

Hart, Rosemary (OLC)

From: Hart, Rosemary (OLC)
Sent: Saturday, January 28, 2017 3:54 PM
To: Stewart, Scott (OLC); Gannon, Curtis E. (OLC)
Subject: RE: TO PRINT: (b) (5)

Checking now

-----Original Message-----

From: Stewart, Scott (OLC)
Sent: Saturday, January 28, 2017 3:19 PM
To: Gannon, Curtis E. (OLC) <(b) (6)> Hart, Rosemary (OLC) <(b) (6)>
Cc: Stewart, Scott (OLC) <(b) (6)>
Subject: FW: TO PRINT: (b) (5)

I believe that this was the final. Rosemary, do you happen to know whether this is the one that you printed and included with the F&L paperwork?

-----Original Message-----

From: Stewart, Scott (OLC) [mailto:(b) (6)]
Sent: Friday, January 27, 2017 5:02 PM

duplicate

Hart, Rosemary (OLC)

From: Hart, Rosemary (OLC)
Sent: Saturday, January 28, 2017 4:00 PM
To: Stewart, Scott (OLC); Gannon, Curtis E. (OLC)
Subject: RE: TO PRINT: (b) (5)

Yes, they contain the redlined changes, though our Word document that we folded into PDF F&L has some formatting issues that may have happened during fold-in.

-----Original Message-----

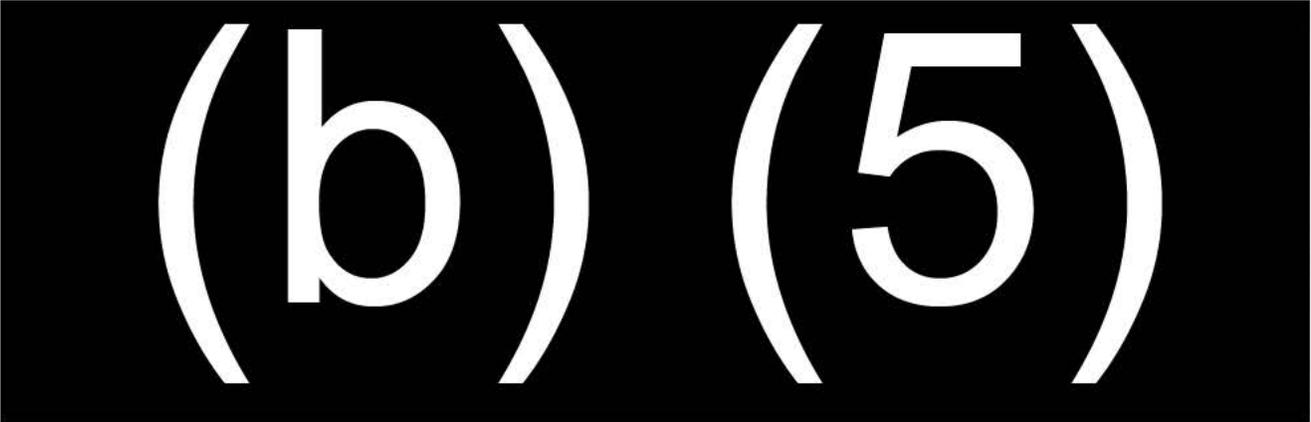
From: Stewart, Scott (OLC)
Sent: Saturday, January 28, 2017 3:19 PM

duplicate

Hart, Rosemary (OLC)

From: Hart, Rosemary (OLC)
Sent: Saturday, January 28, 2017 4:01 PM
To: Stewart, Scott (OLC); Gannon, Curtis E. (OLC)
Subject: FW: OLC approval paperwork Protecting the Nation EO 1 27 2017
Attachments: OLC approval paperwork Protecting the Nation EO 1 27 2017.docx

Here is what I sent.

A large black rectangular redaction box covers the majority of the page content. Inside the box, the text "(b) (5)" is written in large, white, sans-serif font, indicating that the information has been withheld under FOIA exemption (b)(5).

(b) (5)



U.S. Department of Justice

Office of Legal Counsel

Office of the Assistant Attorney General

Washington, D.C. 20530

January 27, 2017

MEMORANDUM

Re: Proposed Executive Order Entitled, "Protecting the Nation from Foreign Terrorist Entry into the United States"

The attached proposed Executive Order was prepared by the Domestic Policy Council and forwarded to this Department for review with respect to form and legality.

The Order would direct a range of executive branch actions designed to ensure that foreign nationals who are approved for admission to the United States do not intend to harm Americans and have no ties to terrorism. Following is a description of several of the actions directed under the Order.

The proposed Order would require the Secretary of Homeland Security, in consultation with the Secretary of State and the Director of National Intelligence, to determine the information needed from other countries to adjudicate visas, admissions, or other benefits under the Immigration and Nationality Act ("INA"), 8 U.S.C. §§ 1101 et seq. It would then direct the Secretary of State to request that other countries provide such information within 60 days. The Order would direct the Secretary of Homeland Security to submit to the President a list of the countries that do not provide such information for inclusion in a presidential proclamation generally prohibiting the entry of nationals from those countries. The Order would also suspend the entry of immigrants and non-immigrants from countries referred to in section 217(a)(12) of the INA, subject to case-by-case exceptions.

The Order would also direct the Secretary of State, the Secretary of Homeland Security, the Director of National Intelligence, and the Director of the Federal Bureau of Investigation to develop uniform screening standards and procedures to identify individuals seeking to enter the United States on a fraudulent basis or with the intent to cause harm, or who are at risk of causing harm after admission.

In addition, the Order would direct the Secretary of State to suspend the U.S. Refugee Admissions Program ("USRAP") for 120 days, subject to case-by-case exceptions. During that 120-day period, the Secretary of State, in conjunction with the Secretary of Homeland Security and in consultation with the Director of National Intelligence, would determine what additional procedures can be taken to ensure that refugees who are approved for admission do not pose a threat to the security and welfare of the United States. Pursuant to section 212(f) of the INA, the President would proclaim that the entry of Syrian refugees, and the entry of more than 50,000

refugees in fiscal year 2017, would be detrimental to the interests of the United States and would suspend such admissions.

The proposed Order is approved with respect to form and legality.



Curtis E. Gannon
Acting Assistant Attorney General



U.S. Department of Justice
Office of Legal Counsel

January 27, 2017

The President,

The White House.

My dear Mr. President:

I am herewith transmitting a proposed Executive Order entitled, "Protecting the Nation from Foreign Terrorist Entry into the United States." This proposed Order was prepared by the Domestic Policy Council and forwarded to this Department for review of its form and legality.

The proposed Executive Order is approved with respect to form and legality.

Respectfully,



Curtis E. Gannon
Acting Assistant Attorney General

Executive Order Protecting the Nation from Foreign Terrorist Entry into the United States

EXECUTIVE ORDER

- - - - -

PROTECTING THE NATION FROM FOREIGN TERRORIST ENTRY INTO THE UNITED STATES

By the authority vested in me as President by the Constitution and laws of the United States of America, including the Immigration and Nationality Act (INA), 8 U.S.C. 1 101 et seq., and section 301 of title 3, United States Code, and to protect the American people from terrorist attacks by foreign nationals admitted to the United States, it is hereby ordered as follows:

Section 1. Purpose. The visa-issuance process plays a crucial role in detecting individuals with terrorist ties and stopping them from entering the United States. Perhaps in no instance was that more apparent than the terrorist attacks of September 11, 2001, when State Department policy prevented consular officers from properly scrutinizing the visa applications of several of the 19 foreign nationals who went on to murder nearly 3,000 Americans. And while the visa-issuance process was reviewed and amended after the September 11 attacks to better detect would-be terrorists from receiving visas, these measures did not stop attacks by foreign nationals who were admitted to the United States.

Numerous foreign-born individuals have been convicted or implicated in terrorism-related crimes since September 11, 2001, including foreign nationals who entered the United States after receiving visitor, student, or employment visas, or who entered through the United States refugee resettlement program. Deteriorating conditions in certain countries due to war, strife, disaster, and civil unrest increase the likelihood that terrorists will use any means possible to enter the United States. The United States must be vigilant during the visa-issuance process to ensure that those approved for admission do not intend to harm Americans and that they have no ties to terrorism.

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

Sec. 2. Policy. It is the policy of the United States to protect its citizens from foreign nationals who intend to 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.

Sec. 3. Suspension of Issuance of Visas and Other Immigration Benefits to Nationals of Countries of Particular Concern. (a) The Secretary of Homeland Security, in consultation with the Secretary of State and the Director of National Intelligence, shall immediately conduct a review to determine the information needed from any country to adjudicate any visa, admission, or other benefit under the INA (adjudications) in order to determine that the individual seeking the benefit is who the individual claims to be and is not a security or public-safety threat.

(b) The Secretary of Homeland Security, in consultation with the Secretary of State and the Director of National Intelligence, shall submit to the President a report on the results of the review described in subsection (a) of this section, including the Secretary of Homeland Security's determination of the information needed for adjudications and a list of countries that do not provide adequate information, within 30 days of the date of this order. The Secretary of Homeland Security shall provide a copy of the report to the Secretary of State and the Director of National Intelligence.

(c) To temporarily reduce investigative burdens on relevant agencies during the review period described in subsection (a) of this section, to ensure the proper review and maximum utilization of available resources for the screening of foreign nationals, and to ensure that adequate standards are established to prevent infiltration by foreign terrorists or criminals, pursuant to section 212(f) of the INA, 8 U.S.C. 1182(f), I hereby proclaim that the immigrant and nonimmigrant entry into the United States of aliens from countries referred to in section 217(a)(12) of the INA, 8 U.S.C. 1187(a)(12), would be detrimental to the interests of the United States, and I hereby suspend entry into the United States, as immigrants and nonimmigrants, of such persons for 90 days from the date of this order (excluding those foreign nationals traveling on diplomatic visas, North Atlantic Treaty Organization visas, C-2 visas for travel to the United Nations, and G-1, G-2, G-3, and G-4 visas).

(d) Immediately upon receipt of the report described in subsection (b) of this section regarding the information needed for adjudications, the Secretary of State shall request all foreign governments that do not supply such information to start providing such information regarding their nationals within 60 days of notification.

(e) After the 60-day period described in subsection (d) of this section expires, the Secretary of Homeland Security, in consultation with the Secretary of State, shall submit to the President a list of countries recommended for inclusion on a Presidential proclamation that would prohibit the entry of foreign nationals (excluding those foreign nationals traveling on diplomatic visas, North Atlantic Treaty Organization visas, C-2 visas for travel to the United Nations, and G-1, G-2, G-3, and G-4 visas) from countries that do not provide the information requested pursuant to subsection (d) of this section until compliance occurs.

(f) At any point after submitting the list described in subsection (e) of this section, the Secretary of State or the Secretary of Homeland Security may submit to the President the names of any additional countries recommended for similar treatment.

(g) Notwithstanding a suspension pursuant to subsection (c) of this section or pursuant to a Presidential proclamation described in subsection (e) of this section, the Secretaries of State and 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 for which visas and benefits are otherwise blocked.

(h) The Secretaries of State and Homeland Security shall submit to the President a joint report on the progress in implementing this order within 30 days of the date of this order, a second report within 60 days of the date of this order, a third report within 90 days of the date of this order, and a fourth report within 120 days of the date of this order.

Sec. 4. Implementing Uniform Screening Standards for All Immigration Programs.

(a) The Secretary of State, the Secretary of Homeland Security, the Director of National Intelligence, and the Director of the Federal Bureau of Investigation shall implement a program, as part of the adjudication process for immigration benefits, to identify individuals seeking to enter the United States on a fraudulent basis with the intent to cause harm, or who are at risk of causing harm subsequent to their admission. This program will include the development of a uniform screening standard and procedure, such as in-person interviews; a database of identity documents proffered by applicants to ensure that duplicate documents are not used by multiple applicants; amended application forms that include questions aimed at identifying fraudulent answers and malicious intent; a mechanism to ensure that the applicant is who the applicant claims to be; a

process to evaluate the applicant's likelihood of becoming a positively contributing member of society and the applicant's ability to make contributions to the national interest; and a mechanism to assess whether or not the applicant has the intent to commit criminal or terrorist acts after entering the United States.

(b) The Secretary of Homeland Security, in conjunction with the Secretary of State, the Director of National Intelligence, and the Director of the Federal Bureau of Investigation, shall submit to the President an initial report on the progress of this directive within 60 days of the date of this order, a second report within 100 days of the date of this order, and a third report within 200 days of the date of this order.

Sec. 5. Realignment of the U.S. Refugee Admissions Program for Fiscal Year 2017. (a) The Secretary of State shall suspend the U.S. Refugee Admissions Program (USRAP) for 120 days. During the 120-day period, the Secretary of State, in conjunction with the Secretary of Homeland Security and in consultation with the Director of National Intelligence, shall review the USRAP application and adjudication process to determine what additional procedures should be taken to ensure that those approved for refugee admission do not pose a threat to the security and welfare of the United States, and shall

implement such additional procedures. Refugee applicants who are already in the USRAP process may be admitted upon the initiation and completion of these revised procedures.

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

(b) Upon the resumption of USRAP admissions, the Secretary of State, in consultation with the Secretary of Homeland Security, is further directed to make changes, to the extent permitted by law, to prioritize refugee claims made by individuals on the basis of religious-based persecution, provided that the religion of the individual is a minority religion in the individual's country of nationality. Where necessary and appropriate, the Secretaries of State and Homeland Security shall recommend legislation to the President that would assist with such prioritization.

(c) Pursuant to section 212(f) of the INA, 8 U.S.C. 1182(f), I hereby proclaim that the entry of nationals of Syria as refugees is detrimental to the interests of the United States and thus suspend any such entry until such time as I have determined that sufficient changes have been made to the USRAP to ensure that admission of Syrian refugees is consistent with the national interest.

(d) Pursuant to section 212(f) of the INA, 8 U.S.C. 1182(f), I hereby proclaim that the entry of more than 50,000 refugees in fiscal year 2017 would be detrimental to the interests of the United States, and thus suspend any such entry until such time as I determine that additional admissions would be in the national interest.

(e) Notwithstanding the temporary suspension imposed pursuant to subsection (a) of this section, the Secretaries of State and Homeland Security may jointly determine to admit individuals to the United States as refugees on a case-by-case basis, in their discretion, but only so long as they determine that the admission of such individuals as refugees is in the national interest including when the person is a religious minority in his country of nationality facing religious persecution, when admitting the person would enable the United States to conform its conduct to a preexisting international agreement, or when the person is already in transit and denying admission would cause undue hardship and it would not pose a risk to the security or welfare of the United States.

(f) The Secretary of State shall submit to the President an initial report on the progress of the directive in subsection (b) of this section regarding prioritization of claims made by individuals on the basis of religious-based persecution within 100 days of the date of this order and shall submit a second report within 200 days of the date of this order.

(g) It is the policy of the executive branch that, to the extent permitted by law and as practicable, State and local jurisdictions be granted a role in the process of determining

the placement or settlement in their jurisdictions of aliens eligible to be admitted to the United States as refugees. To that end, the Secretary of Homeland Security shall examine existing law to determine the extent to which, consistent with applicable law, State and local jurisdictions may have greater involvement in the process of determining the placement or resettlement of refugees in their jurisdictions, and shall devise a proposal to lawfully promote such involvement.

Sec. 6. Rescission of Exercise of Authority Relating to the Terrorism Grounds of Inadmissibility. The Secretaries of State and Homeland Security shall, in consultation with the Attorney General, consider rescinding the exercises of authority in section 212 of the INA, 8 U.S.C. 1 182, relating to the terrorism grounds of inadmissibility, as well as any related implementing memoranda.

Sec. 7. Expedited Completion of the Biometric Entry-Exit Tracking System. (a) The Secretary of Homeland Security shall expedite the completion and implementation of a biometric entry-exit tracking system for all travelers to the United States, as recommended by the National Commission on Terrorist Attacks Upon the United States.

(b) The Secretary of Homeland Security shall submit to the President periodic reports on the progress of the directive contained in subsection (a) of this section. The initial report shall be submitted within 100 days of the date of this order, a second report shall be submitted within 200 days of the date of this order, and a third report shall be submitted within 365 days of the date of this order. Further, the Secretary shall submit a report every 180 days thereafter until the system is fully deployed and operational.

Sec. 8. Visa Interview Security. (a) The Secretary of State shall immediately suspend the Visa Interview Waiver Program and ensure compliance with section 222 of the INA, 8 U.S.C. 1222, which requires that all individuals seeking a nonimmigrant visa undergo an in-person interview, subject to specific statutory exceptions.

(b) To the extent permitted by law and subject to the availability of appropriations, the Secretary of State shall immediately expand the Consular Fellows Program, including by substantially increasing the number of Fellows, lengthening or making permanent the period of service, and making language training at the Foreign Service Institute available to Fellows for assignment to posts outside of their area of core linguistic ability, to ensure that non-immigrant visa-interview wait times are not unduly affected.

Sec. 9. Visa Validity Reciprocity. The Secretary of State shall review all nonimmigrant visa reciprocity agreements to ensure that they are, with respect to each visa classification, truly reciprocal insofar as practicable with respect to validity period and fees, as required by sections 221(c) and 281 of the INA, 8 U.S.C. 1201(c) and 1351, and other treatment. If a country does not treat United States nationals seeking nonimmigrant visas in a reciprocal manner, the Secretary of State shall adjust the visa validity period, fee schedule, or other treatment to match the treatment of United States nationals by the foreign country, to the extent practicable.

Sec. 10. Transparency and Data Collection. (a) To be more transparent with the American people, and to more effectively implement policies and practices that serve the national interest, the Secretary of Homeland Security, in consultation with the Attorney General, shall, consistent with applicable law and national security, collect and make publicly available within 180 days, and every 180 days thereafter:

(i) information regarding the number of foreign nationals in the United States who have been charged with terrorism-related offenses while in the United States; convicted of terrorism-related offenses while in the United States; or removed from the United States based on terrorism-related activity, affiliation, or material support to a terrorism-related organization, or any other national security reasons since the date of this order or the last reporting period, whichever is later;

(ii) information regarding the number of foreign nationals in the United States who have been radicalized after entry into the United States and engaged in terrorism-related acts, or who have provided material support to terrorism-related organizations in countries that pose a threat to the United States, since the date of this order or the last reporting period, whichever is later; and

(iii) information regarding the number and types of acts of gender-based violence against women, including honor killings, in the United States by foreign nationals, since the date of this order or the last reporting period, whichever is later; and

(iv) any other information relevant to public safety and security as determined by the Secretary of Homeland Security and the Attorney General, including information on the immigration status of foreign nationals charged with major offenses.

(b) The Secretary of State shall, within one year of the date of this order, provide a report on the estimated long-term costs of the USRAP at the Federal, State, and local levels.

Sec. 11. General Provisions. (a) Nothing in this order shall be construed to impair or otherwise affect:

(i) the authority granted by law to an executive department or agency, or the head thereof; or

(ii) the functions of the Director of the Office of Management and Budget relating to budgetary, administrative, or legislative proposals.

(b) This order shall be implemented consistent with applicable law and subject to the availability of appropriations.

(c) This order is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person.

Colborn, Paul P (OLC)

From: Colborn, Paul P (OLC)
Sent: Saturday, January 28, 2017 5:01 PM
To: Stewart, Scott (OLC)
Cc: Hart, Rosemary (OLC); Gannon, Curtis E. (OLC); Koffsky, Daniel L (OLC)
Subject: Re: IMPORTANT: : EO review

[REDACTED] (b) (5)
[REDACTED]
[REDACTED]."

On Jan 28, 2017, at 2:10 PM, Stewart, Scott (OLC) <[REDACTED] (b) (6)> wrote:

[REDACTED] (b) (5)
[REDACTED]
[REDACTED]
[REDACTED]. I'll give some thought to an alternative, and of course am open to alternative reads and assessments.

From: Hart, Rosemary (OLC)
Sent: Saturday, January 28, 2017 1:40 PM
To: Gannon, Curtis E. (OLC) <[REDACTED] (b) (6)> Koffsky, Daniel L (OLC) <[REDACTED] (b) (6)> Colborn, Paul P (OLC) <[REDACTED] (b) (6)>; Stewart, Scott (OLC) <[REDACTED] (b) (6)>
Subject: IMPORTANT: : EO review
Importance: High

OLC only: What do you think of the OPA's suggestion:

[REDACTED] (b) (5)
[REDACTED]
[REDACTED]

[REDACTED]
[REDACTED]

-----Original Message-----

From: Carr, Peter (OPA)
Sent: Saturday, January 28, 2017 1:32 PM

duplicate

duplicate

Gannon, Curtis E. (OLC)

From: Gannon, Curtis E. (OLC)
Sent: Saturday, January 28, 2017 9:49 PM
To: Hart, Rosemary (OLC)
Cc: Stewart, Scott (OLC)
Subject: Re: Breaking News: A federal judge stayed part of President Trump's immigration order, barring refugees stopped at U.S. airports from being sent back

Thanks.

On Jan 28, 2017, at 9:41 PM, Hart, Rosemary (OLC) <(b) (6)> wrote:

FYI

Begin forwarded message:

From: [NYTimes.com News Alert <nytdirect@nytimes.com>](mailto:nytdirect@nytimes.com)
Date: January 28, 2017 at 9:36:27 PM EST
To: <(b) (6)>
Subject: Breaking News: A federal judge stayed part of President Trump's immigration order, barring refugees stopped at U.S. airports from being sent back

Add nytdirect@nytimes.com to your address book.

January 28, 2017

NYTimes.com »

Breaking News Alert

BREAKING NEWS

A federal judge stayed part of President Trump's immigration order, barring refugees stopped at U.S. airports from being sent back

Saturday, January 28, 2017 9:31 PM EST

A federal judge blocked part of President Trump's executive order on immigration on Saturday evening, ordering that refugees and others trapped at airports across the United States should not be sent back to their home countries. But the judge stopped short of letting them into the country or issuing a broader ruling on the constitutionality of Mr. Trump's actions.

Lawyers who sued the government to block the White House order said the decision, which came after an emergency hearing in a New York City courtroom, could affect an estimated 100 to 200 people who were detained upon arrival at American airports in the wake of the order that Mr. Trump signed on Friday afternoon, a week into his presidency.

[Read more »](#)

ADVERTISEMENT

FOLLOW NYTimes

FACEBOOK

@NYTimes

Get more NYTimes.com newsletters »

Get unlimited access to [NYTimes.com](#) and our NYTimes apps for just \$0.99. [Subscribe »](#)

ABOUT THIS EMAIL

You received this message because you signed up for [NYTimes.com's](#) Breaking News Alerts newsletter.

[Unsubscribe](#)

[Manage Subscriptions](#)

[Change Your Email](#)

[Privacy Policy](#)

[Contact](#)

[Advertise](#)

Copyright 2017 The New York Times Company | 620 Eighth Avenue New York, NY 10018

Stewart, Scott (OLC)

From: Stewart, Scott (OLC)
Sent: Sunday, January 29, 2017 12:00 PM
To: Gannon, Curtis E. (OLC)
Cc: Hart, Rosemary (OLC)
Subject: Re: Breaking News

I plan to be in a little later too. I've been handling stuff at home for now because it has been radio silence from the WH.

On Jan 29, 2017, at 9:57 AM, Gannon, Curtis E. (OLC) <(b) (6)> wrote:

Thanks, (b) (5)
(b) (5). Enjoy your visit.

On Jan 29, 2017, at 9:43 AM, Hart, Rosemary (OLC) <(b) (6)> wrote:

Haven't seen a draft of this.

I plan to be in around 12 today. (b) (6)
(b) (6) and so won't be checking my email from 10:30-11:30. Please call my cell if you need me during that time. (b) (6).

Begin forwarded message:

From: CNN Breaking News <CNNBreakingNews@mail.cnn.com>
Date: January 29, 2017 at 9:06:27 AM EST
To: <no-reply@siteservices.cnn.com>
Subject: **Breaking News**

White House officials are [discussing the possibility of asking foreign visitors to disclose websites and social media sites they visit, and to share cell phone contacts](#), sources tell CNN.

Get complete coverage of breaking news on [CNN TV](#), [CNN.com](#) and [CNN Mobile](#).
Watch CNN live or On Demand from your computer or mobile device using [CNNgo](#).

You have opted-in to receive this e-mail from [CNN.com](#).

To unsubscribe from Breaking News e-mail alerts, go to:
[http://cnn.com/EMAIL/breakingnews/unsubscribe.html?
l=domestic-adh-bn](http://cnn.com/EMAIL/breakingnews/unsubscribe.html?l=domestic-adh-bn)
One CNN Center Atlanta, GA 30303
(c) & (r) 2016 Cable News Network

Gannon, Curtis E. (OLC)

From: Gannon, Curtis E. (OLC)
Sent: Sunday, January 29, 2017 2:45 PM
To: Hart, Rosemary (OLC)
Subject: RE: [REDACTED] (b) (5)

Thanks. Had received it on my OSG account. That's reassuring to know about. [REDACTED] (b) (5)

[REDACTED]

From: Hart, Rosemary (OLC)
Sent: Sunday, January 29, 2017 2:38 PM
To: Gannon, Curtis E. (OLC) <[REDACTED] (b) (6)>
Subject: [REDACTED] (b) (5)

Tried to send this via westlaw email, but sending again in case it didn't arrive.

Colborn, Paul P (OLC)

From: Colborn, Paul P (OLC)
Sent: Sunday, January 29, 2017 5:16 PM
To: Hart, Rosemary (OLC)
Cc: Koffsky, Daniel L (OLC); Gannon, Curtis E. (OLC)
Subject: Re: IMPORTANT: EO review -- privilege and release Qs

P.s. To be more precise, (b) (5)

Sent from my iPhone

On Jan 29, 2017, at 4:53 PM, Colborn, Paul P (OLC) <(b) (6)> wrote:

(b) (5)

(b) (5)

Sent from my iPhone

On Jan 29, 2017, at 4:22 PM, Hart, Rosemary (OLC) <(b) (6)> wrote:

Paul: Please see questions about releasing F&L letters and F&L memos. (b) (5)

RH

From: Hart, Rosemary (OLC)
Sent: Sunday, January 29, 2017 4:16 PM

duplicate

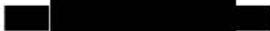
duplicate

duplicate

■ duplicate

duplicate

duplicate



duplicate

duplicate



Hart, Rosemary (OLC)

From: Hart, Rosemary (OLC)
Sent: Sunday, January 29, 2017 10:12 PM
To: Gannon, Curtis E. (OLC)
Subject: pdf
Attachments: ROSEMARY.HART_012717_172444.pdf



U.S. Department of Justice

Office of Legal Counsel

Office of the Assistant Attorney General

Washington, D.C. 20530

January 27, 2017

MEMORANDUM

**Re: Proposed Executive Order Entitled, “Protecting the
Nation from Foreign Terrorist Entry into the United States”**

The attached proposed Executive Order was prepared by the Domestic Policy Council and forwarded to this Department for review with respect to form and legality.

The Order would direct a range of executive branch actions designed to ensure that foreign nationals who are approved for admission to the United States do not intend to harm Americans and have no ties to terrorism. Following is a description of several of the actions directed under the Order.

The proposed Order would require the Secretary of Homeland Security, in consultation with the Secretary of State and the Director of National Intelligence, to determine the information needed from other countries to adjudicate visas, admissions, or other benefits under the Immigration and Nationality Act (“INA”), 8 U.S.C. §§ 1101 *et seq.* It would then direct the Secretary of State to request that other countries provide such information within 60 days. The Order would direct the Secretary of Homeland Security to submit to the President a list of the countries that do not provide such information for inclusion in a presidential proclamation generally prohibiting the entry of nationals from those countries. The Order would also suspend the entry of immigrants and non-immigrants from countries referred to in section 217(a)(12) of the INA, subject to case-by-case exceptions.

The Order would also direct the Secretary of State, the Secretary of Homeland Security, the Director of National Intelligence, and the Director of the Federal Bureau of Investigation to develop uniform screening standards and procedures to identify individuals seeking to enter the United States on a fraudulent basis or with the intent to cause harm, or who are at risk of causing harm after admission.

In addition, the Order would direct the Secretary of State to suspend the U.S. Refugee Admissions Program (“USRAP”) for 120 days, subject to case-by-case exceptions. During that 120-day period, the Secretary of State, in conjunction with the Secretary of Homeland Security and in consultation with the Director of National Intelligence, would determine what additional procedures can be taken to ensure that refugees who are approved for admission do not pose a threat to the security and welfare of the United States. Pursuant to section 212(f) of the INA, the President would proclaim that the entry of Syrian refugees, and the entry of more than 50,000

refugees in fiscal year 2017, would be detrimental to the interests of the United States and would suspend such admissions.

The proposed Order is approved with respect to form and legality.

A handwritten signature in black ink, appearing to read "Curtis E. Gannon". The signature is fluid and cursive, with a long horizontal stroke at the end.

Curtis E. Gannon
Acting Assistant Attorney General



U.S. Department of Justice

Office of Legal Counsel

Office of the Assistant Attorney General

Washington, D.C. 20530

January 27, 2017

The President,

The White House.

My dear Mr. President:

I am herewith transmitting a proposed Executive Order entitled, "Protecting the Nation from Foreign Terrorist Entry into the United States." This proposed Order was prepared by the Domestic Policy Council and forwarded to this Department for review of its form and legality.

The proposed Executive Order is approved with respect to form and legality.

Respectfully,

A handwritten signature in black ink that reads "Curtis E. Gannon".

Curtis E. Gannon
Acting Assistant Attorney General

Executive Order—Protecting the Nation from Foreign Terrorist Entry into the United States

EXECUTIVE ORDER

PROTECTING THE NATION FROM FOREIGN TERRORIST ENTRY INTO THE UNITED STATES

By the authority vested in me as President by the Constitution and laws of the United States of America, including the Immigration and Nationality Act (INA), 8 U.S.C. 1101 et seq., and section 301 of title 3, United States Code, and to protect the American people from terrorist attacks by foreign nationals admitted to the United States, it is hereby ordered as follows:

Section 1. *Purpose.* The visa-issuance process plays a crucial role in detecting individuals with terrorist ties and stopping them from entering the United States. Perhaps in no instance was that more apparent than the terrorist attacks of September 11, 2001, when State Department policy prevented consular officers from properly scrutinizing the visa applications of several of the 19 foreign nationals who went on to murder nearly 3,000 Americans. And while the visa-issuance process was reviewed and amended after the September 11 attacks to better detect would-be terrorists from receiving visas, these measures did not stop attacks by foreign nationals who were admitted to the United States.

Numerous foreign-born individuals have been convicted or implicated in terrorism-related crimes since September 11, 2001, including foreign nationals who entered the United States after receiving visitor, student, or employment visas, or who entered through the United States refugee resettlement program. Deteriorating conditions in certain countries due to war, strife, disaster, and civil unrest increase the likelihood that terrorists will use any means possible to enter the United States. The United States must be vigilant during the visa-issuance process to ensure that those approved for admission do not intend to harm Americans and that they have no ties to terrorism.

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

Sec. 2. *Policy.* It is the policy of the United States to protect its citizens from foreign nationals who intend to 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.

Sec. 3. *Suspension of Issuance of Visas and Other Immigration Benefits to Nationals of Countries of Particular Concern.* (a) The Secretary of Homeland Security, in consultation with the Secretary of State and the Director of National Intelligence, shall immediately conduct a review to determine the information needed from any country to adjudicate any visa, admission, or other benefit under the INA (adjudications) in order to determine that the individual seeking the benefit is who the individual claims to be and is not a security or public-safety threat.

(b) The Secretary of Homeland Security, in consultation with the Secretary of State and the Director of National Intelligence, shall submit to the President a report on the results of the review described in subsection (a) of this section, including the Secretary of Homeland Security's determination of the information needed for adjudications and a list of countries that do not provide adequate information, within 30 days of the date of this order. The Secretary of Homeland Security shall provide a copy of the report to the Secretary of State and the Director of National Intelligence.

(c) To temporarily reduce investigative burdens on relevant agencies during the review period described in subsection (a) of this section, to ensure the proper review and maximum utilization of available resources for the screening of foreign nationals, and to ensure that adequate standards are established to prevent infiltration by foreign terrorists or criminals, pursuant to section 212(f) of the INA, 8 U.S.C. 1182(f), I hereby proclaim that the immigrant and nonimmigrant entry into the United States of aliens from countries referred to in section 217(a)(12) of the INA, 8 U.S.C. 1187(a)(12), would be detrimental to the interests of the United States, and I hereby suspend entry into the United States, as immigrants and nonimmigrants, of such persons for 90 days from the date of this order (excluding those foreign nationals traveling on diplomatic visas, North Atlantic Treaty Organization visas, C-2 visas for travel to the United Nations, and G-1, G-2, G-3, and G-4 visas).

(d) Immediately upon receipt of the report described in subsection (b) of this section regarding the information needed for adjudications, the Secretary of State shall request all foreign governments that do not supply such information to start providing such information regarding their nationals within 60 days of notification.

(e) After the 60-day period described in subsection (d) of this section expires, the Secretary of Homeland Security, in consultation with the Secretary of State, shall submit to the President a list of countries recommended for inclusion on a Presidential proclamation that would prohibit the entry of foreign nationals (excluding those foreign nationals traveling on diplomatic visas, North Atlantic Treaty Organization visas, C-2 visas for travel to the United Nations, and G-1, G-2, G-3, and G-4 visas) from countries that do not provide the information requested pursuant to subsection (d) of this section until compliance occurs.

(f) At any point after submitting the list described in subsection (e) of this section, the Secretary of State or the Secretary of Homeland Security may submit to the President the names of any additional countries recommended for similar treatment.

(g) Notwithstanding a suspension pursuant to subsection (c) of this section or pursuant to a Presidential proclamation described in subsection (e) of this section, the Secretaries of State and 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 for which visas and benefits are otherwise blocked.

(h) The Secretaries of State and Homeland Security shall submit to the President a joint report on the progress in implementing this order within 30 days of the date of this order, a second report within 60 days of the date of this order, a third report within 90 days of the date of this order, and a fourth report within 120 days of the date of this order.

Sec. 4. *Implementing Uniform Screening Standards for All Immigration Programs.*

(a) The Secretary of State, the Secretary of Homeland Security, the Director of National Intelligence, and the Director of the Federal Bureau of Investigation shall implement a program, as part of the adjudication process for immigration benefits, to identify individuals seeking to enter the United States on a fraudulent basis with the intent to cause harm, or who are at risk of causing harm subsequent to their admission. This program will include the development of a uniform screening standard and procedure, such as in-person interviews; a database of identity documents proffered by applicants to ensure that duplicate documents are not used by multiple applicants; amended application forms that include questions aimed at identifying fraudulent answers and malicious intent; a mechanism to ensure that the applicant is who the applicant claims to be; a process to evaluate the applicant's likelihood of becoming a positively contributing member of society and the applicant's ability to make contributions to the national interest; and a mechanism to assess whether or not the applicant has the intent to commit criminal or terrorist acts after entering the United States.

(b) The Secretary of Homeland Security, in conjunction with the Secretary of State, the Director of National Intelligence, and the Director of the Federal Bureau of Investigation, shall submit to the President an initial report on the progress of this directive within 60 days of the date of this order, a second report within 100 days of the date of this order, and a third report within 200 days of the date of this order.

Sec. 5. *Realignment of the U.S. Refugee Admissions Program for Fiscal Year 2017.*

(a) The Secretary of State shall suspend the U.S. Refugee Admissions Program (USRAP) for 120 days. During the 120-day period, the Secretary of State, in conjunction with the Secretary of Homeland Security and in consultation with the Director of National Intelligence, shall review the USRAP application and adjudication process to determine what additional procedures should be taken to ensure that those approved for refugee admission do not pose a threat to the security and welfare of the United States, and shall implement such additional procedures. Refugee applicants who are already in the USRAP process may be admitted upon the initiation and completion of these revised procedures.

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

(b) Upon the resumption of USRAP admissions, the Secretary of State, in consultation with the Secretary of Homeland Security, is further directed to make changes, to the extent permitted by law, to prioritize refugee claims made by individuals on the basis of religious-based persecution, provided that the religion of the individual is a minority religion in the individual's country of nationality. Where necessary and appropriate, the Secretaries of State and Homeland Security shall recommend legislation to the President that would assist with such prioritization.

(c) Pursuant to section 212(f) of the INA, 8 U.S.C. 1182(f), I hereby proclaim that the entry of nationals of Syria as refugees is detrimental to the interests of the United States and thus suspend any such entry until such time as I have determined that sufficient changes have been made to the USRAP to ensure that admission of Syrian refugees is consistent with the national interest.

(d) Pursuant to section 212(f) of the INA, 8 U.S.C. 1182(f), I hereby proclaim that the entry of more than 50,000 refugees in fiscal year 2017 would be detrimental to the interests of the United States, and thus suspend any such entry until such time as I determine that additional admissions would be in the national interest.

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

(f) The Secretary of State shall submit to the President an initial report on the progress of the directive in subsection (b) of this section regarding prioritization of claims made by individuals on the basis of religious-based persecution within 100 days of the date of this order and shall submit a second report within 200 days of the date of this order.

(g) It is the policy of the executive branch that, to the extent permitted by law and as practicable, State and local jurisdictions be granted a role in the process of determining the placement or settlement in their jurisdictions of aliens eligible to be admitted to the United States as refugees. To that end, the Secretary of Homeland Security shall examine existing law to determine the extent to which, consistent with applicable law, State and local jurisdictions may have greater involvement in the process of determining the

placement or resettlement of refugees in their jurisdictions, and shall devise a proposal to lawfully promote such involvement.

Sec. 6. *Rescission of Exercise of Authority Relating to the Terrorism Grounds of Inadmissibility.* The Secretaries of State and Homeland Security shall, in consultation with the Attorney General, consider rescinding the exercises of authority in section 212 of the INA, 8 U.S.C. 1182, relating to the terrorism grounds of inadmissibility, as well as any related implementing memoranda.

Sec. 7. *Expedited Completion of the Biometric Entry-Exit Tracking System.* (a) The Secretary of Homeland Security shall expedite the completion and implementation of a biometric entry-exit tracking system for all travelers to the United States, as recommended by the National Commission on Terrorist Attacks Upon the United States.

(b) The Secretary of Homeland Security shall submit to the President periodic reports on the progress of the directive contained in subsection (a) of this section. The initial report shall be submitted within 100 days of the date of this order, a second report shall be submitted within 200 days of the date of this order, and a third report shall be submitted within 365 days of the date of this order. Further, the Secretary shall submit a report every 180 days thereafter until the system is fully deployed and operational.

Sec. 8. *Visa Interview Security.* (a) The Secretary of State shall immediately suspend the Visa Interview Waiver Program and ensure compliance with section 222 of the INA, 8 U.S.C. 1222, which requires that all individuals seeking a nonimmigrant visa undergo an in-person interview, subject to specific statutory exceptions.

(b) To the extent permitted by law and subject to the availability of appropriations, the Secretary of State shall immediately expand the Consular Fellows Program, including by substantially increasing the number of Fellows, lengthening or making permanent the period of service, and making language training at the Foreign Service Institute available to Fellows for assignment to posts outside of their area of core linguistic ability, to ensure that non-immigrant visa-interview wait times are not unduly affected.

Sec. 9. *Visa Validity Reciprocity.* The Secretary of State shall review all nonimmigrant visa reciprocity agreements to ensure that they are, with respect to each visa classification, truly reciprocal insofar as practicable with respect to validity period and fees, as required by sections 221(c) and 281 of the INA, 8 U.S.C. 1201(c) and 1351, and other treatment. If a country does not treat United States nationals seeking nonimmigrant visas in a reciprocal manner, the Secretary of State shall adjust the visa validity period, fee schedule, or other treatment to match the treatment of United States nationals by the foreign country, to the extent practicable.

Sec. 10. *Transparency and Data Collection.* (a) To be more transparent with the American people, and to more effectively implement policies and practices that serve the national interest, the Secretary of Homeland Security, in consultation with the Attorney General, shall, consistent with applicable law and national security, collect and make publicly available within 180 days, and every 180 days thereafter:

(i) information regarding the number of foreign nationals in the United States who have been charged with terrorism-related offenses while in the United States; convicted of terrorism-related offenses while in the United States; or removed from the United States based on terrorism-related activity, affiliation, or material support to a terrorism-related organization, or any other national security reasons since the date of this order or the last reporting period, whichever is later;

(ii) information regarding the number of foreign nationals in the United States who have been radicalized after entry into the United States and engaged in terrorism-related acts, or who have provided material support to terrorism-related organizations in countries that pose a threat to the United States, since the date of this order or the last reporting period, whichever is later; and

(iii) information regarding the number and types of acts of gender-based violence against women, including honor killings, in the United States by foreign nationals, since the date of this order or the last reporting period, whichever is later; and

(iv) any other information relevant to public safety and security as determined by the Secretary of Homeland Security and the Attorney General, including information on the immigration status of foreign nationals charged with major offenses.

(b) The Secretary of State shall, within one year of the date of this order, provide a report on the estimated long-term costs of the USRAP at the Federal, State, and local levels.

Sec. 11. General Provisions. (a) Nothing in this order shall be construed to impair or otherwise affect:

(i) the authority granted by law to an executive department or agency, or the head thereof; or

(ii) the functions of the Director of the Office of Management and Budget relating to budgetary, administrative, or legislative proposals.

(b) This order shall be implemented consistent with applicable law and subject to the availability of appropriations.

(c) This order is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person.

Colborn, Paul P (OLC)

From: Colborn, Paul P (OLC)
Sent: Monday, January 30, 2017 11:02 AM
To: Hart, Rosemary (OLC); Koffsky, Daniel L (OLC)
Subject: New FOIA Requests for Form and Legality Documents
Attachments: Public Records Request.msg; Request for records under the Freedom of Information Act.msg; NYT FOIA request.msg; Freedom of Information Request: OLC review of Trump immigration EO.msg; FOIA Request.msg; New Expedited FOIA request.msg; FOIA request -- expedited treatment requested.msg; FOIA Request.msg

Could I have a brief discussion with Rosemary or both of you sometime today to consider the lay of the land for these FOIA requests?

From: Kaprove, Jared (OLC)
Sent: Monday, January 30, 2017 10:35 AM
To: Colborn, Paul P (OLC) <[REDACTED] (b) (6)>
Subject: From the weekend

The first one (Arnsdorf) is a representative example, but we have 26 others from him in similar form, seeking other F&Ls.

Jared Kaprove
FOIA and Records Management Attorney
Office of Legal Counsel
U.S. Department of Justice

Heath, Brad

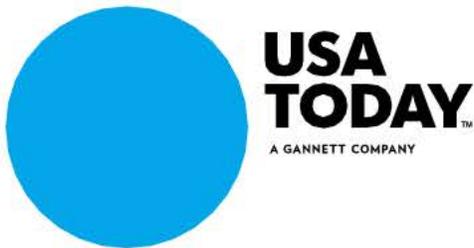
From: Heath, Brad
Sent: Sunday, January 29, 2017 11:18 PM
To: usdoj-officeoflegalcounsel@usdoj.gov
Subject: FOIA Request
Attachments: DOJ - OLC - Travel EO Records - 1.29.2017.pdf

Please see the attached request.

Brad Heath

USA TODAY

bheath@usatoday.com | P: 202 527-9709 | 7950 Jones Branch Drive, McLean, Virginia 22108 | [@bradheath](https://twitter.com/bradheath)



January 29, 2017

VIA ELECTRONIC MAIL TO usdoj-officeoflegalcounsel@usdoj.gov

FOIA Officer
Office of Legal Counsel
U.S. Department of Justice
Room 5515, 950 Pennsylvania Avenue, N.W.
Washington, D.C. 20530-0001

Re: Freedom of Information Act request

Dear FOIA Officer:

This is a request for records under the Freedom of Information Act, 5 U.S.C. § 552.
Please provide me with:

1. Complete copies of any opinions or memoranda regarding the President's Executive Order concerning "Protecting the Nation From Foreign Terrorist Entry Into the United States." Such records would have been produced since January 20, 2017.
2. Complete copies of any work logs, correspondence logs, or telephone logs related to the President's Executive Order concerning "Protecting the Nation From Foreign Terrorist Entry Into the United States."

Where possible, please furnish the records in an electronic format pursuant to 5 U.S.C. §§ 552(a)(3)(B)-(C).

Because this is a request by the news media for information of significant public interest, I ask that you waive any search fees in accordance with § 552(a)(4)(A)(ii)(II). If the cost of reproducing these records will exceed fifty dollars (\$50.00), please notify me before

filling this request. I may be reached at (202) 527-9709, or by electronic mail at bheath@usatoday.com.

If for any reason any portion of this request is denied, please provide written notice of the specific records or portions of records that were withheld, and the specific statutory basis for the withholding. Please also provide the name and address of the officer or body to which my appeal may be directed.

As you know, the Act, in § 552(a)(6), grants an agency no more than twenty working days in which to respond to this request. *See Oglesby v. U.S. Dep't of Army*, 920 F.2d 57, 65 (D.C. Cir. 1990) ("Congress adopted the time limit provision in the FOIA in order to 'contribute to the fuller and faster release of information, which is the basic objective of the Act.'" (quoting H.R. Rep. No. 93-876, March 5, 1974., reprinted (1974) U.S. Code Cong. & Ad. News 6267 at 6271)).

I therefore look forward to your prompt reply.

Sincerely,

Brad Heath

Research Info

From: Research Info
Sent: Monday, January 30, 2017 8:59 AM
To: usdoj-officeoflegalcounsel@usdoj.gov
Subject: FOIA Request

Lauren Dillon
430 S Capitol Street SE
Washington, DC 20003

Melissa Golden
Lead Paralegal and FOIA Specialist
Office of Legal Counsel
Department of Justice
Room 5511, 950 Pennsylvania Avenue, N.W.
Washington, DC 20530-0001

Dear Freedom of Information/Open Records Officer:

Pursuant to the Federal Freedom of Information Act, 5 U.S.C. § 552, and all other applicable state and federal statutes, I request from the Department of Justice's Office of Legal Counsel the following records created on or between January 20, 2017 and January 29, 2017:

- All records (including legal opinions, emails, memoranda, advisories, correspondence, telephone records, or any other document) related to the Executive Order issued by the President of the United States on January 27, 2017 entitled "Protecting the Nation From Foreign Terrorist Entry into the United States."

I request that the information I seek be provided, if possible, in an electronic format via a personal computer disk or CD-ROM. I understand that there might be costs associated with this request. I would request a waiver of fees and ask for you to contact either of us by telephone before making copies if this request will be in excess of \$50.

I would appreciate your communicating with us by email at ResearchInfo@dnc.org or by telephone at (b) (6) rather than by mail, if you have questions regarding this request.

If all or any part of this request is denied, please cite the specific exemption which you believe justifies your refusal to release the information and inform us of your agency's administrative appeal procedures available to me under the law.

We request that you expedite this request, as it relates to a matter of significant public interest.

Thank you for your assistance in this matter.

Sincerely,

Lauren Dillon

1

(b) (6) @americanintegritycenter.org

From: (b) (6) @americanintegritycenter.org
Sent: Monday, January 30, 2017 12:26 AM
To: usdoj-officeoflegalcounsel@usdoj.gov
Subject: FOIA request -- expedited treatment requested

Dear Ms. Golden:

This is a request under the Freedom of Information Act. I hereby request copies of all form and legality memoranda related to all executive orders issued in the following time periods:

- January 20, 2017 through January 30, 2017, inclusive
- January 20, 2009 through January 30, 2009, inclusive

As FOIA requires, please release all reasonably segregable nonexempt portions of documents.

I request expedited processing of this request under 28 C.F.R. 16.5(d)(1)(iv), as "[a] matter of widespread and exceptional media interest in which there exist possible questions about the government's integrity which affect public confidence." The executive orders issued since January 20 have attracted exceptional public and media interest. They have been the subject of dozens of media stories and major protests throughout the nation. The orders have significant implications for the safety, health, and rights of all U.S. citizens and legal permanent residents, as well as for the ethical conduct of government within the executive branch.

Understanding the approval process for these orders will educate the public about whether the government is observing its historic safeguards and affect public confidence in the functioning of the executive branch. The form and legality memoranda concerning the executive orders issued in the first week of the previous presidential administration will give members of the public a reference point for understanding the process that was followed for the recent orders.

If some, but not all, of the documents require privilege review, please release all documents that do not require privilege review on an expedited basis rather than waiting for the conclusion of the privilege review of documents that do require a review.

I request a waiver of all fees for this request. Disclosure of the requested information to me is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not being made for commercial use. In order to help determine my status to assess fees, you should know that I am affiliated with an organization dedicated to good government whose non-profit status is pending. This request is made in collaboration with a media organization. The information sought by this request will add to the public's understanding of executive orders that are the topic of significant public interest.

Thank you for your consideration of this request.

Sincerely,

Jeffrey Dubner

Executive Director

The American Integrity Center

525 Quincy St. NW

Washington, DC 20011

(b) (6)

32619-92942735@requests.muckrock.com

From: 32619-92942735@requests.muckrock.com
Sent: Sunday, January 29, 2017 3:37 PM
To: usdoj-officeoflegalcounsel@usdoj.gov
Subject: Freedom of Information Request: OLC review of Trump immigration EO

January 29, 2017
Department of Justice, Office of Legal Counsel
Bette Farris, Supervisory Paralegal
Office of Legal Counsel
Department of Justice
Room 5515
950 Pennsylvania Avenue, N.W.
Washington, DC 20530-0001

To Whom It May Concern:

This is a request under the Freedom of Information Act. I hereby request the following records:

- The OLC opinion and any related memoranda reviewing President Trump's Jan. 27 executive order restricting immigration from certain countries, "Protecting the Nation From Foreign Terrorist Entry Into the United States."

The requested documents will be made available to the general public, and this request is not being made for commercial purposes.

In the event that there are fees, I would be grateful if you would inform me of the total charges in advance of fulfilling my request. I would prefer the request filled electronically, by e-mail attachment if available or CD-ROM if not.

Thank you in advance for your anticipated cooperation in this matter. I look forward to receiving your response to this request within 20 business days, as the statute requires.

Sincerely,

CJ Ciaramella

Filed via MuckRock.com
E-mail (Preferred): 32619-92942735@requests.muckrock.com

For mailed responses, please address (see note):
MuckRock
DEPT MR 32619
411A Highland Ave
Somerville, MA 02144-2516

Somerville, MA 02144-2310

PLEASE NOTE: This request is not filed by a MuckRock staff member, but is being sent through MuckRock by the above in order to better track, share, and manage public records requests. Also note that improperly addressed (i.e., with the requester's name rather than "MuckRock News" and the department number) requests might be returned as undeliverable.

Kel McClanahan, Esq.

From: Kel McClanahan, Esq.
Sent: Sunday, January 29, 2017 11:29 PM
To: OLC FOIA
Subject: New Expedited FOIA request

The *New York Times* reported today that the White House has stated that President Trump's immigration ban "had gone through the usual process of scrutiny and approval by the Office of Legal Counsel."

<https://www.nytimes.com/2017/01/29/us/politics/donald-trump-rush-immigration-order-chaos.html>

This is a FOIA request on behalf of my client Ken Dilanian for all records, including emails, documenting any discussions on immigration-related topics between the White House (since 1/20/17) or any member of President Trump's transition team, landing team, or beachhead teams, including, but not limited to, records related to OLC's "scrutiny and approval" of the relevant Executive Order. In anticipation of a privilege-base argument, I point out that the fact that the White House has officially confirmed that OLC "scrutin[ized] and approv[ed]" this Executive Order effectively waives any claim of privilege for the portions of any records documenting this scrutiny and approval, and likely waives the privilege entirely for such documents.

We request that all records be released in electronic form, either by email or on a CD sent to the below address.

Mr. Dilanian is an intelligence and national security reporter for NBC and clearly a representative of the news media. Because of this, and the fact that we have requested electronic records, we do not anticipate the assessment of any fees for this request. However, I will specifically state for the record my client's unwillingness to pay any fees for this request.

We request expedited processing of this request. Mr. Dilanian is clearly a person primarily engaged in the dissemination of information, and the subject of President Trump's immigration policies is obviously a subject of great national interest and breaking news, as any Google search will show. Your cooperation in this matter would be appreciated. If you wish to discuss this request, please do not hesitate to contact me.

Sincerely,

Kel McClanahan
National Security Counselors

(b) (6)

—
This electronic mail (email) transmission is meant solely for the person(s) to whom it is addressed. It contains confidential information that may also be legally privileged. Any copying, dissemination or distribution of the contents of this email by anyone other than the addressee or his or her agent for such purposes is strictly prohibited. If you have received this email in error, please notify me immediately by telephone or email and purge the original and all copies thereof. Thank you.

Kel McClanahan, Esq.
Executive Director
National Security Counselors

"As a general rule, the most successful man in life is the man who has the best information."
Benjamin Disraeli, 1880

"Quis custodiet ipsos custodes?" ("Who will watch the watchers?")
Juvenal, Satire VI

Savage, Charlie

From: Savage, Charlie
Sent: Saturday, January 28, 2017 5:20 PM
To: USDOJ-Office of Legal Counsel (SMO)
Cc: David McCraw; Ian MacDougall
Subject: NYT FOIA request

Dear FOIA officers,

Under the Freedom of Information Act, I request access to all e-mails, memos, and other documents related to

1. Office of Legal Counsel review of proposed Trump administration executive orders for form and legality, including during the transition period
2. Office of Legal Counsel review of other proposed Trump White House matters, including during the transition period, including but not limited to whether the appointment of Jared Kushner to a White House role would violate anti-nepotism laws and whether the president's ongoing business operations would violate the emoluments clause of the Constitution

Because I am a member of the news media gathering information for public consumption, I respectfully request a fee waiver.

Thank you for your assistance. Please feel free to email me the document, but if you need to mail a disc for internal procedural reasons, I am at
c/o The New York Times
1627 I St NW
7th Floor
Washington, DC 20006

Charlie Savage
The New York Times

Phone: 202-862-0317
Cell: (b) (6)

Isaac Arnsdorf
Journalist
Politico
1000 Wilson Blvd
8th Floor
Arlington, VA 22209

(b) (6)

January 27, 2017

FOIA Officer
Department of Justice
Office of Legal Counsel
950 Pennsylvania Avenue, NW
Room 5515
Washington, DC 20530-0001
(202) 514-2038
usdoj-officeoflegalcounsel@usdoj.gov

FOIA REQUEST

Fee waiver requested

Dear FOIA Officer:

Pursuant to the federal Freedom of Information Act, 5 U.S.C. § 552, I request access to and copies of OLC's form and legality memo since Jan. 20, 2017, for an Executive Order titled "Protecting the Nation from Foreign Terrorist Entry into the United States," issued Jan. 27, 2017.

I would like to receive the information in electronic files.

I agree to pay reasonable duplication fees for the processing of this request in an amount not to exceed \$250. However, please notify me prior to your incurring any expenses in excess of that amount.

Please waive any applicable fees. Release of the information is in the public interest because it will contribute significantly to public understanding of government operations and activities.

If my request is denied in whole or part, I ask that you justify all deletions by reference to specific exemptions of the act. I will also expect you to release all segregable portions of otherwise exempt material. I, of course, reserve the right to appeal your decision to withhold any information or to deny a waiver of fees.

I would appreciate your communicating with me by email or telephone, rather than by mail.

Please provide expedited processing of this request which concerns a matter of urgency. As a journalist, I am primarily engaged in disseminating information. The public has an urgent need for information about the legal justification for executive actions that affect great numbers of people. I certify that my statements concerning the need for expedited processing are true and correct to the best of my knowledge and belief.

I look forward to your determination regarding my request for expedited processing within 10 calendar days, as the statute requires.

Thank you for your assistance.

Sincerely,

Isaac Arnsdorf

Jason Leopold

From: Jason Leopold
Sent: Saturday, January 28, 2017 2:44 PM
To: FOIArequests, CRT (CRT); FOIA, Civil.routing; FOIARequests, EOIR (EOIR); NSDFOIA (NSD); USDOJ-Office of Legal Counsel (SMO)
Subject: Request for records under the Freedom of Information Act

This is a request for records under the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552 and the Privacy Act, 5 U.S.C. § 552a. This request should be considered under both statutes to maximize the release of records. This request seeks expedited processing.

REQUESTER INFORMATION

Name: Jason Leopold

Position: Investigative Reporter

Address: (b) (6)

Email: (b) (6)

RECORDS SOUGHT

I request **any and all records**, which includes but is not limited to legal opinions, reports, emails, memoranda, in the possession of certain divisions of the Department of Justice, (see offices this request is addressed to above), that mentions or refers to President Donald Trump's Muslim Ban, also known as the "extreme vetting" executive order dated January 27, 2017. The title of the executive order is: "Protecting the Nation From Foreign Terrorist Entry Into The United States." The timeframe for my request is January 1, 2017 through the date the search for responsive records is conducted.

EXPEDITED PROCESSING

I am seeking expedited processing for this request. Since this executive order was signed on January 27, 2017, numerous individuals have been detained at airports around the United States and news reports have described the impact of the executive order as "complete chaos." (<http://www.usatoday.com/story/news/2017/01/28/complete-chaos-1000-calls-after-trump-immigrant-ban-hits/97184560/>). Lawsuits have been filed challenging the constitutionality of the executive order. For many of these refugees this is now a life and death situation.

INSTRUCTIONS REGARDING SEARCH (for purposes of this search DOJ components" refers to the components within DOJ that have been identified as having responsive records)

1. Instructions Regarding "Leads":

As required by the relevant case law, the DOJ components should follow any leads it discovers during the conduct of its searches and perform additional searches when said leads indicate that records may be located in another system. Failure to follow clear leads is a violation of FOIA.

2. Request for Public Records:

Please search for any records even if they are already publicly available.

3. Request for Electronic and Paper/Manual Searches:

I request that searches of all electronic and paper/manual indices, filing systems, and locations for any and all records relating or referring to the subject of my request be conducted.

4. Request for Search of Filing Systems, Indices, and Locations:

I request that the DOJ components search all of its offices and components, which are likely to contain responsive records.

5. Request regarding Photographs and other Visual Materials:

I request that any photographs or other visual materials responsive to my request be released to me in their original or comparable forms, quality, and resolution. For example, if a photograph was taken digitally, or if the DOJ components maintains a photograph digitally, I request disclosure of the original digital image file, not a reduced resolution version of that image file nor a printout and scan of that image file. Likewise, if a photograph was originally taken as a color photograph, I request disclosure of that photograph as a color image, not a black and white image. Please contact me for any clarification on this point.

6. Request for Duplicate Pages:

I request disclosure of any and all supposedly "duplicate" pages. Scholars analyze records not only for the information available on any given page, but also for the relationships between that information and information on pages surrounding it. As such, though certain pages may have been previously released to me, the existence of those pages within new context renders them functionally new pages. As such, the only way to properly analyze released information is to analyze that information within its proper context. Therefore, I request disclosure of all "duplicate" pages.

7. Request to Search Emails:

Please search for emails relating to the subject matter of my request.

8. Request for Search of Records Transferred to Other Agencies:

I request that in conducting its search, the DOJ components disclose releasable records even if they are available publicly through other sources outside the DOJ components, such as NARA.

9. Regarding Destroyed Records

If any records responsive or potentially responsive to my request have been destroyed, my request includes, but is not limited to, any and all records relating or referring to the destruction of those records. This includes, but is not limited to, any and all records relating or referring to the events leading to the destruction of those records.

INSTRUCTIONS REGARDING SCOPE AND BREADTH OF REQUESTS

Please interpret the scope of this request broadly. The DOJ components is instructed to interpret the scope of this request in the most liberal manner possible short of an interpretation that would lead to a conclusion that the request does not reasonably describe the records sought.

EXEMPTIONS AND SEGREGABILITY

I call your attention to President Obama's 21 January 2009 Memorandum concerning the Freedom of Information Act, in which he states:

All agencies should adopt a presumption in favor of disclosure, in order to renew their commitment to the principles embodied in FOIA [...] The presumption of disclosure should be applied to all decisions involving FOIA.

In the same Memorandum, President Obama added that government information should not be kept confidential "merely because public officials might be embarrassed by disclosure, because errors and failures might be revealed, or because of speculative or abstract fears."

Finally, President Obama ordered that "The Freedom of Information Act should be administered with a clear presumption: In the case of doubt, openness prevails."

Nonetheless, if any responsive record or portion thereof is claimed to be exempt from production, FOIA/PA statutes provide that even if some of the requested material is properly exempt from mandatory disclosure, all segregable portions must be released. If documents are denied in part or in whole, please specify which exemption(s) is (are) claimed for each passage or whole document denied. Please provide a complete itemized inventory and a detailed factual justification of total or partial denial of documents. Specify the number of pages in each document and the total number of pages pertaining to this request. For "classified" material denied, please include the following information: the classification (confidential, secret or top secret); identity of the classifier; date or event for automatic declassification or classification review or downgrading; if applicable, identity of official authorizing extension of automatic declassification or review past six years; and, if applicable, the reason for extended classification beyond six years.

In excising material, please "black out" the material rather than "white out" or "cut out." I expect, as provided by FOIA, that the remaining non-exempt portions of documents will be released.

Please release all pages regardless of the extent of excising, even if all that remains are the stationery headings or administrative markings.

In addition, I ask that your agency exercise its discretion to release records which may be technically exempt, but where withholding serves no important public interest.

ADDITIONAL INSTRUCTIONS REGARDING REQUEST

Please produce all records with administrative markings and pagination included.

Please send a memo (copy to me) to the appropriate units in your office to assure that no records related to this request are destroyed. Please advise of any destruction of records and include the date of and authority for such destruction.

be destroyed. I request copies of any destruction of records and include the date of and authority for such destruction.

FORMAT

I request that any releases stemming from this request be provided to me in digital format (soft-copy) on a compact disk or other like media.

FEE CATEGORY AND REQUEST FOR A FEE WAIVER

I am an investigative reporter for VICE News covering a wide-range of issues, including Guantanamo, national security, counterterrorism, civil liberties, human rights, and open government. Additionally, my reporting has been published in the The Guardian, The Wall Street Journal, The Financial Times, Salon, CBS Marketwatch, The Los Angeles Times, The Nation, Truthout, Al Jazeera English and Al Jazeera America.

I am willing to pay any reasonable expenses associated with this request, however, as the purpose of the requested disclosure is in full conformity with the statutory requirements for a waiver of fees, I formally request such a waiver. I request a waiver of all costs pursuant to 5 U.S.C. §552(a)(4)(A)(iii) ("Documents shall be furnished without any charge ... if disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester."). Disclosure in this case meets the statutory criteria, and a fee waiver would fulfill Congress's legislative intent in amending FOIA. See *Judicial Watch, Inc. v. Rossotti*, 326 F.3d 1309, 1312 (D.C. Cir. 2003) ("Congress amended FOIA to ensure that it be 'liberally construed in favor of waivers for noncommercial requesters.'"). I incorporate by reference the explanation and attached materials in the above sections which demonstrates why the requested information is in the public interest.

DoD 5400.7-R C6.1.4.1 provides that "documents shall be furnished without charge, or at a charge reduced below fees assessed to the categories of requesters in subsection C6.1.5., below, when the Component determines that waiver or reduction of the fees is in the public interest because furnishing the information is likely to contribute significantly to public understanding of the operations or activities of the Department of Defense and is not primarily in the commercial interest of the requester."

Should my request for a fee waiver be denied, I request that I be categorized as a member of the news media for fee purposes pursuant to DoD 5400.7-R C6.1.5.7. According to 5 U.S.C. § 552(a)(4)(A)(ii), which codified the ruling of *Nat'l Security Archive v. Dep't of Defense*, 880 F.2d 1381 (D.C. Cir. 1989), the term "a representative of the news media" means any person or entity that gathers information of potential interest to a segment of the public, uses its editorial skills to turn the raw materials into a distinct work, and distributes that work to an audience. This is consistent with the definition provided in DoD 5400.7-R C6.1.5.7.1.

As the legislative history of FOIA reveals, "It is critical that the phrase 'representative of the news media' be broadly interpreted if the act is to work as expected. . . . In fact, any person or organization which regularly publishes or disseminates information to the public . . . should qualify for waivers as a 'representative of the news media.'" 132 Cong. Rec. S14298 (daily ed. Sept. 30, 1986) (emphasis in original quotation); and 2) "A request by a reporter or other person affiliated with a newspaper, magazine, television or radio station, or other entity that is in the business of publishing or otherwise disseminating information to the public qualifies under this provision." 132 Cong. Rec. H9463 (Oct. 8, 1986) (emphasis in original quotation)). Therefore, in accordance with the Freedom of Information Act and relevant case law, I, Jason Leopold, should be considered a representative of the news media.

I have the intent and ability to disseminate this significant expansion of public understanding of government operations. The public interest in this significant expansion of public understanding of government operations far outweighs any commercial interest of my own in the requested release. Accordingly, my fee waiver request amply satisfies the rules of DoD 5400.7-R C6.1.4.1. Legislative history and judicial authority emphatically support this determination. For these reasons, and based upon their extensive elaboration above, I request a full waiver of fees be granted. I will appeal any denial of my request for a waiver administratively and to the courts if necessary.

...

Please do not hesitate to contact me if you have any questions concerning this request.

Thank you. I appreciate your time and attention to this matter.

--

JASON LEOPOLD
Investigative Reporter
[REDACTED]
@jasonleopold
jasonleopold.contently.com
PGP

--

JASON LEOPOLD
Investigative Reporter
[REDACTED]
@jasonleopold
jasonleopold.contently.com
PGP

Colborn, Paul P (OLC)

From: Colborn, Paul P (OLC)
Sent: Monday, January 30, 2017 11:30 AM
To: Gannon, Curtis E. (OLC)
Cc: Hart, Rosemary (OLC); Koffsky, Daniel L (OLC)
Subject: New FOIA Requests for Form and Legality Documents
Attachments: Public Records Request.msg; Request for records under the Freedom of Information Act.msg; NYT FOIA request.msg; Freedom of Information Request: OLC review of Trump immigration EO.msg; FOIA Request.msg; New Expedited FOIA request.msg; FOIA request -- expedited treatment requested.msg; FOIA Request.msg

Curtis, fyi, here's a representative sample of FOIA requests that have come in over the weekend seeking Form and Legality memos, either just for the immigration order or for orders more generally.

From: Kaprove, Jared (OLC)
Sent: Monday, January 30, 2017 10:35 AM
To: Colborn, Paul P (OLC) <(b) (6)>
Subject: From the weekend

The first one (Arnsdorf) is a representative example, but we have 26 others from him in similar form, seeking other F&Ls.

Jared Kaprove
FOIA and Records Management Attorney
Office of Legal Counsel
U.S. Department of Justice

Heath, Brad

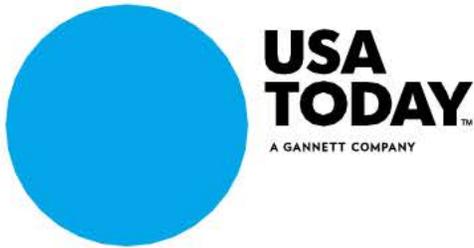
From: Heath, Brad
Sent: Sunday, January 29, 2017 11:18 PM
To: usdoj-officeoflegalcounsel@usdoj.gov
Subject: FOIA Request
Attachments: DOJ - OLC - Travel EO Records - 1.29.2017.pdf

Please see the attached request.

Brad Heath

USA TODAY

bheath@usatoday.com | P: 202 527-9709 | 7950 Jones Branch Drive, McLean, Virginia 22108 | [@bradheath](https://twitter.com/bradheath)



January 29, 2017

VIA ELECTRONIC MAIL TO usdoj-officeoflegalcounsel@usdoj.gov

FOIA Officer
Office of Legal Counsel
U.S. Department of Justice
Room 5515, 950 Pennsylvania Avenue, N.W.
Washington, D.C. 20530-0001

Re: Freedom of Information Act request

Dear FOIA Officer:

This is a request for records under the Freedom of Information Act, 5 U.S.C. § 552.
Please provide me with:

1. Complete copies of any opinions or memoranda regarding the President's Executive Order concerning "Protecting the Nation From Foreign Terrorist Entry Into the United States." Such records would have been produced since January 20, 2017.
2. Complete copies of any work logs, correspondence logs, or telephone logs related to the President's Executive Order concerning "Protecting the Nation From Foreign Terrorist Entry Into the United States."

Where possible, please furnish the records in an electronic format pursuant to 5 U.S.C. §§ 552(a)(3)(B)-(C).

Because this is a request by the news media for information of significant public interest, I ask that you waive any search fees in accordance with § 552(a)(4)(A)(ii)(II). If the cost of reproducing these records will exceed fifty dollars (\$50.00), please notify me before

filling this request. I may be reached at (202) 527-9709, or by electronic mail at bheath@usatoday.com.

If for any reason any portion of this request is denied, please provide written notice of the specific records or portions of records that were withheld, and the specific statutory basis for the withholding. Please also provide the name and address of the officer or body to which my appeal may be directed.

As you know, the Act, in § 552(a)(6), grants an agency no more than twenty working days in which to respond to this request. *See Oglesby v. U.S. Dep't of Army*, 920 F.2d 57, 65 (D.C. Cir. 1990) ("Congress adopted the time limit provision in the FOIA in order to 'contribute to the fuller and faster release of information, which is the basic objective of the Act.'" (quoting H.R. Rep. No. 93-876, March 5, 1974., reprinted (1974) U.S. Code Cong. & Ad. News 6267 at 6271)).

I therefore look forward to your prompt reply.

Sincerely,

Brad Heath

Research Info

From: Research Info
Sent: Monday, January 30, 2017 8:59 AM
To: usdoj-officeoflegalcounsel@usdoj.gov
Subject: FOIA Request

Lauren Dillon
430 S Capitol Street SE
Washington, DC 20003

Melissa Golden
Lead Paralegal and FOIA Specialist
Office of Legal Counsel
Department of Justice
Room 5511, 950 Pennsylvania Avenue, N.W.
Washington, DC 20530-0001

Dear Freedom of Information/Open Records Officer:

Pursuant to the Federal Freedom of Information Act, 5 U.S.C. § 552, and all other applicable state and federal statutes, I request from the Department of Justice's Office of Legal Counsel the following records created on or between January 20, 2017 and January 29, 2017:

- All records (including legal opinions, emails, memoranda, advisories, correspondence, telephone records, or any other document) related to the Executive Order issued by the President of the United States on January 27, 2017 entitled "Protecting the Nation From Foreign Terrorist Entry into the United States."

I request that the information I seek be provided, if possible, in an electronic format via a personal computer disk or CD-ROM. I understand that there might be costs associated with this request. I would request a waiver of fees and ask for you to contact either of us by telephone before making copies if this request will be in excess of \$50.

I would appreciate your communicating with us by email at ResearchInfo@dnc.org or by telephone at (b) (6) [REDACTED] rather than by mail, if you have questions regarding this request.

If all or any part of this request is denied, please cite the specific exemption which you believe justifies your refusal to release the information and inform us of your agency's administrative appeal procedures available to me under the law.

We request that you expedite this request, as it relates to a matter of significant public interest.

Thank you for your assistance in this matter.

Sincerely,

Lauren Dillon

1

██████████@americanintegritycenter.org

From: ██████████@americanintegritycenter.org
Sent: Monday, January 30, 2017 12:26 AM
To: usdoj-officeoflegalcounsel@usdoj.gov
Subject: FOIA request -- expedited treatment requested

Dear Ms. Golden:

This is a request under the Freedom of Information Act. I hereby request copies of all form and legality memoranda related to all executive orders issued in the following time periods:

- January 20, 2017 through January 30, 2017, inclusive
- January 20, 2009 through January 30, 2009, inclusive

As FOIA requires, please release all reasonably segregable nonexempt portions of documents.

I request expedited processing of this request under 28 C.F.R. 16.5(d)(1)(iv), as "[a] matter of widespread and exceptional media interest in which there exist possible questions about the government's integrity which affect public confidence." The executive orders issued since January 20 have attracted exceptional public and media interest. They have been the subject of dozens of media stories and major protests throughout the nation. The orders have significant implications for the safety, health, and rights of all U.S. citizens and legal permanent residents, as well as for the ethical conduct of government within the executive branch.

Understanding the approval process for these orders will educate the public about whether the government is observing its historic safeguards and affect public confidence in the functioning of the executive branch. The form and legality memoranda concerning the executive orders issued in the first week of the previous presidential administration will give members of the public a reference point for understanding the process that was followed for the recent orders.

If some, but not all, of the documents require privilege review, please release all documents that do not require privilege review on an expedited basis rather than waiting for the conclusion of the privilege review of documents that do require a review.

I request a waiver of all fees for this request. Disclosure of the requested information to me is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not being made for commercial use. In order to help determine my status to assess fees, you should know that I am affiliated with an organization dedicated to good government whose non-profit status is pending. This request is made in collaboration with a media organization. The information sought by this request will add to the public's understanding of executive orders that are the topic of significant public interest.

Thank you for your consideration of this request.

Sincerely,

Jeffrey Dubner

Executive Director

The American Integrity Center

525 Quincy St. NW

Washington, DC 20011

[REDACTED]

32619-92942735@requests.muckrock.com

From: 32619-92942735@requests.muckrock.com
Sent: Sunday, January 29, 2017 3:37 PM
To: usdoj-officeoflegalcounsel@usdoj.gov
Subject: Freedom of Information Request: OLC review of Trump immigration EO

January 29, 2017
Department of Justice, Office of Legal Counsel
Bette Farris, Supervisory Paralegal
Office of Legal Counsel
Department of Justice
Room 5515
950 Pennsylvania Avenue, N.W.
Washington, DC 20530-0001

To Whom It May Concern:

This is a request under the Freedom of Information Act. I hereby request the following records:

- The OLC opinion and any related memoranda reviewing President Trump's Jan. 27 executive order restricting immigration from certain countries, "Protecting the Nation From Foreign Terrorist Entry Into the United States."

The requested documents will be made available to the general public, and this request is not being made for commercial purposes.

In the event that there are fees, I would be grateful if you would inform me of the total charges in advance of fulfilling my request. I would prefer the request filled electronically, by e-mail attachment if available or CD-ROM if not.

Thank you in advance for your anticipated cooperation in this matter. I look forward to receiving your response to this request within 20 business days, as the statute requires.

Sincerely,

CJ Ciaramella

Filed via MuckRock.com
E-mail (Preferred): 32619-92942735@requests.muckrock.com

For mailed responses, please address (see note):
MuckRock
DEPT MR 32619
411A Highland Ave
Somerville, MA 02144-2516

Somerville, MA 02144-2310

PLEASE NOTE: This request is not filed by a MuckRock staff member, but is being sent through MuckRock by the above in order to better track, share, and manage public records requests. Also note that improperly addressed (i.e., with the requester's name rather than "MuckRock News" and the department number) requests might be returned as undeliverable.

Kel McClanahan, Esq.

From: Kel McClanahan, Esq.
Sent: Sunday, January 29, 2017 11:29 PM
To: OLC FOIA
Subject: New Expedited FOIA request

The *New York Times* reported today that the White House has stated that President Trump's immigration ban "had gone through the usual process of scrutiny and approval by the Office of Legal Counsel."

<https://www.nytimes.com/2017/01/29/us/politics/donald-trump-rush-immigration-order-chaos.html>

This is a FOIA request on behalf of my client Ken Dilanian for all records, including emails, documenting any discussions on immigration-related topics between the White House (since 1/20/17) or any member of President Trump's transition team, landing team, or beachhead teams, including, but not limited to, records related to OLC's "scrutiny and approval" of the relevant Executive Order. In anticipation of a privilege-base argument, I point out that the fact that the White House has officially confirmed that OLC "scrutin[ized] and approv[ed]" this Executive Order effectively waives any claim of privilege for the portions of any records documenting this scrutiny and approval, and likely waives the privilege entirely for such documents.

We request that all records be released in electronic form, either by email or on a CD sent to the below address.

Mr. Dilanian is an intelligence and national security reporter for NBC and clearly a representative of the news media. Because of this, and the fact that we have requested electronic records, we do not anticipate the assessment of any fees for this request. However, I will specifically state for the record my client's unwillingness to pay any fees for this request.

We request expedited processing of this request. Mr. Dilanian is clearly a person primarily engaged in the dissemination of information, and the subject of President Trump's immigration policies is obviously a subject of great national interest and breaking news, as any Google search will show. Your cooperation in this matter would be appreciated. If you wish to discuss this request, please do not hesitate to contact me.

Sincerely,

Kel McClanahan
National Security Counselors

(b) (6)

—
This electronic mail (email) transmission is meant solely for the person(s) to whom it is addressed. It contains confidential information that may also be legally privileged. Any copying, dissemination or distribution of the contents of this email by anyone other than the addressee or his or her agent for such purposes is strictly prohibited. If you have received this email in error, please notify me immediately by telephone or email and purge the original and all copies thereof. Thank you.

Kel McClanahan, Esq.
Executive Director
National Security Counselors

"As a general rule, the most successful man in life is the man who has the best information."
Benjamin Disraeli, 1880

"Quis custodiet ipsos custodes?" ("Who will watch the watchers?")
Juvenal, Satire VI

Savage, Charlie

From: Savage, Charlie
Sent: Saturday, January 28, 2017 5:20 PM
To: USDOJ-Office of Legal Counsel (SMO)
Cc: David McCraw; Ian MacDougall
Subject: NYT FOIA request

Dear FOIA officers,

Under the Freedom of Information Act, I request access to all e-mails, memos, and other documents related to

1. Office of Legal Counsel review of proposed Trump administration executive orders for form and legality, including during the transition period
2. Office of Legal Counsel review of other proposed Trump White House matters, including during the transition period, including but not limited to whether the appointment of Jared Kushner to a White House role would violate anti-nepotism laws and whether the president's ongoing business operations would violate the emoluments clause of the Constitution

Because I am a member of the news media gathering information for public consumption, I respectfully request a fee waiver.

Thank you for your assistance. Please feel free to email me the document, but if you need to mail a disc for internal procedural reasons, I am at
c/o The New York Times
1627 I St NW
7th Floor
Washington, DC 20006

Charlie Savage
The New York Times

Phone: 202-862-0317
Cell: (b) (6)

Isaac Arnsdorf
Journalist
Politico
1000 Wilson Blvd
8th Floor
Arlington, VA 22209

(b) (6)

January 27, 2017

FOIA Officer
Department of Justice
Office of Legal Counsel
950 Pennsylvania Avenue, NW
Room 5515
Washington, DC 20530-0001
(202) 514-2038
usdoj-officeoflegalcounsel@usdoj.gov

FOIA REQUEST

Fee waiver requested

Dear FOIA Officer:

Pursuant to the federal Freedom of Information Act, 5 U.S.C. § 552, I request access to and copies of OLC's form and legality memo since Jan. 20, 2017, for an Executive Order titled "Protecting the Nation from Foreign Terrorist Entry into the United States," issued Jan. 27, 2017.

I would like to receive the information in electronic files.

I agree to pay reasonable duplication fees for the processing of this request in an amount not to exceed \$250. However, please notify me prior to your incurring any expenses in excess of that amount.

Please waive any applicable fees. Release of the information is in the public interest because it will contribute significantly to public understanding of government operations and activities.

If my request is denied in whole or part, I ask that you justify all deletions by reference to specific exemptions of the act. I will also expect you to release all segregable portions of otherwise exempt material. I, of course, reserve the right to appeal your decision to withhold any information or to deny a waiver of fees.

I would appreciate your communicating with me by email or telephone, rather than by mail.

Please provide expedited processing of this request which concerns a matter of urgency. As a journalist, I am primarily engaged in disseminating information. The public has an urgent need for information about the legal justification for executive actions that affect great numbers of people. I certify that my statements concerning the need for expedited processing are true and correct to the best of my knowledge and belief.

I look forward to your determination regarding my request for expedited processing within 10 calendar days, as the statute requires.

Thank you for your assistance.

Sincerely,

Isaac Arnsdorf

Jason Leopold

From: Jason Leopold
Sent: Saturday, January 28, 2017 2:44 PM
To: FOIArequests, CRT (CRT); FOIA, Civil.routing; FOIARequests, EOIR (EOIR); NSDFOIA (NSD); USDOJ-Office of Legal Counsel (SMO)
Subject: Request for records under the Freedom of Information Act

This is a request for records under the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552 and the Privacy Act, 5 U.S.C. § 552a. This request should be considered under both statutes to maximize the release of records. This request seeks expedited processing.

REQUESTER INFORMATION

Name: Jason Leopold

Position: Investigative Reporter

Address: (b) (6)

Email: (b) (6)

RECORDS SOUGHT

I request **any and all records**, which includes but is not limited to legal opinions, reports, emails, memoranda, in the possession of certain divisions of the Department of Justice, (see offices this request is addressed to above), that mentions or refers to President Donald Trump's Muslim Ban, also known as the "extreme vetting" executive order dated January 27, 2017. The title of the executive order is: "Protecting the Nation From Foreign Terrorist Entry Into The United States." The timeframe for my request is January 1, 2017 through the date the search for responsive records is conducted.

EXPEDITED PROCESSING

I am seeking expedited processing for this request. Since this executive order was signed on January 27, 2017, numerous individuals have been detained at airports around the United States and news reports have described the impact of the executive order as "complete chaos." [<http://www.usatoday.com/story/news/2017/01/28/complete-chaos-1000-calls-after-trump-immigrant-ban-hits/97184560/>]. Lawsuits have been filed challenging the constitutionality of the executive order. For many of these refugees this is now a life and death situation.

INSTRUCTIONS REGARDING SEARCH (for purposes of this search DOJ components" refers to the components within DOJ that have been identified as having responsive records)

1. Instructions Regarding "Leads":

As required by the relevant case law, the DOJ components should follow any leads it discovers during the conduct of its searches and perform additional searches when said leads indicate that records may be located in another system. Failure to follow clear leads is a violation of FOIA.

2. Request for Public Records:

Please search for any records even if they are already publicly available.

3. Request for Electronic and Paper/Manual Searches:

I request that searches of all electronic and paper/manual indices, filing systems, and locations for any and all records relating or referring to the subject of my request be conducted.

4. Request for Search of Filing Systems, Indices, and Locations:

I request that the DOJ components search all of its offices and components, which are likely to contain responsive records.

5. Request regarding Photographs and other Visual Materials:

I request that any photographs or other visual materials responsive to my request be released to me in their original or comparable forms, quality, and resolution. For example, if a photograph was taken digitally, or if the DOJ components maintains a photograph digitally, I request disclosure of the original digital image file, not a reduced resolution version of that image file nor a printout and scan of that image file. Likewise, if a photograph was originally taken as a color photograph, I request disclosure of that photograph as a color image, not a black and white image. Please contact me for any clarification on this point.

6. Request for Duplicate Pages:

I request disclosure of any and all supposedly "duplicate" pages. Scholars analyze records not only for the information available on any given page, but also for the relationships between that information and information on pages surrounding it. As such, though certain pages may have been previously released to me, the existence of those pages within new context renders them functionally new pages. As such, the only way to properly analyze released information is to analyze that information within its proper context. Therefore, I request disclosure of all "duplicate" pages.

7. Request to Search Emails:

Please search for emails relating to the subject matter of my request.

8. Request for Search of Records Transferred to Other Agencies:

I request that in conducting its search, the DOJ components disclose releasable records even if they are available publicly through other sources outside the DOJ components, such as NARA.

9. Regarding Destroyed Records

If any records responsive or potentially responsive to my request have been destroyed, my request includes, but is not limited to, any and all records relating or referring to the destruction of those records. This includes, but is not limited to, any and all records relating or referring to the events leading to the destruction of those records.

INSTRUCTIONS REGARDING SCOPE AND BREADTH OF REQUESTS

Please interpret the scope of this request broadly. The DOJ components is instructed to interpret the scope of this request in the most liberal manner possible short of an interpretation that would lead to a conclusion that the request does not reasonably describe the records sought.

EXEMPTIONS AND SEGREGABILITY

I call your attention to President Obama's 21 January 2009 Memorandum concerning the Freedom of Information Act, in which he states:

All agencies should adopt a presumption in favor of disclosure, in order to renew their commitment to the principles embodied in FOIA [...] The presumption of disclosure should be applied to all decisions involving FOIA.

In the same Memorandum, President Obama added that government information should not be kept confidential "merely because public officials might be embarrassed by disclosure, because errors and failures might be revealed, or because of speculative or abstract fears."

Finally, President Obama ordered that "The Freedom of Information Act should be administered with a clear presumption: In the case of doubt, openness prevails."

Nonetheless, if any responsive record or portion thereof is claimed to be exempt from production, FOIA/PA statutes provide that even if some of the requested material is properly exempt from mandatory disclosure, all segregable portions must be released. If documents are denied in part or in whole, please specify which exemption(s) is (are) claimed for each passage or whole document denied. Please provide a complete itemized inventory and a detailed factual justification of total or partial denial of documents. Specify the number of pages in each document and the total number of pages pertaining to this request. For "classified" material denied, please include the following information: the classification (confidential, secret or top secret); identity of the classifier; date or event for automatic declassification or classification review or downgrading; if applicable, identity of official authorizing extension of automatic declassification or review past six years; and, if applicable, the reason for extended classification beyond six years.

In excising material, please "black out" the material rather than "white out" or "cut out." I expect, as provided by FOIA, that the remaining non-exempt portions of documents will be released.

Please release all pages regardless of the extent of excising, even if all that remains are the stationery headings or administrative markings.

In addition, I ask that your agency exercise its discretion to release records which may be technically exempt, but where withholding serves no important public interest.

ADDITIONAL INSTRUCTIONS REGARDING REQUEST

Please produce all records with administrative markings and pagination included.

Please send a memo (copy to me) to the appropriate units in your office to assure that no records related to this request are destroyed. Please advise of any destruction of records and include the date of and authority for such destruction.

be destroyed. I request copies of any destruction of records and include the date of and authority for such destruction.

FORMAT

I request that any releases stemming from this request be provided to me in digital format (soft-copy) on a compact disk or other like media.

FEE CATEGORY AND REQUEST FOR A FEE WAIVER

I am an investigative reporter for VICE News covering a wide-range of issues, including Guantanamo, national security, counterterrorism, civil liberties, human rights, and open government. Additionally, my reporting has been published in the The Guardian, The Wall Street Journal, The Financial Times, Salon, CBS Marketwatch, The Los Angeles Times, The Nation, Truthout, Al Jazeera English and Al Jazeera America.

I am willing to pay any reasonable expenses associated with this request, however, as the purpose of the requested disclosure is in full conformity with the statutory requirements for a waiver of fees, I formally request such a waiver. I request a waiver of all costs pursuant to 5 U.S.C. §552(a)(4)(A)(iii) ("Documents shall be furnished without any charge ... if disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester."). Disclosure in this case meets the statutory criteria, and a fee waiver would fulfill Congress's legislative intent in amending FOIA. See *Judicial Watch, Inc. v. Rossotti*, 326 F.3d 1309, 1312 (D.C. Cir. 2003) ("Congress amended FOIA to ensure that it be 'liberally construed in favor of waivers for noncommercial requesters.'"). I incorporate by reference the explanation and attached materials in the above sections which demonstrates why the requested information is in the public interest.

DoD 5400.7-R C6.1.4.1 provides that "documents shall be furnished without charge, or at a charge reduced below fees assessed to the categories of requesters in subsection C6.1.5., below, when the Component determines that waiver or reduction of the fees is in the public interest because furnishing the information is likely to contribute significantly to public understanding of the operations or activities of the Department of Defense and is not primarily in the commercial interest of the requester."

Should my request for a fee waiver be denied, I request that I be categorized as a member of the news media for fee purposes pursuant to DoD 5400.7-R C6.1.5.7. According to 5 U.S.C. § 552(a)(4)(A)(ii), which codified the ruling of *Nat'l Security Archive v. Dep't of Defense*, 880 F.2d 1381 (D.C. Cir. 1989), the term "a representative of the news media" means any person or entity that gathers information of potential interest to a segment of the public, uses its editorial skills to turn the raw materials into a distinct work, and distributes that work to an audience. This is consistent with the definition provided in DoD 5400.7-R C6.1.5.7.1.

As the legislative history of FOIA reveals, "It is critical that the phrase 'representative of the news media' be broadly interpreted if the act is to work as expected. . . . In fact, any person or organization which regularly publishes or disseminates information to the public . . . should qualify for waivers as a 'representative of the news media.'" 132 Cong. Rec. S14298 (daily ed. Sept. 30, 1986) (emphasis in original quotation); and 2) "A request by a reporter or other person affiliated with a newspaper, magazine, television or radio station, or other entity that is in the business of publishing or otherwise disseminating information to the public qualifies under this provision." 132 Cong. Rec. H9463 (Oct. 8, 1986) (emphasis in original quotation)). Therefore, in accordance with the Freedom of Information Act and relevant case law, I, Jason Leopold, should be considered a representative of the news media.

I have the intent and ability to disseminate this significant expansion of public understanding of government operations. The public interest in this significant expansion of public understanding of government operations far outweighs any commercial interest of my own in the requested release. Accordingly, my fee waiver request amply satisfies the rules of DoD 5400.7-R C6.1.4.1. Legislative history and judicial authority emphatically support this determination. For these reasons, and based upon their extensive elaboration above, I request a full waiver of fees be granted. I will appeal any denial of my request for a waiver administratively and to the courts if necessary.

...

Please do not hesitate to contact me if you have any questions concerning this request.

Thank you. I appreciate your time and attention to this matter.

--

JASON LEOPOLD
Investigative Reporter
[REDACTED]
@jasonleopold
jasonleopold.contently.com
PGP

--

JASON LEOPOLD
Investigative Reporter
[REDACTED]
@jasonleopold
jasonleopold.contently.com
PGP

Hart, Rosemary (OLC)

From: Hart, Rosemary (OLC)
Sent: Monday, January 30, 2017 3:41 PM
To: Colborn, Paul P (OLC); Gannon, Curtis E. (OLC); Koffsky, Daniel L (OLC)
Subject: RE: Whitehouse letter to AG re EO

Thanks for the heads up.

From: Colborn, Paul P (OLC)
Sent: Monday, January 30, 2017 2:46 PM
To: Gannon, Curtis E. (OLC) <(b) (6)> Hart, Rosemary (OLC) <(b) (6)>;
Koffsky, Daniel L (OLC) <(b) (6)>
Subject: FW: Whitehouse letter to AG re EO

Faith called me to check in on this. She said OLA may ask for help in responding to Sen. Whitehouse's letter when it is received.

From: Burton, Faith (OLA)
Sent: Monday, January 30, 2017 2:37 PM
To: Colborn, Paul P (OLC) <(b) (6)>
Subject: FW: Whitehouse letter to AG re EO

From: Carr, Peter (OPA)
Sent: Monday, January 30, 2017 2:22 PM

duplicate

duplicate

duplicate

duplicate

Colborn, Paul P (OLC)

From: Colborn, Paul P (OLC)
Sent: Monday, January 30, 2017 4:19 PM
To: Gannon, Curtis E. (OLC); Koffsky, Daniel L (OLC); Hart, Rosemary (OLC)
Subject: Letter to Acting AG Yates from Senate Committee Judiciary Democrats re OLC Form and Legality Reviews
Attachments: Letter to DOJ 1-30-17.pdf
Importance: High

Here's the Whitehouse letter that Faith mentioned in the email I recently forwarded. Turns out it is also signed by other SJC Democrats.

From: Burton, Faith (OLA)
Sent: Monday, January 30, 2017 4:09 PM

duplicate

Senator Sheldon Whitehouse
Subcommittee on Crime & Terrorism
Senate Committee on the Judiciary
202-228-6659

United States Senate

WASHINGTON, DC 20510

January 30, 2017

The Honorable Sally Yates
Acting Attorney General
U.S. Department of Justice
950 Pennsylvania Avenue, NW
Washington, D.C. 20530

Dear Acting Attorney General Yates,

As members of the Senate Judiciary Committee, we write to express concern about the Department of Justice's ambiguous response to inquiries about the Department's role in reviewing the legality of President Trump's recent executive orders and memoranda. On Friday, the press reported that the Department had "no comment" when asked whether its Office of Legal Counsel (OLC) had reviewed any of the executive orders issued by the new Administration to date. In the vast majority of cases, the answer to this question should be a straightforward "yes."

As you are well aware, the Department of Justice's website states that:

"All executive orders and proclamations proposed to be issued by the President are reviewed by the Office of Legal Counsel for form and legality, as are various other matters that require the President's formal approval."

In addition, under Executive Order 11030 on the "preparation, presentation, filing, and publication of Executive orders and proclamations," a president "shall" submit proposed executive orders and proclamations to both the Office of Management and Budget and the Attorney General, who reviews the materials for both "form and legality."

Several of the executive orders and memoranda issued this past week, including those relating to deportation priorities and "sanctuary cities," have already been questioned by local law enforcement officials because of their vagueness, negative impact on public safety, and potential conflict with legal precedent. One of them has already been stayed by a Federal court, after causing damage to families around the country and our standing around the globe.

The American public has the right to know that the White House is following the long-standing and sensible practice that new mandates affecting their lives and communities have been deemed legal by the Justice Department. If, on the other hand, the Administration has chosen to deviate from these well-established norms, the public has the right to know that, too.

Based on our understanding, the President has issued the executive orders and memoranda listed below since January 20th. Given the scope and significance of many of

these, we ask that you provide the following information by no later than February 1, 2017:

- Identify which orders and memoranda listed below, or issues subsequent to the date of this letter, were reviewed by OLC before they were issued and which were not;
- Advise whether, to your knowledge, Executive Order 11030 remains in effect.
- For orders issued through a process that failed to comply with 1 C.F.R. Part 19, advise what legal effect, if any, they have;
- Advise whether the procedure followed with respect to the executive orders and memoranda listed reflects a change of Department policy or practice and describe what the policy or practice of the Department will be going forward;
- Advise whether OLC has advised the Department of Homeland Security or any other federal agency on the meaning of any court order staying the President's January 27, 2017, order related to the entry of certain persons into the United States; and
- Advise whether OLC has advised the Department of Homeland Security or any other federal agency with respect to the legality of failing to comply with court orders related to that executive action.

We need an independent Department of Justice to serve as a bulwark against rash and illegal executive actions and flagrant disrespect of our judicial system. It is our hope, and expectation, that the Department will continue to serve this role.

Executive Orders:

1. Executive Order: Reducing Regulation and Controlling Regulatory Costs (January 30, 2017)
2. Executive Order: Protecting the Nation from Foreign Terrorist Entry into the United States. (January 27, 2017)
3. Executive Order: Border Security and Immigration Enforcement Improvements (January 25, 2017)
4. Executive Order: Enhancing Public Safety in the Interior of the United States (January 25, 2017)
5. Executive Order Expediting Environmental Reviews and Approvals For High Priority Infrastructure Projects (January 24, 2017)
6. Executive Order Minimizing the Economic Burden of the Patient Protection and Affordable Care Act Pending Repeal (January 20, 2017)

Memoranda:

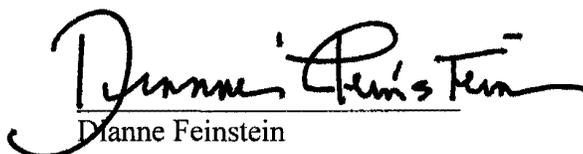
1. Presidential Memorandum Organization of the National Security Council and the Homeland Security Council (January 28, 2017)
2. Presidential Memorandum Plan to Defeat the Islamic State of Iraq and Syria (January 28, 2017)

3. Presidential Memorandum Streamlining Permitting and Reducing Regulatory Burdens for Domestic Manufacturing (January 24, 2017)
4. Presidential Memorandum Regarding Construction of the Dakota Access Pipeline (January 24, 2017)
5. Presidential Memorandum Regarding Construction of the Keystone XL Pipeline (January 24, 2017)
6. Presidential Memorandum Regarding Construction of American Pipelines (January 24, 2017)
7. Presidential Memorandum Regarding the Hiring Freeze (January 24, 2017)
8. Presidential Memorandum Regarding Withdrawal of the United States from the Trans-Pacific Partnership Negotiations and Agreement (January 24, 2017)
9. Presidential Memorandum Regarding the Mexico City Policy (January 23, 2017)
10. Memorandum for the Heads of Executive Departments and Agencies (January 20, 2017)

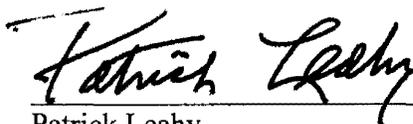
Sincerely,



Sheldon Whitehouse
United States Senator



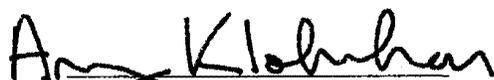
Dianne Feinstein
United States Senator



Patrick Leahy
United States Senator



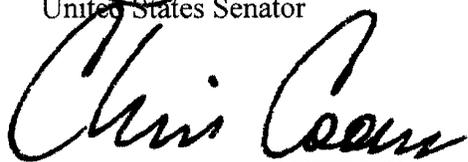
Richard J. Durbin
United States Senator



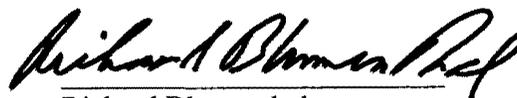
Amy Klobuchar
United States Senator



Al Franken
United States Senator



Christopher A. Coons
United States Senator



Richard Blumenthal
United States Senator



Mazie Hirono
United States Senator

Gannon, Curtis E. (OLC)

From: Gannon, Curtis E. (OLC)
Sent: Monday, January 30, 2017 6:54 PM
To: Koffsky, Daniel L (OLC)
Subject: FW: Breaking News: The acting attorney general, an Obama holdover, has ordered the Justice Department not to defend President Trump's immigration order

From: Hart, Rosemary (OLC)
Sent: Monday, January 30, 2017 6:42 PM
To: Gannon, Curtis E. (OLC) <[REDACTED] (b) (6)>
Subject: FW: Breaking News: The acting attorney general, an Obama holdover, has ordered the Justice Department not to defend President Trump's immigration order

From: NYTimes.com News Alert [mailto:nytdirect@nytimes.com]
Sent: Monday, January 30, 2017 6:38 PM
To: [REDACTED] (b) (6)
Subject: Breaking News: The acting attorney general, an Obama holdover, has ordered the Justice Department not to defend President Trump's immigration order

Add nytdirect@nytimes.com to your address book.

January 30, 2017

NYTimes.com »

Breaking News Alert

BREAKING NEWS

The acting attorney general, an Obama holdover, has ordered the Justice Department not to defend President Trump's immigration order

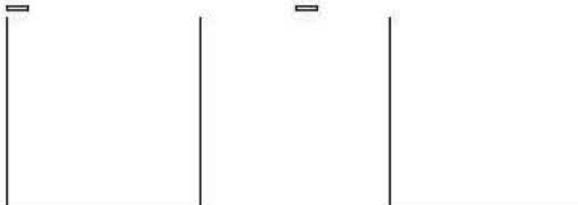
Monday, January 30, 2017 6:32 PM EST

The decision is largely symbolic — President Trump's nominee to be attorney general, Jeffrey Sessions, is likely to be confirmed soon — but it highlights the deep divide at the Justice

Department and elsewhere in the government over Mr. Trump's order.

[Read more »](#)

ADVERTISEMENT



FOLLOW NYTimes FACEBOOK @NYTimes

Get more [NYTimes.com newsletters](#) »

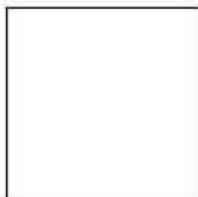
Get unlimited access to NYTimes.com and our NYTimes apps for just \$0.99. [Subscribe](#) »

ABOUT THIS EMAIL

You received this message because you signed up for NYTimes.com's Breaking News Alerts newsletter.

[Unsubscribe](#) | [Manage Subscriptions](#) | [Change Your Email](#) | [Privacy Policy](#) | [Contact](#) | [Advertise](#)

Copyright 2017 The New York Times Company | 620 Eighth Avenue New York, NY 10018

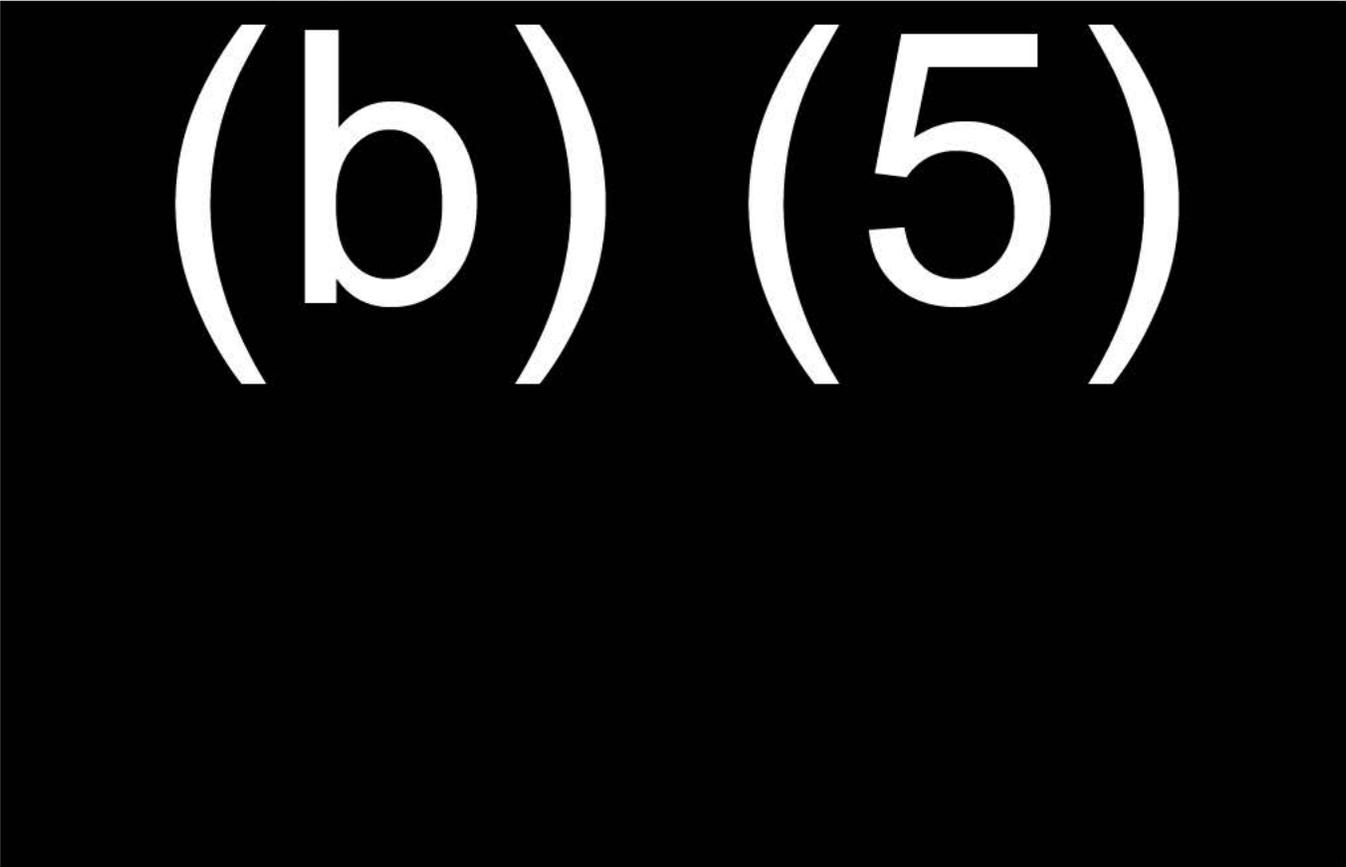


Hart, Rosemary (OLC)

From: Hart, Rosemary (OLC)
Sent: Tuesday, January 31, 2017 9:00 AM
To: Gannon, Curtis E. (OLC)
Subject: Redlines on (b) (5)
Attachments: Copy of (b) (5) (1-14-2017) + OLC (1 14 2017).docx

Curtis: We received this draft EO from Steve on January 13th. We sent this initial redline back on January 14th.

Rosemary



(b) (5)

This e-mail is from Dechert LLP, a law firm, and may contain information that is confidential or privileged. If you are not the intended recipient, do not read, copy or distribute the e-mail or any attachments. Instead, please notify the sender and delete the e-mail and any attachments. Thank you.

Colborn, Paul P (OLC)

From: Colborn, Paul P (OLC)
Sent: Wednesday, February 1, 2017 10:07 AM
To: Hart, Rosemary (OLC)
Subject: FW: Letter to Acting AG Yates from Senate Committee Judiciary Democrats re OLC Form and Legality Reviews
Attachments: Letter to DOJ 1-30-17.pdf
Importance: High

Do you have some time today to talk about how DOJ might respond to this letter? Anyone else you'd like to include in the discussion?

From: Colborn, Paul P (OLC)
Sent: Monday, January 30, 2017 4:19 PM

duplicate

duplicate

United States Senate

WASHINGTON, DC 20510

January 30, 2017

The Honorable Sally Yates
Acting Attorney General
U.S. Department of Justice
950 Pennsylvania Avenue, NW
Washington, D.C. 20530

Dear Acting Attorney General Yates,

As members of the Senate Judiciary Committee, we write to express concern about the Department of Justice's ambiguous response to inquiries about the Department's role in reviewing the legality of President Trump's recent executive orders and memoranda. On Friday, the press reported that the Department had "no comment" when asked whether its Office of Legal Counsel (OLC) had reviewed any of the executive orders issued by the new Administration to date. In the vast majority of cases, the answer to this question should be a straightforward "yes."

As you are well aware, the Department of Justice's website states that:

"All executive orders and proclamations proposed to be issued by the President are reviewed by the Office of Legal Counsel for form and legality, as are various other matters that require the President's formal approval."

In addition, under Executive Order 11030 on the "preparation, presentation, filing, and publication of Executive orders and proclamations," a president "shall" submit proposed executive orders and proclamations to both the Office of Management and Budget and the Attorney General, who reviews the materials for both "form and legality."

Several of the executive orders and memoranda issued this past week, including those relating to deportation priorities and "sanctuary cities," have already been questioned by local law enforcement officials because of their vagueness, negative impact on public safety, and potential conflict with legal precedent. One of them has already been stayed by a Federal court, after causing damage to families around the country and our standing around the globe.

The American public has the right to know that the White House is following the long-standing and sensible practice that new mandates affecting their lives and communities have been deemed legal by the Justice Department. If, on the other hand, the Administration has chosen to deviate from these well-established norms, the public has the right to know that, too.

Based on our understanding, the President has issued the executive orders and memoranda listed below since January 20th. Given the scope and significance of many of

these, we ask that you provide the following information by no later than February 1, 2017:

- Identify which orders and memoranda listed below, or issues subsequent to the date of this letter, were reviewed by OLC before they were issued and which were not;
- Advise whether, to your knowledge, Executive Order 11030 remains in effect.
- For orders issued through a process that failed to comply with 1 C.F.R. Part 19, advise what legal effect, if any, they have;
- Advise whether the procedure followed with respect to the executive orders and memoranda listed reflects a change of Department policy or practice and describe what the policy or practice of the Department will be going forward;
- Advise whether OLC has advised the Department of Homeland Security or any other federal agency on the meaning of any court order staying the President's January 27, 2017, order related to the entry of certain persons into the United States; and
- Advise whether OLC has advised the Department of Homeland Security or any other federal agency with respect to the legality of failing to comply with court orders related to that executive action.

We need an independent Department of Justice to serve as a bulwark against rash and illegal executive actions and flagrant disrespect of our judicial system. It is our hope, and expectation, that the Department will continue to serve this role.

Executive Orders:

1. Executive Order: Reducing Regulation and Controlling Regulatory Costs (January 30, 2017)
2. Executive Order: Protecting the Nation from Foreign Terrorist Entry into the United States. (January 27, 2017)
3. Executive Order: Border Security and Immigration Enforcement Improvements (January 25, 2017)
4. Executive Order: Enhancing Public Safety in the Interior of the United States (January 25, 2017)
5. Executive Order Expediting Environmental Reviews and Approvals For High Priority Infrastructure Projects (January 24, 2017)
6. Executive Order Minimizing the Economic Burden of the Patient Protection and Affordable Care Act Pending Repeal (January 20, 2017)

Memoranda:

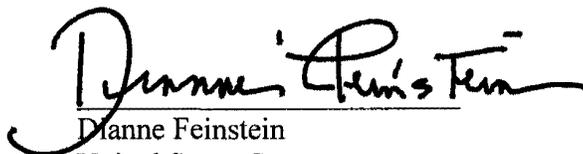
1. Presidential Memorandum Organization of the National Security Council and the Homeland Security Council (January 28, 2017)
2. Presidential Memorandum Plan to Defeat the Islamic State of Iraq and Syria (January 28, 2017)

3. Presidential Memorandum Streamlining Permitting and Reducing Regulatory Burdens for Domestic Manufacturing (January 24, 2017)
4. Presidential Memorandum Regarding Construction of the Dakota Access Pipeline (January 24, 2017)
5. Presidential Memorandum Regarding Construction of the Keystone XL Pipeline (January 24, 2017)
6. Presidential Memorandum Regarding Construction of American Pipelines (January 24, 2017)
7. Presidential Memorandum Regarding the Hiring Freeze (January 24, 2017)
8. Presidential Memorandum Regarding Withdrawal of the United States from the Trans-Pacific Partnership Negotiations and Agreement (January 24, 2017)
9. Presidential Memorandum Regarding the Mexico City Policy (January 23, 2017)
10. Memorandum for the Heads of Executive Departments and Agencies (January 20, 2017)

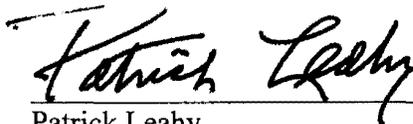
Sincerely,



Sheldon Whitehouse
United States Senator



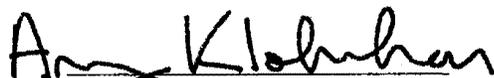
Dianne Feinstein
United States Senator



Patrick Leahy
United States Senator



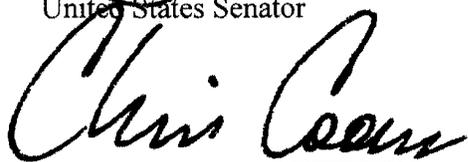
Richard J. Durbin
United States Senator



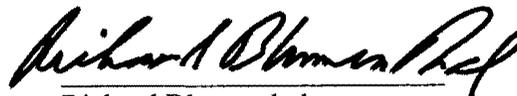
Amy Klobuchar
United States Senator



Al Franken
United States Senator



Christopher A. Coons
United States Senator



Richard Blumenthal
United States Senator



Mazie Hirono
United States Senator

Colborn, Paul P (OLC)

From: Colborn, Paul P (OLC)
Sent: Wednesday, February 01, 2017 11:31 AM
To: Gannon, Curtis E. (OLC)
Subject: RE: OLC involvement with Executive Orders

Thanks, Curtis. I'm going to discuss the incoming letter with Rosemary and then draft a short response letter for your consideration.

From: Gannon, Curtis E. (OLC)
Sent: Wednesday, February 01, 2017 11:27 AM

duplicate

duplicate

duplicate

■ duplicate

duplicate

duplicate

Kaprove, Jared (OLC)

From: Kaprove, Jared (OLC)
Sent: Wednesday, February 1, 2017 12:03 PM
To: Colborn, Paul P (OLC); Gannon, Curtis E. (OLC)
Cc: Hart, Rosemary (OLC); Koffsky, Daniel L (OLC)
Subject: RE: FOIA Requests for Form and Legality Memos

Nothing more from me.

From: Colborn, Paul P (OLC)
Sent: Wednesday, February 1, 2017 11:59
To: Gannon, Curtis E. (OLC) <(b) (6)>
Cc: Kaprove, Jared (OLC) <(b) (6)>; Hart, Rosemary (OLC) <(b) (6)> Koffsky, Daniel L (OLC) <(b) (6)>
Subject: FOIA Requests for Form and Legality Memos

Curtis, following up on the conversation you and I had in my office an hour ago: (b) (5)
[Redacted]

Jared, anything to add?

(b) (6) (OLC)

From: (b) (6) (OLC)
Sent: Thursday, February 02, 2017 9:49 AM
To: Gannon, Curtis E. (OLC)
Subject: Emailing: EO.Foreign Terrorist Entry.pdf
Attachments: EO.Foreign Terrorist Entry.pdf



U.S. Department of Justice

Office of Legal Counsel

Office of the Assistant Attorney General

Washington, D.C. 20530

January 27, 2017

MEMORANDUM

Re: Proposed Executive Order Entitled, "Protecting the Nation from Foreign Terrorist Entry into the United States"

The attached proposed Executive Order was prepared by the Domestic Policy Council and forwarded to this Department for review with respect to form and legality.

The Order would direct a range of executive branch actions designed to ensure that foreign nationals who are approved for admission to the United States do not intend to harm Americans and have no ties to terrorism. Following is a description of several of the actions directed under the Order.

The proposed Order would require the Secretary of Homeland Security, in consultation with the Secretary of State and the Director of National Intelligence, to determine the information needed from other countries to adjudicate visas, admissions, or other benefits under the Immigration and Nationality Act ("INA"), 8 U.S.C. §§ 1101 *et seq.* It would then direct the Secretary of State to request that other countries provide such information within 60 days. The Order would direct the Secretary of Homeland Security to submit to the President a list of the countries that do not provide such information for inclusion in a presidential proclamation generally prohibiting the entry of nationals from those countries. The Order would also suspend the entry of immigrants and non-immigrants from countries referred to in section 217(a)(12) of the INA, subject to case-by-case exceptions.

The Order would also direct the Secretary of State, the Secretary of Homeland Security, the Director of National Intelligence, and the Director of the Federal Bureau of Investigation to develop uniform screening standards and procedures to identify individuals seeking to enter the United States on a fraudulent basis or with the intent to cause harm, or who are at risk of causing harm after admission.

In addition, the Order would direct the Secretary of State to suspend the U.S. Refugee Admissions Program ("USRAP") for 120 days, subject to case-by-case exceptions. During that 120-day period, the Secretary of State, in conjunction with the Secretary of Homeland Security and in consultation with the Director of National Intelligence, would determine what additional procedures can be taken to ensure that refugees who are approved for admission do not pose a threat to the security and welfare of the United States. Pursuant to section 212(f) of the INA, the President would proclaim that the entry of Syrian refugees, and the entry of more than 50,000

refugees in fiscal year 2017, would be detrimental to the interests of the United States and would suspend such admissions.

The proposed Order is approved with respect to form and legality.



Curtis E. Gannon
Acting Assistant Attorney General



U.S. Department of Justice

Office of Legal Counsel

Office of the Assistant Attorney General

Washington, D.C. 20530

January 27, 2017

The President,

The White House.

My dear Mr. President:

I am herewith transmitting a proposed Executive Order entitled, "Protecting the Nation from Foreign Terrorist Entry into the United States." This proposed Order was prepared by the Domestic Policy Council and forwarded to this Department for review of its form and legality.

The proposed Executive Order is approved with respect to form and legality.

Respectfully,

A handwritten signature in black ink that reads "Curtis E. Gannon".

Curtis E. Gannon
Acting Assistant Attorney General

(b) (6) (OLC)

From: (b) (6) (OLC)
Sent: Thursday, February 02, 2017 10:15 AM
To: Gannon, Curtis E. (OLC)
Subject: Emailing: EO.Foreign Terrorist Entry.pdf
Attachments: EO.Foreign Terrorist Entry.pdf



U.S. Department of Justice

Office of Legal Counsel

Office of the Assistant Attorney General

Washington, D.C. 20530

January 27, 2017

MEMORANDUM

Re: Proposed Executive Order Entitled, "Protecting the Nation from Foreign Terrorist Entry into the United States"

The attached proposed Executive Order was prepared by the Domestic Policy Council and forwarded to this Department for review with respect to form and legality.

The Order would direct a range of executive branch actions designed to ensure that foreign nationals who are approved for admission to the United States do not intend to harm Americans and have no ties to terrorism. Following is a description of several of the actions directed under the Order.

The proposed Order would require the Secretary of Homeland Security, in consultation with the Secretary of State and the Director of National Intelligence, to determine the information needed from other countries to adjudicate visas, admissions, or other benefits under the Immigration and Nationality Act ("INA"), 8 U.S.C. §§ 1101 *et seq.* It would then direct the Secretary of State to request that other countries provide such information within 60 days. The Order would direct the Secretary of Homeland Security to submit to the President a list of the countries that do not provide such information for inclusion in a presidential proclamation generally prohibiting the entry of nationals from those countries. The Order would also suspend the entry of immigrants and non-immigrants from countries referred to in section 217(a)(12) of the INA, subject to case-by-case exceptions.

The Order would also direct the Secretary of State, the Secretary of Homeland Security, the Director of National Intelligence, and the Director of the Federal Bureau of Investigation to develop uniform screening standards and procedures to identify individuals seeking to enter the United States on a fraudulent basis or with the intent to cause harm, or who are at risk of causing harm after admission.

In addition, the Order would direct the Secretary of State to suspend the U.S. Refugee Admissions Program ("USRAP") for 120 days, subject to case-by-case exceptions. During that 120-day period, the Secretary of State, in conjunction with the Secretary of Homeland Security and in consultation with the Director of National Intelligence, would determine what additional procedures can be taken to ensure that refugees who are approved for admission do not pose a threat to the security and welfare of the United States. Pursuant to section 212(f) of the INA, the President would proclaim that the entry of Syrian refugees, and the entry of more than 50,000

refugees in fiscal year 2017, would be detrimental to the interests of the United States and would suspend such admissions.

The proposed Order is approved with respect to form and legality.



Curtis E. Gannon
Acting Assistant Attorney General



U.S. Department of Justice

Office of Legal Counsel

Office of the Assistant Attorney General

Washington, D.C. 20530

January 27, 2017

The President,

The White House.

My dear Mr. President:

I am herewith transmitting a proposed Executive Order entitled, "Protecting the Nation from Foreign Terrorist Entry into the United States." This proposed Order was prepared by the Domestic Policy Council and forwarded to this Department for review of its form and legality.

The proposed Executive Order is approved with respect to form and legality.

Respectfully,

A handwritten signature in black ink, which appears to read "Curtis E. Gannon".

Curtis E. Gannon
Acting Assistant Attorney General

Executive Order—Protecting the Nation from Foreign Terrorist Entry into the United States

EXECUTIVE ORDER

PROTECTING THE NATION FROM FOREIGN TERRORIST ENTRY INTO THE UNITED STATES

By the authority vested in me as President by the Constitution and laws of the United States of America, including the Immigration and Nationality Act (INA), 8 U.S.C. 1101 et seq., and section 301 of title 3, United States Code, and to protect the American people from terrorist attacks by foreign nationals admitted to the United States, it is hereby ordered as follows:

Section 1. Purpose. The visa-issuance process plays a crucial role in detecting individuals with terrorist ties and stopping them from entering the United States. Perhaps in no instance was that more apparent than the terrorist attacks of September 11, 2001, when State Department policy prevented consular officers from properly scrutinizing the visa applications of several of the 19 foreign nationals who went on to murder nearly 3,000 Americans. And while the visa-issuance process was reviewed and amended after the September 11 attacks to better detect would-be terrorists from receiving visas, these measures did not stop attacks by foreign nationals who were admitted to the United States.

Numerous foreign-born individuals have been convicted or implicated in terrorism-related crimes since September 11, 2001, including foreign nationals who entered the United States after receiving visitor, student, or employment visas, or who entered through the United States refugee resettlement program. Deteriorating conditions in certain countries due to war, strife, disaster, and civil unrest increase the likelihood that terrorists will use any means possible to enter the United States. The United States must be vigilant during the visa-issuance process to ensure that those approved for admission do not intend to harm Americans and that they have no ties to terrorism.

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

Sec. 2. Policy. It is the policy of the United States to protect its citizens from foreign nationals who intend to 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.

Sec. 3. *Suspension of Issuance of Visas and Other Immigration Benefits to Nationals of Countries of Particular Concern.* (a) The Secretary of Homeland Security, in consultation with the Secretary of State and the Director of National Intelligence, shall immediately conduct a review to determine the information needed from any country to adjudicate any visa, admission, or other benefit under the INA (adjudications) in order to determine that the individual seeking the benefit is who the individual claims to be and is not a security or public-safety threat.

(b) The Secretary of Homeland Security, in consultation with the Secretary of State and the Director of National Intelligence, shall submit to the President a report on the results of the review described in subsection (a) of this section, including the Secretary of Homeland Security's determination of the information needed for adjudications and a list of countries that do not provide adequate information, within 30 days of the date of this order. The Secretary of Homeland Security shall provide a copy of the report to the Secretary of State and the Director of National Intelligence.

(c) To temporarily reduce investigative burdens on relevant agencies during the review period described in subsection (a) of this section, to ensure the proper review and maximum utilization of available resources for the screening of foreign nationals, and to ensure that adequate standards are established to prevent infiltration by foreign terrorists or criminals, pursuant to section 212(f) of the INA, 8 U.S.C. 1182(f), I hereby proclaim that the immigrant and nonimmigrant entry into the United States of aliens from countries referred to in section 217(a)(12) of the INA, 8 U.S.C. 1187(a)(12), would be detrimental to the interests of the United States, and I hereby suspend entry into the United States, as immigrants and nonimmigrants, of such persons for 90 days from the date of this order (excluding those foreign nationals traveling on diplomatic visas, North Atlantic Treaty Organization visas, C-2 visas for travel to the United Nations, and G-1, G-2, G-3, and G-4 visas).

(d) Immediately upon receipt of the report described in subsection (b) of this section regarding the information needed for adjudications, the Secretary of State shall request all foreign governments that do not supply such information to start providing such information regarding their nationals within 60 days of notification.

(e) After the 60-day period described in subsection (d) of this section expires, the Secretary of Homeland Security, in consultation with the Secretary of State, shall submit to the President a list of countries recommended for inclusion on a Presidential proclamation that would prohibit the entry of foreign nationals (excluding those foreign nationals traveling on diplomatic visas, North Atlantic Treaty Organization visas, C-2 visas for travel to the United Nations, and G-1, G-2, G-3, and G-4 visas) from countries that do not provide the information requested pursuant to subsection (d) of this section until compliance occurs.

(f) At any point after submitting the list described in subsection (e) of this section, the Secretary of State or the Secretary of Homeland Security may submit to the President the names of any additional countries recommended for similar treatment.

(g) Notwithstanding a suspension pursuant to subsection (c) of this section or pursuant to a Presidential proclamation described in subsection (e) of this section, the Secretaries of State and 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 for which visas and benefits are otherwise blocked.

(h) The Secretaries of State and Homeland Security shall submit to the President a joint report on the progress in implementing this order within 30 days of the date of this order, a second report within 60 days of the date of this order, a third report within 90 days of the date of this order, and a fourth report within 120 days of the date of this order.

Sec. 4. Implementing Uniform Screening Standards for All Immigration Programs.

(a) The Secretary of State, the Secretary of Homeland Security, the Director of National Intelligence, and the Director of the Federal Bureau of Investigation shall implement a program, as part of the adjudication process for immigration benefits, to identify individuals seeking to enter the United States on a fraudulent basis with the intent to cause harm, or who are at risk of causing harm subsequent to their admission. This program will include the development of a uniform screening standard and procedure, such as in-person interviews; a database of identity documents proffered by applicants to ensure that duplicate documents are not used by multiple applicants; amended application forms that include questions aimed at identifying fraudulent answers and malicious intent; a mechanism to ensure that the applicant is who the applicant claims to be; a process to evaluate the applicant's likelihood of becoming a positively contributing member of society and the applicant's ability to make contributions to the national interest; and a mechanism to assess whether or not the applicant has the intent to commit criminal or terrorist acts after entering the United States.

(b) The Secretary of Homeland Security, in conjunction with the Secretary of State, the Director of National Intelligence, and the Director of the Federal Bureau of Investigation, shall submit to the President an initial report on the progress of this directive within 60 days of the date of this order, a second report within 100 days of the date of this order, and a third report within 200 days of the date of this order.

Sec. 5. Realignment of the U.S. Refugee Admissions Program for Fiscal Year 2017.

(a) The Secretary of State shall suspend the U.S. Refugee Admissions Program (USRAP) for 120 days. During the 120-day period, the Secretary of State, in conjunction with the Secretary of Homeland Security and in consultation with the Director of National Intelligence, shall review the USRAP application and adjudication process to determine what additional procedures should be taken to ensure that those approved for refugee admission do not pose a threat to the security and welfare of the United States, and shall implement such additional procedures. Refugee applicants who are already in the USRAP process may be admitted upon the initiation and completion of these revised procedures.

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

(b) Upon the resumption of USRAP admissions, the Secretary of State, in consultation with the Secretary of Homeland Security, is further directed to make changes, to the extent permitted by law, to prioritize refugee claims made by individuals on the basis of religious-based persecution, provided that the religion of the individual is a minority religion in the individual's country of nationality. Where necessary and appropriate, the Secretaries of State and Homeland Security shall recommend legislation to the President that would assist with such prioritization.

(c) Pursuant to section 212(f) of the INA, 8 U.S.C. 1182(f), I hereby proclaim that the entry of nationals of Syria as refugees is detrimental to the interests of the United States and thus suspend any such entry until such time as I have determined that sufficient changes have been made to the USRAP to ensure that admission of Syrian refugees is consistent with the national interest.

(d) Pursuant to section 212(f) of the INA, 8 U.S.C. 1182(f), I hereby proclaim that the entry of more than 50,000 refugees in fiscal year 2017 would be detrimental to the interests of the United States, and thus suspend any such entry until such time as I determine that additional admissions would be in the national interest.

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

(f) The Secretary of State shall submit to the President an initial report on the progress of the directive in subsection (b) of this section regarding prioritization of claims made by individuals on the basis of religious-based persecution within 100 days of the date of this order and shall submit a second report within 200 days of the date of this order.

(g) It is the policy of the executive branch that, to the extent permitted by law and as practicable, State and local jurisdictions be granted a role in the process of determining the placement or settlement in their jurisdictions of aliens eligible to be admitted to the United States as refugees. To that end, the Secretary of Homeland Security shall examine existing law to determine the extent to which, consistent with applicable law, State and local jurisdictions may have greater involvement in the process of determining the

placement or resettlement of refugees in their jurisdictions, and shall devise a proposal to lawfully promote such involvement.

Sec. 6. *Rescission of Exercise of Authority Relating to the Terrorism Grounds of Inadmissibility.* The Secretaries of State and Homeland Security shall, in consultation with the Attorney General, consider rescinding the exercises of authority in section 212 of the INA, 8 U.S.C. 1182, relating to the terrorism grounds of inadmissibility, as well as any related implementing memoranda.

Sec. 7. *Expedited Completion of the Biometric Entry-Exit Tracking System.* (a) The Secretary of Homeland Security shall expedite the completion and implementation of a biometric entry-exit tracking system for all travelers to the United States, as recommended by the National Commission on Terrorist Attacks Upon the United States.

(b) The Secretary of Homeland Security shall submit to the President periodic reports on the progress of the directive contained in subsection (a) of this section. The initial report shall be submitted within 100 days of the date of this order, a second report shall be submitted within 200 days of the date of this order, and a third report shall be submitted within 365 days of the date of this order. Further, the Secretary shall submit a report every 180 days thereafter until the system is fully deployed and operational.

Sec. 8. *Visa Interview Security.* (a) The Secretary of State shall immediately suspend the Visa Interview Waiver Program and ensure compliance with section 222 of the INA, 8 U.S.C. 1222, which requires that all individuals seeking a nonimmigrant visa undergo an in-person interview, subject to specific statutory exceptions.

(b) To the extent permitted by law and subject to the availability of appropriations, the Secretary of State shall immediately expand the Consular Fellows Program, including by substantially increasing the number of Fellows, lengthening or making permanent the period of service, and making language training at the Foreign Service Institute available to Fellows for assignment to posts outside of their area of core linguistic ability, to ensure that non-immigrant visa-interview wait times are not unduly affected.

Sec. 9. *Visa Validity Reciprocity.* The Secretary of State shall review all nonimmigrant visa reciprocity agreements to ensure that they are, with respect to each visa classification, truly reciprocal insofar as practicable with respect to validity period and fees, as required by sections 221(c) and 281 of the INA, 8 U.S.C. 1201(c) and 1351, and other treatment. If a country does not treat United States nationals seeking nonimmigrant visas in a reciprocal manner, the Secretary of State shall adjust the visa validity period, fee schedule, or other treatment to match the treatment of United States nationals by the foreign country, to the extent practicable.

Sec. 10. *Transparency and Data Collection.* (a) To be more transparent with the American people, and to more effectively implement policies and practices that serve the national interest, the Secretary of Homeland Security, in consultation with the Attorney General, shall, consistent with applicable law and national security, collect and make publicly available within 180 days, and every 180 days thereafter:

(i) information regarding the number of foreign nationals in the United States who have been charged with terrorism-related offenses while in the United States; convicted of terrorism-related offenses while in the United States; or removed from the United States based on terrorism-related activity, affiliation, or material support to a terrorism-related organization, or any other national security reasons since the date of this order or the last reporting period, whichever is later;

(ii) information regarding the number of foreign nationals in the United States who have been radicalized after entry into the United States and engaged in terrorism-related acts, or who have provided material support to terrorism-related organizations in countries that pose a threat to the United States, since the date of this order or the last reporting period, whichever is later; and

(iii) information regarding the number and types of acts of gender-based violence against women, including honor killings, in the United States by foreign nationals, since the date of this order or the last reporting period, whichever is later; and

(iv) any other information relevant to public safety and security as determined by the Secretary of Homeland Security and the Attorney General, including information on the immigration status of foreign nationals charged with major offenses.

(b) The Secretary of State shall, within one year of the date of this order, provide a report on the estimated long-term costs of the USRAP at the Federal, State, and local levels.

Sec. 11. General Provisions. (a) Nothing in this order shall be construed to impair or otherwise affect:

(i) the authority granted by law to an executive department or agency, or the head thereof; or

(ii) the functions of the Director of the Office of Management and Budget relating to budgetary, administrative, or legislative proposals.

(b) This order shall be implemented consistent with applicable law and subject to the availability of appropriations.

(c) This order is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person.

Gannon, Curtis E. (OLC)

From: Gannon, Curtis E. (OLC)
Sent: Thursday, February 2, 2017 5:51 PM
To: (b) (6) (OLC)
Cc: Hart, Rosemary (OLC); Stewart, Scott (OLC)
Subject: FW: OLC form-and-legality released
Attachments: EO.Foreign Terrorist Entry.pdf

FYI: late this afternoon, in response to FOIA requests from media entities (that included requests for expedition), we released the form-and-legality paperwork for the Jan. 27 EO. For context, reporters were also told by OPA the following:

"The Office of Legal Counsel's form-and-legality paperwork includes a short description of some of the provisions of the proposed executive order and memorializes the conclusion that the proposed order is approved with respect to form and legality. As is generally the case under the Office's longstanding practice, however, it does not identify or contain substantive analysis of issues that were evaluated in the course of the review."



U.S. Department of Justice

Office of Legal Counsel

Office of the Assistant Attorney General

Washington, D.C. 20530

January 27, 2017

MEMORANDUM

Re: Proposed Executive Order Entitled, "Protecting the Nation from Foreign Terrorist Entry into the United States"

The attached proposed Executive Order was prepared by the Domestic Policy Council and forwarded to this Department for review with respect to form and legality.

The Order would direct a range of executive branch actions designed to ensure that foreign nationals who are approved for admission to the United States do not intend to harm Americans and have no ties to terrorism. Following is a description of several of the actions directed under the Order.

The proposed Order would require the Secretary of Homeland Security, in consultation with the Secretary of State and the Director of National Intelligence, to determine the information needed from other countries to adjudicate visas, admissions, or other benefits under the Immigration and Nationality Act ("INA"), 8 U.S.C. §§ 1101 *et seq.* It would then direct the Secretary of State to request that other countries provide such information within 60 days. The Order would direct the Secretary of Homeland Security to submit to the President a list of the countries that do not provide such information for inclusion in a presidential proclamation generally prohibiting the entry of nationals from those countries. The Order would also suspend the entry of immigrants and non-immigrants from countries referred to in section 217(a)(12) of the INA, subject to case-by-case exceptions.

The Order would also direct the Secretary of State, the Secretary of Homeland Security, the Director of National Intelligence, and the Director of the Federal Bureau of Investigation to develop uniform screening standards and procedures to identify individuals seeking to enter the United States on a fraudulent basis or with the intent to cause harm, or who are at risk of causing harm after admission.

In addition, the Order would direct the Secretary of State to suspend the U.S. Refugee Admissions Program ("USRAP") for 120 days, subject to case-by-case exceptions. During that 120-day period, the Secretary of State, in conjunction with the Secretary of Homeland Security and in consultation with the Director of National Intelligence, would determine what additional procedures can be taken to ensure that refugees who are approved for admission do not pose a threat to the security and welfare of the United States. Pursuant to section 212(f) of the INA, the President would proclaim that the entry of Syrian refugees, and the entry of more than 50,000

refugees in fiscal year 2017, would be detrimental to the interests of the United States and would suspend such admissions.

The proposed Order is approved with respect to form and legality.



Curtis E. Gannon
Acting Assistant Attorney General



U.S. Department of Justice

Office of Legal Counsel

Office of the Assistant Attorney General

Washington, D.C. 20530

January 27, 2017

The President,

The White House.

My dear Mr. President:

I am herewith transmitting a proposed Executive Order entitled, "Protecting the Nation from Foreign Terrorist Entry into the United States." This proposed Order was prepared by the Domestic Policy Council and forwarded to this Department for review of its form and legality.

The proposed Executive Order is approved with respect to form and legality.

Respectfully,

A handwritten signature in black ink, reading "Curtis E. Gannon". The signature is written in a cursive style with a prominent initial "C".

Curtis E. Gannon
Acting Assistant Attorney General

Executive Order—Protecting the Nation from Foreign Terrorist Entry into the United States

EXECUTIVE ORDER

PROTECTING THE NATION FROM FOREIGN TERRORIST ENTRY INTO THE UNITED STATES

By the authority vested in me as President by the Constitution and laws of the United States of America, including the Immigration and Nationality Act (INA), 8 U.S.C. 1101 et seq., and section 301 of title 3, United States Code, and to protect the American people from terrorist attacks by foreign nationals admitted to the United States, it is hereby ordered as follows:

Section 1. Purpose. The visa-issuance process plays a crucial role in detecting individuals with terrorist ties and stopping them from entering the United States. Perhaps in no instance was that more apparent than the terrorist attacks of September 11, 2001, when State Department policy prevented consular officers from properly scrutinizing the visa applications of several of the 19 foreign nationals who went on to murder nearly 3,000 Americans. And while the visa-issuance process was reviewed and amended after the September 11 attacks to better detect would-be terrorists from receiving visas, these measures did not stop attacks by foreign nationals who were admitted to the United States.

Numerous foreign-born individuals have been convicted or implicated in terrorism-related crimes since September 11, 2001, including foreign nationals who entered the United States after receiving visitor, student, or employment visas, or who entered through the United States refugee resettlement program. Deteriorating conditions in certain countries due to war, strife, disaster, and civil unrest increase the likelihood that terrorists will use any means possible to enter the United States. The United States must be vigilant during the visa-issuance process to ensure that those approved for admission do not intend to harm Americans and that they have no ties to terrorism.

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

Sec. 2. Policy. It is the policy of the United States to protect its citizens from foreign nationals who intend to 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.

Sec. 3. *Suspension of Issuance of Visas and Other Immigration Benefits to Nationals of Countries of Particular Concern.* (a) The Secretary of Homeland Security, in consultation with the Secretary of State and the Director of National Intelligence, shall immediately conduct a review to determine the information needed from any country to adjudicate any visa, admission, or other benefit under the INA (adjudications) in order to determine that the individual seeking the benefit is who the individual claims to be and is not a security or public-safety threat.

(b) The Secretary of Homeland Security, in consultation with the Secretary of State and the Director of National Intelligence, shall submit to the President a report on the results of the review described in subsection (a) of this section, including the Secretary of Homeland Security's determination of the information needed for adjudications and a list of countries that do not provide adequate information, within 30 days of the date of this order. The Secretary of Homeland Security shall provide a copy of the report to the Secretary of State and the Director of National Intelligence.

(c) To temporarily reduce investigative burdens on relevant agencies during the review period described in subsection (a) of this section, to ensure the proper review and maximum utilization of available resources for the screening of foreign nationals, and to ensure that adequate standards are established to prevent infiltration by foreign terrorists or criminals, pursuant to section 212(f) of the INA, 8 U.S.C. 1182(f), I hereby proclaim that the immigrant and nonimmigrant entry into the United States of aliens from countries referred to in section 217(a)(12) of the INA, 8 U.S.C. 1187(a)(12), would be detrimental to the interests of the United States, and I hereby suspend entry into the United States, as immigrants and nonimmigrants, of such persons for 90 days from the date of this order (excluding those foreign nationals traveling on diplomatic visas, North Atlantic Treaty Organization visas, C-2 visas for travel to the United Nations, and G-1, G-2, G-3, and G-4 visas).

(d) Immediately upon receipt of the report described in subsection (b) of this section regarding the information needed for adjudications, the Secretary of State shall request all foreign governments that do not supply such information to start providing such information regarding their nationals within 60 days of notification.

(e) After the 60-day period described in subsection (d) of this section expires, the Secretary of Homeland Security, in consultation with the Secretary of State, shall submit to the President a list of countries recommended for inclusion on a Presidential proclamation that would prohibit the entry of foreign nationals (excluding those foreign nationals traveling on diplomatic visas, North Atlantic Treaty Organization visas, C-2 visas for travel to the United Nations, and G-1, G-2, G-3, and G-4 visas) from countries that do not provide the information requested pursuant to subsection (d) of this section until compliance occurs.

(f) At any point after submitting the list described in subsection (e) of this section, the Secretary of State or the Secretary of Homeland Security may submit to the President the names of any additional countries recommended for similar treatment.

(g) Notwithstanding a suspension pursuant to subsection (c) of this section or pursuant to a Presidential proclamation described in subsection (e) of this section, the Secretaries of State and 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 for which visas and benefits are otherwise blocked.

(h) The Secretaries of State and Homeland Security shall submit to the President a joint report on the progress in implementing this order within 30 days of the date of this order, a second report within 60 days of the date of this order, a third report within 90 days of the date of this order, and a fourth report within 120 days of the date of this order.

Sec. 4. Implementing Uniform Screening Standards for All Immigration Programs.

(a) The Secretary of State, the Secretary of Homeland Security, the Director of National Intelligence, and the Director of the Federal Bureau of Investigation shall implement a program, as part of the adjudication process for immigration benefits, to identify individuals seeking to enter the United States on a fraudulent basis with the intent to cause harm, or who are at risk of causing harm subsequent to their admission. This program will include the development of a uniform screening standard and procedure, such as in-person interviews; a database of identity documents proffered by applicants to ensure that duplicate documents are not used by multiple applicants; amended application forms that include questions aimed at identifying fraudulent answers and malicious intent; a mechanism to ensure that the applicant is who the applicant claims to be; a process to evaluate the applicant's likelihood of becoming a positively contributing member of society and the applicant's ability to make contributions to the national interest; and a mechanism to assess whether or not the applicant has the intent to commit criminal or terrorist acts after entering the United States.

(b) The Secretary of Homeland Security, in conjunction with the Secretary of State, the Director of National Intelligence, and the Director of the Federal Bureau of Investigation, shall submit to the President an initial report on the progress of this directive within 60 days of the date of this order, a second report within 100 days of the date of this order, and a third report within 200 days of the date of this order.

Sec. 5. Realignment of the U.S. Refugee Admissions Program for Fiscal Year 2017.

(a) The Secretary of State shall suspend the U.S. Refugee Admissions Program (USRAP) for 120 days. During the 120-day period, the Secretary of State, in conjunction with the Secretary of Homeland Security and in consultation with the Director of National Intelligence, shall review the USRAP application and adjudication process to determine what additional procedures should be taken to ensure that those approved for refugee admission do not pose a threat to the security and welfare of the United States, and shall implement such additional procedures. Refugee applicants who are already in the USRAP process may be admitted upon the initiation and completion of these revised procedures.

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

(b) Upon the resumption of USRAP admissions, the Secretary of State, in consultation with the Secretary of Homeland Security, is further directed to make changes, to the extent permitted by law, to prioritize refugee claims made by individuals on the basis of religious-based persecution, provided that the religion of the individual is a minority religion in the individual's country of nationality. Where necessary and appropriate, the Secretaries of State and Homeland Security shall recommend legislation to the President that would assist with such prioritization.

(c) Pursuant to section 212(f) of the INA, 8 U.S.C. 1182(f), I hereby proclaim that the entry of nationals of Syria as refugees is detrimental to the interests of the United States and thus suspend any such entry until such time as I have determined that sufficient changes have been made to the USRAP to ensure that admission of Syrian refugees is consistent with the national interest.

(d) Pursuant to section 212(f) of the INA, 8 U.S.C. 1182(f), I hereby proclaim that the entry of more than 50,000 refugees in fiscal year 2017 would be detrimental to the interests of the United States, and thus suspend any such entry until such time as I determine that additional admissions would be in the national interest.

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

(f) The Secretary of State shall submit to the President an initial report on the progress of the directive in subsection (b) of this section regarding prioritization of claims made by individuals on the basis of religious-based persecution within 100 days of the date of this order and shall submit a second report within 200 days of the date of this order.

(g) It is the policy of the executive branch that, to the extent permitted by law and as practicable, State and local jurisdictions be granted a role in the process of determining the placement or settlement in their jurisdictions of aliens eligible to be admitted to the United States as refugees. To that end, the Secretary of Homeland Security shall examine existing law to determine the extent to which, consistent with applicable law, State and local jurisdictions may have greater involvement in the process of determining the

placement or resettlement of refugees in their jurisdictions, and shall devise a proposal to lawfully promote such involvement.

Sec. 6. *Rescission of Exercise of Authority Relating to the Terrorism Grounds of Inadmissibility.* The Secretaries of State and Homeland Security shall, in consultation with the Attorney General, consider rescinding the exercises of authority in section 212 of the INA, 8 U.S.C. 1182, relating to the terrorism grounds of inadmissibility, as well as any related implementing memoranda.

Sec. 7. *Expedited Completion of the Biometric Entry-Exit Tracking System.* (a) The Secretary of Homeland Security shall expedite the completion and implementation of a biometric entry-exit tracking system for all travelers to the United States, as recommended by the National Commission on Terrorist Attacks Upon the United States.

(b) The Secretary of Homeland Security shall submit to the President periodic reports on the progress of the directive contained in subsection (a) of this section. The initial report shall be submitted within 100 days of the date of this order, a second report shall be submitted within 200 days of the date of this order, and a third report shall be submitted within 365 days of the date of this order. Further, the Secretary shall submit a report every 180 days thereafter until the system is fully deployed and operational.

Sec. 8. *Visa Interview Security.* (a) The Secretary of State shall immediately suspend the Visa Interview Waiver Program and ensure compliance with section 222 of the INA, 8 U.S.C. 1222, which requires that all individuals seeking a nonimmigrant visa undergo an in-person interview, subject to specific statutory exceptions.

(b) To the extent permitted by law and subject to the availability of appropriations, the Secretary of State shall immediately expand the Consular Fellows Program, including by substantially increasing the number of Fellows, lengthening or making permanent the period of service, and making language training at the Foreign Service Institute available to Fellows for assignment to posts outside of their area of core linguistic ability, to ensure that non-immigrant visa-interview wait times are not unduly affected.

Sec. 9. *Visa Validity Reciprocity.* The Secretary of State shall review all nonimmigrant visa reciprocity agreements to ensure that they are, with respect to each visa classification, truly reciprocal insofar as practicable with respect to validity period and fees, as required by sections 221(c) and 281 of the INA, 8 U.S.C. 1201(c) and 1351, and other treatment. If a country does not treat United States nationals seeking nonimmigrant visas in a reciprocal manner, the Secretary of State shall adjust the visa validity period, fee schedule, or other treatment to match the treatment of United States nationals by the foreign country, to the extent practicable.

Sec. 10. *Transparency and Data Collection.* (a) To be more transparent with the American people, and to more effectively implement policies and practices that serve the national interest, the Secretary of Homeland Security, in consultation with the Attorney General, shall, consistent with applicable law and national security, collect and make publicly available within 180 days, and every 180 days thereafter:

(i) information regarding the number of foreign nationals in the United States who have been charged with terrorism-related offenses while in the United States; convicted of terrorism-related offenses while in the United States; or removed from the United States based on terrorism-related activity, affiliation, or material support to a terrorism-related organization, or any other national security reasons since the date of this order or the last reporting period, whichever is later;

(ii) information regarding the number of foreign nationals in the United States who have been radicalized after entry into the United States and engaged in terrorism-related acts, or who have provided material support to terrorism-related organizations in countries that pose a threat to the United States, since the date of this order or the last reporting period, whichever is later; and

(iii) information regarding the number and types of acts of gender-based violence against women, including honor killings, in the United States by foreign nationals, since the date of this order or the last reporting period, whichever is later; and

(iv) any other information relevant to public safety and security as determined by the Secretary of Homeland Security and the Attorney General, including information on the immigration status of foreign nationals charged with major offenses.

(b) The Secretary of State shall, within one year of the date of this order, provide a report on the estimated long-term costs of the USRAP at the Federal, State, and local levels.

Sec. 11. General Provisions. (a) Nothing in this order shall be construed to impair or otherwise affect:

(i) the authority granted by law to an executive department or agency, or the head thereof; or

(ii) the functions of the Director of the Office of Management and Budget relating to budgetary, administrative, or legislative proposals.

(b) This order shall be implemented consistent with applicable law and subject to the availability of appropriations.

(c) This order is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person.

Hunt, Jody (CIV)

From: Hunt, Jody (CIV)
Sent: Friday, February 3, 2017 3:24 AM
To: Gannon, Curtis E. (OLC)
Subject: Washington v. Trump
Attachments: 2017.02.02 [050] Defendants' Opposition to TRO.PDF; 2017.02.02 [050-1] Exhibit A - LPR Guidance.pdf
Importance: High

FYI . . . our brief, as filed (attached)

Exhibit A

THE WHITE HOUSE

WASHINGTON

February 1, 2017

MEMORANDUM TO THE ACTING SECRETARY OF STATE, THE ACTING ATTORNEY GENERAL, AND THE SECRETARY OF HOMELAND SECURITY

FROM: Donald F. McGahn II Counsel to the President

SUBJECT: Authoritative Guidance on Executive Order Entitled “Protecting the Nation from Foreign Terrorist Entry into the United States” (Jan. 27, 2017)

Section 3(c) of the Executive Order entitled “Protecting the Nation from Foreign Terrorist Entry into the United States” (Jan. 27, 2017) suspends for 90 days the entry into the United States of certain aliens from countries referred to in section 217(a)(12) of the Immigration and Nationality Act (INA), 8 U.S.C. 1187(a)(12). Section 3(e) of the order directs the Secretary of Homeland Security, in consultation with the Secretary of State, to submit to the President a list of countries recommended for inclusion on a Presidential proclamation that would prohibit the entry of certain foreign nationals from countries that do not provide information needed to adjudicate visas, admissions, or other benefits under the INA.

I understand that there has been reasonable uncertainty about whether those provisions apply to lawful permanent residents of the United States. Accordingly, to remove any confusion, I now clarify that Sections 3(c) and 3(e) do not apply to such individuals. Please immediately convey this interpretive guidance to all individuals responsible for the administration and implementation of the Executive Order.

The Honorable James L. Robart

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

**UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON**

STATE OF WASHINGTON and
STATE OF MINNESOTA,

Plaintiffs,

v.

DONALD TRUMP, in his official capacity as
President of the United States; U.S.
DEPARTMENT OF HOMELAND
SECURITY; JOHN F. KELLY, in his official
capacity as Secretary of the Department of
Homeland Security; REX W. TILLERSON, in
his official capacity as Secretary of State;¹ and
the UNITED STATES OF AMERICA,

Defendants.

No. 2:17-cv-00141 (JLR)

**DEFENDANTS' OPPOSITION TO
PLAINTIFF STATE OF
WASHINGTON'S MOTION FOR
TEMPORARY RESTRAINING
ORDER**

Noted For Consideration:
February 3, 2017

¹ Rex W. Tillerson, Secretary of State, has been substituted for Tom Shannon pursuant to Federal Rule of Civil Procedure 25(d).

TABLE OF CONTENTS

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

INTRODUCTION 1

BACKGROUND 3

 I. The Immigration and Nationality Act 3

 II. Presidential Authority Over Foreign Affairs and National Security 5

 III. The President’s Executive Order of January 27, 2017 6

STANDARD OF REVIEW..... 8

ARGUMENT 9

 I. The State Lacks Standing to Invoke the Court’s Jurisdiction 9

 A. The State Lacks Standing on Its Own Behalf..... 9

 B. The State Cannot Bring a *Parens Patriae* Action Here 12

 II. The State Does Not Demonstrate It Is Likely to Prevail on the Merits..... 14

 A. The Executive Order Is a Valid Exercise of Congress’ Broad Delegation
 of Authority to the President, and His Own Constitutional Powers 14

 B. This Court Cannot, and Need Not, Review the President’s National
 Security Determinations Underlying the Executive Order..... 19

 C. The State’s Facial Constitutional Challenges Fail..... 23

 III. The State Has Made No Showing of Irreparable Harm 26

 IV. The Balance of the Equities and the Public Interest Mandate Against a
 Temporary Restraining Order..... 28

 V. Any Relief Entered Must Be Limited in Scope to the Plaintiff State and to
 the Specific Harm Found 30

CONCLUSION 30

INTRODUCTION

1
2 A provision of the Immigration and Nationality Act (INA) titled “Suspension of entry or
3 imposition of restrictions by President,” 8 U.S.C. § 1182(f), authorizes the President to “suspend
4 the entry of . . . any class of aliens” whenever the President determines their entry “would be
5 detrimental to the interests of the United States[.]” Invoking that authority, on January 27, 2017,
6 the President issued an Executive Order titled “Protecting the Nation from Foreign Terrorist
7 Entry into the United States.” *See* ECF No. 1-7. The Executive Order’s purpose is “to protect
8 the American people from terrorist attacks by foreign nationals admitted to the United States,”
9 *id.* pmb1., and as pertinent here it directs the following actions:

- 10 • a 90-day suspension of entry for individuals from certain countries, during which time
11 the Secretary of Homeland Security and other officials must review whether the United
12 States has adequate information to determine that an individual seeking an immigration
13 benefit “is not a security or public-safety threat,” *see id.* § 3(a), (c);
- 14 • a 120-day suspension of the U.S. Refugee Admissions Program (“USRAP” or “refugee
15 program”), during which time the Secretary of State and other officials must “review the
16 USRAP application and adjudication process to determine what additional procedures
17 should be taken to ensure that those approved for refugee admission do not pose a threat
18 to the security and welfare of the United States, and shall implement such additional
19 procedures,” *see id.* § 5(a); and
- 20 • a suspension of entry of Syrian nationals as refugees, until such time as the President
21 determines “that sufficient changes have been made to the USRAP to ensure that
22 admission of Syrian refugees is consistent with the national interest,” *see id.* § 5(c).

23 The Executive Order also contains waiver provisions permitting exceptions from some of these
24 actions. *See, e.g., id.* §§ 3(g), 5(e).

25 Despite this plain congressional authorization to the President to make determinations
26 regarding national security and the admissibility of aliens, the State of Washington (hereafter,
27 “the State”) requests entry of a temporary restraining order prohibiting enforcement nationwide
28 of the President’s Executive Order. *See* Proposed Order (ECF No. 3-1) at 3 ¶ 2. The State does
so despite the heavy burden it carries to justify such an “extraordinary remedy,” particularly

1 where the remedy would interfere with Congress' determination that it is the President, not a
2 court or a single state, that should make the relevant judgments over national security and foreign
3 affairs. *See Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20, 22, 25-26 (2008).

4 At the outset, the State's motion for a temporary restraining order (ECF No. 3, hereafter
5 "TRO Mot.") overlooks whether the State even has standing to pursue its claims. It is well-
6 established that a state cannot sue the Federal Government on a *parens patriae* theory. And the
7 State's attempts to manufacture standing in its own right *i.e.*, through lost tax revenues, or
8 reputational injury to its universities are not concrete, particularized harms cognizable under
9 Article III. Many of the State's claimed harms, moreover, simply do not exist. Most
10 significantly, the State cannot rely on injuries to lawful permanent residents ("LPRs"), as it seeks
11 to do, in light of guidance from the White House clarifying that the 90-day suspension of entry
12 does not apply to those individuals.¹

15 The State's claims likewise fails on the merits. Congress has "plenary power" over the
16 admission and exclusion of aliens, *Kleindienst v. Mandel*, 408 U.S. 753, 766 (1972), and here
17 expressly has delegated to the President the broad power to suspend entry "of any class of aliens
18 into the United States." 8 U.S.C. § 1182(f). The President's exercise of his Section 1182(f)
19 authority is committed to his discretion by law, and thus judicial review is precluded. Moreover,
20 that delegation, combined with the President's own Article II powers in this realm, placed the
21 President at the apex of his authority when issuing the Executive Order. *Cf. Youngstown Sheet*
22 *& Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952) (Jackson, J., concurring). The Order was well
23 within the President's authority under Congress' delegation, particularly in an area, like
24 immigration, in which the admission to the United States of foreign aliens is subject to plenary
25

26
27
28 ¹ See Memorandum from Donald F. McGahn II, Counsel to the President (Feb. 1, 2017) (filed herewith as Exhibit A) (hereafter "Feb. 1, 2017 Memorandum").

1 control by the political branches. *See Landon v. Plasencia*, 459 U.S. 21, 32 (1982) (“This Court
2 has long held that an alien seeking initial admission to the United States requests a privilege and
3 has no constitutional rights regarding his application, for the power to admit or exclude aliens is
4 a sovereign prerogative.”). In light of these principles, the State’s claims on the merits cannot
5 succeed, for they would force this Court to override the plenary power of the political branches
6 to determine which aliens should be admitted into this Nation’s borders according to those
7 branches’ assessments of the foreign policy and national security interests of the United States.
8

9 Indeed, the State’s likelihood of success faces a particularly insurmountable barrier
10 because the State is bringing a facial challenge to the Executive Order. To prevail on its facial
11 challenge, the State must prove that the Executive Order is unconstitutional in all (or at least
12 most) of its applications. It cannot do so. At a minimum, because there are unquestionably a
13 significant number of lawful applications of the Executive Order *e.g.*, to non-resident
14 unadmitted aliens the State’s facial challenge necessarily must fail.
15

16 Nor can the State sustain its other burdens. The State’s claimed irreparable harm is vague
17 and abstract, and certainly not occurring with the immediacy necessary to warrant a temporary
18 restraining order (*i.e.*, within the coming days or weeks). The balance of the equities and the
19 public interest also decisively favor the United States, given that the State’s requested relief
20 would interfere with the President’s exercise of plenary power delegated by Congress. As these
21 factors, like the merits, weigh squarely against judicial relief, the State’s motion should be denied.
22

23 **BACKGROUND**

24 **I. THE IMMIGRATION AND NATIONALITY ACT**

25 The Immigration and Nationality Act of 1952 (“INA”), 8 U.S.C. §§ 1101 *et seq.*, as
26 amended, provides the legal framework under which Congress has exercised and delegated its
27
28

1 constitutional authority to determine who is permitted to enter the United States, who is permitted
2 to remain in the United States, and for what reasons persons may be admitted to or removed from
3 the United States. Central to the Court's consideration of the issues before it is Section 212(f) of
4 the INA, 8 U.S.C. § 1182(f), which provides broad authority to the President to suspend or
5 impose restrictions on the entry of aliens into the United States:
6

7 **(f) Suspension of entry or imposition of restrictions by President**

8 Whenever the President finds that the entry of any aliens or of any class of aliens
9 into the United States would be detrimental to the interests of the United States,
10 he may by proclamation, and for such period as he shall deem necessary, suspend
11 the entry of all aliens or any class of aliens as immigrants or nonimmigrants, or
12 impose on the entry of aliens any restrictions he may deem to be appropriate. . . .

13 Every President over the last thirty years has invoked this authority to suspend or impose
14 restrictions on the entry of certain aliens or classes of aliens,² in some instances including
15 classifications based on nationality. For example, in 1986, President Reagan (through
16 Presidential Proclamation 5517) invoked section 212(f) to suspend entry of Cuban nationals as
17 immigrants into the United States, subject to certain exceptions. *See Suspension of Cuban*
18 *Immigration*, 1986 WL 796773 (Aug. 22, 1986). In 1996, President Clinton (through
19 Presidential Proclamation 6958) invoked section 212(f) to suspend entry, subject to certain
20 exceptions, of members of the Government of Sudan, officials of that Government, and members
21 of the Sudanese armed forces as immigrants or nonimmigrants into the United States. *See*
22 *Suspension of Entry as Immigrants and Nonimmigrants of Persons Who Are Members or*
23 *Officials of the Sudanese Government or Armed Forces*, 1996 WL 33673860 (Nov. 22, 1996).

24
25 _____
26 ² *See, e.g.*, Presidential Proclamation 5517 (President Reagan); Exec. Order No. 12,324 (President Reagan); Exec.
27 Order No. 12,807 (President George H.W. Bush); Presidential Proclamation 6958 (President Clinton); Presidential
28 Proclamation 8342 (President George W. Bush); Presidential Proclamation 8693 (President Obama); Exec. Order
No. 13,694 (President Obama); Exec. Order No. 13,726 (President Obama). The Department of States maintains a
list of Section 212(f) Presidential Proclamations that currently affect the issuance of United States visas at
https://travel.state.gov/content/visas/en/fees/presidential_proclamations.html.

1 Congress likewise has expressly drawn distinctions based on nationality. For example,
 2 in 2015, Congress amended the INA to exclude certain individuals from a visa waiver program
 3 (*i.e.*, the ability to enter the United States as a nonimmigrant without a visa) on the basis of
 4 nationality.³ See Consolidated Appropriations Act, 2016, Pub. L. No. 114-113, 129 Stat. 2242,
 5 2990 (2015) (codified at 8 U.S.C. § 1187(a)(12)). Congress expressly excluded nationals of Iraq
 6 and Syria from the program, *see* 8 U.S.C. § 1187(a)(12)(A)(ii), and created a process by which
 7 the Secretary of Homeland Security could designate additional “Countries or areas of concern,”
 8 for exclusion of a country’s nationals. *See id.* § 1187(a)(12)(D). As of February 2016, the
 9 exclusion applied to nationals of Iraq and Syria (pursuant to the statute’s plain text), as well as
 10 nationals of Iran, Sudan, Libya, Somalia, and Yemen (pursuant to Executive Branch designations
 11 under the statutory scheme). *See* Dep’t of Homeland Sec., *DHS Announces Further Travel*
 12 *Restrictions for the Visa Waiver Program* (Feb. 18, 2016).⁴ These seven countries excluded
 13 from the visa waiver program are the same seven countries that are covered by Section 3 of the
 14 President’s January 27, 2017 Executive Order. *See* Executive Order § 3(c) (incorporating by
 15 reference “countries referred to in section 217(a)(12) of the INA, 8 U.S.C. 1187(a)(12)”).

19 II. PRESIDENTIAL AUTHORITY OVER FOREIGN AFFAIRS AND NATIONAL SECURITY

20 These delegations of authority to deny entry to certain classes of aliens, based on the
 21 President’s findings regarding the national interest, fall in the heartland of (and are bolstered by)

22
 23
 24 ³ The INA sets out several terms of art. An “alien” is any person who is neither a citizen nor a national of the United
 25 States. *See* 8 U.S.C. § 1101(a)(3). A “nonimmigrant” is an alien admitted to the United States on a temporary
 26 basis, with one of the visa categories established for particular purposes under 8 U.S.C. § 1101(a)(15). On the other
 27 hand, an “immigrant” is an individual who is permitted to stay in the United States on a permanent basis. Within
 28 the category of “immigrant,” an individual may be admitted with the privilege of residing permanently in the United
 States, thereby acquiring LPR status. *See* 8 U.S.C. § 1101(a)(20). LPRs are authorized to work in the United States,
 as are some aliens temporarily admitted pursuant to certain nonimmigrant categories. *See generally* 8 C.F.R. §
 274a.12 (Classes of aliens authorized to accept employment).

⁴ <https://www.dhs.gov/news/2016/02/18/dhs-announces-further-travel-restrictions-visa-waiver-program>

1 the President's broad authority under Article II relating to foreign affairs and national security.
2 See U.S. Const., art. II, § 2 ("Commander in Chief" power, and authority to "make treaties" and
3 "appoint ambassadors"), § 3 (power to "receive ambassadors"). As the Supreme Court
4 repeatedly has held, Article II confers upon the President expansive authority over foreign affairs,
5 national security, and immigration. See *Knauff v. Shaughnessy*, 338 U.S. 537, 542 (1950) ("The
6 exclusion of aliens is a fundamental act of sovereignty . . . inherent in the executive power to
7 control the foreign affairs of the nation."); *United States v. Curtiss-Wright Exp. Corp.*, 299 U.S.
8 304, 320 (1936) (discussing "the very delicate, plenary and exclusive power of the President as
9 the sole organ of the federal government in the field of international relations a power which
10 does not require as a basis for its exercise an act of Congress").
11

12 **III. THE PRESIDENT'S EXECUTIVE ORDER OF JANUARY 27, 2017**

13
14 Invoking these constitutional and statutory authorities, on January 27, 2017, the President
15 issued an Executive Order titled: "Protecting the Nation from Foreign Terrorist Entry into the
16 United States." See ECF No. 1-7, also available at 2017 WL 394075. The Executive Order is
17 intended "to protect the American people from terrorist attacks by foreign nationals admitted to
18 the United States." Executive Order § 2.
19

20 To accomplish this purpose, the Executive Order directs a number of actions. See *id.*
21 §§ 2-11. First, Section 3 of the Executive Order directs the Secretary of Homeland Security (in
22 consultation with other Executive Branch officials) to immediately conduct a review to identify
23 the "information needed from any country . . . to determine that [an] individual seeking [an
24 immigration-related] benefit is who the individual claims to be and is not a security or public-
25 safety threat." *Id.* § 3(a). The Secretary must, within 30 days of the Executive Order, "submit
26 to the President a report on the results of the review," as well as "a list of countries that do not
27
28

1 provide adequate information[.]” *Id.* § 3(b). During the next 60 days, the Executive Order directs
2 a process for requesting necessary information from foreign governments that do not supply such
3 information, and consequences for countries not providing the information. *See id.* § 3(d)-(f).

4 While this review is ongoing, the Executive Order, pursuant to section 212(f) of the INA,
5 suspends entry for 90 days of aliens from the seven countries covered by 8 U.S.C. § 1187(a)(12).
6 *Id.* § 3(c). During this period, exceptions may be made (on a case-by-case basis) by the
7 Secretaries of State or Homeland Security. *Id.* § 3(g). The suspension of entry in Section 3(c)
8 does not apply to lawful permanent residents of the United States. *See* Feb. 1, 2017
9 Memorandum (Exhibit A).
10

11 The Executive Order also suspends the U.S. Refugee Admissions Program for 120 days,
12 while the Secretary of State (in conjunction with other Executive Branch officials) reviews “the
13 USRAP application and adjudication process to determine what additional procedures should be
14 taken to ensure that those approved for refugee admission do not pose a threat to the security and
15 welfare of the United States,” and then “implement[s] such additional procedures.” Executive
16 Order § 5(a). Upon resumption of the refugee program *i.e.*, no sooner than 120 days after
17 issuance of the Executive Order the Order directs the Secretary of State to “make changes, to
18 the extent permitted by law, to prioritize refugee claims made by individuals on the basis of
19 religious-based persecution, provided that the religion of the individual is a minority religion in
20 the individual’s country of nationality.” *Id.* § 5(b). Again, during the 120-day suspension of the
21 refugee program, the Executive Order allows the Secretaries of State and Homeland Security to
22 permit entry of individual refugees on a case-by-case basis. *Id.* § 5(e).
23
24
25

26 Finally, notwithstanding the general resumption of the refugee program after 120 days,
27 the Executive Order directs, pursuant to Section 212(f), a suspension of entry of nationals of
28

1 Syria as refugees based upon the President’s finding that such entry “is detrimental to the interests
2 of the United States.” *Id.* § 5(c). Such suspension will continue until such time as the President
3 determines “that sufficient changes have been made to the USRAP to ensure that admission of
4 Syrian refugees is consistent with the national interest.” *Id.*

6 STANDARD OF REVIEW

7 A temporary restraining order is “an extraordinary and drastic remedy[.]” *Munaf v.*
8 *Geran*, 553 U.S. 674, 689 (2008). A party seeking such relief “must establish that [it] is likely
9 to succeed on the merits, that [it] is likely to suffer irreparable harm in the absence of preliminary
10 relief, that the balance of equities tips in [its] favor, and that [a temporary restraining order] is in
11 the public interest.” *Winter v. NRDC*, 555 U.S. 7, 20 (2008). Further, injunctive relief that would
12 “deeply intrude[] into the core concerns of the executive branch” such as foreign affairs and
13 national security may be awarded only where the plaintiff “make[s] an extraordinarily strong
14 showing” as to each element. *Adams v. Vance*, 570 F.2d 950, 954-55 (D.C. Cir. 1978); *see*
15 *Winter*, 555 U.S. at 32-33.

17 The State raises only facial challenges to the Executive Order, which are “the most
18 difficult challenge[s] to mount successfully.” *United States v. Salerno*, 481 U.S. 739, 745 (1987).
19 To demonstrate that it is likely to prevail on the merits, the State must show more than that the
20 Executive Order “might operate unconstitutionally under some conceivable set of
21 circumstances.” *Id.* Instead, the State bears the “heavy burden” of “establish[ing] that no set of
22 circumstances exist under which the [Executive Order] would be valid.” *Id.*; *see also Puente*
23 *Arizona v. Arpaio*, 821 F.3d 1098, 1104 (9th Cir. 2016).

ARGUMENT

I. THE STATE LACKS STANDING TO INVOKE THE COURT’S JURISDICTION

The State of Washington pursues two theories of standing. First, it purports to sue on its own behalf, alleging various injuries to its “proprietary interests.” Pl.’s Supp. Br. at 2-3 (ECF No. 17). Second, it seeks to bring a *parens patriae* action on behalf of its residents. *Id.* at 3-5. Neither theory satisfies the State’s burden to demonstrate standing.

A. The State Lacks Standing on Its Own Behalf

In some circumstances, a state may have standing to challenge federal action that threatens its own distinct interests. As with any other party, however, the harm to the state’s interests must be “an invasion of a legally protected interest” that is “concrete and particularized” and “actual or imminent, not ‘conjectural’ or ‘hypothetical.’” *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560-61 (1992). A state suffers a cognizable injury when, for example, its physical territory such as its “coastal land” is harmed. *See Massachusetts v. EPA*, 549 U.S. 497, 522-23 (2007). A state likewise may challenge a measure commanding the state itself to act, *see New York v. United States*, 505 U.S. 144 (1992) (standing to challenge federal law requiring State to take title to nuclear waste or enact federally-approved regulations), or that prohibits it from acting, *see Oregon v. Mitchell*, 400 U.S. 112 (1970) (standing to challenge federal law barring literacy-test or durational-residency requirements in elections and requiring State to enfranchise 18-year-olds).

The State’s allegations of harm here are insufficient to establish Article III standing. Most fundamentally, the State’s allegations of standing rely on downstream, incidental effects stemming from the Federal Government’s regulation of immigration as to third-party aliens. The State has no legally cognizable interest in ensuring that the Federal Government issue any

1 particular alien any particular visa or admit any particular alien into the United States. The
2 State's conception of standing misconceives the Nation's constitutional structure: under our
3 federal system of separate sovereigns, a State has no legally protected interest in avoiding indirect
4 and incidental consequences (allegedly) flowing from the United States' regulation of
5 individuals' conduct pursuant to the powers vested in the Federal Government by the
6 Constitution. And it would be especially inconsistent with the constitutional structure to allow
7 such claims to proceed when they involve immigration, which is a subject uniquely committed
8 to the Federal Government, and in which the State has no role. *See Arizona v. United States*, 132
9 S. Ct. 2492, 2502 (2012) ("The federal power to determine immigration policy is well settled.").
10 Thus, the State's incidental, indirect injuries from federal immigration policies simply cannot
11 establish standing here.
12

13
14 Even so, the State's alleged harms are neither concrete nor particularized. The State first
15 asserts that it will "lose . . . tax revenue" from tourists who, absent the Executive Order, would
16 visit the State and purchase goods and services there. Pl.'s Supp. Br. at 2; Decl. of Kathy Oline,
17 ECF No. 17-1. But allegations of a reduction in a State's tax revenues (particularly where, as
18 here, there is no "direct link between the state's status as a collector and recipient of revenues
19 and the . . . action being challenged") is a "generalized grievance about the conduct of
20 government," not the sort of particularized injury necessary to establish standing. *Pennsylvania*
21 *v. Kleppe*, 533 F.2d 668, 672 (D.C. Cir. 1976) (rejecting similar allegations by analogy to
22 taxpayer standing cases); *see Florida v. Mellon*, 273 U.S. 12, 17-18 (1927) (rejecting standing
23 despite Florida's allegation that challenged federal law would induce citizens to remove property
24 from the state thereby diminishing the state's tax revenues); *Iowa ex rel. Miller v. Block*, 771
25 F.2d 347, 353 (8th Cir. 1985) (concluding state lacked standing despite claim that challenged
26
27
28

1 action would “forc[e] unemployment up and state tax revenues down”). Were the Court to find
 2 standing based on incidental impacts to the State’s treasury without any direct link to the action
 3 challenged, virtually any change in federal policy could prompt an Article III dispute, which is
 4 an approach to standing the Supreme Court decisively has rejected. *See DaimlerChrysler Corp.*
 5 *v. Cuno*, 547 U.S. 332, 341 (2006); *Kleppe*, 533 F.2d at 672.⁵
 6

7 The State next claims that the “mission” of various state universities and “their
 8 attractiveness to international students” may be “damage[d]” because some students and faculty
 9 members may be prevented from attending the universities or from travelling abroad for research.
 10 Pl.’s Supp. Br. at 3. This argument fails for two reasons. First, most (if not all) of the students
 11 and faculty members the State identifies are not actually prohibited from entering the United
 12 States, and others’ alleged difficulties are hypothetical or speculative.⁶ That is particularly true
 13 given the waiver authority granted to the Secretaries of Homeland Security and State under the
 14 Executive Order when entry of an alien would be in the national interest. *See* Executive Order
 15 §§ 3(g), 5(e). And second, even if the State could piggyback on these individuals to establish an
 16 injury to the State itself, the State’s assertions of injury are too abstract. *See Whitmore v.*
 17 *Arkansas*, 495 U.S. 149, 155 (1990). Vague allegations about the universities’ reputations and
 18 ability to attract students are not sufficiently concrete to show standing. The State’s reliance on
 19 *Parks Sch. of Bus., Inc. v. Symington*, 51 F.3d 1480 (9th Cir. 1995), *see* Pl.’s Supp. Br. at 3 n.3,
 20 is inapposite. The school’s injury in that case was that it had been terminated from the
 21
 22
 23

24 ⁵ *City of Sausalito v. O’Neill*, 386 F.3d 1186 (9th Cir. 2004), *see* Pl.’s Supp. Br. at 2, is not to the contrary. In that
 25 case, there was a direct link between the challenged construction project and the alleged injury to the adjacent City’s
 natural resources, aesthetic, and economy. *See O’Neill*, 386 F.3d at 1199.

26 ⁶ *See, e.g.*, Second Riedinger Decl. ¶¶ 3 7, ECF No. 17 2 (allegations about lawful permanent residents, who are
 27 not impacted by the Executive Order); Boesenberg Decl. ¶ 6, ECF No. 17 3 (same); Second Riedinger Decl. ¶ 8
 28 (asserting that certain countries may “ban . . . U.S. travelers” in response to the Executive Order); Second Chaudhry
 Decl. ¶ 8, ECF No. 17 4 (alleging one faculty member may not be able to return to the university at a future date).

1 defendant's loan guarantee program, *id.* at 1483, not that its reputation or attractiveness to
2 students had been incidentally diminished by some action that did not directly affect the school.

3 Additionally, the State asserts that it "expects" the Executive Order will have effects on
4 its agency recruitment efforts and its child welfare system. Pl.'s Supp. Br. at 3 n.4. But the State
5 concedes that it cannot identify any State agency employees that are currently affected by the
6 Executive Order, *see* Schumacher Decl. ¶ 7, ECF No. 17-5, nor any specific and actual impact
7 on its child welfare system, *see* Strus Decl., ECF No. 17-6. Speculation about possible future
8 events does not constitute an injury in fact. *Whitmore*, 495 U.S. at 158.

9
10 Finally, the State cites no case recognizing the standing of a state government to bring an
11 Establishment Clause challenge, and it is not clear how a state can suffer "spiritual or
12 psychological harm" or have "religious beliefs" that can be "stigmatized." *Catholic League for*
13 *Religious & Civil Rights v. City & Cty. of San Francisco*, 624 F.3d 1043, 1051-52 (9th Cir. 2010).

14
15 **B. The State Cannot Bring a *Parens Patriae* Action Here**

16 The State cannot convert its political dispute with the Federal Government into a legal
17 claim through the vehicle of a *parens patriae* suit brought on behalf of its residents. The Supreme
18 Court made clear more than eighty years ago that a state cannot bring a *parens patriae* action
19 against federal defendants. *See Massachusetts v. Mellon*, 262 U.S. at 485-86. In dismissing an
20 action brought by Massachusetts to exempt its citizens from a federal statute designed to "protect
21 the health of mothers and infants," the Court explained that the citizens of a state "are also citizens
22 of the United States," and therefore "[i]t cannot be conceded that a state, as *parens patriae*, may
23 institute judicial proceedings to protect citizens of the United States from the operation of the
24 statutes thereof." *Id.* at 479, 485. "[I]t is no part of [a state's] duty or power to enforce [its
25
26
27
28

1 citizens’] rights in respect of their relations with the federal government;” “it is the United States,
2 and not the state, which represents [its citizens] as *parens patriae*.” *Id.* at 485-86.⁷

3 Contrary to the State’s assertion, the “special solicitude” for states referred to in
4 *Massachusetts v. EPA*, 549 U.S. 497, 520 (2007), did not “eradicate[.]” the bar on *parens patriae*
5 actions against the Federal Government, Pl.’s Supp. Br. at 4 n.5. Indeed, *Massachusetts*
6 recognized that *Mellon* “prohibits” allowing a state “to protect her citizens from the operation
7 of federal statutes.” *Massachusetts*, 549 U.S. at 520 n.17; *see also Del. Dep’t of Nat. Res. &*
8 *Env’tl. Control v. FERC*, 558 F.3d 575, 579 n.6 (D.C. Cir. 2009) (*Massachusetts* “does not
9 eliminate the state [plaintiff’s] obligation to establish a concrete injury, as Justice Stevens’
10 opinion amply indicates”). The special solicitude afforded in *Massachusetts* was based on the
11 “unique circumstances” of that case, *Ctr. for Biological Diversity v. U.S. Dep’t of Interior*, 563
12 F.3d 466, 476 (D.C. Cir. 2009), wherein Massachusetts sought to assert its own rights to ensure
13 the protection of the land and air within its “sovereign territory,” which was protected by a special
14 “procedural right.” 549 U.S. at 519-20; *see id.* at 522-23 (explaining that Massachusetts “owns
15 a substantial portion of the state’s coastal property” that was harmed by EPA’s inaction). Here,
16 the State’s interest in protecting its territorial sovereignty is not at issue, and the State has
17 identified no other injury to any legally protected rights. Moreover, Congress has not created
18 any protection for states against the incidental impacts asserted by the State here.⁸ Because a
19
20
21
22

23 ⁷ The Supreme Court has repeatedly applied this principle since *Mellon* to dismiss actions brought by a state as
24 *parens patriae* against federal defendants. *See Florida*, 273 U.S. at 18 (relying on *Mellon* to dismiss Florida’s
25 challenge to a federal inheritance tax based on alleged injury to its citizens); *South Carolina v. Katzenbach*, 383 U.S.
26 301, 324 (1966) (concluding South Carolina lacked standing as *parens patriae* to invoke the Due Process Clause or
the Bill of Attainder Clause against the Federal Government); *see also Snapp*, 458 U.S. at 610 n.16 (“A State does
not have standing as *parens patriae* to bring an action against the Federal Government.”).

27 ⁸ The generic cause of action under the Administrative Procedure Act, 5 U.S.C. § 702, is no substitute for the
28 necessary conditions for standing in *Massachusetts*. *See* Pl.’s Supp. Br. at 4 n.5. It would have made little sense for
the Supreme Court to attach “critical importance” to Congress’s creation of a particular procedural right,
Massachusetts, 549 U.S. at 516, if the APA already made that right available generally. The State’s reliance on the

1 state cannot bring a *parens patriae* suit against federal defendants, the State lacks standing and
2 thus the Court should deny the State’s motion for lack of jurisdiction.

3 **II. THE STATE DOES NOT DEMONSTRATE IT IS LIKELY TO PREVAIL ON THE MERITS**

4 The State falls far short of carrying its “heavy burden” to demonstrate that it is likely to
5 prevail on the merits of its facial challenge by “establish[ing] that no set of circumstances exist
6 under which the [Executive Order] would be valid.” *Salerno*, 481 U.S. at 745. To the contrary,
7 the Executive Order fits within the express delegation of authority in Section 212(f). The State’s
8 constitutional and statutory claims additionally fail pursuant to their individual elements.

9
10 **A. The Executive Order Is a Valid Exercise of Congress’ Broad Delegation of**
11 **Authority to the President, and His Own Constitutional Powers**

12 The Executive Order was issued pursuant to Congress’ broad delegation of authority to
13 the President to “suspend the entry of all aliens or any class of aliens as immigrants or
14 nonimmigrants, or impose on the entry of aliens any restrictions he may deem to be appropriate.”
15 8 U.S.C. § 1182(f). The express delegation from Congress, coupled with the President’s own
16 Article II powers over foreign affairs and national security, mean that the President’s “authority
17 is at its maximum, for it includes all that he possesses in his own right plus all that Congress can
18 delegate.”” *Zivotofsky ex rel. Zivotofsky v. Kerry*, 135 S. Ct. 2076, 2083-84 (2015) (quoting
19 *Youngstown*, 343 U.S. at 635 (Jackson, J., concurring)).

20
21
22 Indeed, in the immigration context specifically, “[t]he Supreme Court has ‘long
23 recognized the power to expel or exclude aliens as a fundamental sovereign attribute exercised
24 by the Government’s political departments largely immune from judicial control.’” *Cardenas v.*
25 *United States*, 826 F.3d 1164, 1169 (9th Cir. 2016) (quoting *Fiallo v. Bell*, 430 U.S. 787, 792

26
27
28 _____
Religious Freedom Restoration Act, 42 U.S.C. § 2000bb 1, also is unavailing, as that statute only provides a cause
of action for persons that exercise religion.

1 (1977)). “Congress has ‘plenary power to make rules for the admission of aliens and to exclude
 2 those who possess those characteristics which Congress has forbidden.’” *Cardenas*, 826 F.3d at
 3 1169 (quoting *Kleindienst v. Mandel*, 408 U.S. 753, 769 (1972)). “When Congress delegates this
 4 plenary power to the Executive, the Executive’s decisions are likewise generally shielded from
 5 administrative or judicial review.” *Cardenas*, 826 F.3d at 1169. And “[i]n the exercise of its
 6 broad power over naturalization and immigration, Congress regularly makes rules that would be
 7 unacceptable if applied to citizens.” *Mathews v. Diaz*, 426 U.S. 67, 79-80 (1976).⁹

9 Here, the President’s Executive Order falls squarely within the express delegation of
 10 power granted him under Section 212(f) of the INA, codified at 8 U.S.C. § 1182(f). “[T]hat
 11 statute specifically grants the President, where it is in the national interest to do so, the extreme
 12 power to prevent the entry of any alien or groups of aliens into this country as well as the lesser
 13 power to grant entry to such person or persons with any restriction on their entry as he may deem
 14 to be appropriate.” *Mow Sun Wong v. Campbell*, 626 F.2d 739, 744 n.9 (9th Cir. 1980); *Haitian*
 15 *Refugee Ctr., Inc. v. Baker*, 953 F.2d 1498, 1507 (11th Cir. 1992) (“8 U.S.C. § 1182(f) clearly
 16 grants the President broad discretionary authority to control the entry of aliens into the United
 17 States.”).¹⁰

18 Presidents, moreover, repeatedly have exercised authority under Section 212(f) to
 19 suspend entry of certain aliens or classes of aliens, and at least twice have drawn distinctions
 20
 21

22
 23
 24 ⁹ As an example of the judicial deference in this area, under the long established doctrine of consular non
 25 reviewability, a non resident alien outside the United States has no right to judicial review of a consular officer’s
 26 denial of a visa. *See Capistrano v. Dep’t of State*, 267 F. App’x 593, 594 (9th Cir. 2008) (“The doctrine of consular
 nonreviewability predates the founding of our Republic” and “prevents [courts] from reviewing decisions reached
 by consular officials regarding the entry of visa applicants.”).

27 ¹⁰ In several other statutory provisions, Congress delegated authority to the Secretaries of Homeland Security and
 28 State to, in their sole discretion, revoke visas or visa petitions. *See* 8 U.S.C. §§ 1155, 1201(i); *see also Bernardo ex*
rel. M & K Eng’g, Inc. v. Johnson, 814 F.3d 481, 484 (1st Cir. 2016) (describing the unreviewability of such
 revocations).

1 based on nationality. *See* Background, Section II.A. For example, in 1986, the President invoked
2 Section 212(f) to suspend entry of Cuban nationals as immigrants into the United States, and in
3 1996, the President did something similar for Sudanese government officials. And with respect
4 to Executive Order 12,807 which, among other things, suspended entry of undocumented aliens
5 by sea the Supreme Court found “[i]t is perfectly clear that 8 U.S.C. § 1182(f) . . . grants the
6 President ample power to establish a naval blockade that would simply deny *illegal Haitian*
7 *migrants* the ability to disembark on our shores.” *Sale v. Haitian Ctrs. Council, Inc.*, 509 U.S.
8 155, 164 n.13, 187 (1993) (emphasis added). There can be little doubt, therefore, that 8 U.S.C.
9 § 1182(f) authorizes the President to suspend the entry of classes of immigrants on the basis of
10 nationality where, as here, the President has determined that their entry would be “detrimental to
11 the interests of the United States.” And it is thus untenable for the State to contend that, for
12 countries that present a national-security risk to the United States as judged by Congress, the
13 State Department, and DHS the President lacks the authority to pause the entry of aliens from
14 those countries.
15

16
17 Indeed, courts repeatedly have confirmed that “[d]istinctions on the basis of nationality
18 may be drawn in the immigration field by the Congress or the Executive.” *Narenji v. Civiletti*,
19 617 F.2d 745, 747 (D.C. Cir. 1979). “In view of the Supreme Court’s repeated emphasis on the
20 concurrent nature of executive and legislative power in this area and the sweeping congressional
21 delegations of discretionary authority to the Executive under the INA, there is little question that
22 the Executive has the power to draw distinctions among aliens on the basis of nationality.” *Jean*
23 *v. Nelson*, 727 F.2d 957, 978 n.30 (11th Cir. 1984) (en banc), *aff’d*, 472 U.S. 846 (1985).
24 “[C]lassifications on the basis of nationality are frequently unavoidable in immigration matters,”
25
26
27
28

1 including because “the very concept of ‘alien’ is a nationality-based classification.” *Rajah v.*
2 *Mukasey*, 544 F.3d 427, 435 (2d Cir. 2008).

3
4 Despite this wealth of authority, the State asserts that the President’s authority under
5 Section 212(f) is limited by 8 U.S.C. § 1152(a)(1)(A), another provision of the INA stating that,
6 with certain exceptions,¹¹ “no person shall receive any preference or priority or be discriminated
7 against in the issuance of an immigrant visa because of the person’s race, sex, nationality, place
8 of birth, or place of residence.” *See* TRO Mot. at 19-21. The State is wrong. First, as an initial
9 matter, this provision’s reach is limited to only the “issuance of an immigrant visa” meaning
10 that it does not apply to nonimmigrant visas or to refugees (who generally do not enter the United
11 States with a visa), and also expressly does not extend to procedures for processing visa
12 applications. Indeed, § 1152(a)(1)(B) clarifies that subsection (A) is not to be “construed to limit
13 the authority of the Secretary of State to determine the procedures for the processing of immigrant
14 visa applications or the locations where such applications will be processed.” This clarification
15 suggests that the Executive Order, in part or in whole, may not be covered by the restrictions of
16 subsection (A) because the Executive Order governs the procedures for pausing then resuming
17 visa applications. *See, e.g.*, Executive Order §§ 3(a), 5(a). Moreover, this provision does not
18 purport to prohibit preference, priority, or discrimination on the basis of religion, so it would
19 provide no benefit to the State here under one of the State’s theories of the case. *See* TRO Mot.
20 at 10 (“There is little doubt that the Executive Order is prompted by animus to those of the Islamic
21 faith[.]”). By the statute’s plain terms, then, the provision could have only limited application to
22 the State’s claims here.
23
24
25
26

27
28 ¹¹ These exceptions include most family based, employment based, and special immigrant visa categories. 8 U.S.C.
§§ 1101(a)(27), 1151(b)(2)(A)(i), 1152(b), 1153.

1 More fundamentally, however, the State misreads 8 U.S.C. § 1152(a)(1)(A) as
2 constraining the broad delegation of authority to the President in Section 212(f) of the Act. “[I]t
3 is a well established axiom of statutory construction that, whenever possible, a court should
4 interpret two seemingly inconsistent statutes to avoid a potential conflict.” *California ex rel.*
5 *Sacramento Metro. Air Quality Mgmt. Dist. v. United States*, 215 F.3d 1005, 1012 (9th Cir. 2000).
6 Likewise, it is a “well established canon of statutory interpretation . . . that the specific governs
7 the general.” *RadLAX Gateway Hotel v. Amalgamated Bank*, 132 S. Ct. 2065, 2070-71 (2012).
8

9 In light of these principles, Section 212(f) is easily reconciled with § 1152(a)(1)(A): the
10 latter sets forth the general default rule that applies in the absence of action by the President,
11 whereas Section 212(f) governs the specific instance in which the President proclaims that entry
12 of a “class of aliens” would be “detrimental to the interests of the United States.” Here, as the
13 challenged Executive Order involves “detrimental” findings, Section 212(f) controls. That is
14 precisely why (as discussed above) prior Presidents have drawn nationality-based distinctions
15 when exercising their authority under Section 212(f). And it is likewise why the 2015
16 Amendment to the INA, as implemented by the Executive Branch over the past year, has drawn
17 the exact same nationality-based distinctions as the Executive Order. Indeed, under the State’s
18 view, the United States could not suspend entry of nationals of a country with which the United
19 States is at war. The INA plainly does not require that result.
20
21

22 The placement of the anti-discrimination rule within Section 1152 further indicates that
23 the rule is not intended to curb the President’s authority under Section 212(f) to suspend or
24 impose restrictions upon entry. Section 1152 generally establishes a uniform annual numerical
25 limit on immigrant visas for nationals of each foreign country. Had Congress intended to enact
26 a general bar against nationality-based distinctions, it would have enacted such a bar as a general
27
28

1 provision of the INA, rather than as a subpart of a subsection speaking to the implementation of
2 nationality-based numerical limitations for the issuance of immigrant visas.

3 Finally, the State mischaracterizes the Executive Order as “tak[ing] us back to a period
4 in our history when distinctions based on national origin were accepted . . . rather than outlawed.”
5 TRO Mot. at 20. As an initial matter, the State repeatedly characterizes the Executive Order as
6 discriminating on the basis of “national origin.” See TRO Mot. at 1, 6. But the Executive Order
7 does not distinguish on the basis of national origin insofar as that term implicates ethnic heritage;
8 rather, discrimination on the basis of *nationality* implicates whether “a person ow[es] permanent
9 allegiance to a state.” 8 U.S.C. § 1101(a)(21) (defining “national”).
10

11 In any event, in 2015, Congress amended the INA to single out nationals of Iraq, Syria,
12 and other to-be-designated countries for exclusion from the Visa Waiver Program. See
13 Background, Section II.B. It is that same group of countries that is covered by Section 3(c) of
14 the Executive Order, which expressly cross-references 8 U.S.C. § 1187(a)(12). And Section 5(c)
15 of the Executive Order applies to nationals of Syria, one of the countries Congress expressly
16 identified. Accordingly, the President has joined with Congress in selecting the seven countries
17 whose nationals warrant different treatment on the basis of national security and foreign policy
18 concerns.
19

20
21 **B. This Court Cannot, and Need Not, Review the President’s National Security**
22 **Determinations Underlying the Executive Order**

23 The State asks this Court to not only disregard case law, Congress’ express delegation of
24 authority to the President, and the President’s own Article II powers, but indeed, to substitute the
25 Court’s own judgment regarding what is in the national security and foreign policy interests of
26 the United States. See, e.g., TRO Mot. at 8. This Court should soundly reject that invitation, for
27
28

1 as courts repeatedly have recognized, these areas are within the exclusive domain of the political
2 branches of our government.

3 As a statutory matter, Section 212(f), by its plain terms, vests complete discretion in the
4 President to determine whether “the entry of any aliens or of any class of aliens into the United
5 States would be detrimental to the interests of the United States,” for the period “as he shall deem
6 necessary,” and to impose such conditions of entry as “he may deem appropriate.” 8 U.S.C. §
7 1182(f). The statute does not require the President to state any basis for such a finding, nor does
8 it require ratification of such a finding by any other entity. Instead, it reflects Congress’
9 considered judgment that these determinations should be vested exclusively in the President.
10

11 Critically, the State cites no instance where any court has reviewed presidential findings
12 under Section 212(f) regarding what is detrimental to the interests of the United States, nor does
13 the State explain how such an inquiry would be judicially manageable. To the contrary, one
14 court analyzing a presidential exercise of authority under 8 U.S.C. § 1182(f) concluded that
15 “because exercise of this discretion is not limited to circumstances defined in the statute, but
16 rather is geared to Executive ‘find[ings]’ and what is ‘deem[ed]’ necessary or appropriate, the
17 statute provides no discernable standards by which this court can review the challenged actions
18 under the APA.” *Haitian Refugee Ctr., Inc. v. Baker*, 789 F. Supp. 1552, 1575-76 (S.D. Fla.
19 1991); *see also Webster v. Doe*, 486 U.S. 592, 594, 600-01 (1988) (holding that similar statutory
20 language vested the Director of Central Intelligence with complete discretion over employee
21 discharges, and thus judicial review was precluded).
22
23

24 The State here asks the Court to evaluate whether the President’s Executive Order
25 achieves its stated purposes. *See* TRO Mot. at 9 (arguing that the Executive Order is unlawful
26 because “there is no ‘fit’ between the rationales advanced to support the Executive Order and the
27
28

1 means used to further those rationales”). But that would require the Court inappropriately to
2 second-guess the underlying finding that Congress has tasked the President with making, and
3 which lies at the heartland of his constitutional authority regarding foreign affairs, national
4 security, and immigration. *See Mandel*, 408 U.S. at 765 (“[T]he power to exclude aliens is
5 inherent in sovereignty, necessary for maintaining normal international relations and defending
6 the country against foreign encroachments and dangers[.]”); *see also, e.g., Harisiades v.*
7 *Shaughnessy*, 342 U.S. 580, 588-89 (1952) (“[A]ny policy toward aliens is vitally and intricately
8 interwoven with contemporaneous policies in regard to the conduct of foreign relations, the war
9 power, and the maintenance of a republican form of government.”); *Knauff*, 338 U.S. at 542;
10 *Mow Sun Wong*, 626 F.2d at 743. It is thus well-established that courts cannot evaluate the
11 President’s national security and foreign affairs judgments, especially in the immigration context.
12 *See Knauff*, 338 U.S. at 543 (“[I]t is not within the province of any court, unless expressly
13 authorized by law, to review the determination of the political branch of the Government to
14 exclude a given alien.”); *INS v. Aguirre-Aguirre*, 526 U.S. 415, 425 (1999) (“[J]udicial deference
15 to the Executive Branch is especially appropriate in the immigration context where officials
16 ‘exercise especially sensitive political functions that implicate questions of foreign relations.’”);
17 *see also Dep’t of Navy v. Egan*, 484 U.S. 518, 529-30 (1988); *Al-Haramain Islamic Found., Inc.*
18 *v. Bush*, 507 F.3d 1190, 1203 (9th Cir. 2007).

19
20
21
22 It is simply not possible for the Court here to evaluate the President’s Executive Order
23 without passing judgment on the President’s national security and foreign affairs determinations.
24 *See, e.g.,* TRO Mot. at 11 (arguing that the Executive Order is unlawful because there is “no basis
25 to conclude that existing screening procedures are uniquely failing as to individuals from the
26 listed countries or as to refugees”). The Constitution vests the President with the duty of
27
28

1 protecting our Nation’s security, and Congress has specifically empowered the President to
2 suspend the entry of categories of aliens if he finds that their entry would be detrimental to the
3 national interest. There is accordingly no basis for the Judiciary to second-guess the President’s
4 determinations in that regard. *See Al Haramain Islamic Found., Inc. v. Dep’t of Treasury*, 686
5 F.3d 965, 980 (9th Cir. 2012) (stating that the court “owe[s] unique deference to the executive
6 branch’s determination that we face ‘an unusual and extraordinary threat to the national security’
7 of the United States” (quoting an Executive Order)); *Harisiades*, 342 U.S. at 597 (Frankfurter,
8 J., concurring) (noting that immigration policies have sometimes been “departures . . . from the
9 best traditions of this country” and “may be deemed to offend American traditions,” but “the
10 place to resist unwise or cruel legislation touching aliens is the Congress, not this Court”).
11

12
13 Finally, the State also argues that the President’s stated rationale under Section 212(f)
14 was pretextual and, instead, that the Executive Order was “prompted by animus to those of the
15 Islamic faith.” TRO Mot. at 10. But any such inquiry would be directly contrary to the Supreme
16 Court’s decision in *Kleindienst v. Mandel*, 408 US. 753 (1972), which held that “when the
17 Executive exercises” its delegated plenary power over immigration “on the basis of a facially
18 legitimate and bona fide reason, the courts will [not] look behind the exercise of that
19 discretion[.]” *Id.* at 770. Here, the Executive Order undeniably states a facially legitimate and
20 bona fide reason protecting against terrorism which is sufficient to end the matter. *Cf. Kerry*
21 *v. Din*, 135 S. Ct. 2128, 2140 (2015) (Kennedy, J., concurring) (noting that *Mandel*’s “reasoning
22 has particular force in the area of national security”). Accordingly, the State’s references to
23 statements outside the four corners of the Executive Order are not legally pertinent. The State,
24 moreover, creates a constitutional separation-of-powers problem between the Judiciary and the
25 President, and between a state and the Federal Government to the extent that this Court is being
26
27
28

1 urged to allow the State to use Article III judicial process to attempt to divine the President's
 2 purported subjective motives in issuing the Executive Order.¹² The State cites no precedent for
 3 such an inquiry by the Judiciary of the President. *Cf. United States v. O'Brien*, 391 U.S. 367,
 4 383-84 (1968) (holding that an inquiry into the subjective motives of members of Congress is a
 5 "hazardous matter" and that courts "will not strike down an otherwise constitutional statute on
 6 the basis of an alleged illicit legislative motive").

8 C. The State's Facial Constitutional Challenges Fail

9 Aside from its statutory argument under the INA, the State contends that the Executive
 10 Order is facially unconstitutional under the Fifth Amendment's equal protection and procedural
 11 due process doctrines, and under the First Amendment's Establishment Clause. TRO Mot. at 5-
 12 19. These claims fail for reasons in addition to those discussed above.

14 1. An overarching and insurmountable hurdle for the State's claims of facial
 15 unconstitutionality is that the State has the burden to show there is no constitutionally valid
 16 application of the Executive Order. *See Salerno*, 481 U.S. at 745; *United States v. Mujahid*, 799
 17 F.3d 1228, 1233 (9th Cir. 2015). That showing is improbable indeed, impossible because it
 18 is clear that valid applications exist, at an absolute minimum as to unadmitted and nonresident
 19 aliens. *See Mandel*, 408 U.S. at 762 ("It is clear that Mandel personally, as an unadmitted and
 20 nonresident alien, had no constitutional right of entry to this country as a nonimmigrant or
 21 otherwise."); *Plasencia*, 459 U.S. at 32 ("This Court has long held that an alien seeking initial
 22 admission to the United States requests a privilege and has no constitutional rights regarding his
 23 application, for the power to admit or exclude aliens is a sovereign prerogative."); *United States*

26
 27 ¹² In addition, it is well settled that courts have no jurisdiction "to enjoin the President in the performance of his
 28 official duties." *Mississippi v. Johnson*, 71 U.S. 475, 501 (1866). Accordingly, the President cannot be the subject
 of any injunctive order. *Id.*; *see Franklin v. Massachusetts*, 505 U.S. 788, 826 (1992) (Scalia, J., concurring in part
 and concurring in judgment).

1 v. *Verdugo-Urquidez*, 494 U.S. 259, 269 (1990) (“[W]e have rejected the claim that aliens are
 2 entitled to Fifth Amendment rights outside the sovereign territory of the United States.”). The
 3 State does not dispute that the Executive Order is constitutional as applied to this category of
 4 unadmitted and nonresident aliens who have no constitutional right to entry. Whatever claims
 5 may exist in hypothetical individual cases, therefore, are irrelevant because the State must but
 6 cannot demonstrate that all (or even most) applications of the Executive Order are
 7 unconstitutional.¹³

9 The State’s arguments rest heavily on the Executive Order’s purported application to
 10 lawful permanent residents. *See, e.g.*, TRO Mot. at 1 (contending that the Executive Order
 11 “block[s] longtime legal permanent residents from returning to this country”). But as is now
 12 clear, the Executive Order does not apply to such individuals. *See* Feb. 1, 2017 Memorandum
 13 (Exhibit A).

15 2. A further problem with the State’s equal protection and procedural due process claims
 16 is that they both arise under the Fifth Amendment’s Due Process Clause, but the State is ineligible
 17 to assert a Fifth Amendment claim. The Fifth Amendment provides that “[n]o person shall . . .
 18 be deprived of life, liberty, or property, without due process of law.” U.S. Const. amend. V.
 19 “The word ‘person’ in the context of the Due Process Clause of the Fifth Amendment cannot . . .
 20 be expanded to encompass the States of the Union, and to our knowledge this has never been
 21 done by any court.” *Katzenbach*, 383 U.S. at 323-24; *see also Premo v. Martin*, 119 F.3d 764,
 22 771 (9th Cir. 1997) (“Because the State is not a ‘person’ for the purposes of the Fifth Amendment,
 23 the State’s reliance on the Due Process Clause was misplaced.”). “Nor does a State have standing
 24 as the parent of its citizens to invoke these constitutional provisions against the Federal
 25
 26

27
 28 ¹³ With respect to hypothetical individual cases that may arise, the Executive Order contains an overarching
 direction that “[t]his order shall be implemented consistent with applicable law.” Executive Order § 11(b).

1 Government, the ultimate *parens patriae* of every American citizen.” *Katzenbach*, 383 U.S. at
 2 324. This defect is also fatal to the State’s equal protection and due process claims.

3 3. The State’s claim under the Establishment Clause which is limited to Section 5(b)
 4 of the Executive Order is likewise meritless. *See* TRO Mot. at 12. The State argues that
 5 Section 5(b) discriminates based on religion, because it “give[s] preference to Christian refugees
 6 while disadvantaging Muslim refugees.” TRO Mot. at 7. That is wrong. Notably, Section 5(b)
 7 does not take effect for at least 120 days (*i.e.*, “Upon the resumption of USRAP admissions”),
 8 and thus the State cannot yet know how it will be implemented. The State’s Establishment Clause
 9 claim therefore is not ripe. *See Addington v. U.S. Airline Pilots Ass’n*, 606 F.3d 1174, 1179 (9th
 10 Cir. 2010) (“A question is fit for decision when it can be decided without considering ‘contingent
 11 future events that may or may not occur as anticipated, or indeed may not occur at all.’”).¹⁴
 12

13
 14 Even if the claim were ripe, moreover, Section 5(b) is lawful. That Section applies to *all*
 15 USRAP admissions not just admissions for nationals of the seven countries of concern so it
 16 does not exclusively “tilt the scales in favor of Christian refugees at the expense of Muslims.”
 17 TRO Mot. at 12. Moreover, Section 5(b) merely provides an accommodation to minority
 18 religions within each country participating in the refugee program. That accommodation makes
 19 eminent sense, because members of minority religions are more likely to face persecution. Such
 20 accommodations do not violate the Establishment Clause. *Cutter v. Wilkinson*, 544 U.S. 709,
 21 713 (2005) (“[T]here is room for play in the joints between the Free Exercise and Establishment
 22
 23

24
 25 ¹⁴ There is also an interim provision, Section 5(e), which authorizes the Secretaries of State and Homeland Security
 26 to admit refugees on a case by case basis, with one factor (of several) being religious persecution as a minority
 27 religion. The State does not mention this interim provision in its TRO motion, but its proposed order seeks to enjoin
 28 this section “to the extent Section 5(e) purports to prioritize only the refugee claims of certain religious minorities.”
 ECF No. 3-1 at 3, ¶ 1(e). Obviously Section 5(e) does not prioritize *only* claims of religious minorities because that
 is only one of several factors expressly listed, and thus, the State does not appear to be meaningfully challenging
 this provision.

1 Clauses, allowing the government to accommodate religion beyond free exercise requirements,
2 without offense to the Establishment Clause.”). Because Section 5(b) is both lawful and not yet
3 subject to challenge, therefore, the State has failed to justify any relief let alone emergency
4 relief with respect to this provision.

6 **III. THE STATE HAS MADE NO SHOWING OF IRREPARABLE HARM**

7 The State’s motion for a temporary restraining order also should be denied because the
8 State has not “demonstrate[d]” that it will be “immediate[ly]” and “irreparabl[y]” harmed by the
9 Executive Order if this case proceeds in the normal course. *Caribbean Marine Servs. Co. v.*
10 *Baldrige*, 844 F.2d 668, 674 (9th Cir. 1988). The State speculates that its residents might be
11 harmed by the Executive Order, *see* Pl.’s TRO Mot. at 22, but to obtain a temporary restraining
12 order, the State must demonstrate irreparable harm to itself, not merely to “third parties.” *Phany*
13 *Poeng v. United States*, 167 F. Supp. 2d 1136, 1142 (S.D. Cal. 2001); *see, e.g., Adams v. Freedom*
14 *Forge Corp.*, 204 F.3d 475, 487 (3d Cir. 2000) (“[T]he preliminary injunction device should not
15 be exercised unless the moving party shows that it specifically and personally risks irreparable
16 harm.”). Because the State has identified no injury to itself much less a likely, immediate, and
17 irreparable injury it has not met its burden.

18
19
20 Even if the Court could consider purported harms to non-parties, moreover, the State does
21 no more than speculate that amorphous harms may occur at some point in time to unspecified
22 individuals. The State claims that some “workers and students” may be harmed economically or
23 psychologically because they will not be able to travel overseas for work or school, and that
24 businesses’ recruitment efforts may be hampered because they may not be able to hire certain
25 aliens. *See* TRO Mot. at 21. This sort of generalized speculation is a far cry from the concrete
26 evidence of likely immediate and irreparable harm that is necessary to obtain a temporary
27
28

1 restraining order. *See Winter*, 555 U.S. at 22; *Caribbean Marine*, 844 F.2d at 674; *cf. Oregon v.*
2 *Legal Servs. Corp.*, 552 F.3d 965, 971 (9th Cir. 2009) (noting that the Supreme Court has
3 disapproved of considering ““abstract questions of wide public significance”” amounting to
4 ““generalized grievances””).

5
6 The State’s arguments also fail to acknowledge the limited timeframe relevant to
7 consideration of their request for a temporary restraining order. To obtain such relief, the State
8 must show that irreparable harm will occur *in the time prior to a hearing on the preliminary*
9 *injunction motion*. *Cf. Granny Goose Foods, Inc. v. Bhd. of Teamsters & Auto Truck Drivers*,
10 415 U.S. 423, 439 (1974) (“Ex parte temporary restraining orders . . . should be restricted to
11 serving their underlying purpose of preserving the status quo and preventing irreparable harm
12 just so long as is necessary to hold a hearing, and no longer.”). Here, even assuming the State’s
13 harms are both cognizable and irreparable (and they are not), those harms will be suffered over
14 the long-term; there is no showing that harm is imminent within the next days or even weeks.

15
16 Finally, the restrictions on entry in Sections 3(c) and 5(a) of the Executive Order are both
17 subject to exceptions to be applied by the Secretaries of State and Homeland Security on a case-
18 by-case basis. *See* Executive Order §§ 3(g), 5(e). Therefore, none of the purported harms the
19 State identifies will occur unless a particular individual falls within the terms of the Executive
20 Order *and* cannot obtain an exception under these case-by-case provisions. Because of the
21 availability of this case-by-case review, any allegations of harm to third parties are not irreparable
22 at this time. *Cf. Leidseplein Presse, B.V. v. Does*, No. C16-5065 (BHS), 2016 WL 337267, at *1
23 (W.D. Wash. Jan. 28, 2016) (denying temporary restraining order based on lack of irreparable
24 harm, because “Plaintiff has failed to show that other means of preventing the alleged [harm] are
25
26
27
28

1 either unavailable or unavailing” and “Plaintiff has failed to submit evidence describing efforts
2 made to explore other available means of preventing” the alleged harm).

3 **IV. THE BALANCE OF THE EQUITIES AND THE PUBLIC INTEREST MANDATE AGAINST A**
4 **TEMPORARY RESTRAINING ORDER**

5
6 The State has not demonstrated that any harm to it (and there is none) outweighs the harm
7 that a temporary restraining order would cause the Federal Government, or that “an injunction is
8 in the public interest.” *Winter*, 555 U.S. at 20. These two factors merge where, as here, the
9 Federal Government is the opposing party. *Nken v. Holder*, 556 U.S. 418, 435 (2009). Courts
10 have accorded “great weight” to considerations of foreign policy and national security when
11 balancing the interests and equities of the parties. *Nat’l Res. Def. Council, Inc. v. Pena*, 972 F.
12 Supp. 9, 20 (D.D.C. 1997); see *Winter*, 555 U.S. at 24; *Comm. for Nuclear Responsibility, Inc.*
13 *v. Seaborg*, 463 F.2d 796, 798 (D.C. Cir. 1971) (Because of “assertions of potential harm to
14 national security and foreign policy assertions which [the court] obviously can not appraise
15 and given the meager state of the record before us, we are constrained to refuse an injunction.”).
16 Moreover, in assessing the public interest, a court must heed “the judgment of Congress,
17 deliberately expressed in legislation,” and “the balance that Congress has struck.” *United States*
18 *v. Oakland Cannabis Buyers’ Coop.*, 532 U.S. 483, 497 (2001).

19
20
21 These final elements weigh heavily in favor of the Federal Government. The State asks
22 the Court to enjoin an Executive Order that suspends the entry of certain aliens into the United
23 States based on the President’s determination that failing to do so would be detrimental to the
24 interests of the United States, including its national security. The State of Washington disagrees
25 with the President’s determination and believes the Executive Order will harm the interests of
26 residents in that state. The Constitution, however, commits “decision-making in the fields of
27
28

1 foreign policy and national security . . . to the political branches of government,” *Schneider v.*
2 *Kissinger*, 412 F.3d 190, 194 (D.C. Cir. 2005), not to the states. And in 8 U.S.C. § 1182(f),
3 Congress expressly authorized the President to do what he has done here based upon a finding,
4 which the President has made here, that “the entry . . . of any class of aliens into the United States
5 would be detrimental to the interests of the United States.” It undoubtedly would be contrary to
6 the public interest for this Court to ignore Congress’s judgment that the President should make
7 such determinations, to second-guess the President’s determination, or to override the President’s
8 determination based on purported interests of a single state. *See, e.g., Adams*, 570 F.2d at 954
9 (vacating preliminary injunction that directed action by the Secretary of State in foreign affairs,
10 which “deeply intrude[d] into the core concerns of the executive branch”).
11

12
13 Finally, even if the State satisfied the requirements for a temporary restraining order, this
14 Court still would retain its equitable discretion *i.e.*, the discretion to refrain from issuing relief
15 that would interfere in the Executive Branch’s foreign affairs and national security activities. In
16 an analogous situation, the D.C. Circuit held it would be an abuse of discretion for a court to
17 enter equitable relief against one of the President’s foreign affairs policies: “At least where the
18 authority for our interjection into so sensitive a foreign affairs matter as this are statutes no more
19 specifically addressed to such concerns than the Alien Tort Statute and the APA, we think it
20 would be an abuse of our discretion to provide discretionary relief.” *Sanchez-Espinoza v.*
21 *Reagan*, 770 F.2d 202, 208 (D.C. Cir. 1985). Similarly here, the Court should not intrude upon
22 the President’s efforts “to ensure that those approved for admission do not intend to harm
23 Americans and that they have no ties to terrorism.” Executive Order § 1.
24
25
26
27
28

1 **V. ANY RELIEF ENTERED MUST BE LIMITED IN SCOPE TO THE PLAINTIFF STATE AND TO**
2 **THE SPECIFIC HARM FOUND**

3 Even if the Court were to conclude that the State has satisfied the requirements for a
4 temporary restraining order with respect to some or all of its claims, the Court should not enter
5 the “nationwide injunction” the State seeks. TRO Mot. at 23; *see* Pl.’s Proposed TRO, ECF No.
6 3-1, at 3. “[A]n injunction must be narrowly tailored ‘to affect only those persons over which it
7 has power, and to remedy only the specific harms shown by the plaintiffs, rather than’ to enjoin
8 all possible breaches of the law.” *Price v. City of Stockton*, 390 F.3d 1105, 1117 (9th Cir. 2004).
9 Thus, courts routinely deny requests for nationwide injunctive relief. *See Dep’t of Def. v.*
10 *Meinhold*, 510 U.S. 939 (1993) (staying nationwide injunction insofar as it “grants relief to
11 persons other than” named plaintiff); *Skydive Arizona, Inc. v. Quattrocchi*, 673 F.3d 1105 (9th
12 Cir. 2012) (affirming district court’s refusal to grant nationwide relief).

13
14
15 **CONCLUSION**

16 For the reasons set forth above, the Court should deny the State of Washington’s motion
17 for a temporary restraining order.

18
19 DATED: February 2, 2017

Respectfully submitted,

20 CHAD A. READLER
Acting Assistant Attorney General

21 JOSEPH H. HUNT
Director, Federal Programs Branch

22 JOHN R. TYLER
Assistant Director, Federal Programs Branch

23 /s/ Michelle R. Bennett
24 MICHELLE R. BENNETT
ERIC SOSKIN
25 DANIEL SCHWEI
26 ARJUN GARG
27
28

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

Trial Attorneys
U.S. Department of Justice
Civil Division, Federal Programs Branch
20 Massachusetts Avenue, NW
Washington, DC 20530
Tel: (202) 305-8902
Fax: (202) 616-8470
Email: michelle.bennett@usdoj.gov
arjun.garg@usdoj.gov

Attorneys for Defendants

CERTIFICATE OF SERVICE

I hereby certify that on February 2, 2017, I electronically filed the foregoing Opposition to Plaintiff's Motion for Temporary Restraining Order using the Court's CM/ECF system, causing a notice of filing to be served upon all counsel of record.

Dated: February 2, 2017

/s/ Michelle R. Bennett
MICHELLE R. BENNETT

Colborn, Paul P (OLC)

From: Colborn, Paul P (OLC)
Sent: Friday, February 3, 2017 9:49 AM
To: Gannon, Curtis E. (OLC); [REDACTED] (b) (6) (OLC); [REDACTED] (b) (6) (OLC); [REDACTED] (b) (6) (OLC); [REDACTED] (OLC)
Subject: DHS IG Investigation of Immigration Order

FYI from the Washington Post. This IG investigation was requested by two Democratic senators. [REDACTED] (b) (5)
[REDACTED]
[REDACTED]

By [Matt Zapotosky](#) By [Matt Zapotosky](#)
[National Security](#)

February 2 at 12:26 AM [Follow @mattzap](#)

The Department of Homeland Security Office of Inspector General announced late Wednesday that it will conduct a broad review of the implementation of President Trump's controversial refugee ban, looking particularly at whether employees engaged in misconduct or failed to comply with court orders.

The review came in response to requests from Sens. Richard J. Durbin (D-Ill.) and Tammy Duckworth (D-Ill.) and whistleblower complaints, said Arlen M. Morales, a spokeswoman for the inspector general's office said. She said the inspector general will produce a report, likely in three to five months, to Congress and the public.

Spokesmen for the White House and the Department of Homeland Security did not immediately return messages late Wednesday night.

The president's executive order — which temporarily bars refugees and people from seven Muslim-majority countries from entering the United States — was met with nationwide protests and legal challenges soon after it took effect Friday night. Customs and Border Protection officers initially were detaining and deporting valid visa and green-card holders after they arrived at U.S. airports — some even after federal judges ordered the practice to stop.

DHS officials have defended their implementation of the order, and the government said as of late Tuesday night that no one remained in detention. But civil liberties lawyers have said they are still pressing for more thorough compliance with court rulings.

They are pushing, for example, for a list of those who were detained, and they have fielded reports of people being coerced into signing away their documentation. DHS officials have conceded that they made some mistakes in the rapid implementation of the order and said that they would investigate concerns brought to their attention.

Inspector General John Roth's review, [reported by the Intercept earlier Wednesday](#), will not assess whether Trump's executive order is constitutional. That will be a matter left to the courts. Depending on what the review finds, though, it might lay out a narrative counter to previous assertions from the department and the White House.

Trump [wrote on Twitter on Monday](#) that Homeland Security Secretary John Kelly "said that all is going well with very few problems," though he later added there was "nothing nice about searching for terrorists before they can enter our country."

Inspectors general are supposed to operate independently of the president and the agencies they oversee, and they typically are kept on through different administrations. The Trump transition team, though, initially contemplated holding over inspectors general only "on a temporary basis," according to an email from a member of the Trump transition team. The team [later reassured some inspectors general they would not be forced from their posts](#).

Koffsky, Daniel L (OLC)

From: Koffsky, Daniel L (OLC)
Sent: Friday, February 3, 2017 11:58 AM
To: Colborn, Paul P (OLC); Gannon, Curtis E. (OLC)
Cc: Hart, Rosemary (OLC)
Subject: RE: Letter to Acting AG Yates from Senate Committee Judiciary Democrats re OLC Form and Legality Reviews

The draft looks good to me.

From: Colborn, Paul P (OLC)
Sent: Friday, February 03, 2017 11:16 AM
To: Gannon, Curtis E. (OLC) <(b) (6)> Koffsky, Daniel L (OLC) <(b) (6)>
Cc: Hart, Rosemary (OLC) <(b) (6)>
Subject: FW: Letter to Acting AG Yates from Senate Committee Judiciary Democrats re OLC Form and Legality Reviews

What do you think of this draft response? It reflects Rosemary's input. (b) (5)

[REDACTED]

[REDACTED]

Once we agree on a draft, I'd like to send it to Faith Burton for her consideration. After we get her views, we can consider (b) (5).

From: Hart, Rosemary (OLC)
Sent: Wednesday, February 01, 2017 11:41 AM
To: Colborn, Paul P (OLC) <(b) (6)>
Subject: RE: Letter to Acting AG Yates from Senate Committee Judiciary Democrats re OLC Form and Legality Reviews

OK. See you then.

From: Colborn, Paul P (OLC)
Sent: Wednesday, February 01, 2017 11:30 AM
To: Hart, Rosemary (OLC) <(b) (6)>
Subject: RE: Letter to Acting AG Yates from Senate Committee Judiciary Democrats re OLC Form and Legality Reviews

I'll look for you at noon. Our conversation should be brief. I discussed this letter briefly with Curtis this morning when he stopped by to discuss the FOIA requests.

From: Hart, Rosemary (OLC)
Sent: Wednesday, February 01, 2017 11:11 AM
To: Colborn, Paul P (OLC) <(b) (6)>
Subject: RE: Letter to Acting AG Yates from Senate Committee Judiciary Democrats re OLC Form and Legality

Reviews

I have flexibility between 12 and 3:30.

From: Colborn, Paul P (OLC)

Sent: Wednesday, February 01, 2017 10:30 AM

To: Hart, Rosemary (OLC) <[REDACTED] (b) (6)>

Subject: RE: Letter to Acting AG Yates from Senate Committee Judiciary Democrats re OLC Form and Legality Reviews

Maybe as a first step you and I should just bounce around some ideas for a response. I'm free today except for 11 to 11:30. How about you?

From: Hart, Rosemary (OLC)

Sent: Wednesday, February 01, 2017 10:14 AM

To: Colborn, Paul P (OLC) <[REDACTED] (b) (6)>

Subject: RE: Letter to Acting AG Yates from Senate Committee Judiciary Democrats re OLC Form and Legality Reviews

Curtis for sure. And Dan?

From: Colborn, Paul P (OLC)

Sent: Wednesday, February 01, 2017 10:07 AM

To: Hart, Rosemary (OLC) <[REDACTED] (b) (6)>

duplicate

duplicate

Colborn, Paul P (OLC)

From: Colborn, Paul P (OLC)
Sent: Friday, February 3, 2017 1:43 PM
To: Gannon, Curtis E. (OLC); Hart, Rosemary (OLC)
Cc: Koffsky, Daniel L (OLC)
Subject: RE: Letter to Acting AG Yates from Senate Committee Judiciary Democrats re OLC Form and Legality Reviews

I'll run the draft by Faith. (I think the White House can want, but the building can't call.)

From: Gannon, Curtis E. (OLC)
Sent: Friday, February 03, 2017 1:32 PM
To: Hart, Rosemary (OLC) <(b) (6)>; Colborn, Paul P (OLC) <(b) (6)>
Cc: Koffsky, Daniel L (OLC) <(b) (6)>
Subject: RE: Letter to Acting AG Yates from Senate Committee Judiciary Democrats re OLC Form and Legality Reviews

Okay. I recede. I guess the building wants.

From: Hart, Rosemary (OLC)
Sent: Friday, February 3, 2017 1:29 PM
To: Colborn, Paul P (OLC) <(b) (6)>
Cc: Gannon, Curtis E. (OLC) <(b) (6)> Koffsky, Daniel L (OLC) <(b) (6)>
Subject: Re: Letter to Acting AG Yates from Senate Committee Judiciary Democrats re OLC Form and Legality Reviews

(b) (5)

On Feb 3, 2017, at 1:02 PM, Colborn, Paul P (OLC) <(b) (6)> wrote:

Rosemary?

From: Gannon, Curtis E. (OLC)
Sent: Friday, February 03, 2017 1:00 PM
To: Colborn, Paul P (OLC) <(b) (6)>; Koffsky, Daniel L (OLC) <(b) (6)>
Cc: Hart, Rosemary (OLC) <(b) (6)>
Subject: RE: Letter to Acting AG Yates from Senate Committee Judiciary Democrats re OLC Form and Legality Reviews

(b) (5)

(b) (5) 1

From: Colborn, Paul P (OLC)

Sent: Friday, February 3, 2017 11:16 AM

duplicate

duplicate

duplicate