



President Trump's Travel Orders And National Security

By Andrew R. Arthur

Background on President Trump's Travel Orders

President Trump has issued two executive orders and one presidential proclamation restricting the entry of certain foreign nationals to the United States. While those actions have been deemed “travel bans”, this is a misnomer, as each only applied to certain nationals from certain countries.

How did we get here? The story begins well before the Trump administration.

Concerns about terrorist exploitation of our immigration system were heightened following the Paris attacks in November 2015, which left 130 people dead.¹ Press reports stated that “[a]t least one Syrian refugee who had recently entered Europe was among the ... terrorists who carried out” that attack.²

Less than three weeks after that attack, in December, Syed Rizwan Farook and his wife, Tashfeen Malik, killed 14 people attending a holiday party in San Bernardino, Calif.³ The fact that Malik had been born in Pakistan, moved to Saudi Arabia, and entered the United States on a fiancée visa raised new concerns about the vulnerability of our immigration system.⁴ Those concerns were further enhanced by then-President Barack Obama's mistaken assertion that Malik had entered the United States under the Visa Waiver Program (VWP),⁵ of which he had ordered a review.⁶

Concerns about exploitation of the Visa Waiver Program by European nationals led to passage of the “Visa Waiver Program Improvement and Terrorist Travel Prevention Act of 2015”, passed as part of the Consolidated Appropriations Act of 2016.⁷ It barred nationals of Iran, Iraq, Sudan, and Syria,⁸ as well as individuals who had traveled to those countries or Libya, Somalia, or Yemen, from accessing the VWP.⁹

It was against this backdrop on December 7, 2015, that then-candidate Trump issued a statement calling for “a total and complete shutdown of Muslims entering the United States until our country's representatives can figure out what is going on.”¹⁰ Trump again alluded to the Paris and San Bernardino attacks in a March 9, 2016, exchange with Anderson Cooper, in which he stated:

I think Islam hates us. There is something — there is something there that is a tremendous hatred there. There's a tremendous hatred. We have to get to the bottom of it. There's an unbelievable hatred of us. . . . And we can't allow people coming into this country who have this hatred of the United States. [Emphasis added.]¹¹

On this, the president has not been as eloquent or precise in his use of language as one would hope. In context, however, the president's language reflects more frustration with the United States government's inability to differentiate between bona fide travelers to the United States and terrorists seeking to do harm than animus toward Muslims.

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His statements on this issue became more refined as time went on. Candidate Trump began using facially neutral language, at times, to describe the need to screen travelers from majority-Muslim countries coming to the United States. Following mass shootings at an Orlando nightclub committed by the son of an Afghan immigrant in June 2016, for example. Trump gave a speech promising to “suspend immigration from areas of the world where there’s a proven history of terrorism against the United States, Europe or our allies until we fully understand how to end these threats.”¹²

Rationale Behind the 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, predates the Trump administration.

Obama administration officials made clear that the vetting of visa applicants is only as good as the information available. For example, 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 in 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 case of vetting Syrian refugees] is a different situation.*¹³

Those officials also made clear the danger posed by terrorist aliens seeking 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.*¹⁴

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 temporarily.

The Trump Travel Orders, and Resulting Litigation

On January 27, 2017, President Trump issued Executive Order 13,769 (EO-1) captioned “Protecting the Nation from Foreign Terrorist Entry into the United States.”¹⁵ EO-1 suspended the entry into the United States of nationals of Iraq, Syria, Iran, Sudan, Libya, Yemen, and Somalia for 90 days.¹⁶ This suspension was intended to allow the Department of Homeland Security (DHS), in conjunction with the Department of State (DOS) and the DNI, to determine what information was needed:

*[F]rom any country to adjudicate any visa, admission, or other benefit under the [Immigration and Nationality Act (INA)] 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.*¹⁷

It also suspended the U.S. Refugee Admissions Program (USRAP) 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 pose a threat to the security and welfare of the United States,”¹⁸ 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.”¹⁹

On February 3, 2017, a federal district court judge in the Western District of Washington issued a temporary restraining order (TRO) preventing enforcement of these suspensions.²⁰

On March 16, 2017, the White House issued a second executive order (EO 13,780) also captioned “Protecting the Nation from Foreign Terrorist Entry into the United States” (EO-2).²¹ 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.²²

Security and vetting concerns related to those six countries, which supported those suspensions, were set forth in section 1 of EO-2.²³

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 under the INA (adjudications) in order to determine that the individual is not a security or public-safety threat.*²⁴

DHS was required to submit a report on the results of that review within 20 days of the effective date of that order.²⁵

Unlike EO-1, EO-2 applied only to foreign nationals outside the United States without a visa.²⁶ Like EO-1, EO-2 suspended USRAP for 120 days to allow DOS, in conjunction with DHS and 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.*²⁷

On May 25, 2017, the Court of Appeals for the Fourth Circuit issued a decision in *International Refugee Assistance Project [IRAP] v. Trump*, in which it enjoined the 90-day suspension in section 2(c) of EO-2.²⁸ 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.”²⁹ 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 [including the statements cited above]; 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 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 decision making 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.*³⁰

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.*³¹

“Looking behind” EO-2, the court found, meant applying the so-called *Lemon* test to determine whether EO-2 violates the Establishment Clause.³²

In this context, the Establishment Clause refers to the first provision in the First Amendment to the Constitution, which states: “Congress shall make no law respecting an establishment of religion”³³ “This clause not only forbids the government from establishing an official religion, but also prohibits government actions that unduly favor one religion over another.”³⁴

The *Lemon* test was set forth by the Supreme Court in its decision in *Lemon v. Kurtzman*.³⁵ As the Heritage Foundation states:

*The Lemon test requires courts to consider whether the law in 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.*³⁶

After 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,”³⁷ and therefore concluded “EO-2 likely fails *Lemon*’s purpose prong

in violation of the Establishment Clause.”³⁸ Having reached this conclusion, the Fourth Circuit found that “Plaintiffs are likely to succeed on the merits of their Establishment Clause claim.”³⁹

In this decision, the Fourth Circuit improperly applied Supreme Court precedent in *Kleindienst v. Mandel*,⁴⁰ as the dissent noted.⁴¹ In *Mandel*, the 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. [Emphasis added.]*⁴²

EO-2 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.”⁴³ 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.*⁴⁴

Subsequently, on September 24, 2017, President Trump issued Presidential Proclamation No. 9645, “Enhancing Vetting Capabilities and Processes for Detecting Attempted Entry into the United States By Terrorists or Other Public-Safety Threats” (EO-3).⁴⁵ That proclamation, which succeeded EO-2, indefinitely suspended the entry of some or all immigrants and/or non-immigrants from eight countries: Chad, Iran, Libya, North Korea, Somalia, Syria, Venezuela, and Yemen.⁴⁶ These restrictions apply only to nationals of those countries who are outside of the United States and who do not have a valid travel document.⁴⁷

Those designations resulted from the report required by EO-2. That report established a “baseline” for the types of information required to determine whether a foreign national should be allowed to enter the United States. The baseline consisted of three categories of criteria relevant to the ability of the United States “to confirm the identity of individuals seeking entry ... and ... assess whether they are a security or public-safety threat.”⁴⁸

The first category is “identity-management information”, which “focuses on the integrity of documents required for travel to the United States.”⁴⁹ Its purpose is to determine whether applicants for immigration benefits are who they claim to be.

The second category is “national security and public-safety information.”⁵⁰ This category focuses on whether the country in question provides criminal and terrorist information to the United States about individuals seeking entry upon request, and whether it provides exemplars of travel documents.

The third category is “national security and public-safety risk assessment.”⁵¹ This category is broader, and focuses on “whether the country is a known or potential terrorist safe haven” and whether it accepts its returned nationals.

Such information is fundamental to the integrity of the immigration system. Simply put, to grant a visa to an individual, the United States must be able identify who that person is and whether he or she specifically poses a national security risk, as well as whether the home country of that individual has interests inimical to the United States, and will accept its nationals if they are deported.

Following its review, DHS determined that the eight countries in question were “inadequate”, such that there were reasons to restrict the ability of their nationals to enter the United States.⁵² EO-3 states that in the judgment of the president, these restrictions were needed to “prevent the entry of those foreign nationals about whom the United States Government lacks sufficient information;” to “elicit improved identity-management and information-sharing protocols and practices from foreign governments;” and “to advance foreign policy, national security, and counterterrorism objectives.”⁵³

Three lawsuits were filed against EO-3 by different groups in federal court in Maryland. The plaintiffs asserted that EO-3 and EO-2, among other things, violated the Establishment Clause of the First Amendment.⁵⁴ On October 17, 2017, that court granted the motion “in substantial part, entering a nationwide preliminary injunction enjoining the enforcement of” EO-3

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.”⁵⁵ The court concluded that the plaintiffs in that case were likely to succeed in their argument that EO-3 violated the INA and the Establishment Clause.⁵⁶

The government appealed that decision to the Court of Appeals for the Fourth Circuit.⁵⁷ A majority of that court determined that the proffered reason for EO-3 (“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.”⁵⁸

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”, and most exceptionally “the issuance of [EO-3], 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.”⁵⁹ Unlike its earlier decision, the court focused solely on the president’s post-inauguration statements.⁶⁰

The court rejected the government’s arguments that “substantive differences” between EO-3 and its predecessors “reflect the elimination of any anti-Muslim bias.”⁶¹

First, it dismissed the addition of North Korea and Venezuela to the list of countries facing restrictions as “an attempt to ‘cast off’ the ‘unmistakable’ religious objective” of the first two executive orders.”⁶²

Most significantly, however, it dismissed the “review” on which EO-3 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” EO-3.⁶³ 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.⁶⁴ 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.⁶⁵

Again, in making these findings, the court violated *Mandel*. In so doing, the court underscored the dangers inherent in failing to follow that Supreme Court precedent.

By their nature, 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 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 substitutes its 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 EO-3 are indicative of this. While the court focused on information-sharing between the United States in Somalia, it ignored the findings in EO-3 related to that country’s “identity-management deficiencies”, and the “persistent terrorist threat [that] emanates from Somalia’s territory”, which EO-3 describes in-depth.⁶⁶ Similarly, while the court noted that Iran fails to accept its deported nationals, it ignores the rest of the findings in EO-3 related to that country:

*Iran regularly fails to cooperate with the United States Government in identifying security risks, ... is the source of significant terrorist threats, and ... [DOS] has also designated Iran as a state sponsor of terrorism.*⁶⁷

These are not minor points, nor ones subject to serious dispute. The court simply chose to ignore them.

The majority in that case also failed to defer to the authority of the political branches (and in particular the executive) as it relates to the exclusion of aliens, a fact the dissent discussed in great length.⁶⁸ Quoting *United States ex rel. Knauff v. Shaughnessy*,⁶⁹ 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. [Emphasis added.]*⁷⁰

Finally, the dissent acknowledged the politically charged nature of EO-1, EO-2, and EO-3, 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.*⁷¹

Supreme Court's Decision in *Trump v. Hawaii*

On June 26, 2018, the Supreme Court issued a decision in *Trump v. Hawaii*, reviewing a decision of the Ninth Circuit that (like *IRAP*) enjoined in part EO-3.⁷² While the circuit court's decision was based on its conclusion that the INA did not give the president the authority to issue EO-3, the Supreme Court rejected that finding,⁷³ but also considered whether EO-3 unconstitutionally violated the Establishment Clause.⁷⁴

The 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" EO-3.⁷⁵ It found that the issue was not whether to "denounce 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.⁷⁶

In its analysis, the court underscored the judiciary's traditional deference to the political branches when their actions relate to the exclusion of aliens, particularly if national security concerns were involved, recognizing the authority of those branches as it relates to foreign policy and political and economic circumstances.⁷⁷ It admitted (citing *Mandel*) that it did, however, consider such actions in a circumscribed manner when they allegedly burdened the constitutional rights of U.S. citizens.⁷⁸ The court acknowledged, nonetheless, its marked "lack of competence" in "collecting evidence and drawing inferences" on national security questions.⁷⁹

For purposes of its review, the Court assumed that it could "look behind the face of" EO-3 "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."⁸⁰ 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."⁸¹

The Court noted that policies were rarely struck down under rational basis scrutiny given the deferential standard of review, and then only when "the laws at issue lack any purpose other than 'bare ... desire to harm a politically unpopular group."⁸² 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.⁸³

Specifically, the court held that EO-3 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 reference to religion.⁸⁴ Moreover, the Court noted, EO-3 "reflects the results of a worldwide review process undertaken by multiple Cabinet officials and their agencies."⁸⁵ With respect to religion, the court concluded that the fact that five of the seven countries listed in EO-3 had Muslim-majority populations "alone does not support an inference of religious hostility," because only 8 percent of the world's Muslim population is covered by EO-3, and that EO-3 "is limited to countries that were previously designated by Congress or prior administrations as posing national security risks."⁸⁶

Conclusion

Since September 11, 2001, 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 the Middle East, have heightened concerns 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.

In an opinion piece published in the *New York Times* six years to the day before September 11, 2001, civil rights icon Barbara Jordan, then-chairwoman of the Commission on Immigration Reform, wrote:

The United States has united immigrants and their descendants around a commitment to democratic ideals and constitutional principles. People from an extraordinary range of ethnic and religious backgrounds have embraced these ideals.⁸⁷

She referred to this process as “Americanization”, and in the two decades since, the vast majority of immigrants to the United States have embraced this concept. Unfortunately, a handful of immigrants to our country have used their access to our institutions to attempt to harm the American people.

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 simplistic and broadly general terms. Since becoming president, Trump has issued a series of orders to tighten the United States’ visa-issuance and refugee-processing systems in order to address these concerns, but his statements on the campaign trail and as president have been used by those seeking to block those orders.

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, often based on novel and contradictory theories. In so doing, judges have substituted their limited national security expertise for that of the executive branch. This not only undermines the effectiveness of those orders, but it also threatens to undercut the respect of at least some portion of the American people for the impartiality of the judicial branch. The Supreme Court restored the deference due to the political branches on this issue.

The protection of its citizens 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 their 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.

End Notes

- ¹ See [“Paris attacks: What happened on the night”](#), BBC, December 9, 2015.
- ² Yaron Steinbuch, [“A ‘refugee’ in killers’ ranks: Terrorist linked to Syrian refugee route”](#), *New York Post*, November 15, 2015.
- ³ [“San Bernardino shooting updates”](#), *Los Angeles Times*, December 9, 2015.
- ⁴ Pat St. Claire, Greg Botelho, and Ralph Ellis, [“San Bernardino shooter Tashfeen Malik: Who was she?”](#), CNN, December 8, 2015.
- ⁵ 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*, December 7, 2015.
- ⁶ *Id.*
- ⁷ [Consolidated Appropriations Act](#), 2016, div. O, tit. II, Pub. L. 114-113 (2015).
- ⁸ [“United States Begins Implementation of Changes to the Visa Waiver Program”](#), Department of Homeland Security, January 21, 2016.
- ⁹ [“DHS Announces Further Travel Restrictions for the Visa Waiver Program”](#), Department of Homeland Security, February 8, 2016.
- ¹⁰ See Tessa Berenson, [“Donald Trump Calls For ‘Complete Shutdown’ of Muslim Entry to U.S.”](#), *Time*, December 7, 2015.
- ¹¹ [Transcript](#), “Anderson Cooper 360”, CNN, March 9, 2016.
- ¹² See Christine Wang, [“Trump: If elected, I’ll ban immigration from areas with terrorism ties”](#), CNBC, June 13, 2016.
- ¹³ [“Nation’s Top Security Officials Concerns on Refugee Vetting”](#), House Homeland Security Committee, November 19, 2015.
- ¹⁴ *Id.*
- ¹⁵ Executive Order 13,769, [“Protecting the Nation from Foreign Terrorist Entry into the United States”](#), January 27, 2017.
- ¹⁶ *Id.* at §3(c).
- ¹⁷ *Id.* at §3(a).
- ¹⁸ *Id.* at §5(a).
- ¹⁹ *Id.* at §5(c).
- ²⁰ [Washington v. Trump](#), Case No. C17-0141JLR, Temporary Restraining Order (W.D. Wash. Feb. 3, 2017).
- ²¹ Executive Order No. 13,780 [“Protecting the Nation from Foreign Terrorist Entry into the United States”](#), March 6, 2017.
- ²² *Id.* at §2(c).
- ²³ See *Id.* at §1(e) cl. I-vi.
- ²⁴ *Id.* at §2(a).

²⁵ *Id.* at §2(b).

²⁶ *Id.* at §3.

²⁷ *Id.* at §6(a).

²⁸ [International Refugee Assistance Project v. Trump](#), 857 F. 3d 554 (4th Cir. 2017).

²⁹ *Id.* at 591.

³⁰ *Id.* at 591-92.

³¹ *Id.* at 592.

³² *Id.*

³³ [U.S. Constitution Amendment I](#).

³⁴ [“Establishment Clause”](#), Legal Information Institute, undated.

³⁵ [Lemon v. Kurtzman](#), 403 U.S. 602 (1971).

³⁶ John Baker, [“The Heritage Guide to the Constitution, Establishment of Religion”](#), Heritage Foundation, undated.

³⁷ [International Refugee Assistance Project v. Trump](#), 857 F. 3d 554, 594 (4th Cir. 2017).

³⁸ *Id.* at 601.

³⁹ *Id.*

⁴⁰ [Kleindienst v. Mandel](#), 408 U.S. 753 (1972).

⁴¹ [International Refugee Assistance Project v. Trump](#), 857 F. 3d 554, 639 (4th Cir. 2017) (Niemayer, J., dissenting).

⁴² [Kleindienst v. Mandel](#), 408 U.S. 753 (1972).

⁴³ Executive Order No. 13,780 [“Protecting the Nation from Foreign Terrorist Entry into the United States”](#), March 6, 2017, § 1(e).

⁴⁴ *Id.* at cl. i.

⁴⁵ Proclamation No. 9645, [“Enhancing Vetting Capabilities and Processes for Detecting Attempted Entry into the United States By Terrorists or Other Public-Safety Threats”](#), September 24, 2017.

⁴⁶ *Id.*

⁴⁷ *Id.* at §3.

⁴⁸ *Id.* at §1(c).

⁴⁹ *Id.* at cl. i.

⁵⁰ *Id.* at cl. ii.

⁵¹ *Id.* at cl. iii.

⁵² *Id.* at §1(g).

⁵³ *Id.* at § 1(h)(i).

⁵⁴ See [IRAP v. Trump](#), 883 F.3d 233, 360 (4th Cir. 2018) (Niemayer, J. dissenting).

⁵⁵ *Id.* at 359.

⁵⁶ *Id.*

⁵⁷ *Id.* at 233.

⁵⁸ *Id.* at 264.

⁵⁹ *Id.*

⁶⁰ See *Id.* at 266-68.

⁶¹ *Id.* at 268.

⁶² *Id.*

⁶³ *Id.* at 269.

⁶⁴ *Id.* at n. 17.

⁶⁵ *Id.*

⁶⁶ Proclamation No. 9645, [“Enhancing Vetting Capabilities and Processes for Detecting Attempted Entry into the United States By Terrorists or Other Public-Safety Threats”](#), September 24, 2017, § 2(h)(i) (2017).

⁶⁷ *Id.* at §2(b)(i).

⁶⁸ See [IRAP v. Trump](#), 883 F.3d 233, 360 (4th Cir. 2018) (Niemayer, J. dissenting).

⁶⁹ [United States ex rel. Knauff v. Shaughnessy](#), 338 U.S. 537, 542-43 (1950).

⁷⁰ [IRAP v. Trump](#), 883 F.3d 233, 360 (4th Cir. 2018) (Niemayer, J. dissenting).

⁷¹ *Id.* at 376-77.

⁷² [Trump v. Hawaii](#), 138 S. Ct. 2392 (2018).

⁷³ *Id.* at 2415.

⁷⁴ *Id.* at 2415-16.

⁷⁵ *Id.* at 2417.

⁷⁶ *Id.* at 2418.

⁷⁷ See *Id.* at 2418-19.

⁷⁸ *Id.* at 2419.

⁷⁹ *Id.*

⁸⁰ *Id.* at 2420.

⁸¹ *Id.*

⁸² *Id.*

⁸³ *Id.* at 2421.

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ Barbara Jordan, [“The Americanization Ideal”](#), *The New York Times*, September 11, 1995.