a visa and a waiver. The visa application, supporting documentation, and required interview provide considerable information to the consular officer, who determines an applicant’s eligibility for a waiver.<sup>69</sup> [Emphasis added; internal citations omitted]*

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<sup>66</sup> *Id.* at § 4(a)(i).

<sup>67</sup> *Id.* at § 4(a)(ii).

<sup>68</sup> *June 26 Supreme Court Decision on Presidential Proclamation 9645*, U.S. DEP’T OF STATE (undated), available at: <https://travel.state.gov/content/travel/en/us-visas/visa-information-resources/presidential-proclamation-archive/june-26-supreme-court-decision-on-presidential-proclamation9645.html>.

<sup>69</sup> *Department of State Report: Implementation of Presidential Proclamation 9645, December 8, 2017 to March 31, 2019*, U.S. DEP’T OF STATE (undated), available at: <https://travel.state.gov/content/dam/visas/presidentialproclamation/Combined%20-%20Report%20on%20Implementation%20of%20PP%209645%20December%2007%202017%20to%20March%2031%202019.pdf>.

As DOS explains therein, at least as of the time that guidance was issued, “applicants for visas subject to PP 9645 who are being considered for a waiver . . . should undergo a post-interview interagency security review to resolve whether their entry would not pose a threat to the national security or public safety” until an automated screening process can be put into place.<sup>70</sup> As a consequence, much of that screening must be performed manually.

That guidance continues, however:

*Meanwhile, since the March 6, 2017 memorandum, [DOS] has been diligently working with interagency partners to strengthen the automated screening and vetting process. We currently envision a procedure for PP 9645 cases that will include enhanced automated front-end (pre-interview) screening to determine whether any additional review is required related to determine whether the applicant has satisfied the national security and public safety waiver criterion. When fully operational later this fiscal year, the new automated system should significantly increase the speed and efficiency of the vetting process for both current and future waiver cases while maintaining all security standards.<sup>71</sup>*

The implementation of that system should reduce the backlog in the number of waivers considered by DOS, which at the time that guidance was issued totaled more than 12,000 cases.<sup>72</sup>

That said, the waiver screening process should continue to be thorough and complete. DOS and CBP should take a lesson from the shortcuts in the so-called “visa express” program, which had allowed applicants in Saudi Arabia to use intermediaries to obtain visas.<sup>73</sup> That program was purportedly utilized by three of the September 11<sup>th</sup> hijackers.<sup>74</sup>

### *A Review of the Trump Administration Travel Orders, and Resulting Litigation*

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<sup>70</sup> *Id.*

<sup>71</sup> *Id.*

<sup>72</sup> *Id.*

<sup>73</sup> Jonathan Peterson, *Express Visa Program May Have Benefited 3 Hijackers*, LOS ANGELES TIMES, Dec. 17, 2001, available at: <https://www.latimes.com/archives/la-xpm-2001-dec-17-mn-15615-story.html>.

<sup>74</sup> *Id.*

Implementation of PP 9645 was the result of almost 18 months of litigation over that proclamation and similar travel orders. A review of those orders, and the ensuing litigation, is useful in understanding the authority of the president to issue such restrictions, and the rationale for the ultimate limitations and restrictions in that proclamation.

### *EO-1*

On January 27, 2017, President Trump issued EO-1, captioned “Protecting the Nation from Foreign Terrorist Entry into the United States.”<sup>75</sup> EO-1 had suspended the entry into the United States of nationals of Iraq, Syria, Iran, Sudan, Libya, Yemen, and Somalia for 90 days.<sup>76</sup> This suspension was intended to allow the Department of Homeland Security (DHS), in conjunction with DOS and the DNI, to determine what information was needed:

*[F]rom 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.*<sup>77</sup>

EO-1 also suspended the U.S. Refugee Admissions Program (USRAP)<sup>78</sup> for 120 days to allow DOS and DHS, in consultation with the DNI, to review the USRAP process “to determine what additional procedures should be taken to ensure that those approved for refugee admission do not

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<sup>75</sup> Exec. Order 13769, “Protecting the Nation from Foreign Terrorist Entry into the United States” (2017), available at: <https://www.whitehouse.gov/the-press-office/2017/01/27/executive-order-protecting-nation-foreign-terrorist-entry-united-states>.

<sup>76</sup> *Id.* at §3(c).

<sup>77</sup> *Id.* at §3(a).

<sup>78</sup> See *Refugees*, U.S. Citizenship and Immigration Services, Oct. 24, 2017, available at: <https://www.uscis.gov/humanitarian/refugees-asylum/refugees> (“You must receive a referral to the U.S. Refugee Admissions Program (USRAP) for consideration as a refugee . . . . If you receive a referral, you will receive help filling out your application and then be interviewed abroad by a USCIS officer who will determine whether you are eligible for refugee resettlement.”).

pose a threat to the security and welfare of the United States,”<sup>79</sup> and suspended the admission of Syrian refugees “until such time as [the president has] determined that sufficient changes have been made to the USRAP to ensure that admission of Syrian refugees is consistent with the national interest.”<sup>80</sup>

On February 3, 2017, a federal district court judge in the Western District of Washington issued a temporary restraining order, which effectively prevented enforcement of the EO-1 suspensions pending a final decision on their legality.<sup>81</sup>

### *EO-2*

On March 16, 2017, the White House issued EO-2, also captioned “Protecting the Nation from Foreign Terrorist Entry into the United States.”<sup>82</sup> Subsection 2(c) of EO-2 suspended the entry of nationals from Iran, Libya, Somalia, Sudan, Syria, and Yemen for 90 days, subject to a number of limitations, waivers, and exceptions.<sup>83</sup> Security and vetting concerns related to those six countries, which supported those suspensions, were set forth in section 1 of EO-2.<sup>84</sup>

As noted above, section 2(a) of EO-2 required DHS, in conjunction with DOS and the DNI, to:

*[C]onduct a worldwide review to identify whether, and if so what, additional information will be needed from each foreign country to adjudicate an application by a national of that country for a visa, admission, or other benefit*

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<sup>79</sup> Exec. Order 13,769, “Protecting the Nation from Foreign Terrorist Entry into the United States” (2017), at §5(a), available at: <https://www.whitehouse.gov/the-press-office/2017/01/27/executive-order-protecting-nation-foreign-terrorist-entry-united-states>.

<sup>80</sup> *Id.* at §5(c).

<sup>81</sup> *Washington v. Trump*, Case No. C17-0141JLR, Temporary Restraining Order (W.D. Wash. Feb. 3, 2017), available at: [http://cdn.ca9.uscourts.gov/datastore/general/2017/02/03/17-141\\_TRO\\_order.pdf](http://cdn.ca9.uscourts.gov/datastore/general/2017/02/03/17-141_TRO_order.pdf).

<sup>82</sup> Exec. Order No. 13,780 “Protecting the Nation from Foreign Terrorist Entry into the United States” (2017), available at: <https://www.whitehouse.gov/presidential-actions/executive-order-protecting-nation-foreign-terrorist-entry-united-states-2/>.

<sup>83</sup> *Id.* at §2(c).

<sup>84</sup> See *id.* at §1(e) cl. I-vi.

*under the INA (adjudications) in order to determine that the individual is not a security or public-safety threat.*<sup>85</sup>

DHS was required to submit a report on the results of that review within 20 days of the effective date of that order.<sup>86</sup>

Unlike EO-1, EO-2 applied only to foreign nationals outside the United States who did not then have a visa.<sup>87</sup> Like EO-1, EO-2 suspended USRAP for 120 days to allow DOS, in conjunction with DHS and the DNI to:

*[R]eview the USRAP application and adjudication processes to determine what additional procedures should be used to ensure that individuals seeking admission as refugees do not pose a threat to the security and welfare of the United States, and shall implement such additional procedures.*<sup>88</sup>

Thereafter, on May 25, 2017, the U.S. Court of Appeals for the Fourth Circuit issued a decision in *International Refugee Assistance Project [IRAP] v. Trump*<sup>89</sup>, temporarily blocking the 90-day suspension in section 2(c) of EO-2.

The plaintiffs there asserted that the national security purpose in EO-2 “was given in bad faith . . . as a pretext for what really is an anti-Muslim religious purpose.”<sup>90</sup> The Fourth Circuit agreed, finding:

*Plaintiffs point to ample evidence that national security is not the true reason for EO-2, including, among other things, then-candidate Trump's numerous campaign statements expressing animus towards the Islamic faith; his proposal to ban Muslims from entering the United States; his subsequent explanation that he would effectuate this ban by targeting “territories” instead of Muslims directly; the issuance of EO-1, which targeted certain majority-Muslim nations and*

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<sup>85</sup> *Id.* at §2(a).

<sup>86</sup> *Id.* at §2(b).

<sup>87</sup> *Id.* at §3.

<sup>88</sup> *Id.* at §6(a).

<sup>89</sup> *International Refugee Assistance Project v. Trump*, 857 F. 3d 554 (4<sup>th</sup> Cir. 2017), available at: <http://coop.ca4.uscourts.gov/171351.P.pdf>.

<sup>90</sup> *Id.* at 591.

*included a preference for religious minorities; an advisor's statement that the President had asked him to find a way to ban Muslims in a legal way; and the issuance of EO-2, which resembles EO-1 and which President Trump and his advisors described as having the same policy goals as EO-1. Plaintiffs also point to the comparably weak evidence that EO-2 is meant to address national security interests, including the exclusion of national security agencies from the decisionmaking process, the post hoc nature of the national security rationale, and evidence from DHS that EO-2 would not operate to diminish the threat of potential terrorist activity.<sup>91</sup>*

Based on this, the court then concluded:

*Plaintiffs have more than plausibly alleged that EO-2's stated national security interest was provided in bad faith, as a pretext for its religious purpose. And having concluded that the "facially legitimate" reason proffered by the government is not "bona fide," we no longer defer to that reason and instead may "look behind" EO-2.<sup>92</sup>*

"Looking behind" EO-2, the court found, meant applying the so-called "*Lemon* test" to determine whether EO-2 violates the Establishment Clause.<sup>93</sup>

In this context, the "Establishment Clause" refers to the first provision in the First Amendment to the U.S. Constitution, which states: "Congress shall make no law respecting an establishment of religion . . . ."<sup>94</sup> "This clause not only forbids the government from establishing an official religion, but also prohibits government actions that unduly favor one religion over another."<sup>95</sup>

The *Lemon* test was set forth by the Supreme Court in its decision in *Lemon v. Kurtzman*.<sup>96</sup> As the Heritage Foundation states: "The *Lemon* test requires courts to consider whether the law in

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<sup>91</sup> *Id.* at 591-92.

<sup>92</sup> *Id.* at 592.

<sup>93</sup> *Id.*

<sup>94</sup> U.S. Const. amend. I, available at: [https://www.law.cornell.edu/constitution/first\\_amendment](https://www.law.cornell.edu/constitution/first_amendment).

<sup>95</sup> *Establishment Clause*, LEGAL INFORMATION INSTITUTE, available at: [https://www.law.cornell.edu/wex/establishment\\_clause](https://www.law.cornell.edu/wex/establishment_clause).

<sup>96</sup> *Lemon v. Kurtzman*, 403 U.S. 602 (1971), available at: <https://www.law.cornell.edu/supremecourt/text/403/602>.

question has (1) a secular purpose, (2) a primary effect that neither advances nor inhibits religion, and (3) does not create excessive entanglement with religion.”<sup>97</sup>

After again reviewing statements of candidate Trump, President Trump, and the president's spokesman and advisors, the Fourth Circuit found “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,”<sup>98</sup> and therefore concluded “EO-2 likely fails *Lemon's* purpose prong in violation of the Establishment Clause.”<sup>99</sup> Having reached this conclusion, the Fourth Circuit found: “Plaintiffs are likely to succeed on the merits of their Establishment Clause claim.”<sup>100</sup>

The dissent in *IRAP* asserted that the Fourth Circuit had improperly applied the Supreme Court’s 1972 decision in *Kleindienst v. Mandel*.<sup>101</sup> In *Mandel*, the Supreme Court held:

*[P]lenary congressional power to make policies and rules for exclusion of aliens has long been firmly established. . . . We hold that when the Executive exercises this power negatively on the basis of a facially legitimate and bona fide reason, the courts will neither look behind the exercise of that discretion, nor test it by balancing its justification against the First Amendment interests of those who seek personal communication with the applicant.*<sup>102</sup> [Emphasis added]

Although *Mandel* involved First Amendment free-speech rights, the Supreme Court did not limit the scope of that decision to only that clause of the First Amendment.

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<sup>97</sup> John Baker, *The Heritage Guide to the Constitution, Establishment of Religion*, HERITAGE FOUNDATION, available at: <https://www.heritage.org/constitution/#!/amendments/1/essays/138/establishment-of-religion>.

<sup>98</sup> *International Refugee Assistance Project v. Trump*, 857 F. 3d 554, 594 (4<sup>th</sup> Cir. 2017), available at: <http://coop.ca4.uscourts.gov/171351.P.pdf>

<sup>99</sup> *Id.* at 601.

<sup>100</sup> *Id.*

<sup>101</sup> *Id.* at 639; *Kleindienst v. Mandel*, 408 U.S. 753 (1972), available at: [https://scholar.google.com/scholar\\_case?case=2384957718526063733&hl=en&as\\_sdt=6&as\\_vis=1&oi=scholar](https://scholar.google.com/scholar_case?case=2384957718526063733&hl=en&as_sdt=6&as_vis=1&oi=scholar).

<sup>102</sup> *Id.* at 769-70.

Contrary to the Fourth Circuit’s holding, a review of EO-2 reveals that it was both facially legitimate and facially bona fide.

The clauses in subsection 1(e) of that executive order stated, with respect to each of the six affected countries “why their nationals continue to present heightened risks to the security of the United States.”<sup>103</sup> For example, with respect to Iran, EO-2 states:

*Iran has been designated as a state sponsor of terrorism since 1984 and continues to support various terrorist groups, including Hizballah, Hamas, and terrorist groups in Iraq. Iran has also been linked to support for al-Qa’ida and has permitted al-Qa’ida to transport funds and fighters through Iran to Syria and South Asia. Iran does not cooperate with the United States in counterterrorism efforts.*<sup>104</sup>

With due respect to the circuit court, this would appear to be a more than sufficient rationale for the inclusion of Iran in EO-2.

*PP 9645*

Subsequently, as noted, on September 24, 2017, President Trump issued PP 9645.<sup>105</sup> Three lawsuits were filed against by different groups in federal court in Maryland to block that proclamation. The plaintiffs asserted that PP 9645 and EO-2, among other things, violated the Establishment Clause of the First Amendment to the U.S. Constitution, described above.<sup>106</sup>

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<sup>103</sup> Exec. Order No. 13,780 "Protecting the Nation from Foreign Terrorist Entry into the United States" (2017), § 1(e), available at: <https://www.whitehouse.gov/presidential-actions/executive-order-protecting-nation-foreign-terrorist-entry-united-states-2/>.

<sup>104</sup> *Id.* at cl. i.

<sup>105</sup> Proclamation No. 9645, “Enhancing Vetting Capabilities and Processes for Detecting Attempted Entry into the United States By Terrorists or Other Public-Safety Threats” (2017), available at: <https://www.whitehouse.gov/presidential-actions/presidential-proclamation-enhancing-vetting-capabilities-processes-detecting-attempted-entry-united-states-terrorists-public-safety-threats/>.

<sup>106</sup> See *IRAP v. Trump*, 883 F.3d 233, 254 (4<sup>th</sup> Cir. 2018), available at: <http://www.ca4.uscourts.gov/Opinions/172231.P.pdf>.



On October 17, 2017, the district court granted the motion “in substantial part, entering a nationwide preliminary injunction enjoining the enforcement of” the proclamation to nationals of Chad, Iran, Libya, Somalia, Syria, and Yemen who have “a credible claim of a bona fide relationship with a person or entity in the United States.”<sup>107</sup> The court concluded that the plaintiffs in that case were likely to succeed on their argument that PP 9645 violated the INA and the Establishment Clause.<sup>108</sup>

The government directly appealed that decision to the Court of Appeals for the Fourth Circuit.<sup>109</sup> Again, a majority of that court determined that the proffered reason for the proclamation (“to protect [United States] citizens from terrorist attacks and other public-safety threats” and “to encourage foreign governments to improve their information-sharing and identity-management protocols and practices and to regularly share identity and threat information with our immigration screening and vetting systems”) was not “bona fide,” but was rather “a pretext for an anti-Muslim religious purpose.”<sup>110</sup>

To support this determination, the court referenced “the words of the President,” as well as his “issuance of EO-1 and EO-2, addressed only to majority-Muslim nations.” Most exceptionally, the court relied upon the very “issuance of [the proclamation], which not only closely tracks EO-1 and EO-2, but which President Trump and his advisors described as having the same goal as EO-1 and EO-2.”<sup>111</sup> Unlike its earlier decision, the Fourth Circuit court focused solely on the president’s post-inauguration statements.<sup>112</sup>

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<sup>107</sup> *Id.* at 359.

<sup>108</sup> *Id.*

<sup>109</sup> *Id.* at 233.

<sup>110</sup> *Id.* at 264.

<sup>111</sup> *Id.*

<sup>112</sup> *See id.* at 266-68.

Such a basis would, in essence, have prevented the president from issuing any travel order, because he had issued travel orders that the court struck down in the past, effectively leaving the United States unprotected from the dangers described in PP 9645.

The court specifically rejected the government’s arguments that “substantive differences” between the proclamation and its predecessors “reflect[ed] the elimination of any anti-Muslim bias.”<sup>113</sup>

First, it dismissed the addition of North Korea and Venezuela to the list of countries facing limitations and restrictions as “an attempt to ‘cast off’ the ‘unmistakable’ religious objective” of the first two executive orders.”<sup>114</sup>

Most significantly, however, it dismissed the “review” on which the proclamation was premised, finding “the criteria allegedly used in the review to identify problematic countries lie at odds with a list of countries actually included in” PP 9645.<sup>115</sup> The court referenced only two of those countries in the footnote supporting this proposition. Specifically, it noted that Somalia “satisfied ‘the information-sharing requirements of the baseline,’” but that nonetheless Somali nationals were subject to entry restrictions.<sup>116</sup> It also noted that although “many countries regularly fail to receive deportees from the United States,” only Iranian citizens were subject to entry restrictions on this account.<sup>117</sup>

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<sup>113</sup> *Id.* at 268.

<sup>114</sup> *Id.*

<sup>115</sup> *Id.* at 269.

<sup>116</sup> *Id.* at n. 17.

<sup>117</sup> *Id.*

Again, in making these findings, the court ignored the Supreme Court’s decision in *Mandel*. In so doing, the court underscored the dangers inherent in failing to follow that Supreme Court precedent, for the reasons explained below.

By their nature, federal courts deal only with the limited information that they are provided by the parties, and do not have access to the broader scope of national-security information on which the Congress, but more importantly the executive branch, render their decisions. That is why it is important for courts to look only to whether an exclusionary decision is valid and bona fide *on its face*. Going beyond the four corners of such a decision takes the court outside of its areas of expertise and knowledge, and therefore gives it free rein to substitute its limited judgment for that of the executive based on imperfect information.

The two examples offered by the court for rejecting the importance of the review process that led up to PP 9645 are indicative of this. In essence, it “cherry-picked” the facts that supported its decision while ignoring the ones that did not.

For example, while the court focused on information-sharing between the United States and Somalia, it ignored the findings in PP 9645 related to that country’s “identity-management deficiencies,” and the “persistent terrorist threat [that] emanates from Somalia’s territory,” which the proclamation describes in-depth.<sup>118</sup> Similarly, while the court noted that Iran fails to accept its deported nationals, it ignores the rest of the significant findings in the proclamation related to that country: “Iran regularly fails to cooperate with the United States Government in identifying

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<sup>118</sup> Proclamation No. 9645, “Enhancing Vetting Capabilities and Processes for Detecting Attempted Entry into the United States By Terrorists or Other Public-Safety Threats,” § 2(h)(i) (2017), *available at*: <https://www.whitehouse.gov/presidential-actions/presidential-proclamation-enhancing-vetting-capabilities-processes-detecting-attempted-entry-united-states-terrorists-public-safety-threats/>.

security risks, . . . is the source of significant terrorist threats, and . . . [DOS] has also designated Iran as a state sponsor of terrorism.”<sup>119</sup>

These are not minor points, nor ones subject to serious dispute. The Fourth Circuit simply chose to ignore them, and erred significantly in doing so.

The majority in that case also failed to defer to the authority of the U.S. political branches (and in particular the executive) as it relates to the exclusion of aliens, a fact the dissent discussed at great length.<sup>120</sup> Quoting the Supreme Court’s 1950 decision in *United States ex rel. Knauff v. Shaughnessy*<sup>121</sup>, the dissent noted:

***The exclusion of aliens is a fundamental act of sovereignty. The right to do so stems not alone from legislative power but is inherent in the executive power to control the foreign affairs of the nation. When Congress prescribes a procedure concerning the admissibility of aliens, it is not dealing alone with a legislative power. It is implementing an inherent executive power.***

*Thus, the decision to admit or exclude an alien may be lawfully placed with the President, who may delegate the carrying out of this function to a responsible executive officer . . . . The action of the executive officer under such authority is final and conclusive.*<sup>122</sup> [Emphasis added]

Put another way, the president was that the height of his executive power when he issued PP 9645, and the majority erred in its analysis of the president’s exercise of that authority.

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<sup>119</sup> *Id.* at §2(b)(i).

<sup>120</sup> See *IRAP v. Trump*, 883 F.3d 233, 360 (4<sup>th</sup> Cir. 2018) (Niemayer, J. dissenting), available at: <http://www.ca4.uscourts.gov/Opinions/172231.P.pdf>.

<sup>121</sup> *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 542-43 (1950), available at: [https://scholar.google.com/scholar\\_case?case=5235136558696880110&hl=en&as\\_sdt=6&as\\_vis=1&oi=scholar](https://scholar.google.com/scholar_case?case=5235136558696880110&hl=en&as_sdt=6&as_vis=1&oi=scholar).

<sup>122</sup> *IRAP v. Trump*, 883 F.3d 233, 360 (4<sup>th</sup> Cir. 2018) (Niemayer, J. dissenting), available at: <http://www.ca4.uscourts.gov/Opinions/172231.P.pdf>.

Finally, the dissent acknowledged the politically charged nature of EO-1, EO-2, and PP 9645, and the dangers posed by the judicial branch’s interference with decisions that are inherently within the scope of the executive:

*The public debate over the Administration’s foreign policy and, in particular, its immigration policy, is indeed intense and thereby seductively tempts courts to effect a politically preferred result when confronted with such issues. But public respect for Article III courts calls for heightened discipline and sharpened focus on only the applicable legal principles to avoid substituting judicial judgment for that of elected representatives. It appears that the temptation may have blinded some Article III courts, including the district court and perhaps the majority of this court, to these obligations, risking erosion of the public’s trust and respect, as well as our long-established constitutional structure.<sup>123</sup>*

#### *The Supreme Court’s Affirmation of the President’s Authority to Issue PP 9645*

On June 26, 2018, the Supreme Court issued a decision in *Trump v. Hawaii*<sup>124</sup>, reviewing a decision of the Ninth Circuit that (like *IRAP*) enjoined in part PP 9645. While the Ninth Circuit’s decision was based on its conclusion that the INA did not give the president the authority to issue PP 9645 (which the Supreme Court expressly rejected<sup>125</sup>) the Court also in an unusual move considered whether the proclamation unconstitutionally violated the Establishment Clause.<sup>126</sup>

The Supreme Court began by noting that the heart of the plaintiffs’ argument on this point was “a series of statements by the president and his advisors casting doubt on the official objective of” the proclamation.<sup>127</sup> It found that the issue before the Court was not whether to “denounce

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<sup>123</sup> *Id.* at 376-77.

<sup>124</sup> *Trump v. Hawaii*, 138 S. Ct. 2392 (2018), available at:

[https://scholar.google.com/scholar\\_case?case=16062632215534775045&hl=en&as\\_sdt=6&as\\_vis=1&oi=scholar](https://scholar.google.com/scholar_case?case=16062632215534775045&hl=en&as_sdt=6&as_vis=1&oi=scholar).

<sup>125</sup> *Id.* at 2415.

<sup>126</sup> *Id.* at 2415-16.

<sup>127</sup> *Id.* at 2417.

th[os]e statements,” but instead to consider “the significance of those statements in reviewing a Presidential directive” that was neutral on its face, because it did not refer to religion.<sup>128</sup>

In its analysis, the Supreme Court underscored the judiciary’s traditional deference to the political branches (Congress and the executive) when their actions relate to the exclusion of foreign nationals from entering the United States, particularly where national security concerns were involved, recognizing the authority of those branches as it relates to foreign policy and political and economic considerations.<sup>129</sup> It admitted (citing *Mandel*) that it could, nonetheless, consider such actions in a circumscribed manner when they allegedly burdened the constitutional rights of U.S. citizens.<sup>130</sup> The court acknowledged, however, its marked “lack of competence” in “collecting evidence and drawing inferences” on national security questions, which I alluded to above.<sup>131</sup>

For purposes of its review, the Supreme Court assumed that it could “look behind the face of” PP 9645 “to the extent of applying rational basis review,” which in this context allowed the Court to examine “whether the entry policy is plausibly related to the Government’s stated objective to protect the country and improve vetting processes.”<sup>132</sup> The Court found that it could consider the president’s statements, but had to uphold the policy if it could be “**reasonably understood** to result from a **justification independent** of unconstitutional grounds.”<sup>133</sup> (Emphasis added).

The Supreme Court noted that policies were rarely struck down under rational-basis scrutiny given the fact that it is a deferential standard of review, and then only when “the laws at issue

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<sup>128</sup> *Id.* at 2418.

<sup>129</sup> *See id.* at 2418-19.

<sup>130</sup> *Id.* at 2419.

<sup>131</sup> *Id.*

<sup>132</sup> *Id.* at 2420.

<sup>133</sup> *Id.*

lack any purpose other than ‘bare . . . desire to harm a politically unpopular group.’”<sup>134</sup> It concluded that because there was “persuasive evidence that the entry suspension has a legitimate grounding in national security concerns, quite apart from any religious hostility,” the Court had to accept that justification.<sup>135</sup>

Specifically, the court held that PP 9645 was premised on the legitimate purpose of preventing the “entry of nationals who cannot be adequately vetted and inducing other nations to improve their practices,” without that proclamation referencing religion.<sup>136</sup> Moreover, the Court noted, the proclamation “reflects the results of a worldwide review process undertaken by multiple Cabinet officials and their agencies.”<sup>137</sup> Again, the thorough and unbiased nature of that review made clear that the conclusions in PP 9645 were premised on objective facts, not subjective biases.

With respect to religion, the court concluded that the fact that five of the seven countries listed in the proclamation had Muslim-majority populations “alone does not support an inference of religious hostility,” because only eight percent of the world’s Muslim population is covered by the proclamation, and because PP 9645 “is limited to countries that were previously designated by Congress or prior administrations as posing national security risks.”<sup>138</sup>

This is a significant point, which was ignored or rejected by the lower courts. Had PP 9645 been a “Muslim ban,” as its detractors asserted, it would have been an exceptionally ineffective one. Only one country on the list (the Islamic Republic of Iran) was among the ten countries with the

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<sup>134</sup> *Id.*

<sup>135</sup> *Id.* at 2421.

<sup>136</sup> *Id.*

<sup>137</sup> *Id.*

<sup>138</sup> *Id.*

largest Muslim populations in 2015 according to the Pew Research Center, coming in at number seven, well below Indonesia, Pakistan, Nigeria, and even India.<sup>139</sup> And, as recent events have demonstrated, the Iranian government plainly has positions that are hostile to the United States and its allies.

Notably, in remarks at the Washington Institute for Near East Policy Counterterrorism Lecture Series on November 13, 2018, Nathan A. Sales, the Acting Undersecretary of State for Civilian Security, Democracy, and Human Rights, explained:

*Iran is the world's leading state sponsor of terrorism. Period. It has held that dubious distinction for many years now and shows no sign of relinquishing the title.*

*To the contrary, the regime in Tehran continues to provide hundreds of millions of dollars every year to terrorists across the world. It does this, despite ongoing economic turmoil that's impoverishing many of its people. The beneficiaries of this misbegotten largesse range from Hizballah in Lebanon, to Hamas in Gaza, to violent rejectionist groups in the West Bank, to the Houthis in Yemen, to hostile militias in Iraq and Syria.*

*Let me give you some numbers. This may sound hard to believe, but Iran provides Hizballah alone some \$700 million a year. It gives another \$100 million to various Palestinian terrorist groups. When you throw in the money provided to other terrorists, the total comes close to one billion dollars.<sup>140</sup>*

## *Conclusion*

Since well before September 11, the U.S. government has been alert to the dangers posed by alien terrorism. Terrorist attacks in the United States and Europe in recent years, coupled with the destabilization of certain countries in Africa and the Middle East, have heightened concerns

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<sup>139</sup> Jeff Diamant, *The countries with the 10 largest Christian populations and the 10 largest Muslim populations*, PEW RESEARCH CENTER FACTTANK, Apr. 1, 2019, available at: <https://www.pewresearch.org/fact-tank/2019/04/01/the-countries-with-the-10-largest-christian-populations-and-the-10-largest-muslim-populations/>.

<sup>140</sup> Nathan A. Sales, Acting Undersecretary of State for Civilian Security, Democracy, and Human Rights, *Countering Iran's Global Terrorism*, U.S. DEP'T OF STATE, Nov. 13, 2018, available at: <https://www.state.gov/countering-irans-global-terrorism/>.



that foreign nationals will seek to exploit vulnerabilities within our visa and refugee-processing systems to enter and do harm to the people and institutions of the United States.

During his campaign for president of the United States, Donald Trump expressed concerns about the vulnerabilities that those individuals exploited, or others could potentially exploit, often in overly simplistic and broadly general terms. Since becoming president, he has issued a series of orders to tighten the United States' visa-issuance and refugee-processing systems in order to address these concerns.

Despite the deference traditionally shown to the executive branch in reviewing actions relating to the exclusion of aliens from the United States, certain courts have attempted to enjoin or narrow those orders. In so doing, lower-court judges have erroneously substituted their limited national-security expertise for that of the executive branch.

The Supreme Court's decision in *Hawaii* went a long way to restore the deference due to the political branches on this issue, consistent with concerns about executive overreach.

The protection of its citizens, nationals, and lawfully admitted immigrants is the primary responsibility of any government. Having undertaken a worldwide review of whether, and if so what, additional information would be needed from each foreign country to assess adequately whether its nationals seeking to enter the United States pose a security or safety threat, the executive branch should be given the opportunity to implement the results of that review. The Supreme Court gave the Trump administration back that authority.

I thank you for your time, and I look forward to your questions.