

## ADOPTED AS AMENDED

RESOLUTION

1 RESOLVED, That the American Bar Association urges  
2 that the Executive Branch, while fulfilling its  
3 responsibility to secure the nation's borders, take care that  
4 any Executive Orders regarding border security,  
5 immigration enforcement, and terrorism:

6 A. Respect the bounds of the U.S. Constitution;

7 B. Not use religion or nationality as a basis for  
8 barring an otherwise eligible individual from entry to  
9 the United States;

10 C. Adhere to the United States' international law  
11 obligations, including the 1967 Protocol Relating to  
12 the Status of Refugees of the 1951 Convention  
13 Relating to the Status of Refugees, the International  
14 Covenant on Civil and Political Rights, and  
15 international bilateral agreements and treaties, and to  
16 the principle of non-refoulement;

17 ~~D. Comply with laws and procedures that govern~~  
18 ~~and advance the orderly promulgation of Executive~~  
19 ~~Orders and Executive Branch policies, including~~  
20 ~~Executive Order 11,030, "Preparation, Presentation,~~

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21 ~~Filing, and Publication of Executive Orders and~~  
22 ~~Proclamations,” as amended, and the Federal~~  
23 ~~Register Act, 44 U.S.C. §§ 1501-1511;~~

24 ~~E. Follow established inter-agency consultation~~  
25 ~~processes to determine means and measures by which~~  
26 ~~to address threats to national security;~~

27 F. Facilitate a transparent, accessible, fair, and efficient  
28 system of administering the immigration laws and  
29 policies of the United States, including the  
30 adjudication of visa applications, applications for  
31 immigration benefits, and applications for entry to  
32 the United States; and ensure protection for refugees,  
33 asylum seekers, torture victims, and others deserving  
34 of humanitarian refuge;

35 FURTHER RESOLVED, That the American Bar  
36 Association accordingly urges the President to ~~revoke~~  
37 **withdraw** Executive Order 13,769, “Protecting the Nation  
38 from Foreign Terrorist Entry into the United States,”  
39 dated January 27, 2017; and

40 FURTHER RESOLVED, That so long as Executive  
41 Order 13,769 remains in effect, the American Bar  
42 Association urges the Executive Branch to ensure full,  
43 prompt, and uniform compliance with court orders  
44 addressing Executive Order 13,769.

## REPORT

### **I. INTRODUCTION**

On Friday, January 27, 2017, the President signed Executive Order 13,769, “Protecting the Nation from Foreign Terrorist Entry into the United States” (“EO 13769” or the “Executive Order”).<sup>1</sup> Comprising eleven sections, EO 13769 declares that 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.”<sup>2</sup>

#### **A. Purpose and Immediately Operative Core Provisions of EO 13769**

In furtherance of its stated policy, EO 13769, *inter alia*:

(1) sets forth, as one of its purposes, that:

[i]n 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 . . . [and] cannot, and should not, admit those who do not support the Constitution, or those who would place violent ideologies over American law . . . [or] 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 different religions from their own) or those who would oppress Americans of any race, gender, or sexual orientation;<sup>3</sup>

(2) suspends, with immediate effect, immigrant and non-immigrant entry into the United States for 90 days of nationals of seven Muslim-majority countries,<sup>4</sup> with limited exceptions for certain holders of diplomatic and related visas;<sup>5</sup>

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<sup>1</sup> Exec. Order No. 13,769 of Jan. 27, 2017, Protecting the Nation From Foreign Terrorist Entry Into the United States, 82 Fed. Reg. 8,977 (Feb. 1, 2017), *available at* <https://www.federalregister.gov/documents/2017/02/01/2017-02281/protecting-the-nation-from-foreign-terrorist-entry-into-the-united-states>.

<sup>2</sup> *Id.* § 2.

<sup>3</sup> *Id.* § 1.

<sup>4</sup> As of this writing, these countries consist of Iran, Iraq, Libya, Somalia, Sudan, Syria, and Yemen. *Id.* § 3(c) (incorporating the list of countries “referred to in section 217(a)(12) of the” Immigration and Nationality Act).

<sup>5</sup> *Id.* § 3(c) (excluding from suspension of entry “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.”). EO 13769 authorizes the Secretaries of State and Homeland Security to, “on a case-by-case basis, and when in the national

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- (3) suspends, with immediate effect, the U.S. Refugee Admissions Program (“USRAP”) for 120 days;<sup>6</sup>
- (4) indefinitely suspends, with immediate effect, “the entry [into the United States] of nationals of Syria as refugees . . . until such time as . . . [the President] has determined that sufficient changes have been made to the USRAP to ensure that admission of Syrian refugees is consistent with the national interest;”<sup>7</sup>
- (5) reduces the number of annual refugee admissions from 110,000 to 50,000;<sup>8</sup> and
- (6) directs the Secretary of State, “in consultation with the Secretary of Homeland Security,” 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.”<sup>9</sup>

## **B. Announcement and Implementation of EO 13769**

Notwithstanding its immediate operation and sweeping effects, EO 13769 was announced and signed in public by the President after 4:30 p.m. Eastern time on a Friday, January 27, 2017.<sup>10</sup> In his remarks announcing the Executive Order, the President explained that he was: “establishing new vetting measures to keep radical Islamic terrorists out of the United States of America.”<sup>11</sup>

According to multiple reports, the Executive Order was issued with little consultation or coordination with relevant stakeholders, including the Departments of Homeland Security and

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interest, issue visas or other immigration benefits to nationals of countries for which visas and benefits are otherwise blocked.” *Id.* § 3(g).

<sup>6</sup> *Id.* § 5(a).

<sup>7</sup> *Id.* § 5(c) (“proclaim[ing]” that the entry of nationals of Syria as refugees is detrimental to the interests of the United States.”). Similar to the case of the suspension of immigrant and non-immigrant entry under Section 3(g), EO 13769 authorizes the Secretaries of State and Homeland Security to “jointly determine to admit individuals to the United States as refugees on a case-by-case basis.” *Id.* § 5(e).

<sup>8</sup> *Id.* § 5(d).

<sup>9</sup> *Id.* § 5(b).

<sup>10</sup> *See, e.g.*, Ceremonial Swearing-in of Secretary of Defense James Mattis and Signing of Executive Orders, Jan. 27, 2017, C-SPAN (televised event starting at 4:30 p.m. and ending at 4:44 p.m. Eastern time), at <https://www.c-span.org/video/?422913-1/president-trump-signs-executive-action-calling-extreme-vetting-refugees>.

<sup>11</sup> *Id.* at 8:55 to 9:45 (“I’m establishing new vetting measures to keep radical Islamic terrorists out of the United States of America. We don’t want them here. We want to ensure that we are not admitting into our country the very threats that our soldiers are fighting overseas. We only want to admit those into our country who will support our country, and love, deeply, our people. We will never forget the lessons of 9/11, nor the heroes who lost their lives at the Pentagon. They were the best of us. We will honor them not only with our words, but with our actions. And that’s what we’re doing today.”)

State, the federal agencies principally and immediately responsible for and affected by its enforcement.<sup>12</sup>

Nor, according to reports, was EO 13769 accompanied or timely followed by guidance to the relevant agencies and personnel responsible for its implementation.<sup>13</sup> The lack of prior and timely coordination and guidance resulted in confusion at the nation's ports of entry and at foreign points of departure.<sup>14</sup> On February 1, the Office of Inspector General of the Department of Homeland Security (DHS) announced that it would review that agency's implementation of EO 13769, "in response to congressional request and whistleblower and hotline complaints," and, in addition, "review DHS' adherence to court orders and allegations of individual misconduct on the part of DHS personnel."<sup>15</sup>

### C. Court Orders Enjoining Enforcement of EO 13769: January 28 – February 3

Immediately after EO 13769 was issued, numerous parties filed suit to enjoin its enforcement on constitutional and statutory grounds. On January 28, Judge Ann Donnelly of the U.S. District Court for the Eastern District of New York issued an Emergency Stay of Removal in a nationwide putative class action. She found that two Iraqi nationals, one of whom had been issued a Special Immigrant Visa for his service to the United States military as an interpreter in Iraq, had "a strong likelihood of success of establishing" that their removal and held that the removal of similarly situated parties from the United States would constitute violations of the Due Process and Equal Protection guarantees of the Constitution.<sup>16</sup> Between January 28 and February 3, at

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<sup>12</sup> See, e.g., Evan Perez, Pamela Brown and Kevin Liptak, *Inside the confusion of the Trump executive order and travel ban*, CNN, Jan. 30, 2017, available at <http://www.cnn.com/2017/01/28/politics/donald-trump-travel-ban/> ("The policy team at the White House developed the executive order on refugees and visas, and largely avoided the traditional interagency process that would have allowed the Justice Department and homeland security agencies to provide operational guidance . . . Homeland Security Secretary John Kelly and Department of Homeland Security leadership saw the final details shortly before the order was finalized, government officials said."); Rachel Bade, Jake Sherman, and Josh Dawsey, *Hill staffers secretly worked on Trump's immigration order*, Politico, January 30, 2017, available at <http://www.politico.com/story/2017/01/trump-immigration-congress-order-234392> ("The work of [House Judiciary] committee aides [on the Executive Order] began during the transition period after the election and before Donald Trump was sworn in. The staffers signed nondisclosure agreements, according to two sources familiar with the matter. Trump's transition operation forced its staff to sign these agreements, but it would be unusual to extend that requirement to congressional employees.").

<sup>13</sup> See, e.g., Michael D. Shear and Ron Nixon, *How Trump's Rush to Enact an Immigration Ban Unleashed Global Chaos*, N.Y. Times, Jan. 29, 2017, available at <https://www.nytimes.com/2017/01/29/us/politics/donald-trump-rush-immigration-order-chaos.html>.

<sup>14</sup> See, e.g., Deepti Hajela and Michael Tarm, *Trump travel ban sows chaos at airports, outrage at protests*, Washington Post, Jan. 29, 2017, available at [https://www.washingtonpost.com/national/tears-and-detention-for-us-visitors-as-trump-travel-ban-hits/2017/01/29/6e9d13ec-e5ee-11e6-a419-eefe8eff0835\\_story.html?utm\\_term=.d6197f5f9527](https://www.washingtonpost.com/national/tears-and-detention-for-us-visitors-as-trump-travel-ban-hits/2017/01/29/6e9d13ec-e5ee-11e6-a419-eefe8eff0835_story.html?utm_term=.d6197f5f9527).

<sup>15</sup> Press Release, Office of Inspector General, Department of Homeland Security, Inspector General Announces Review of Implementation of Executive Order (Feb. 1, 2017), available at <https://www.oig.dhs.gov/assets/pr/2017/oigpr-020217.pdf>.

<sup>16</sup> *Darweesh v. Trump*, No. 17 Civ. 480 (AMD), 2017 WL 388504 (E.D.N.Y. Jan. 28, 2017).

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least five federal courts issued orders blocking enforcement of provisions of EO 13769, although one of these courts subsequently declined to extend its initial TRO.<sup>17</sup>

On February 3, in a case filed by the State of Washington and the State of Minnesota and supported by Amazon, Expedia, and Microsoft,<sup>18</sup> the U.S. District Court for the Western District of Washington issued a temporary restraining order enjoining, on a nationwide basis, the enforcement of key provisions of EO 13769, including those described in paragraphs (2) through (6) above.<sup>19</sup> Pursuant to this order, all refugees and visa holders whose lawful permission to enter the country had been affected by EO 13769 should be permitted to travel.

## D. Legal, Procedural, and Rule of Law Issues Raised by EO 13769

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<sup>17</sup> See, e.g., *State of Washington v. Trump*, No. C17-0141JLR (W.D. Wash. Feb. 3, 2017) (ordering, *inter alia*, defendants the President of the United States, the DHS and the Secretary of the DHS, and the then-Acting Secretary of State, enjoined and restrained on a nationwide basis from enforcing the following sections of EO 13769: 3(c) (suspension of entry into the United States of persons from the seven Muslim majority countries targeted by the Executive Order; 5(a) (suspension of the USRAP); 5(b) (prioritization religion-based persecution refugee claims by members of minority religions) (and further enjoining and restraining defendants from “proceeding with any action that prioritizes the refugee claims of certain religious minorities”; 5(c) (indefinite ban on entry of nationals of Syria as refugees); 5(e) (discretionary joint determinations by the Secretaries of State and DHS to, on a case-by-case basis, to admit individuals “including when the person is a religious minority in a country of nationality facing religious persecution.”); *Mohammed v. United States*, No. CV 17-00786 AB (PLAx), 2017 WL 438750 (C.D. Cal. Jan. 31, 2017) (ordering, *inter alia*, the DHS, other federal agencies, and their “officers, agents, employees, attorneys, and all persons acting in concert or participating with them . . . enjoined and restrained from enforcing Defendant President Donald J. Trump’s January 27, 2017 Executive Order by removing, detaining, or blocking the entry of Plaintiffs, or any other person from Iran, Iraq, Libya, Somalia, Sudan, Syria and Yemen with a valid immigrant visa.”); *Doe v. Trump*, No.: C17-126, 2017 WL 388532 (W.D. Wash. Jan. 28, 2017) (granting motion for emergency stay of removal pursuant to EO 13769); *Aziz v. Trump*, No. 1:17-cv-116, 2017 WL 386549 (E.D. Va. Jan. 28, 2017) (granting temporary restraining order forbidding federal government agencies from removing, pursuant to EO 13769, individuals from Dulles International Airport in Virginia and ordering respondents to “permit lawyers access to all legal permanent residents being detained at Dulles International Airport.”); *but see Louhghalam v. Trump*, No. 17-cv-10154 (slip op.) (Feb. 3, 2017) (denying continuance of previously-issued temporary restraining order because Respondents had stopped applying Executive Order to lawful permanent resident petitioners, and based on reasoning that classifications involving aliens are subject to rational basis Equal Protection review, that F-1 visa holders lacked standing to sue on issues affecting refugees, that F-1 visa holders lacked a property interest in their visas, that the President did not exceed his statutory authority, and that under the First Circuit’s standard for First Amendment claims, the court lacked power to review the President’s decision), *declining motion to extend TRO previously granted in Tootkaboni v. Trump*, No. 17-cv-10154, 2017 WL 386550 (D. Mass. Jan. 29, 2017) (granting initial temporary restraining order before claims of lawful permanent residents became moot, finding strong likelihood that “the detention and/or removal of the petitioners and others similarly situated [pursuant to EO 13769] would violate their rights to Due Process and Equal Protection as guaranteed by the United States Constitution” and enjoining both detentions and removals subject to EO 13769).

<sup>18</sup> See, e.g., *CNBC, Microsoft joins Amazon in lawsuit over Trump’s immigration ban*, Jan. 31, 2017, at <http://www.cnbc.com/2017/01/31/microsoft-joins-amazon-in-lawsuit-over-trumps-immigration-ban.html>.

<sup>19</sup> *State of Washington*, No. 17-CV-00141-JLR, 2017 WL 462040, slip op. at 5 (granting a nationwide TRO and reasoning that limiting the order geographically would “undermine the constitutional imperative of ‘a uniform Rule of Naturalization and Congress’ instruction that ‘the immigration laws of the United States should be enforced vigorously and uniformly.’”) (citing *Texas v. United States*, 89 F.3d 134, 155 (5th Cir. 2015)) (emphasis in *State of Washington*).

EO 13769 raises fundamental legal, procedural, and rule of law issues. Given the recency of EO 13769, this report does not attempt to address every provision or catalog every concern arising therefrom. Rather, it reviews several constitutional and statutory concerns. For example, the Executive Order raises concerns that arise under or implicate:

- The Religion Clauses of the First Amendment
- The Due Process Clause of the Fifth Amendment
- The Equal Protection Clause of the Fifth Amendment
- The Immigration and Nationality Act (INA) and the Administrative Procedure Act, 5 U.S.C. §§ 706(2)(A)-(D)
- International human rights laws and principles and international refugee law
- The rules, procedures, and norms governing and attached to the orderly and accountable promulgation and implementation of Executive Branch policies and rules, including those set forth in Executive Order 11,030, “Preparation, Presentation, Filling and Publication of Executive Orders and Proclamations” and the Federal Register Act.

## II. CONSTITUTIONAL ISSUES

### A. **First Amendment: Religion Clauses**

The “Establishment Clause” of the First Amendment to the United States Constitution prohibits the government from making any law “respecting an establishment of religion.”<sup>20</sup> As the Supreme Court noted in *Larson v. Valente*, “the clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another.”<sup>21</sup> The Court explained that this constitutional limit on government is intended to ensure religious liberty by forbidding “favoritism among sects,” and that the government may not “aid or oppose any religion. This prohibition is absolute.”<sup>22</sup>

A governmental preference for one religion over another likewise implicates the First Amendment’s protection of the Free Exercise of Religion. “Free exercise . . . can be guaranteed only when legislators – and voters – are required to accord to their own religions the very same treatment given to small, new, or unpopular denominations.”<sup>23</sup> In *Church of Lukumi Babalu Ave. v. City of Hialeah*, the Supreme Court held that the Free Exercise Clause “protects against governmental hostility which is masked, as well as overt,” and it struck down a local ordinance

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<sup>20</sup> U.S. CONST. amend. I.

<sup>21</sup> *Larson v. Valente*, 456 U.S. 228, 240 (1982).

<sup>22</sup> *Id.* at 240.

<sup>23</sup> *Id.*

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intended to discourage practice of the Santeria religion even though the ordinance made no mention of this religion by name.<sup>24</sup>

Similarly, although EO 13769 does not use the term “Muslim” or “Islam,” its suspension of entry applies only to those visa holders who are nationals of one of seven Muslim-majority countries.<sup>25</sup> In addition, statements made by the President of the United States—as President, President-Elect, and as a presidential candidate—and his surrogates lend credibility to the view that the purpose of EO 13769 is to prevent people of Muslim faith from coming to the United States. For example, Trump campaign press release stated, “Donald J. Trump is calling for a total and complete shutdown of Muslims entering the United States until our country’s representatives can figure out what is going on. According to Pew Research, among others, there is great hatred towards Americans by large segments of the Muslim population.”<sup>26</sup> In a July 2016 press interview, then-candidate Trump implied that he had reframed his proposal to avoid mentioning the word “Muslim,” as opposed to backing down from his initial campaign promise: “I actually don’t think it’s a rollback. In fact, you could say it’s an expansion . . . People were so upset when I used the word Muslim. Oh, you can’t use the word Muslim. Remember this. And I’m OK with that, because I’m talking territory instead of Muslim.”<sup>27</sup> In March 2016, then-candidate Trump stated, “Frankly, look, we’re having problems with the Muslims, and we’re having problems with Muslims coming into the country.”<sup>28</sup>

A full legal review of the legality of the Executive Order must take into account statements made by an administration or its surrogates close in time to the issuance of the Executive Order that may bear on the order’s purpose. The question is “whether an objective observer . . . would perceive” the government to have placed its stamp of approval or disapproval on religion or on a particular faith.<sup>29</sup> The hypothetical objective observer is “presumed to be familiar with the history of the government’s actions and competent to learn what history has to show,”<sup>30</sup> meaning that the publicly available information about the genesis and evolution of the policy at issue is relevant in

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<sup>24</sup> *Church of Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 534-35 (1993).

<sup>25</sup> EO 13769 §3(c) *see also* the country list at INA § 217(a)(12), 8 U.S.C. § 1187(a)(12).

<sup>26</sup> Press Release, Trump-Pence Campaign, *Donald J. Trump Statement on Preventing Muslim Immigration*, December 7, 2015, <https://www.donaldjtrump.com/press-releases/donald-j.-trump-statement-on-preventing-muslim-immigration>. *See also* President Trump’s February 1, 2017 statement on Twitter in response to characterizations of EO 13769 as a “Muslim Ban:” “Everybody is arguing whether or not it is a BAN. Call it what you want, it is about keeping bad people (with bad intentions) out of country!”, @realDonaldTrump <https://twitter.com/realDonaldTrump/status/826774668245946368>.

<sup>27</sup> Meet the Press: Interview with NBC’s Chuck Todd, July 24, 2016, [www.nbcnews.com/meet-the-press/meet-press-july-24-2016-n615706](http://www.nbcnews.com/meet-the-press/meet-press-july-24-2016-n615706).

<sup>28</sup> David Sherfinski, *Trump on Brussels attacks: ‘We’re having problems with Muslims’*, The Washington Times, March 22, 2016, *available at* <http://www.washingtontimes.com/news/2016/mar/22/donald-trump-brussels-we-have-be-very-very-careful/>.

<sup>29</sup> *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 308 (2000) (quoting *Wallace v. Jaffree*, 472 U.S. 38, 76 (1985) (O’Connor, J., concurring)).

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determining whether it favors one religion over another. A religion-based ban raises serious First Amendment concerns.<sup>31</sup>

National security is a compelling government interest, but an order that applies broadly to groups of people who have already been screened and approved to enter the United States – a process that led the United States to revoke either 60,000 or 100,000 visas in its first week<sup>32</sup> does not appear “narrowly tailored” to serve this purpose.

## B. Due Process

The Due Process Clause provides procedural and substantive protections against the arbitrary deprivation of life, liberty, or property. For over a century, U.S. courts have recognized that non-citizens in the United States have due process rights.<sup>33</sup> Thus, for example, courts held that this clause requires fundamentally fair court procedures to determine whether an individual should be removed from the United States.<sup>34</sup> The Supreme Court has also held that construing a civil immigration detention statute to permit indefinite detention of a non-citizen with a final removal order would raise a serious due process problem.<sup>35</sup>

Moreover, even non-citizens outside of the United States can bring due process challenges in certain circumstances.<sup>36</sup> For example, a resident non-citizen who departs the United States on

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<sup>31</sup> EO 13769 § 1.

<sup>32</sup> Mary Emily O’Hara, *Over 100,000 Visas Have Been Revoked by Immigration Ban, Justice Dept. Reveals*, NBC News, Feb. 3, 2017, available at <http://www.nbcnews.com/news/us-news/over-100-000-visas-have-been-revoked-immigration-ban-justice-n716121> (“At least 100,000 visas have been revoked in a single week in response to President Donald Trump’s executive immigration order, a lawyer for the Justice Department revealed in court Friday... But confusion abounds over the ban after the State Department disputed the Justice Department’s numbers, issuing a statement claiming the amount of revoked visas was actually fewer than 60,000.”).

<sup>33</sup> See *Wong Wing v. United States*, 163 U.S. 228, 238 (1896) (“[A]ll persons within the territory of the United States are entitled to the protection guaranteed by th[e Fifth and Sixth] amendments, and [] even aliens shall not be . . . deprived of life, liberty, or property without due process of law.”); see also *Zadvydas v. Davis*, 533 U.S. 678, 693 (2001); *Mathews v. Diaz*, 426 U.S. 67, 77 (1976) (“There are literally millions of aliens within the jurisdiction of the United States. The [Constitution] protects *every one of these persons*.”) (emphasis supplied); *Bridges v. Wixon*, 326 U.S. 135, 147 (1945).

<sup>34</sup> For example, the right to retain counsel in removal proceedings derives from the Fifth Amendment Due Process clause. *Leslie v. Att’y Gen. of the U.S.*, 611 F.3d 171, 180-81 (3d Cir. 2010). Ineffective assistance of counsel in a removal proceeding violates Due Process “if the proceeding was so fundamentally unfair that the alien was prevented from reasonably presenting his case.” *Singh v. Holder*, 658 F.3d 879, 885 (9th Cir. 2011); see, e.g., *Fadiga v. Att’y Gen. of the U.S.*, 488 F.3d 142, 155 (3d Cir. 2007). A failure to follow regulations or statutes governing removal proceedings can likewise give rise to a due process claim when they render a proceeding fundamentally unfair. E.g., *Leslie*, 611 F.3d 171 (holding that failure to advise respondent of availability of free legal services violated Due Process).

<sup>35</sup> *Zadvydas v. Davis*, 533 U.S. 678, 690 (2001).

<sup>36</sup> “[T]he border of the United States is not a clear line that separates non-citizens who may bring constitutional challenges from those who may not.” *Ibrahim v. U.S. Department of Homeland Security* 669 F.3d 983, 995 (9th Cir. 2012).

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a brief trip is constitutionally entitled to a hearing if the government seeks to exclude her upon return to the United States.<sup>37</sup>

In addition, courts have recognized that immigration laws and processes directly applicable to non-citizens may collaterally trigger due process rights of U.S. citizens. For example, U.S. citizens have a right to procedural due process in the adjudication of petitions for non-citizen relatives.<sup>38</sup>

Both EO 13769 and the manner of its implementation raise due process concerns. For example:

- Denial of full and fair hearings: Individuals who were detained upon arrival in the United States faced potential removal without an immigration court process. These individuals have a protected liberty interest in avoiding removal, and due process requires that they have full and fair court hearing to permit them to contest their removability and apply for protections guaranteed by the Immigration and Nationality Act.<sup>39</sup> Examples of available relief from removal include asylum, withholding of removal, or deferral of removal pursuant to the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.<sup>40</sup> This is particularly concerning in the case of people whom the United States itself had already approved for refugee status, but many people with other visas may also qualify for such humanitarian protection.
- Failure to adjudicate pending family immigration petitions: The suspension of visas for people from the seven countries targeted by the Executive Order could affect the due process rights of U.S. citizens who applied for their relatives to come to the United States.<sup>41</sup>
- Denial of access to counsel: To the extent those subject to EO 13769 have been or are denied access to their attorneys, this would raise due process concerns.<sup>42</sup>

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<sup>37</sup> See, e.g., *Landon v. Plasencia*, 459 U.S. 21, 34, 103 S.Ct. 321, 74 L.Ed.2d 21 (1982) (holding that resident non-citizen had due process right to hearing in exclusion proceedings upon re-entry after a “few days” abroad). Moreover, The Supreme Court has held that the Suspension Clause extends to non-citizens abroad who are functionally in United States territory (e.g., detained at the U.S. naval base at Guantanamo Bay, Cuba), providing an avenue to raise due process claims from abroad. *Boumediene v. Bush*, 553 U.S. 723 (2008).

<sup>38</sup> See e.g., *Ching v. Mayorkas*, 725 F.3d 1149, 1156 (9th Cir. 2013).

<sup>39</sup> See *Dia v. Ashcroft*, 353 F.3d 228, 239 (3d Cir. 2003) (“[M]inimum due process rights attach to statutory rights.”); *Accardi v. Shaughnessy*, 347 U.S. 260 (1954) (holding that an agency’s failure to follow its own regulations can give rise to a Due Process violation); see also *Clark v. Martinez*, 543 U.S. 371 (2005).

<sup>40</sup> 8 U.S.C. §§ 1158 (asylum), 1231(b)(3) (withholding of removal); Foreign Affairs Reform and Restructuring Act of 1998, Pub. L. No. 105-277, 112 Stat. 2681 (1998).

<sup>41</sup> See *Ching*, 725 F.3d at 1156.

<sup>42</sup> Elise Viebeck and Michael Laris, *Hundreds of lawyers descend on airports to offer free help after Trump’s executive order*, The Washington Post, Jan. 29, 2017, available at <https://www.washingtonpost.com/politics/hundreds-of->

- Coerced waiver of rights to hearing: There have been reports that lawful permanent residents may have been pressured to sign agreements relinquishing their lawful permanent resident status and return to their country of nationality.<sup>43</sup>

### C. Fifth Amendment: Equal Protection

The Executive Order’s provisions target people from Syria and 6 other predominantly Muslim countries. For purposes of the Equal Protection Clause, a law that expressly adopts classifications on the basis of a protected class is considered facially discriminatory.<sup>44</sup> A facially neutral law, in contrast, violates Equal Protection when applied in a discriminatory way,<sup>45</sup> or if it has discriminatory animus and its application results in a discriminatory effect.<sup>46</sup>

The Executive Order raises concerns regarding discriminatory intent, as described above in the context of the First Amendment. And as discussed above, the order raises concerns that it is not narrowly tailored – and might not even satisfy the more permissive “rational basis” test – because it burdens all refugees and lawful immigrants seeking to come to the United States simply because they are citizens of a specified country, or because they are Muslim, without requiring any suggestion whatsoever that an individual may pose a danger and without regard to whether their presence would actually be beneficial or even critical to the United States.<sup>47</sup> Thus, the travel ban has burdened doctors, lawyers, volunteers, and students with no rational connection to the stated purpose of the order.

It has also had a disparate effect on Muslims compared with those of other religions. Muslims have disproportionately had their visas suspended and revoked and have been refused

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lawyers-descend-on-airports-to-offer-free-help/2017/01/29/55ef11b2-e64b-11e6-bf6f-301b6b443624\_story.html?utm\_term=.0afa2236b3a1 (“An email circulating in the Washington-area legal community illustrated the hardship at Washington Dulles International Airport, where lawyers were still being prevented from talking to detainees as of Sunday afternoon in contravention of a court order.”). Kaveh Waddell, *An Army of Attorneys Descend on Dulles*, *The Atlantic*, Jan. 29, 2017, available at <https://www.theatlantic.com/politics/archive/2017/01/an-army-of-lawyers-stands-by-to-help-at-dulles-airport/514853/> (“By midnight, lawyers still hadn’t been let in to see detainees—despite the fact that a federal judge in the Eastern District of Virginia signed a restraining order requiring Customs and Border Patrol to allow the attorneys in. Siddiqi said she was told that the officers were still waiting on instructions from lawyers at the Department of Homeland Security. Just before midnight, Cory Booker, a Democratic Senator for New Jersey, arrived at Dulles Airport to try to get access for the lawyers. Attorneys began reassembling at Dulles Sunday morning, but were still being denied access to detainees.”).

<sup>43</sup> Oliver Laughland, Joanna Walters, *Immigration officials coerced Yemenis to sign away green cards, suit claims*, *The Guardian*, Jan. 30, 2017, available at <https://www.theguardian.com/us-news/2017/jan/30/trump-travel-ban-yemenis-coerced-relinquish-green-card>. Natasha Bertrand, *Lawsuit: Dozens of immigrants trying to enter the US coerced into giving up visas and green cards after Trump travel ban*, Feb. 3, 2017, available at <https://www.theguardian.com/us-news/2017/jan/30/trump-travel-ban-yemenis-coerced-relinquish-green-card>.

<sup>44</sup> See, e.g., *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 213, 227-29 (1995).

<sup>45</sup> *Yick Wo v. Hopkins*, 118 U.S. 356, 373-74 (1886).

<sup>46</sup> See *Village of Arlington Heights v. Metro. Housing Dev. Corp.*, 429 U.S. 252, 264-65 (1977).

<sup>47</sup> See, e.g., *Francis v. INS*, 532 F.2d 268 (1976) (striking down immigration statute based on rational basis review).

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entry to the United States, denied the ability to board flights to the United States, detained at airports, forced to abandon their permanent residency status, and removed from the United States. These early examples of the disparate impacts of the implementation of EO 13769 bring into focus again questions about its purpose or intent: a partial or first step in an incremental Muslim Ban. As discussed above, the circumstances surrounding EO 13769 should be considered in assessing EO 13769, including for the purpose of ensuring that Constitutional equal protection guarantees are observed.

## II. THE IMMIGRATION AND NATIONALITY ACT'S PROSCRIPTION ON DISCRIMINATION IN VISA ISSUANCE

In 1965, Congress acted to eliminate the national quota system governing immigration into the United States and added a provision to the Immigration and Nationality Act (INA), expressly prohibiting discrimination in the issuance of visas on the basis of “race, sex, *nationality*, *place of birth*, or place of residence.”<sup>48</sup> Thus, the Executive Branch lacks the authority to discriminate on the basis of national origin or race in the issuance of visas.<sup>49</sup>

In *Olsen v. Albright*, a court found that consular fraud profiles based on applicant's race, ethnicity, *national origin*, economic class and physical appearance, constituted unlawful discrimination in violation of the Immigration and Nationality Act.<sup>50</sup> Even while agreeing that the discriminatory fraud profiles were intended to help the consulate identify cases of fraud, the Court held that “the principle that government must not discriminate against particular individuals based on the color of their skin or the place of their birth means that the use of generalizations based on these factors is unfair and unjustified.”<sup>51</sup> The Court analogized this policy to the government’s “grave error” in its unjustified mass internment of individuals of Japanese origin during World War II.<sup>52</sup>

Some of EO 13769’s provisions are similarly discriminatory, insofar as they apply only to citizens from Syria, Iraq, Iran, Libya, Somalia, Sudan and Yemen, as “nationals of countries of particular concern.”<sup>53</sup> Thus, the Executive Order raises concerns regarding discrimination based on national origin or place of birth in violation of INA section 1152(a)(1)(A).

## III. INTERNATIONAL LAW AND TREATY OBLIGATIONS

Suspending the admission of refugees, and the denial of protection to refugees on the basis of national origin or religion, are contrary to our laws and ideals at a moment when U.S. leadership

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<sup>48</sup> 8 U.S.C. § 1152(a)(1)(A); 11 INA § 202(a)(1)(A).

<sup>49</sup> *Haitian Refugee Ctr. v. Civiletti*, 503 F. Supp. 442, 453 (S.D. Fla. 1980), *modified sub nom. Haitian Refugee Ctr. v. Smith*, 676 F.2d 1023 (5th Cir. 1982).

<sup>50</sup> *Olsen v. Albright*, 990 F.Supp. 31, 39 (D.D.C. 1997) (holding that consular employee’s termination for refusing to follow fraud profile was not justified because agency had ordered him to apply an illegal policy).

<sup>51</sup> *Id.*

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

<sup>53</sup> EO 13769 § 3.

on refugees is desperately needed. Historically, the United States has been a global leader on refugee resettlement, having resettled over 3 million refugees since 1975. The United States announced its commitment to protecting this vulnerable population by ratifying the 1967 United Nations Protocol Relating to the Status of Refugees, which adopted the core provisions of the United Nations Refugee Convention of 1951 (the “Convention”). The United States then implemented these treaty obligations through the Refugee Act of 1980, which created a standardized and secure system of refugee resettlement.

The current global refugee crisis calls for greater leadership from the United States. Should the United States roll back its own commitment to resettle Syrian and Iraqi refugees, the impact of this change would reverberate far beyond the particular group of refugees whom the United States itself turns away. The United States has long exercised leadership and encouraged compliance with international law by example, and the Executive Order's provisions may discourage other nations from addressing the global refugee crisis and fulfilling their own obligations under international law.

Denying protection to refugees and suspending entry of nonimmigrants and immigrants on the basis of religion or national origin also runs afoul of international law obligations. Article 3 of the Refugee Convention requires signatory states to “apply the provisions ... to refugees without discrimination as to race, religion or country of origin.” Article 26 of the International Covenant on Civil and Political Rights (ICCPR), to which the US is a state party, requires states to “guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law.”<sup>54</sup> Article 4 of the International Convention on the Elimination of All Forms of Racial Discrimination, which the United States has ratified, also prohibits discrimination on the basis of race or ethnic origin.

#### **IV. RULE OF LAW: PROCEDURAL INTEGRITY, ADMINISTRATIVE PROCESSES, COMPLIANCE WITH COURT ORDERS**

It has been widely reported that EO 13769 lacked the prior coordination, transparency and predictability, and guidance required and expected in connection with new or significant modifications of national policies and final or prospective Executive Branch rules. The content, objectives, and implementation of EO 13769 not only raise the Constitutional and other legal issues discussed previously, the Executive Order and the circumstances surrounding its issuance and implementation implicate structural and procedural matters that are essential to the rule of law generally and within the Constitutional framework of the United States, including the President’s obligation to faithfully execute the laws and the respective roles and co-equality of the three branches of the federal government. Three such matters are addressed here:

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<sup>54</sup> Moreover, even in the rare and extreme circumstance in which a state properly declares a state of “public emergency which threatens the life of the nation,” and takes the steps legally required to formally derogate from the ICCPR, Article 4 prohibits the state from undertaking measures that are “inconsistent with their other obligations under international law” or that “involve discrimination solely on the ground of race, colour, sex, language, religion or social origin.”

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- (1) Procedures and rules that govern the issuance and publication of Executive orders and advance important rule of law and good governance objectives, such as uniformity, predictability, accountability, and transparency;
- (2) Statutorily-mandated procedures designed to maximize orderliness, respect for substantive rights, and accountability in administrative procedures, including in visa application processes; and,
- (3) Access to and accountability under the law of both private parties and government branches, agencies, and other official actors.

**A. Executive Order 11,030, “Preparation, Presentation, Filing and Publication of Executive Orders and Proclamations.”**

Executive Order 11,030, dated June 19, 1962, as amended (“EO 11030”), prescribes “regulations governing the preparation, presentation, filing, and publication of Executive Orders and proclamations.”<sup>55</sup> Among its provisions, EO 11030 sets forth procedures for the “routing and approval” of draft Executive orders, as follows:<sup>56</sup>

- Executive orders “shall first” be submitted for review and approval by Office of Management and Budget (OMB),<sup>57</sup> “together with a letter, signed by the head or other properly authorized officer of the originating Federal agency, explaining the nature, purpose, background, and effect of the proposed Executive order . . . and its relationship, if any, to pertinent laws and other Executive orders or proclamations.”<sup>58</sup>
- Following OMB review and approval, EO 11030 requires that the OMB transmit an approved Executive order to the Attorney General “for his [or her] consideration as to both form and legality.”<sup>59</sup>

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<sup>55</sup> Executive Order 11,030, Preparation, Presentation, Filing and Publication of Executive Orders and Proclamations, 27 FR 5847, 3 CFR, 1959-1963 Comp., p. 610, as amended. EO 11030 is premised on Presidential authority and the Federal Register Act.

<sup>56</sup> *Id.* § 2.

<sup>57</sup> EO 11030 refers to the Director of the Bureau of the Budget, the predecessor of the OMB. *Id.* § 2(a).

<sup>58</sup> *Id.* The OMB in the Obama Administration confirmed its role under EO 11030 and elaborated as follow. “Under Executive Order 11030, as amended, OMB substantively reviews and *clears* all draft Presidential Executive Orders . . . *prior to their issuance*. Any agency head or *White House component* wishing to sponsor an executive order . . . formally requests such order or memorandum from OMB . . . the OMB General Counsel also obtains ‘form and legality’ approval of draft executive orders from the Department of Justice, and seeks legal authority approval from the Department of Justice for Presidential memoranda as well. Draft executive orders . . . are submitted for signature to the President by the OMB and the General Counsel of OMB.” Office of Management and Budget (The White House of President Obama Archive), The Mission and Structure of the Office of Management and Budget, *available at* [https://obamawhitehouse.archives.gov/omb/organization\\_mission/](https://obamawhitehouse.archives.gov/omb/organization_mission/) (emphasis added).

<sup>59</sup> *Id.* Executive Order 11030 § 2(b).

- After review and approval by the Attorney General (or his or her designee),<sup>60</sup> EO 11030 requires that the Attorney General transmit an Executive order to the Director of the Office of the Federal Register.<sup>61</sup> Thereafter, the Director of the Office of the Federal Register is required to transmit the Executive order and three copies to the President.<sup>62</sup>

The manner in which EO 13769 was promulgated and implemented necessitate a review and a reaffirmation of the commitment to the laws, rules, and procedures that govern the manner in which those same laws, rules, and processes are issued and enforced by the President of the United States who, by the Constitution, is vested with “the executive power”<sup>63</sup> and obligated to “take care that the laws be faithfully executed.”<sup>64</sup>

## B. Publication of Executive Order in Federal Register

The Federal Register Act (“FRA”) requires that “Presidential proclamations and Executive orders” be published in the Federal Register, “except those not having general applicability and legal effect or [are] effective only against Federal agencies or persons in their capacity as officers, agents, or employees thereof.”<sup>65</sup> For the purposes of its provisions, the FRA provides that “every document or order which prescribes a penalty has general applicability and legal effect.”<sup>66</sup>

The prior publication of an executive order appears to be one component in the assessment of its legal effect and enforceability. Executive orders, “if issued under a legitimate claim of authority *and made public* ... could have the force and effect of law ‘of which all courts are bound to take notice, and to which all courts are bound to give effect.’”<sup>67</sup> It does not appear that EO 13769 was “made public,” *i.e.*, through publication in the Federal Register, prior to its enforcement on January 27.<sup>68</sup> This raises questions as to the status and effect of EO 13769 prior to its publication in the Federal Register.

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<sup>60</sup> The Attorney General may delegate his or her functions to officers, employees, or agencies of the Department of Justice. EO 11030 § 2(c). *Accord*, 28 U.S.C.S. § 510 (LexisNexis through PL 114-327, approved 12/16/16).

<sup>61</sup> Except that in “cases involving sufficient urgency,” the Attorney General may transmit such an order directly to the President. EO 11030 § 2(c).

<sup>62</sup> *Id.* § 2(d).

<sup>63</sup> U.S. Const. Art. 2, § 1.

<sup>64</sup> *Id.* at § 3.

<sup>65</sup> 44 U.S.C. A. § 1505(a)(1).

<sup>66</sup> *Id.* at (a)(3).

<sup>67</sup> Vivian S. Chu, Todd Garvey, “Executive Orders: Issuance, Modification, and Revocation, Congressional Research Service Report”, Congressional Research Service, April 16, 2014 *available at* <https://fas.org/sgp/crs/misc/RS20846.pdf>. “The Federal Register Act requires that executive orders and proclamations be published in the *Federal Register*. Furthermore, executive orders must comply with . . . Exec. Order No. 11030.” *Id.* at 2, n. 7 (emphasis added) (internal citation omitted).

<sup>68</sup> It should be noted that EO 13769 was not published on the White House website contemporaneously with the President’s public signing on January 27 or immediately thereafter. *See i.e.* Timeline of Turmoil: The Rollout of Trump’s Executive Order, ABC News, Jan, 31 2017 *available at* <http://abcnews.go.com/Politics/timeline-turmoil-rollout-trumps-immigration-order/story?id=45150816> (“Hours after Trump signed his order, the public had not yet

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Moreover, in the absence of official publication of an Executive Order, the public generally and persons directly and indirectly affected by Presidential actions specifically are deprived of official, reliable, and uniform information as to the content and status of policy and law. Legal and policy clarity and transparency are essential to the rule of law. On a forward basis, closer examination is required of the relationship between the timing of the publication of an Executive order in the Federal Register and the legal status and effect, generally and as to specific parties, of an Executive order until such publication.

## C. Administrative Procedure Act

Additionally, the implementation of the Executive Order raises concerns under the Administrative Procedure Act.<sup>69</sup>

Congress has laid out a process whereby U.S. citizens and lawful permanent residents can petition for immigrant visas for their family members; companies can petition for needed workers; universities can support applications for student visas; and refugees can be screened and processed to enter the United States. EO 13769 effectively replaces longstanding processes enacted by Congress and refined through agency regulations with unfettered executive control.

A review of the initial implementation of EO 13769 illustrates the concern regarding potential arbitrary and capricious agency action. For example, DHS initially prevented lawful permanent residents from listed countries from reentering the United States. After court action, however, DHS released a statement indicating that lawful permanent residents would be admitted into the U.S. Reports from volunteer attorneys at the airports suggest that returning lawful permanent residents continue to be subject to extended secondary inspections.<sup>70</sup>

While the Executive Order invokes “terrorism” concerns,<sup>71</sup> a wholesale ban that applies to all nationals of a certain country or members of a certain religion does not reasonably address national security. The fact that EO 13769 only applies to select countries, and not to others whose

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seen documents that would describe exactly how airports and government officials around the world would implement the new rules. At 6:58 p.m., the order was distributed to the White House press list.”).

<sup>69</sup> 5 U.S.C. §§ 706(2)(A)-(D).

<sup>70</sup> John Campbell, *JFK Post-Muslim Ban: Travelers Face Interrogations About Trump and ISIS*, The Village Voice, Feb. 3, 2017, available at <http://www.villagevoice.com/content/printView/9640379> (“The attorneys at JFK say travelers are routinely being held for long periods in secondary questioning, whether they hail from countries on the banned list or not. Worried families find themselves sitting in the arrivals section for hours at a time, cut off from contact with loved ones in secondary inspection. Travelers report that Customs and Border Protection [CBP] officers have been ‘courteous’ even as they pressed with inappropriate questions, Mackler said, and seem to be ‘doing as they’ve been instructed.’”). See also *Lawyer Says Immigration Executive Order Caught Many By Surprise*, NPR, Jan 30, 2017, available at <http://www.npr.org/2017/01/30/512421763/lawyer-says-immigration-executive-order-caught-many-by-surprise> (“Our members have reported being asked to give access to people who were being detained for secondary inspection.”).

<sup>71</sup> See, EO 13769 generally.

nationals have committed acts of terrorism in the United States, undercuts the central premise upon which the Executive Order is based.

The blanket, wholesale nature of the Executive Order necessarily results in the denial of due process to thousands of individuals who are guilty of nothing other than wanting to reunite with their wives, husbands, parents, brothers and sisters in the United States, or to seek refuge from persecution abroad.<sup>72</sup>

#### **D. Compliance with Court Orders**

Finally, the ABA notes with grave concern the President's comment on Twitter describing the federal District Court Judge who issued the nationwide Temporary Restraining Order in *State of Washington v. Trump*<sup>73</sup> as a "so-called judge."<sup>74</sup> Respect for the judiciary is a fundamental cornerstone of American democracy, constitutional separation of powers, and the rule of law. Moreover, the ABA recognizes the importance of prompt compliance with court orders. Executive Branch compliance with the orders of the Courts is mandated by the co-equality of the three branches, the separation of powers, and the objectives of the rule of law generally and within the Constitutional framework of the United States.

Respectfully submitted,

John S. Kiernan, President  
New York City Bar Association

Sara Sandford, Chair  
Section of International Law

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<sup>72</sup> See e.g. *Bakalis v. Golembeski*, 35 F.3d 318, 326 (7th Cir.1994) (holding that a decision-making body "that has prejudged the outcome cannot render a decision that comports with due process");

<sup>73</sup> No. 2:17-cv-00141 (W.D. Wash. Feb. 3, 2017).

<sup>74</sup> On February 4, President Trump issued the following comment regarding the federal judge who issued the order: @realDonaldTrump "The opinion of this so-called judge, which essentially takes law-enforcement away from our country, is ridiculous and will be overturned!" Twitter, Jan. 4, 2017, 8:12 a.m., <https://twitter.com/realDonaldTrump/status/827867311054974976>.

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## GENERAL INFORMATION FORM

Submitting Entities:

New York City Bar Association  
Section of International Law

Submitted By:

John S. Kiernan  
President  
New York City Bar Association

Sara Sandford  
Chair  
Section of International Law

1. Summary of Resolution(s). The Resolution expresses concerns regarding Executive Order 13769, recognizes that the United States has the responsibility to secure its borders to keep the nation and its citizens and residents safe, and urges the Executive Branch to also take care that all Executive Orders regarding border security, immigration enforcement, and terrorism respect the bounds of the U.S. Constitution and the due process rights it secures; not use religion or nationality as a basis for barring an otherwise eligible individual from admission to the United States; adhere to the United States' international law obligations, including the 1967 Protocol Relating to the Status of Refugees of the 1951 Convention Relating to the Status of Refugees, and to the principle of non-refoulement; comply with laws and procedures that govern and advance the orderly promulgation of Executive Orders and Executive Branch policies, including Executive Order 11,030, "Preparation, Presentation, Filing, and Publication of Executive Orders and Proclamations," as amended, and the Federal Register Act, 44 U.S.C. §§ 1501-1511; and be issued following established inter-agency consultation processes to determine appropriate means and measures by which to address threats to national security.
2. Has this or a similar resolution been submitted to the House or Board previously? No
3. What existing Association policies are relevant to this Resolution and how would they be affected by its adoption?  
  
Resolutions 107c (due process in immigration matters) and 107f (fair treatment of refugees, asylum seekers, torture victims and others deserving of humanitarian refuge) are relevant to this Resolution.
4. If this is a late report, what urgency exists which requires action at this meeting of the House? The Executive Order that is the subject of this Resolution was issued on January 27, 2017. The legal rights of thousands of people have already been negatively impacted by this Executive Order, and more stand to be impacted in the coming weeks and months. A swift response by the Association is both justified and needed.
5. Status of Legislation. (If applicable). Not Applicable.

6. Brief explanation regarding plans for implementation of the policy, if adopted by the House of Delegates. Adoption of the policy would permit appropriate representatives of the Association to speak out regarding the legal issues with the Executive Order.
7. Cost to the Association. (Both direct and indirect costs). None.
8. Disclosure of Interest. (If applicable). Not Applicable.
9. Referrals.

Commission on Immigration  
 Criminal Justice Section  
 Section of Civil Rights and Social Justice  
 Standing Committee on International Trade in Legal Services  
 Massachusetts Bar Association

The American Immigration Lawyers Association was consulted and is supporting.

10. Contact Name and Address Information. (Prior to the meeting. Please include name, address, telephone number and e-mail address).

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11. Contact Name and Address Information. (Who will present the report to the House? Please include name, address, telephone number, cell phone number and e-mail address.)

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## EXECUTIVE SUMMARY

### 1. Summary of the Resolution

The purpose of this Resolution is to express concerns regarding Executive Order 13769. The Resolution urges the President to rescind Executive Order 13769, and urges that future Executive Orders regarding border security, immigration enforcement, and terrorism:

- A. Respect the bounds of our Constitution and the due process rights it secures;
- B. Not discriminate on the basis of religion or national origin;
- C. Be issued only following the established inter-agency consultation processes to determine appropriate means and measures by which to address threats to national security; and
- D. Comply with laws and procedures governing the orderly promulgation of Executive Orders and Executive Branch policies.

The report accompanying the Resolution details the legal basis for our concerns regarding Executive Order 13769, including: failure to follow established inter-agency consultation processes in advance of implementation, failure to comply with the laws and procedures governing the promulgation of Executive Orders and Executive Branch policies, infringement on due process rights, and discrimination on the basis of religion and national origin.

### 2. Summary of the Issue that the Resolution Addresses

The Resolution addresses serious issues with Executive Order 13769, which was issued by the President on January 27, 2017. Among other things, the order suspends the entry of nationals of seven Muslim-majority countries for 90 days, suspends the U.S. Refugee Admissions Program for 120 days, and suspends the entry of Syrian nationals indefinitely. We have grave concerns regarding the legality of the order both from a procedural standpoint, and from a substantive standpoint with respect to the violation of due process, equal protection, and the presence of discrimination on the basis of religion and national origin.

### 3. Please Explain How the Proposed Policy Position will address the issue

It would call on the President to rescind Executive Order 13769, and to follow proper legal procedures and important legal rights, such as due process and non-discrimination, in the promulgation of future Executive Orders.

### 4. Summary of Minority Views

None known.