



2017

# A Funny Thing Happened On My Way To The Border . . . How the Recent Immigration Executive Orders and Subsequent Lawsuits Demonstrate the Immediate Need for Comprehensive Immigration Reform

Emily C. Callan

Follow this and additional works at: <https://scholarworks.law.ubalt.edu/ublr>



Part of the [Immigration Law Commons](#)

## Recommended Citation

Callan, Emily C. (2017) "A Funny Thing Happened On My Way To The Border . . . How the Recent Immigration Executive Orders and Subsequent Lawsuits Demonstrate the Immediate Need for Comprehensive Immigration Reform," *University of Baltimore Law Review*: Vol. 47 : Iss. 1 , Article 2.

Available at: <https://scholarworks.law.ubalt.edu/ublr/vol47/iss1/2>

This Article is brought to you for free and open access by ScholarWorks@University of Baltimore School of Law. It has been accepted for inclusion in University of Baltimore Law Review by an authorized editor of ScholarWorks@University of Baltimore School of Law. For more information, please contact [hmorrell@ubalt.edu](mailto:hmorrell@ubalt.edu).

**A FUNNY THING HAPPENED ON MY WAY TO THE  
BORDER . . . HOW THE RECENT IMMIGRATION  
EXECUTIVE ORDERS AND SUBSEQUENT LAWSUITS  
DEMONSTRATE THE IMMEDIATE NEED FOR  
COMPREHENSIVE IMMIGRATION REFORM**

**Emily C. Callan\***

I. INTRODUCTION

January 20, 2017, heralded not only the start of the 45th Presidency of the United States, but also marked the beginning of a new era in immigration law and practice, the likes of which immigration attorneys, United States companies, and foreign nationals have never seen.<sup>1</sup> Since his inauguration, President Trump has made good on his campaign promises to completely turn current immigration practices and policies on their heads.<sup>2</sup> From executive orders, to federal court cases, and nearly every bureaucratic hurdle in between, immigration attorneys and other stakeholders have quickly learned that they need to constantly monitor Capitol Hill, because change will come both fast and furiously—often with little to no warning.<sup>3</sup>

For example, in his first one hundred days in the Oval Office, President Trump issued a number of executive orders affecting

---

\* Emily C. Callan (nee Kendall) is an attorney working in private practice in Arlington, Virginia. She has published articles on multiple immigration and constitutional issues in law journals, including the *Georgetown Immigration Law Journal*, the *John Marshall Law Review*, the *Michigan State University College of Law International Law Review*, the *Journal of Supreme Court History*, and others.

1. Yamiche Alcindor et al., *Donald Trump Inauguration: A Day of Ceremony, Protests and Celebration*, N.Y. TIMES (Jan. 20, 2017), <https://www.nytimes.com/2017/01/20/us/politics/donald-trump-inauguration.html>; see also Alan Neuhauser, *Sessions Enhances Criminal Penalties for Immigration Violations: 'This Is the Trump Era,'* U.S. NEWS & WORLD REP. (Apr. 11, 2017, 3:14 PM), <https://www.usnews.com/news/national-news/articles/2017-04-11/sessions-mandates-felony-prosecutions-for-immigration-violations> (discussing the “Trump era,” in which “[t]he lawlessness, the abdication of the duty to enforce our immigration laws, and the catch-and-release practices of old are over”).
2. See *Trump’s Promises Before and After the Election*, BBC NEWS (Sept. 19, 2017), <http://www.bbc.com/news/world-us-canada-37982000>.
3. See Chelsea Bailey, *Living in Limbo: Lawyer Navigates Trump Stance on Immigration*, NBC NEWS (Mar. 5, 2017, 1:59 PM), <http://www.nbcnews.com/news/us-news/living-limbo-lawyer-navigates-trump-stance-immigration-n717376>.

immigration law and regulations, including two travel bans and one call to multiple government agencies to completely recreate the H-1B visa program reserved for skilled foreign national workers.<sup>4</sup> Along with these executive actions, the President has also given several interviews or taken steps that detail his plans to construct a wall along the country's southern border with Mexico,<sup>5</sup> to withhold federal funding from so-called "sanctuary cities," jurisdictions that do not collaborate with Immigration and Customs Enforcement officers to assist the agency in its enforcement of immigration laws,<sup>6</sup> and to institute new merit-based visa programs aimed at protecting United States workers while simultaneously welcoming only the best and brightest foreign workers.<sup>7</sup>

As a direct result of these actions, multiple lawsuits have been filed challenging the presidential authority to take such steps affecting immigration laws and practice without the action, consent, or cooperation of Congress.<sup>8</sup> The immigration world has been effectively turned upside down and inside out as foreign nationals, United States companies, community organizations, and attorneys continue to scramble to adjust to this new and ever-changing landscape.<sup>9</sup>

As we approach the anniversary of President Trump's first year in office, still nary a day goes by that the President's immigration-related actions, thoughts, statements, or predictions thereof, are not featured prominently in the news.<sup>10</sup> Multiple national media outlets have covered various immigration issues with near daily frequency during this past election cycle and beyond, as immigration continues

- 
4. Exec. Order No. 13,769, 82 Fed. Reg. 8977 (Jan. 27, 2017); Exec. Order No. 13,780, 82 Fed. Reg. 13,209 (Mar. 6, 2017); Exec. Order No. 13,788, 82 Fed. Reg. 18,837 (Apr. 18, 2017).
  5. Michael D. Shear & Emmarie Huetteman, *Trump Insists Mexico Will Pay for Wall After U.S. Begins the Work*, N.Y. TIMES (Jan. 6, 2017), <https://www.nytimes.com/2017/01/06/us/politics/trump-wall-mexico.html>.
  6. Laura Meckler & Beth Reinhard, *In Sanctuary-City Crackdown, Justice Department Threatens to Withhold Grants from 9 Jurisdictions*, WALL STREET J. (Apr. 21, 2017, 7:09 PM), <https://www.wsj.com/articles/in-sanctuary-city-crackdown-justice-department-threatens-to-withhold-grants-from-8-cities-1492788608>.
  7. Julie Hirschfeld Davis, *How Trump's 'Merit-Based' Immigration System Might Work*, N.Y. TIMES (Mar. 1, 2017), <https://www.nytimes.com/2017/03/01/us/politics/immigration-trump.html>.
  8. See Matt Pearce, *Trump Has Been Sued More than 60 Times Since Becoming President: A Partial Survey*, L.A. TIMES (Feb. 11, 2017, 3:00 AM), <http://www.latimes.com/nation/la-na-trump-lawsuits-20170210-story.html>.
  9. See Jonathan Berr, *It's a Good Time to Be an Immigration Lawyer*, CBS NEWS (Feb. 13, 2017, 5:30 AM), <https://www.cbsnews.com/news/donald-trump-policies-good-for-immigration-lawyers/>.
  10. See *infra* note 11 and accompanying text.

to be a contentious subject across the entire country.<sup>11</sup> However, it need hardly be stated that this constant media coverage rarely, if ever, provides a legally accurate explanation of these admittedly, exceedingly complex issues.<sup>12</sup> Because immigration policy and topics persist in dominating the national conversation, and will likely continue to do so for the foreseeable future, a careful and close examination of the implications of the President's actions and their consequences is clearly warranted.

To do so, Part II provides an in-depth explanation of the President's first executive order that instituted the infamous travel ban and the resulting lawsuit which followed.<sup>13</sup> Part III examines the President's second order, analyzes its differences from the first order, and discusses the subsequent lawsuit, while Part IV briefly analyzes the President's third order.<sup>14</sup> Part V reviews how immigration law and policy is made and discusses the potential impact of the President's other proposed immigration measures, namely the repudiation of former President Obama's Deferred Action for Childhood Arrivals program and the withdrawal of the United States from the North American Free Trade Agreement.<sup>15</sup> Finally, Part VI provides alternative solutions and measures that may be taken by the President, Congress, and immigration practitioners in order to move past this initial period of chaos and into a more stable environment.<sup>16</sup>

Although sometimes begrudgingly, it is generally accepted that immigration, and especially employment-based immigration, provides multiple economic benefits to the United States on a national scale.<sup>17</sup> Large-scale software development companies, technology consulting firms, and financial institutions represent just a small number of companies that routinely sponsor talented foreign

- 
11. Emily C. Callan, *Is the Game Still Worth the Candle (or the Visa)? How the H-1B Visa Lottery Lawsuit Illustrates the Need for Immigration Reform*, 80 ALB. L. REV. 335, 337 (2017); see also Frank Camp, *Immigration Such a Hot-Button Issue in 2016 Election that a Stunning Percentage Will Only Vote for Candidate They Agree with on the Matter*, INDEP. J. REV., <http://ijr.com/2015/09/417923-new-polling-dats-suggests-immigration-may-confusing-issue-2016-election/> (last visited Nov. 12, 2017) (examining polling data demonstrating that 80% of American voters considered immigration an important issue in the 2016 presidential election).
  12. Callan, *supra* note 11, at 337.
  13. See *infra* Part II.
  14. See *infra* Parts III, IV.
  15. See *infra* Part V.
  16. See *infra* Part VI.
  17. Jeffrey Sparshott, *Immigration Does More Good than Harm to Economy, Study Finds*, WALL STREET J. (Sept. 22, 2016, 5:20 PM), <https://www.wsj.com/articles/immigration-does-more-good-than-harm-to-economy-study-finds-1474568991>.

nationals for temporary and permanent employment visas.<sup>18</sup> However, these opportunities, along with opportunities to encourage and welcome foreign investment and family unification efforts, are frustratingly compromised and constrained due to the existing state of our country's immigration laws and policies.<sup>19</sup> Instead of engaging in identity politics or incendiary rhetoric, all interested parties would be much better served by looking to the precise language of the extant immigration law and regulations to create solutions that properly balance national security concerns with the economic needs and the well-established and long-standing values of the country.<sup>20</sup>

## II. YOU DON'T HAVE TO GO HOME, BUT YOU CAN'T STAY HERE: A PRIMER ON THE PRESIDENT'S FIRST EXECUTIVE ORDER

Less than a week after taking his oath of office, President Trump signed his first immigration-related executive order on January 25, 2017, titled "Border Security and Immigration Enforcement Improvements."<sup>21</sup> To provide a comprehensive account of the extent to which President Trump's subsequent immigration-related executive orders have rocked the immigration world, a brief outline of the first "travel ban" order and its immediate consequences is presented, followed by a detailed analysis of the ensuing federal court cases challenging its provisions.<sup>22</sup>

### A. *The Provisions of Executive Order 13,769*

Executive Order 13,769, titled "Protecting the Nation From Foreign Terrorist Entry Into the United States" (hereinafter Executive Order 1), resulted in a political and legal upheaval, the likes of which the immigration world has not experienced since the aftermath of September 11, 2001.<sup>23</sup> Executive Order 1 banned foreign nationals from Iran, Iraq, Libya, Somalia, Sudan, Syria, and Yemen from

---

18. OFFICE OF FOREIGN LABOR CERTIFICATION, U.S. DEP'T OF LABOR EMP'T & TRAINING ADMIN., H-1B TEMPORARY SPECIALTY OCCUPATIONS LABOR CONDITION PROGRAM – SELECTED STATISTICS, FY 2017 YTD (2017), [https://www.foreignlaborcert.doleta.gov/pdf/PerformanceData/2017/H-1B\\_Selected\\_Statistics\\_FY2017\\_Q3.pdf](https://www.foreignlaborcert.doleta.gov/pdf/PerformanceData/2017/H-1B_Selected_Statistics_FY2017_Q3.pdf).

19. *See infra* Part V.

20. *See infra* Part VI.

21. Exec. Order No. 13,767, 82 Fed. Reg. 8793 (Jan. 25, 2017).

22. *See infra* Sections II.A–B.

23. Exec. Order No. 13,769, 82 Fed. Reg. 8977 (Jan. 27, 2017); *see also* Registration and Monitoring of Certain Nonimmigrants from Designated Countries, 67 Fed. Reg. 57,032, 57,033 (Sept. 6, 2002) (to be codified at 8 C.F.R. pt. 264.1(f)) (directing that nonimmigrants from Iran, Iraq, Libya, Sudan, and Syria "be subject to special registration requirements").

receiving visas and entering the United States.<sup>24</sup> Even if foreign nationals from those countries had already obtained a valid visa, it was automatically revoked and could not be used for further travel to the United States.<sup>25</sup> This visa revocation mechanism was estimated to have impacted approximately 100,000 foreign nationals.<sup>26</sup> Executive Order 1 also barred, on an indefinite basis, the entry of Syrian refugees into the United States, and temporarily suspended the admission of all refugees for 120 days.<sup>27</sup>

While the order did not affect naturalized United States citizens who had been born in one of the affected Middle-Eastern countries, the order did not make clear whether its provisions applied to lawful permanent residents, known as green card holders.<sup>28</sup> Due to this uncertainty, hundreds of thousands of returning lawful permanent residents were stopped and placed into secondary inspection at various airports around the world.<sup>29</sup> As a result of the lack of guidance provided to border officers regarding the implementation of Executive Order 1's provisions, some permanent residents were permitted to enter the country after additional screening, whereas others were refused admission and flown back to their departure cities.<sup>30</sup>

As soon as the President signed Executive Order 1, total and utter chaos ensued.<sup>31</sup> Along with the stranded travelers and mass confusion at airports all over the world, the President also fired the acting Attorney General, Sally Yates, after she refused to defend court challenges to the order.<sup>32</sup> Executive Order 1 was quickly and loudly condemned by numerous diplomats, multiple news media outlets, congressional representatives and senators, and former

---

24. Exec. Order No. 13,769, 82 Fed. Reg. 8977, 8978 (Jan. 27, 2017); Liam Stack, *Trump's Executive Order on Immigration: What We Know and What We Don't*, N.Y. TIMES (Jan. 29, 2017), <https://www.nytimes.com/2017/01/29/us/trump-refugee-ban-muslim-executive-order.html>.

25. James Salmon, *The Implications of Donald Trump's Travel Ban*, DAILY MAIL (Jan. 29, 2017, 7:00 PM), <http://www.dailymail.co.uk/news/article-4170146/The-implications-Donald-Trump-s-travel-ban.html>.

26. Mary Emily O'Hara, *Over 100,000 Visas Have Been Revoked by Immigration Ban, Justice Dept. Reveals*, NBC NEWS (Feb. 3, 2017, 2:19 PM), <https://www.nbcnews.com/news/us-news/over-100-000-visas-have-been-revoked-immigration-ban-justice-n716121>.

27. Exec. Order No. 13,769, 82 Fed. Reg. 8977, 8979 (Jan. 27, 2017).

28. *See id.*; *see also* Stack, *supra* note 24 (noting that the order did not impact naturalized citizens).

29. *See* Stack, *supra* note 24.

30. *Id.*

31. *See infra* notes 32–34 and accompanying text.

32. Stack, *supra* note 24.

president Barack Obama.<sup>33</sup> Additionally, large groups of citizens took to the streets to protest the order, and many of these gatherings required police intervention and other safety measures.<sup>34</sup>

Merely a few days after the order was signed, a federal district judge in New York blocked part of the order and stated that those travelers being detained at airports across the country should not be returned to their home countries.<sup>35</sup> Soon thereafter, federal judges in Washington, Virginia, and Massachusetts issued similar orders.<sup>36</sup> Perhaps due in part to these early legal challenges, on the Sunday morning following the release of Executive Order 1, the White House clarified that lawful permanent residents originally from the banned countries would be allowed to return to the United States.<sup>37</sup>

B. *Making Many Federal Cases Out of It: The Legal Challenges to Executive Order 1*

In the three days after President Trump signed Executive Order 1, a plethora of plaintiffs filed nearly fifty cases in the federal courts across the country.<sup>38</sup> The parties that filed challenges against the executive order included both private individuals or organizations adversely affected by its provisions, as well as Massachusetts and Washington State, on behalf of their affected residents.<sup>39</sup> However, due to space and time constraints, this article will confine its analysis to the case brought by Washington State, wherein the judge issued a nationwide temporary restraining order (hereinafter TRO).<sup>40</sup>

*Washington v. Trump* soon emerged as the focal case challenging the provisions of Executive Order 1.<sup>41</sup> The State of Washington entered the fray only a few days after the President signed the order, and filed its lawsuit on the ground that the order was

---

33. *Id.*

34. *Id.*; Emanuella Grinberg & Madison Park, *2nd Day of Protests over Trump's Immigration Policies*, CNN (Jan. 30, 2017, 1:42 AM), <http://www.cnn.com/2017/01/29/politics/us-immigration-protests/index.html>.

35. Stack, *supra* note 24.

36. *Id.*

37. *Id.*

38. Reid Wilson, *50-Plus Lawsuits Filed Against Trump Refugee Order*, HILL (Feb. 3, 2017, 3:07 PM), <http://thehill.com/homenews/state-watch/317822-50-plus-lawsuits-filed-against-trump-refugee-order>.

39. Alexander Burns, *Legal Challenges Mount Against Trump's Travel Ban*, N.Y. TIMES (Jan. 30, 2017), <https://www.nytimes.com/2017/01/30/us/legal-challenges-mount-against-trumps-travel-ban.html>.

40. *Washington v. Trump*, No. C17-0141JLR, 2017 WL 462040, at \*2 (W.D. Wash. Feb. 3, 2017); *infra* notes 41–54 and accompanying text.

41. *Washington*, 2017 WL 462040, at \*1.

unconstitutional.<sup>42</sup> Specifically, the State's Complaint alleged that the order violated equal protection guaranteed by the Fifth Amendment because the order discriminated against and otherwise harmed Washington State residents on the basis of their religion or national origin.<sup>43</sup> Because the basis for the alleged discrimination included religion, the lawsuit also charged that Executive Order 1 violated the Establishment Clause of the First Amendment because it gave preferences to practitioners of Christianity, while disfavoring practitioners of Islam.<sup>44</sup>

In the Complaint, the State of Washington requested declaratory relief in the form of a court declaration that several provisions of Executive Order 1 were in violation of the Constitution, and injunctive relief in the form of an order to block the enforcement of those provisions.<sup>45</sup> Along with the initial Complaint, the State also filed a TRO motion requesting the court to immediately stop implementation of Executive Order 1 on the grounds that, should the order go into effect, the plaintiffs would be substantially harmed.<sup>46</sup>

On February 3, 2017, Judge James L. Robart granted the motion for the TRO, with immediate and nationwide effect.<sup>47</sup> The federal government, represented by the Department of Justice (hereinafter DOJ), subsequently filed an emergency motion to stay the TRO in the United States Court of Appeals for the Ninth Circuit.<sup>48</sup> DOJ challenged the ruling, arguing that the Constitution reserves the sole and exclusive authority over these types of immigration matters for the President, and that the foreign nationals affected by Executive

---

42. Complaint for Declaratory & Injunctive Relief at 8–10, *Washington*, No. C17-0141JLR (W.D. Wash. Feb. 3, 2017).

43. *Id.* at 8–9.

44. *Id.* at 9. This argument was further bolstered by the order's provisions that gave preference to asylum seekers who claimed to be fleeing persecution based upon their "minority religion." Exec. Order No. 13,769, 82 Fed. Reg. 8977, 8979 (Jan. 27, 2017). These provisions essentially prioritized Christian refugees over Muslim refugees. Michael D. Shear & Helene Cooper, *Trump Bars Refugees and Citizens of 7 Muslim Countries*, N.Y. TIMES (Jan. 27, 2017), <https://www.nytimes.com/2017/01/27/us/politics/trump-syrian-refugees.html>.

45. Complaint for Declaratory & Injunctive Relief, *supra* note 42, at 13.

46. Motion for Temporary Restraining Order at 1, 3–4, *Washington*, No. C17-0141JLR (W.D. Wash. Feb. 3, 2017).

47. *Washington*, 2017 WL 462040, at \*2.

48. *Washington v. Trump*, 847 F.3d 1151, 1156 (9th Cir. 2017); Laura Jarrett, *Setback for Trump: Appeals Court Rejects Demand to Resume Travel Ban -- For Now*, CNN (Feb. 5, 2017, 5:31 PM), <http://www.cnn.com/2017/02/04/politics/doj-appeals-travel-ban-ruling/>.

Order 1 lack standing because they do not enjoy due process rights to contest the order in the courts.<sup>49</sup>

Thus, it came as no surprise when, on February 9, 2017, a three-judge panel denied the stay and upheld the TRO.<sup>50</sup> The panel based its decision on several factors, including: the conclusion that the plaintiffs had standing to sue, rejection of the DOJ's position that the judiciary branch had no power to review the constitutionality of Executive Order 1, and the belief that there was no need for the travel ban provision to go into immediate effect.<sup>51</sup> In response to the panel's decision, the President tweeted, "SEE YOU IN COURT, THE SECURITY OF OUR NATION IS AT STAKE!"<sup>52</sup>

Through the rest of February and into March, the parties continued to file motions in the case, including: the DOJ's request to delay proceedings while the administration drafted a new executive order, the DOJ's request to dismiss its appeal, and the State of Washington's filing of a second amended complaint.<sup>53</sup> However, these additional court filings became moot when Executive Order 1 was specifically revoked and replaced by the terms of the President's second travel ban order, Executive Order 13,780.<sup>54</sup>

### III. IF AT FIRST, YOU DON'T SUCCEED . . . THE PRESIDENT'S SECOND EXECUTIVE ORDER

The President signed Executive Order 13,780, "Protecting the Nation From Foreign Terrorist Entry Into the United States," (hereinafter Executive Order 2) on March 6, 2017.<sup>55</sup> It is widely believed that the administration used the court documents from the challenges to the first order to draft the second, in the hopes that this second order would either avoid challenge in the courts or would

---

49. *Washington*, 847 F.3d at 1161–65.

50. *Id.* at 1169.

51. *Id.* at 1161–62, 1168.

52. Maura Dolan & Jaweed Kaleem, 'See You in Court,' *Trump Tweets After 9th Circuit Panel Unanimously Refuses to Reinstate His Travel Ban*, L.A. TIMES (Feb. 9, 2017, 5:55 PM), <http://www.latimes.com/nation/la-na-ninth-circuit-travel-ban-2017-story.html>; Donald J. Trump (@realDonaldTrump), TWITTER (Feb. 9, 2017, 3:35 PM), <https://twitter.com/realdonaldtrump/status/829836231802515457?lang=en>.

53. Defendants-Appellants' Motion to Hold Proceedings in Abeyance, *Washington*, No. 17-35105 (9th Cir. Feb. 24, 2017); Appellants' Motion for Voluntary Dismissal, *Washington*, No. 17-35105 (9th Cir. Mar. 7, 2017); Second Amended Complaint for Declaratory & Injunctive Relief, *Washington v. Trump*, No. 2:17-cv-00141-JLR (W.D. Wash. Mar. 13, 2017).

54. Exec. Order No. 13,780, 82 Fed. Reg. 13,209 (Mar. 6, 2017).

55. *Id.*

survive any cases filed against it.<sup>56</sup> However, as discussed in the following section, these best laid plans did not help the President, as Executive Order 2 also had its day in court.<sup>57</sup>

A. *Same Script, Slightly Different Cast: The Provisions of Executive Order 13,780*

The first difference between the second order and its predecessor was that Executive Order 2 did not immediately take effect upon signing, but instead was effective ten days later on March 16, 2017, seemingly in an attempt to put potentially impacted foreign nationals “on notice” of the order’s provisions, as the lack of notice to affected parties was one of the main criticisms lodged against Executive Order 1.<sup>58</sup> Other key differences included: the removal of Iraq from the list of countries subject to the travel ban, the addition of multiple national security-based justifications for the order’s provisions, a clear and specific statement confirming that the order does not intend to result in religious discrimination, and a reversal of the indefinite ban on the admission of Syrian refugees into the United States, which was replaced by a temporary 120-day suspension of admission.<sup>59</sup>

However, from an immigration practice perspective, the most notable difference between Executive Order 1 and Executive Order 2 was that Executive Order 2 specified that its provisions did *not* apply to lawful permanent residents, to foreign nationals in possession of a valid visa as of the order’s effective date, to dual nationals who were eligible to present a passport issued by a country that is not affected by the travel ban, nor to foreign nationals who had already been

---

56. See Glenn Thrush, *Trump’s New Travel Ban Blocks Migrants from Six Nations, Sparing Iraq*, N.Y. TIMES (Mar. 6, 2017), <https://www.nytimes.com/2017/03/06/us/politics/travel-ban-muslim-trump.html>; see also Matt Zapposky et al., *Revised Executive Order Bans Travelers from Six Muslim-Majority Countries from Getting New Visas*, WASH. POST (Mar. 6, 2017), [https://www.washingtonpost.com/world/national-security/new-executive-order-bans-travelers-from-six-muslim-majority-countries-applying-for-visas/2017/03/06/3012a42a-0277-11e7-ad5b-d22680e18d10\\_story.html?utm\\_term=.f4b093a4439b](https://www.washingtonpost.com/world/national-security/new-executive-order-bans-travelers-from-six-muslim-majority-countries-applying-for-visas/2017/03/06/3012a42a-0277-11e7-ad5b-d22680e18d10_story.html?utm_term=.f4b093a4439b) (noting that the revisions to the order may “make it more defensible in court”).

57. See *infra* Section III.A.

58. See Ariane de Vogue et al., *US President Donald Trump Signs New Travel Ban, Exempts Iraq*, CNN (Mar. 7, 2017, 4:15 AM), <http://www.cnn.com/2017/03/06/politics/trump-travel-ban-iraq/index.html>. Compare Exec. Order No. 13,769, 82 Fed. Reg. 8977 (Jan. 27, 2017) (containing no effective date), with Exec. Order No. 13,780, 82 Fed. Reg. 13,209 (Mar. 6, 2017) (providing that the revised order is effective on March 16, 2017, ten days after signing).

59. Exec. Order No. 13,780, 82 Fed. Reg. 13,209, 13,211–18 (Mar. 6, 2017); see also Thrush, *supra* note 56 (analyzing the differences in Executive Order 2).

granted asylum or refugee status before the effective date of the order.<sup>60</sup> These exceptions greatly helped to alleviate the concerns of green card holders and allowed immigration attorneys to provide concrete guidance to their clients on this important issue.<sup>61</sup>

Additionally, another major difference between the two orders was that Executive Order 2 included a provision allowing foreign nationals subject to the travel ban to apply for a waiver and obtain permission to enter the United States.<sup>62</sup> These waiver applications would be reviewed on a case-by-case basis by the Commissioner of United States Customs and Border Protection.<sup>63</sup> The order outlined a number of criteria that foreign nationals could meet in order to qualify for waiver, such as: providing proof that the foreign national had previously been approved for admission to the United States to work or study, proof that the foreign national is an infant, adoptee, young child, or in need of urgent medical care, or proof that the foreign national has provided valuable and faithful service to the United States government.<sup>64</sup>

Notwithstanding these differences, Executive Order 2 did not enjoy preferential treatment as the President had hoped, and a federal case was filed challenging the order just two days after it was signed.<sup>65</sup>

B. *Hawai‘i v. Trump: The Case Against the Administration’s “Muslim Ban 2.0”*

On March 8, 2017, the State of Hawai‘i filed a lawsuit challenging Executive Order 2 in federal court and requested an injunction to stop the implementation of the order.<sup>66</sup> Hawai‘i’s Attorney General, Mr. Douglas Chin, referred to the order as “nothing more than [a] Muslim Ban 2.0” and specifically accused the Trump administration of attempting to work around the legal challenges previously levied against the first executive order.<sup>67</sup> The Complaint lists eight causes

---

60. Exec. Order No. 13,780, 82 Fed. Reg. 13,209, 13,213–14 (Mar. 6, 2017).

61. See Laura Jarrett & Elise Labott, *Travel Ban 2.0 in Effect, Court Challenges Begin*, CNN (June 30, 2017, 5:09 AM), <http://www.cnn.com/2017/06/29/politics/revised-travel-ban-thursday/index.html>.

62. Exec. Order No. 13,780, 82 Fed. Reg. 13,209, 13,214–15 (Mar. 6, 2017).

63. *Id.* at 13,214.

64. *Id.*

65. Eric Beech, *State of Hawaii to Challenge New Trump Order in Court: Court Document*, REUTERS (Mar. 7, 2017, 8:41 PM), <http://www.reuters.com/article/us-usa-immigration-hawaii/state-of-hawaii-to-challenge-new-trump-order-in-court-court-document-idUSKBN16F077; infra> Section III.B.

66. Second Amended Complaint for Declaratory & Injunctive Relief at 37, *Hawai‘i v. Trump*, 241 F. Supp. 3d 1119 (D. Haw. 2017) (No. 1:17-cv-00050-DKW-KJM).

67. Alexander Burns, *Hawaii Sues to Block Trump Travel Ban; First Challenge to Order*, N.Y. TIMES (Mar. 8, 2017), <https://www.nytimes.com/2017/03/08/us/trump->

of action against the President, including violation of the Fifth Amendment's Equal Protection Clause, Substantive Due Process Clause, and Procedural Due Process guarantee, violation of the Immigration and Nationality Act, violation of the Establishment Clause,<sup>68</sup> and violation of the Religious Freedom Restoration Act.<sup>69</sup>

On March 15, 2017, United States District Judge Derrick K. Watson granted Hawai'i's request and signed a TRO, which prohibited implementation or enforcement of Executive Order 2's travel ban provisions.<sup>70</sup> Displeased, President Trump referred to the decision as "unprecedented judicial overreach."<sup>71</sup> In support of his decision, Judge Watson explained that Hawai'i satisfactorily demonstrated its likelihood to succeed on the merits of its First Amendment Establishment Clause claim.<sup>72</sup> In the United States District Court for the District of Maryland, Judge Theodore D. Chuang echoed that Executive Order 2 would indeed operate as a Muslim ban if implemented.<sup>73</sup>

This ruling perfectly illustrates what makes *Hawai'i v. Trump* so interesting from a jurisprudential standpoint. When making his decision, Judge Watson stated that he also considered "questionable evidence supporting the Government's national security motivations," which is no doubt a thinly veiled allusion to the many controversial statements made by President Trump on the campaign trail.<sup>74</sup> By looking past Executive Order 2's plain language and taking into account statements made by the President before he was elected, Judge Watson entered a new realm of jurisprudence, wherein justices and judges may blatantly allow outside commentary and

---

travel-ban-hawaii.html; Laurel Wamsley, *Hawaii Mounts Legal Challenge to President's Revised Travel Ban*, NPR (Mar. 8, 2017, 6:10 PM), <http://www.npr.org/sections/thetwo-way/2017/03/08/519263084/hawaii-will-mount-legal-challenge-to-presidents-revised-travel-ban>.

68. Second Amended Complaint for Declaratory & Injunctive Relief, *supra* note 66, at 31. This cause of action was included due to the State's belief that Executive Order 2 attempted to establish a state religion by specifically and pointedly targeting Muslims. *Id.*

69. *Id.* at 31–37.

70. *Hawai'i*, 241 F. Supp. 3d at 1140.

71. Alexander Burns, *Trump Calls Ruling Against Ban 'Unprecedented Judicial Overreach'*, BOS. GLOBE (Mar. 15, 2017), <https://www.bostonglobe.com/news/politics/2017/03/15/ban/925aot1WCKjHXToUd3sTJK/story.html>.

72. *Hawai'i*, 241 F. Supp. 3d at 1134.

73. Alexander Burns, *2 Federal Judges Rule Against Trump's Latest Travel Ban*, N.Y. TIMES (Mar. 15, 2017), <https://www.nytimes.com/2017/03/15/us/politics/trump-travel-ban.html>.

74. *Hawai'i*, 241 F. Supp. 3d at 1140.

media reports to influence their decision-making process when ruling on a case.<sup>75</sup>

On March 17, 2017, Judge Alexander Kozinski of the Court of Appeals for the Ninth Circuit filed a late dissent to the Ninth Circuit panel's opinion in *Washington v. Trump*, seemingly in direct response to Judge Watson's statements about the President's campaign speeches in his TRO ruling.<sup>76</sup> Judge Kozinski took issue with the panel's decision because it relied on statements President Trump made during his candidacy, noting that the decision would "chill campaign speech" and would create an unworkable analysis.<sup>77</sup>

#### IV. THE THIRD TIME IS *NOT* THE CHARM . . . THE PRESIDENT'S FAILED THIRD ATTEMPT TO BAN IMMIGRATION

On September 24, 2017, the President took one more bite at the apple of immigration by issuing what amounts to his third executive order, though it was characterized as a "proclamation."<sup>78</sup> The proclamation, entitled "Enhancing Vetting Capabilities and Processes for Detecting Attempted Entry Into the United States by Terrorists or Other Public-Safety Threats" (hereinafter the Proclamation), aims to accomplish the same goals as the President's executive orders: to prevent the entry into the United States by foreign nationals of certain countries.<sup>79</sup> This Proclamation was quickly halted, again by the federal court in Hawai'i, with Judge Watson reiterating that the Proclamation's terms do not cure the ills contained in its predecessor executive orders and, as such, cannot be implemented for the same reasons: the terms are overbroad and are not supported by extant data.<sup>80</sup> Judge Watson also characterized the Proclamation as "plainly discrimina[tory] based on nationality."<sup>81</sup>

---

75. *See id.* at 1136–37.

76. *Washington v. Trump*, 858 F.3d 1168, 1172–74 (9th Cir. 2017) (Kozinski, J., dissenting).

77. *Id.*

78. Proclamation 9645—Enhancing Vetting Capabilities and Processes for Detecting Attempted Entry into the United States by Terrorists or Other Public-Safety Threats, 2017 DAILY COMP. PRES. DOC. 1 (Sept. 24, 2017), <https://www.gpo.gov/fdsys/pkg/DCPD-201700685/pdf/DCPD-201700685.pdf>.

79. *Id.* at 5–8.

80. *Hawai'i v. Trump*, No. 17-00050 DKW-KSC, 2017 WL 4639560, at \*9–13 (D. Haw. Oct. 17, 2017), *appeal docketed*, No. 17-17168 (9th Cir. Oct. 24, 2017).

81. *Id.* at \*1.

V. ANOTHER ONE BITES THE DUST: AN EXAMINATION OF THE PRESIDENT'S COMMITMENT TO ENDING IMMIGRATION PROGRAMS AND HOW THESE GOALS AFFECT THE PRACTICE OF IMMIGRATION LAW

The practice of immigration law in the Trump Era has become so fraught with difficulties that a variety of bar associations and organizations are offering entire seminars, webinars, and Continuing Legal Education courses to help provide guidance to attorneys who are trying to navigate through these ever-murkier waters.<sup>82</sup> The primary reason why immigration practice has become so frustratingly muddled is two-fold: the state of current immigration law is largely driven by executive orders and regulations, and the media constantly reports on statements the President has reportedly made—yet not acted upon—both in public and in private meetings.<sup>83</sup>

First, it is important to understand the basis of immigration lawmaking powers and the various agencies that are involved in these processes.<sup>84</sup> The Constitution vests Congress with the power “[t]o establish an uniform Rule of Naturalization . . . .”<sup>85</sup> Therefore, both chambers of Congress must act to pass immigration-related laws,<sup>86</sup> however, there are several wrinkles when ascertaining what is immigration *law*, and what is immigration *policy*. As noted, immigration law must be enacted through both the House and Senate, which is largely why the often-promised comprehensive immigration reform legislation has yet to pass.<sup>87</sup> But immigration *policy* may be implemented through the President's independent actions, such as executive orders, or even through actions taken by federal agencies in

---

82. See, e.g., Continuing Legal Education Course Description for *Immigration Practice in the Trump Era*, MD. ST. B. ASS'N, <https://msba.inreachce.com/Details?groupId=8f646db8-58e0-4f30-82b4-0190d83ac727> (last visited Nov. 12, 2017); *Fighting Enforcement & Keeping Families Together in the Trump Era*, NAT'L IMMIGR. PROJECT NAT'L LAW. GUILD, <https://secure.nationalimmigrationproject.org/np/client/s/nationalimmigration/event.jsp?event=569> (last visited Nov. 12, 2017); *Webinar: Immigration in the Trump Era*, KLASKO L., <http://www.klaskolaw.com/event/webinar-immigration-trump-era/> (last visited Nov. 12, 2017).

83. See *infra* notes 84–120 and accompanying text.

84. See *infra* notes 85–108 and accompanying text.

85. U.S. CONST. art. I, § 8, cl. 4.

86. *The Legislative Process*, U.S. HOUSE REPRESENTATIVES, [https://www.house.gov/content/learn/legislative\\_process/](https://www.house.gov/content/learn/legislative_process/) (last visited Nov. 12, 2017).

87. Priscilla Alvarez, *Could Trump's Immigration Agenda Ever Get Through Congress?*, ATLANTIC (July 28, 2017), <https://www.theatlantic.com/politics/archive/2017/07/trump-immigration-congress/534951/>.

the federal rulemaking process.<sup>88</sup> It is important to note that heads of agencies are empowered to utilize the federal rulemaking process without any sort of congressional or presidential involvement or approval.<sup>89</sup>

Because both the President and federal agencies can implement immigration *policies* without working with Congress,<sup>90</sup> it should come as no surprise that the distinction between what is “policy” and what is “law” has drastically expanded in recent years. This expansion has already been challenged in the court system, with lawsuits opposing former President Obama’s Deferred Action for Parents of Americans (DAPA) program,<sup>91</sup> and the Department of Homeland Security’s H-4 Employment Authorization Document (EAD) program serving as prime examples.<sup>92</sup>

The basis for both lawsuits was that the respective immigration policies and regulations effectively had the force of law because they dramatically changed immigration practice and benefits.<sup>93</sup> For example, in the wake of former President Obama’s institution of the Deferred Action for Childhood Arrivals (DACA) program in June 2012,<sup>94</sup> United States Citizenship and Immigration Services (USCIS)<sup>95</sup> received close to 1.5 million applications for deferred

---

88. See D’vera Cohn, *How U.S. Immigration Laws and Rules Have Changed Through History*, PEW RES. CTR. (Sept. 30, 2015), <http://www.pewresearch.org/fact-tank/2015/09/30/how-u-s-immigration-laws-and-rules-have-changed-through-history/>; see also *A Guide to the Rulemaking Process*, OFF. FED. REG., [https://www.federalregister.gov/uploads/2011/01/the\\_rulemaking\\_process.pdf](https://www.federalregister.gov/uploads/2011/01/the_rulemaking_process.pdf) (last visited Nov. 12, 2017) (describing the federal agency rulemaking process).

89. See, e.g., Homeland Security Act of 2002, Pub. L. No. 107-296, § 102, 116 Stat. 2135, 2142–43 (codified at 6 U.S.C. § 112 (2016)); 8 U.S.C. § 1103(a) (2016). Both of these provisions authorize the Secretary of the Department of Homeland Security to administer and enforce the immigration and nationality laws. § 102; § 1103(a).

90. See *supra* notes 88–89 and accompanying text.

91. See, e.g., *Texas v. United States*, 809 F.3d 134, 146 (5th Cir. 2015), *aff’d*, 136 S. Ct. 2271 (2016).

92. See, e.g., *Save Jobs USA v. U.S. Dep’t of Homeland Sec.*, 210 F. Supp. 3d 1, 4–5 (D.D.C. 2016), *appeal docketed*, No. 16-5287 (D.C. Cir. Sept. 30, 2016).

93. See *Understanding the Legal Challenges to Executive Action*, AM. IMMIGR. COUNCIL (June 28, 2016), <https://www.americanimmigrationcouncil.org/research/legal-challenges-executive-action-on-immigration>.

94. Remarks on Immigration Reform and an Exchange with Reporters, 2012 DAILY COMP. PRES. DOC. 1–3 (June 15, 2012), <https://www.gpo.gov/fdsys/pkg/DCPD-201200483/pdf/DCPD-201200483.pdf>.

95. USCIS is the sub-agency within the United States Department of Homeland Security that adjudicates applications for immigration-related benefits. See *Our History*, U.S. CITIZENSHIP & IMMIGR. SERVICES, <https://www.uscis.gov/history-and-genealogy/our-history/our-history> (last updated Feb. 11, 2016). USCIS was formerly part of the Immigration and Naturalization Service (INS). *Id.*

action and DACA-based employment authorization benefits.<sup>96</sup> From an immigration attorney perspective, the announcement of this policy resulted in a huge influx of inquiries from new clients regarding their options under DACA and how they could apply for these new benefits.<sup>97</sup>

However, attorneys could not simply assess the case to determine if the potential applicant met the minimum requirements for the program.<sup>98</sup> Attorneys, community organizations, and non-profit groups who assisted foreign nationals with these applications were arguably under an ethical obligation to inform the potential DACA recipients that, by submitting their applications to USCIS, they were effectively putting USCIS on notice that they were present in the United States without legal immigration status.<sup>99</sup> This created a veritable, treasure trove-like database of undocumented foreign nationals for which USCIS or Immigration and Customs Enforcement did not even have to lift a finger.<sup>100</sup> Thus, if the policy were to be rescinded and if deportation enforcement efforts were to escalate, federal immigration officials could easily look to the DACA application records to readily identify hundreds of thousands of foreign nationals to investigate.<sup>101</sup>

Even a casual observer can see how this policy is now potentially a huge problem under the new administration.<sup>102</sup> On September 5, 2017, the President announced his decision to rescind the DACA program, explaining that “[t]here can be no path to principled immigration reform if the executive branch is able to rewrite or nullify federal laws at will.”<sup>103</sup> The fact that DACA can be rescinded

---

96. U.S. CITIZENSHIP & IMMIGRATION SERVS., U.S. DEP’T OF HOMELAND SEC., NUMBER OF I-821D, CONSIDERATION OF DEFERRED ACTION FOR CHILDHOOD ARRIVALS BY FISCAL YEAR, QUARTER, INTAKE, BIOMETRICS AND CASE STATUS: 2012-2016 (JUNE 30) (2016), [https://www.uscis.gov/sites/default/files/USCIS/Resources/Reports%20and%20Studies/Immigration%20Forms%20Data/All%20Form%20Types/DACA/daca\\_performance\\_data\\_fy2016\\_qtr3.pdf](https://www.uscis.gov/sites/default/files/USCIS/Resources/Reports%20and%20Studies/Immigration%20Forms%20Data/All%20Form%20Types/DACA/daca_performance_data_fy2016_qtr3.pdf).

97. See Julián Gustavo Gómez, *There’s a Federal Database of Undocumented Immigrants like Me. Don’t Let Trump Get It.*, WASH. POST (Nov. 22, 2016), [https://www.washingtonpost.com/posteverything/wp/2016/11/22/theres-a-federal-database-of-undocumented-immigrants-like-me-erase-it-while-theres-still-time/?utm\\_term=.802c5103bae6](https://www.washingtonpost.com/posteverything/wp/2016/11/22/theres-a-federal-database-of-undocumented-immigrants-like-me-erase-it-while-theres-still-time/?utm_term=.802c5103bae6).

98. See *infra* notes 99–100 and accompanying text.

99. See Gustavo Gómez, *supra* note 97.

100. See *id.*

101. *Id.*

102. See *id.*

103. *Statement from President Donald J. Trump*, WHITE HOUSE (Sept. 5, 2017), <https://www.whitehouse.gov/the-press-office/2017/09/05/statement-president-donald-j-trump>.

so easily because it is merely *policy* implemented through executive order, and not *law* passed by Congress, has given attorneys great pause when deciding whether to submit DACA extension applications on behalf of clients.<sup>104</sup>

The previously discussed Executive Order 1, which instituted the sweeping and sudden travel bans, caused an unprecedented and widespread panic in the foreign national community.<sup>105</sup> This panic extended to United States companies who employ foreign nationals in positions ranging from physicians to chief executive officers.<sup>106</sup> For immigration attorneys, it was nearly impossible to properly advise clients on who would be affected by the executive orders and how these individuals would be affected.<sup>107</sup> Lawyers had to be cautious because the information about the orders was constantly changing.<sup>108</sup>

Another characteristic of the new administration, which has made effective immigration practice increasingly difficult, is the extent to which the media discusses comments allegedly made by the President in both public and private meetings.<sup>109</sup> The amount of press coverage and leaked information that is released to the public under the Trump administration is unprecedented, and such leaks were nearly unheard of under former President Obama.<sup>110</sup> Hardly a day goes by that one

- 
104. See *Immigration Lawyer Fears for Fate of 'Dreamers' Under Trump*, NPR (Feb. 1, 2017, 4:27 PM), <http://www.npr.org/2017/02/01/512906688/immigration-lawyer-fears-for-fate-of-dreamers-under-trump>.
105. Yeganeh Torbati & Doina Chiacu, *Trump Immigration Curbs Cause Worldwide Chaos, Panic, Anger*, REUTERS (Jan. 28, 2017, 10:38 AM), <http://in.reuters.com/article/usa-trump-immigration/trump-immigration-curbs-cause-worldwide-chaos-panic-anger-idINKBN15COL5>.
106. *Trump's Travel Ban Causing Angst for America's Health System*, CBS NEWS (Feb. 21, 2017, 6:50 AM), <https://www.cbsnews.com/news/trump-travel-ban-impact-on-international-doctors-american-health-system/>; see also Drew Calvert, *Companies Want to Hire the Best Employees. Can Changes to the H-1B Visa Program Help?*, KELLOGGINSIGHT (Feb. 6, 2017), <https://insight.kellogg.northwestern.edu/article/how-to-revamp-the-visa-program-for-highly-skilled-workers> (explaining that United States companies are negatively impacted by the current H-1B visa's restrictions and are discouraged from "diversifying their workforce").
107. Darran Simon, *Attorneys: Travel Ban Fight Is 'a Marathon' with No End in Sight*, CNN (Mar. 7, 2017, 1:43 AM), <http://www.cnn.com/2017/03/06/us/attorneys-activists-fighting-travel-ban/index.html>.
108. See *id.*
109. See *infra* notes 110–20 and accompanying text.
110. Joe Concha, *Trump's First 100 Days Earned Triple the Coverage of Previous Presidents*, HILL (May 18, 2017, 2:33 PM), <http://thehill.com/homenews/media/334097-trumps-first-100-days-earned-triple-the-coverage-of-previous-presidents-study>; see also Paul Farhi, *The Trump Administration Has Sprung a Leak. Many of Them, in Fact.*, WASH. POST (Feb. 5, 2017), <https://www.washingtonpost.com/lifestyle/style/the-trump-administration-has-sprung-a-leak-many-of-them-in-fact/2017/02/05/a13>

news outlet or another, including less traditional media sources such as Twitter, Reddit, and blogs, publishes a story about the President's supposed impending executive order or action that affects immigration.<sup>111</sup> These stories are often quite alarming, and they result in foreign nationals frantically contacting their employers, families, and immigration attorneys seeking more information when there is little to provide.<sup>112</sup>

A prime example of this rumor-spreading is the recent false alarm dealing with the North American Free Trade Agreement (NAFTA), a 1993 trilateral trade agreement signed by Canada, Mexico, and the United States.<sup>113</sup> Pursuant to this agreement, Congress created the TN visa, which is reserved for professionals from Canada and Mexico that migrate to the United States to work in one of the specialized job positions enumerated in the NAFTA index.<sup>114</sup> According to the United States Department of State, nearly 40,000 TN visas have been issued in the past three years.<sup>115</sup> This figure does not include the number of foreign nationals that were issued TN visas prior to 2014 and have been continuously renewing their TN visas.<sup>116</sup> This figure also does not include the number of spouses and children of TN workers that hold TD visas.<sup>117</sup>

Therefore, it came as no surprise to immigration attorneys when a flurry of desperate phone calls and emails came pouring in to their offices after multiple media news outlets ran stories that President

---

fad24-ebe2-11e6-b4ff-ac2cf509efe5\_story.html?utm\_term=.1afec0ae935c (discussing the information leaks in the Trump administration and noting that “the Trump White House has gushed”).

111. See, e.g., Zoe Tillman, *President Trump Signs New Travel Restrictions as the Previous Travel Ban Expires*, BUZZFEED (Sept. 25, 2017, 8:43 PM), [https://www.buzzfeed.com/zoetillman/president-trump-signs-new-travel-restrictions-as-the?utm\\_term=.myw1rAVpO#.yx2KzNnpe](https://www.buzzfeed.com/zoetillman/president-trump-signs-new-travel-restrictions-as-the?utm_term=.myw1rAVpO#.yx2KzNnpe).
112. See Simon, *supra* note 107.
113. North American Free Trade Agreement, Can.-Mex.-U.S., Dec. 17, 1992, 32 I.L.M. 289 (1993); Jethro Mullen, *Trump: We'll Probably End Up Killing NAFTA 'At Some Point'*, CNN (Aug. 23, 2017, 3:47 PM), <http://money.cnn.com/2017/08/22/investing/trump-nafta-termination/index.html?iid=EL>.
114. See *TN NAFTA Professionals*, U.S. CITIZENSHIP & IMMIGR. SERVICES, <https://www.uscis.gov/working-united-states/temporary-workers/tn-nafta-professionals> (last updated Mar. 7, 2017).
115. BUREAU OF CONSULAR AFFAIRS, U.S. DEP'T OF STATE, TABLE XVI(B) NONIMMIGRANT VISAS ISSUED BY CLASSIFICATION (INCLUDING BORDER CROSSING CARDS) FISCAL YEARS 2012-2016 (2016), <https://travel.state.gov/content/dam/visas/Statistics/AnnualReports/FY2016AnnualReport/FY16AnnualReport-TableXVIB.pdf>.
116. *Id.*
117. *Id.*

Trump was “reportedly mulling an executive order”<sup>118</sup> and was rumored to issue an executive order withdrawing the United States from NAFTA.<sup>119</sup> Because the President shortly thereafter issued a statement confirming that he will be working with the Canadian and Mexican leaders to renegotiate NAFTA,<sup>120</sup> the TN and TD visa holders’ fears were thankfully soon dispelled. However, the incident remains the model for immigration practice in the current political climate: shoot first and ask questions later.

#### VI. BUILDING BRIDGES INSTEAD OF WALLS: HOW CONGRESS, THE PRESIDENT, AND ATTORNEYS CAN WORK TOGETHER TO PREVENT FURTHER CHAOS IN IMMIGRATION PRACTICE

Immigration lawyers around the country will agree that the past six months have been some of the most trying times in their careers.<sup>121</sup> The media frequently interviews immigration attorneys about their new workload and stress level in the “Trump era,” and there are anecdotes abound describing practitioners who go days without shaving or sleeping, or who have taken up smoking to cope with the stress and frustration of not knowing what the President will do—for what the media will speculate the President will do—on any given day.<sup>122</sup> The solution to this problem is two-fold: quick congressional action and long-term presidential *inaction*.<sup>123</sup>

First, because the Constitution grants Congress the power to pass immigration laws, Congress *must* use this power to enact reform legislation in order to update the current system that is so terribly in

---

118. Matt Ford, *How Easily Could Trump Withdraw the U.S. from NAFTA?*, ATLANTIC (Apr. 26, 2017), <https://www.theatlantic.com/politics/archive/2017/04/trump-nafta-withdrawal-order/524463/>.

119. Mythili Sampathkumar, *Donald Trump to Sign Executive Order Withdrawing US from Nafta*, INDEP. (Apr. 26, 2017, 11:05 AM), <http://www.independent.co.uk/news/donald-trump-nafta-executive-order-trade-deal-us-america-leave-latest-a7703926.html> (“The order has been submitted for final review to the appropriate teams within the White House and may be signed as early as the next few days.”).

120. Julie Hirschfeld Davis, *Trump Sends Nafta Renegotiation Notice to Congress*, N.Y. TIMES (May 18, 2017), <https://www.nytimes.com/2017/05/18/us/politics/nafta-renegotiation-trump.html>.

121. Berr, *supra* note 9.

122. Bailey, *supra* note 3; Adam Chandler, *What It's like to Be an Immigration Attorney in the Final Weeks Before the Trump Presidency*, ATLANTIC (Dec. 5, 2016), <https://www.theatlantic.com/business/archive/2016/12/immigration-lawyers-trump/509585/>.

123. See *infra* notes 124–36 and accompanying text.

need of modernization.<sup>124</sup> It is completely unacceptable for any sort of reform legislation to stall for years due to political threats and holdouts because it hamstring the entire country.<sup>125</sup> In fact, the argument could be made that, because Congress is granted the sole power to create immigration law and refuses to effectively use it, this branch of government is actually *abusing* its power and should be disciplined by the judicial or executive branch. This necessary reform legislation must tackle the hot button issues of undocumented immigration and employment-based immigration quotas, at the very least. The representatives and senators may not like it, but it is their job. They are obligated, by both the law and the oaths they take to uphold it, to pass legislation which affects the entire country.<sup>126</sup>

Second, the President and his federal agencies must restrain themselves with regards to implementing policies that have the effect of law.<sup>127</sup> To be fair, this advice was also applicable to the former administration, as it was President Obama's liberal use of executive orders that set the stage for his successor to similarly change entire aspects of the immigration landscape with the stroke of his pen.<sup>128</sup> This advice may seem unfair to the current President and his supporters, because, after all, the previous administration utilized executive orders to get what it wanted.<sup>129</sup> Now that it is arguably "their turn" to respond in kind, it is of the utmost importance that, moving forward, all branches of the government acknowledge and respect their individual boundaries.<sup>130</sup>

---

124. Senator Richard Blumenthal, *Congress Must Pass Comprehensive Reform*, HILL (Jan. 20, 2015, 9:59 PM), <http://thehill.com/special-reports/immigration-january-21-2015/230171-congress-must-pass-comprehensive-reform>.

125. *See id.*

126. U.S. CONST. art. VI, cl. 3 ("The Senators and Representatives before mentioned, and the Members of the several State Legislatures, and all executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution . . .").

127. *See infra* notes 128–36 and accompanying text.

128. Aaron Blake, *What Is an Executive Order? And How Do President Trump's Stack Up?*, WASH. POST (Jan. 27, 2017), [https://www.washingtonpost.com/news/the-fix/wp/2017/01/27/what-is-an-executive-order-and-how-do-president-trumps-stack-up/?utm\\_term=.1af858a15a3c](https://www.washingtonpost.com/news/the-fix/wp/2017/01/27/what-is-an-executive-order-and-how-do-president-trumps-stack-up/?utm_term=.1af858a15a3c); Sebastian Payne, *How Obama Has Used Executive Powers Compared to His Predecessors*, WASH. POST (July 10, 2014), <https://www.washingtonpost.com/news/the-fix/wp/2014/07/10/how-obama-has-used-executive-powers-compared-to-his-predecessors/>.

129. Payne, *supra* note 128.

130. *See* Mickey Edwards, *We No Longer Have Three Branches of Government*, POLITICO (Feb. 27, 2017), <http://www.politico.com/magazine/story/2017/02/three-branches-government-separation-powers-executive-legislative-judicial-214812>.

Former President Obama made use of executive orders because Congress would not pass comprehensive immigration reform, but by doing so, he set the stage for subsequent administrations to similarly circumvent Congress by implementing sweeping changes to the law under the guise of instituting policies via these orders.<sup>131</sup> However, even proponents of the Obama administration's actions must acknowledge that by making use of executive orders, the former President may have adversely affected the people he was trying to help.<sup>132</sup> By instituting DACA through executive order instead of working with Congress to ensconce it in law, President Obama provided mere temporary relief and effectively created a database of foreign nationals who are eligible for deportation.<sup>133</sup> Now that President Trump is in the White House, those hundreds of thousands of foreign nationals who received DACA protection may soon find their lives thrown into chaos if the protection is removed.<sup>134</sup>

Realistically, former President Obama's executive order may have simply worked to delay the inevitable for many of these individuals, possibly doing them more harm than good.<sup>135</sup> To prevent further uncertainty in immigration practice, it is imperative that the Trump administration restrain itself and work with Congress—not presidential pens—in order to pass immigration reform legislation.<sup>136</sup>

## VII. CONCLUSION

It is certainly true that the reality of being an immigration attorney in the "Trump era" was wholly unexpected. However, the new challenges and uncertainties that have resulted from changes in the White House present unique opportunities for practitioners. Practitioners should take a more holistic approach with advocacy efforts. They should focus on bringing about the needed permanent relief through legislation, rather than encouraging temporary measures that offer immediate gratification, but depend upon the way the wind blows in Washington D.C. every four or eight years.

---

131. See Rebecca Kaplan, *Obama to Immigration Critics in Congress: "Pass a Bill,"* CBS NEWS (Nov. 20, 2014, 8:30 PM), <https://www.cbsnews.com/news/obama-move-to-shield-millions-from-deportation-is-lawful/>.

132. See *id.*; see also Gustavo Gómez, *supra* note 97 (noting that the database containing DACA recipients' personal information will now be available to President Trump).

133. Gustavo Gómez, *supra* note 97.

134. Nina Mashurova, *Dreamers on DACA and What Happens if Trump Takes It Away*, FADER (Jan. 18, 2017), <http://www.thefader.com/2017/01/18/daca-undocumented-youth-interview-trump>.

135. See Gustavo Gómez, *supra* note 97.

136. See *supra* notes 123–34 and accompanying text.

The foregoing explanation of the President's executive orders,<sup>137</sup> and the resulting litigation,<sup>138</sup> has clearly illustrated the overwhelming need for immediate immigration reform.<sup>139</sup> Congress *must* pass legislation that addresses the numerous problems with our nation's needlessly complex and outdated immigration system.<sup>140</sup> As the nation continues to wait for Congress to act, it is ardently hoped that the administration and the media will begin to exercise restraint so that the practice of immigration law will no longer require a stiff upper lip—and an even stiffer drink.

---

137. *See supra* Sections II.A, III.A, and Part IV.

138. *See supra* Sections II.B, III.B, and Part IV.

139. *See supra* notes 124–26 and accompanying text.

140. *See supra* notes 124–26 and accompanying text.

