



## **Analysis of January 27, 2017 Executive Order:**

### **Protecting the Nation from Foreign Terrorist Entry into the United States**

#### **I. Overview**

On January 27, 2017, President Trump issued an Executive Order for the stated purpose of “Protecting the Nation from Foreign Terrorist Entry into the United States.”<sup>1</sup> The Order states that it is intended to “ensure that those admitted to this country do not bear hostile attitudes toward it and its founding principles.” It states further: “It is the policy of the United States to protect its citizens from foreign nationals who commit terrorist attacks in the United States; and to prevent the admission of foreign nationals who intend to exploit United States immigration laws for malevolent purposes.”

The Executive Order seeks to implement this policy through several significant restrictions upon immigrants and nonimmigrants seeking entry into the United States.

First, Section 3 of the Order suspends the issuance of visas and other immigration benefits to immigrants and nonimmigrants of seven countries – Iraq, Syria, Iran, Libya, Somalia, Sudan, and Yemen – for a period of 90 days from the date of the order. The Secretaries of State or Homeland Security may, on a case-by-case basis, and when in the national interest, issue visas or other immigration benefits to nationals of countries which visas and benefits are otherwise blocked.

Second, Section 5 of the Order suspends the U.S. Refugee Admissions Program for 120 days from the date of the order. During these 120 days, the Order directs the Secretaries of State and Homeland Security to consult with the Director of National Intelligence to review the refugee application and adjudication processes to ensure that those approved for refugee admission do not pose a threat to the security and welfare of the United States. Relying on Section 212(f) of the Immigration and Nationality Act—which states that “[w]henver 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,” 8 U.S.C. § 1182(f)—Section 5 of the Executive Order provides that:

- (1) Upon resumption of refugee admissions, the Government shall 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.

- (2) Entry of Syrian refugees is deemed detrimental to the interest of the United States and thus suspended until President Trump determines that sufficient changes have been made to the US refugee admissions program to ensure that admission of Syrian refugees is consistent with the national interest.
- (3) No more than 50,000 refugees shall be admitted in fiscal year 2017 until President Trump determines that additional admissions would be in the national interest.
- (4) The Secretaries of State and Homeland Security may jointly determine to admit 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.

## II. The Executive Order Violates the Fifth Amendment's Equal Protection Clause<sup>ii</sup>

As discussed in greater detail in Section VI, the Order is presently subject to multiple legal challenges in courts across the country, including a case that is likely to reach the Supreme Court. The following sections summarize the Order's principal vulnerabilities as articulated in the key constitutional and statutory arguments challenging the Order.

The Fifth Amendment of the Constitution states in part that no person shall be "deprived of life, liberty or property without due process of law." Our Supreme Court has held that this language has "an equal protection component,"<sup>iii</sup> and that U.S. citizens, *as well as noncitizens*, are protected by this language.<sup>iv</sup> Consequently, if a law or, in this case, an order by a President, seeks to discriminate against a certain class of noncitizens with the force of law, ordinarily it must be "narrowly tailored to serve a compelling government interest."<sup>v</sup> While the government has argued that constitutional review of the President's decision-making in the immigration area is extremely circumscribed—requiring the court to accept any "facially legitimate" justification offered—even under that theory, at a minimum, any such justification must be "bona fide" and made in "good faith."<sup>vi</sup>

Here, because the Executive Order is so broad, and because there is no evidence establishing that its restrictions will protect the United States from foreign terrorist threat, the Order is at odds with the fundamental promise that all are entitled to equal protection under the law. First, it discriminates based on national origin by singling out people from seven countries for an outright ban on admissions to the United States, including lawful permanent residents from the listed countries who live in the United States. Second, it singles out refugees from Syria for differential treatment, indefinitely suspending their entry regardless of whether such individuals are suspected terrorists or pose a threat to the United States (the Order applies equally to all, including men, women, babies, toddlers, and the elderly). Third, the Order discriminates based upon religion, through the prioritization of 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. President Trump and his advisors have made clear that the intent of this provision is to give preference to Christian refugees while disadvantaging Muslim refugees.

Even under the test the government advocates, this establishes that the Order is vastly overbroad and lacks any bona fide basis—especially if the public statements by the President and his advisors are taken into account. The “sheer breadth” of the ban, together with the promise of favorable treatment of Christians, “lacks a rational relationship to legitimate state interests.”<sup>vii</sup> Equally significant, the Order’s arbitrary and discriminatory restrictions are also exemplified through its failure to impose entry restrictions on people from countries whose nationals were responsible for the September 11, 2001 attack on the United States (Egypt, Lebanon, Saudi Arabia, and the United Arab Emirates), despite the fact President Trump refers to and relies upon the September 11 attacks to justify, both morally and legally, the Order’s expression of Executive power.

### III. The Executive Order Violates the First Amendment’s Establishment Clause

The First Amendment states that “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.” The Supreme Court has thus stated that one religious denomination cannot be officially preferred over another, and that, where a law (or in this case an Executive Order) grants a denominational preference, “our precedents demand that we treat the law as suspect and that we apply strict scrutiny in adjudging its constitutionality.”<sup>viii</sup>

Here, the Executive Order’s refugee provisions explicitly distinguish between members of religious faiths, granting priority to refugee claims made by individuals on the basis of religious-based persecution, only if the religion of the individual is a minority religion in the individual’s country of nationality. As noted above, President Trump and his advisors have made it clear that the purpose of this provision is to favor Christian refugees at the expense of Muslim refugees. This is precisely the sort of discrimination among denominations that the Supreme Court has deemed to be unconstitutional.

In addition, the Order violates the Establishment clause because, despite its stated purpose (to protect against foreign acts of terror within the United States), the Order does not reflect a sincere and credible non-religious, or secular, legislative purpose. Recall that during his campaign, then Presidential Candidate Trump called for “a total and complete shutdown of Muslims entering the United States.” Considered alongside the Order’s provisions and restrictions that are unlikely to achieve its express purpose (as discussed above), the reasonable conclusion is that the Order impermissibly politicizes religion, and reflects President Trump’s preference for one religion over another, which the Constitution prohibits.

### IV. The Executive Order Violates Due Process and, In Several Instances, Statutory Procedural Protections

Section 3(c) of the Executive Order denies entry to all persons from Iraq, Syria, Iran, Libya, Somalia, Sudan, and Yemen, including visa holders and legal permanent residents (“LPRs”) with the right to leave and re-enter the United States. Consequently, under the Order’s plain terms, LPRs and visa holders traveling abroad will be deported if they attempt to reenter the United States, and those who remain will be forced to avoid international travel to ensure that they will not be deported. On February 1, 2017, the White House issued “authoritative guidance”<sup>ix</sup> stating that the Order exempts LPRs, or green card holders, however, this guidance is

contrary to a reasonable reading of the Order’s plain language, and is, of course subject to the shifting and unpredictable will of the Executive. Consequently, the Order as written constitutes a violation of their due process rights.

As stated above, the Fifth Amendment of the Constitution states in part that no person shall be “deprived of life, liberty or property without due process of law.” This protection applies to all persons within our borders, regardless of immigration status,<sup>x</sup> and there is no exception to this rule.<sup>xi</sup> Our caselaw establishes that aliens who have entered the United States, legally or illegally, cannot be expelled without the Government following established procedures consistent with the requirements of due process.

Worthy of note, our caselaw also establishes that those who are either in the country or who have ties to the country, (e.g., LPRs who have left for a brief time and wish to return), benefit from stronger protection than noncitizens who are not present in the country and otherwise have no ties. In addition, numerous provisions of the immigration laws vest Executive officials with “broad discretion” to admit, deport, or deny entry to foreign nationals. Nevertheless, the Due Process Clause demands that every grant of discretion “provide explicit standards” so that officers will not act “on an ad hoc and subjective basis.”<sup>xii</sup> These safeguards ensure that the immigration laws are not enforced in an arbitrary and discriminatory manner, and that immigrants, their families, and their employers are afforded consistent and predictable treatment at the hands of the Federal Government.

Consequently, at least for noncitizens who have either already received valid visas and have arrived in the United States, or for LPRs present in the country or intending to return after a brief time abroad, the denial of re-entry to all visa holders and LPRs from impacted countries, without any established procedures, and without an opportunity for a fair hearing, is a violation of due process principles. The same is true regarding the impact upon the right to travel: the Order deprives noncitizens of the right to travel, without due process of law, which is a constitutionally protected interest.<sup>xiii</sup>

Likewise, our laws state that any alien who is physically present in the United States or who arrives in the United States, irrespective of such alien’s status, may apply for asylum.<sup>xiv</sup> Specifically, federal law prohibits the return of a noncitizen to a country where she may face torture or persecution, and Congress has established procedures to implement those statutory rights, which includes providing refugees the right to present evidence in support of a claim for asylum, to move for reconsideration of an adverse decision, and to seek judicial review of a final order denying their claims. Here, the Executive Order violates the due process rights of refugees, because it explicitly states that the United States will not entertain asylum claims from certain groups for a specified period of time regardless of the merits of the asylum claim.

#### V. The Executive Order Violates the Immigration and Nationality Act

Sections 3(c) and 5(c) of the Executive Order violate the Immigration and Nationality Act (“INA”). Enacted in 1965, the INA states in part 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.”<sup>xv</sup> By suspending entry of refugees from Syria indefinitely, and immigrants from Iraq, Iran, Libya, Somalia, Sudan, Syria,

and Yemen, for 90 days, the Executive Order violates the INA. While the government has relied on Section 212(f) of the INA—the provision that authorizes the suspension of entry of certain aliens who are deemed “detrimental” to the national interest—to justify the Order, its arguments would render this nondiscrimination provision of the INA a dead letter.

## VI. Conclusions and Practical Guidance

The constitutionality and legality of President Trump’s Executive Order is currently subject to judicial review by a three judge panel of the United States Court of Appeals for the Ninth Circuit, following a lawsuit challenging the Order by the Washington State Attorney General. The procedural posture of this appeal is review of a district court’s issuance of a Temporary Restraining Order or TRO blocking most of the Order; it will therefore probably not produce a definitive ruling on the merits, though may address the “likelihood” of either side prevailing on the merits. (More often, courts in these situations issue orders with little to no reasoning, but this is no routine case.) As of the time of this writing, a decision is expected within a matter of days, and it is further expected that, regardless of who prevails, the disappointed party will petition the Supreme Court for a stay of the district court’s order blocking parts of the Executive Order. The Supreme Court will decide to either deny or grant the stay (it could also stay part of the TRO). Regardless of the outcome, one or more Justices may issue opinions that opine on the merits.

In the meantime, while the public and the world wait for a decision, there are a number of public interest organizations, such as the American Civil Liberties Union, that have published specific guidance regarding Constitutional rights, including Rights at the Airport and the Border,<sup>xvi</sup> and, more broadly, rights if questioned regarding Immigration Status.<sup>xvii</sup> With respect to rights at the airport and the border, the ACLU advises that you have the right to:

- 1) Be free from discriminatory questioning at the airport or border;
- 2) Be free from discriminatory stops and searches at the airport or border;
- 3) Wear your religious head covering;
- 4) Be free from discriminatory questioning or removal by airline employees, and;
- 5) Return to the United States after traveling abroad if you are a U.S. Citizen or Lawful Permanent Resident.

And if questioned regarding immigration status, the ACLU advises:

- 1) You have the right to remain silent. You do not have to answer questions about where you were born, whether you’re a U.S. citizen, or how you entered the country.
- 2) If you’re not a U.S. citizen and an immigration agent requests your immigration papers, you must show them. If you’re over 18, carry your immigration documents with you at all times. If you don’t have immigration papers, say you want to remain silent.

3) Do not lie about your citizenship status or provide fake documents.

We welcome your questions or comments.

The analysis was compiled by members of the HNBA's Amicus Brief Committee, including Jonatha DeMella and Peter Karanjia. If interested in joining the committee, please contact Amicus Brief Committee Chair Peter Karanjia at peterkaranjia@dwt.com.

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<sup>i</sup> Available here: <https://www.whitehouse.gov/the-press-office/2017/01/27/executive-order-protecting-nation-foreign-terrorist-entry-united-states>

<sup>ii</sup> The following analysis relies significantly upon the State of Washington's briefing in *State of Washington v. Donald Trump*, Motion for Temporary Restraining Order, Case 2:17-cv-00141, Dkt. No. 3 (W.D. WA) (filed January 30, 2017).

<sup>iii</sup> *Harris v. McRae*, 448 U.S. 297, 297 (1980)

<sup>iv</sup> *Kwai Fun Wong v. United States*, 373 F.3d 952, 974 (9th Cir. 2004)

<sup>v</sup> *Ball v. Massanari*, 254 F.3d 817, 823 (9th Cir. 2001).

<sup>vi</sup> See Gov't Mot. for Admin. Stay and Stay Pending Appeal, in *Washington v. Trump*, No. 17-35105 (9th Cir.), at 17 (citing *Kleindienst v. Mandel*, 408 U.S. 753, 770 (1972), and *Kerry v. Din*, 135 S. Ct. 2128, 2140 (2015) (Kennedy, J., concurring)).

<sup>vii</sup> *Romer v. Evans*, 517 U.S. 620, 632 (1996).

<sup>viii</sup> *Larson v. Valente*, 456 U.S. 228, 244 (1982).

<sup>ix</sup> Available at: <http://www.politico.com/f/?id=00000159-fb28-da98-a77d-fb7dba170001>

<sup>x</sup> *Mathews v. Diaz*, 426 U.S. 67, 69, 77 (1976).

<sup>xi</sup> *United States v. Raya-Vaca*, 771 F.3d 1195, 1203 (9th Cir. 2014).

<sup>xii</sup> *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972).

<sup>xiii</sup> *Kent v. Dulles*, 357 U.S. 116, 125 (1958).

<sup>xiv</sup> 8 U.S.C. § 1158(a)(1)

<sup>xv</sup> 8 U.S.C. § 1152(a)(1)(A)

<sup>xvi</sup> <https://www.aclu.org/know-your-rights/what-do-when-faced-anti-muslim-discrimination>

<sup>xvii</sup> <https://www.aclu.org/know-your-rights/what-do-if-questioned-about-your-immigration-status>