

TRUMP'S TRAVEL BAN: LAWFUL BUT ILL-ADVISED

Waging relentless and barbaric genocide against minority religious groups in Syria and Iraq,¹ ISIS² has murdered,³ raped,⁴ and kidnapped⁵ Yazidis and Christians, among others. Almost

1. USCIRF in December 2015 and U.S. Secretary of State John Kerry in March 2016 declared that ISIS committed genocide against Yazidis, Christians, and Shi'a Muslims, and the U.S. Holocaust Memorial Museum (USHMM) reported in 2015 that ISIS conducted genocide in summer 2014 against Yazidis. U.S. COMM'N ON INT'L RELIGIOUS FREEDOM, ANNUAL REPORT 99–100 (2016), <http://www.uscirf.gov/sites/default/files/USCIRF%202016%20Annual%20Report.pdf> [<https://perma.cc/9S9U-KNEV>] [hereinafter *USCIRF REPORT 2016*].

2. The Author uses the recognizable acronym "ISIS" as an abbreviation for "The Islamic State of Iraq and Syria." See Helen Lock, *Isis vs Isil vs Islamic State: What do they mean—and why does it matter?*, INDEPENDENT (Sept. 14, 2014, 2:12 PM), <http://www.independent.co.uk/news/world/middle-east/isis-vs-isil-vs-islamic-state-what-is-in-a-name-9731894.html> [<https://perma.cc/QLQ8-FPZY>]. Yet no government has ever recognized ISIS as a state. See Richard Allen Greene & Nick Thompson, *ISIS: Everything you need to know about the group*, CNN (Aug. 11, 2016, 12:12 PM), <http://www.cnn.com/2015/01/14/world/isis-everything-you-need-to-know/index.html> [<https://perma.cc/TKX6-KBJ9>]. Moreover, according to the Islamic Society of Britain and the Association of Muslim Lawyers, ISIS "has no standing with faithful Muslims." Lock, *supra*. ISIS can also stand for "The Islamic State of Iraq and al Sham," with "al Sham" signifying the area ISIS seeks to control consisting of southern Turkey through Syria to Egypt (including Lebanon, Israel, the Palestinian territories and Jordan). *Id.* This area can also be referred to as "the Levant"—hence the "L" in ISIL, the acronym that was favored by the Obama administration. *Id.* In June 2014, ISIS publically stated that it wished to be referred to as IS (Islamic State). *Id.* The Author, having no desire to legitimize the imperialistic aspirations of this terrorist organization, continues to use the acronym, ISIS.

3. ISIS stoned, beheaded, and electrocuted members of religious minority groups. *USCIRF REPORT 2016, supra* note 1, at 100 (2016). USHMM reports that ISIS murdered 1562 Yazidis in the summer of 2014. *Id.* at 101. The United Nations reports 16 likely Yazidi mass graves near Sinjar. *Id.* The Iraqi Defense Minister reports ISIS murdering 2000 Iraqis in (Christian-populated) Ninevah Plains from January to August 2015. *Id.* ISIS (comprised of mostly Sunni Muslims) also mass-murdered Shi'a Muslims (the religious majority in Iraq) through bombings and targeted individual Sunni Muslims who disagree with its ideology. *Id.*

4. In August 2014, ISIS fighters kidnapped, raped, sold into sex-slavery, or killed thousands of Yazidi women, including pre-pubescent girls in Sinjar. U.S. COMM'N ON INT'L RELIGIOUS FREEDOM, ANNUAL REPORT 96–97 (2015), <http://www.uscirf.gov/sites/default/files/USCIRF%20Annual%20Report%202015%20282%29.pdf> [<https://perma.cc/8FWW-3NG9>].

5. The United Nations Assistance Mission for Iraq (UNAMI) and the Office of the United Nations High Commissioner for Human Rights reported in January

90% of Iraq's Mandeian population has been killed or displaced, and only a fourth of the 1700-year-old Christian population remains.⁶ Citing religious persecution⁷ and security concerns presented by terrorist groups,⁸ in January 2017 President Trump issued the controversial Executive Order 13,769, "Protecting the Nation From Foreign Terrorist Entry Into the United States" (the "Original Order"). Section Three of the Original Order banned the entry of nationals from Iraq, Iran, Sudan, Libya, Somalia, Syria and Yemen for 90 days.⁹ In Section Five, the Original Order indefinitely postponed the admission of Syrian refugees,¹⁰ gave preference to "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,"¹¹ and suspended the Refugee Admissions Program for 120 days.¹²

2016 that since August 2014 ISIS kidnapped 5838 people (3192 women, 2646 men). *USCIRF REPORT 2016*, *supra* note 1, at 101.

6. *Id.* at 100.

7. Exec. Order No. 13,769 § 1, 82 Fed. Reg. 8977, 8977 (Jan. 27, 2017) (revoked & replaced with Exec. Order 13,780, 82 Fed. Reg. 13,209 (Mar. 9, 2017)) ("[T]he United States should not admit those who engage in acts of bigotry or hatred (including . . . the persecution of those who practice religions different from their own) . . .").

8. *Id.* As of October 2017, ISIS has been removed from 87% of the territory it once held in Iraq and Syria. Susan Jones, *Military Spokesman: ISIS 'On the Verge of Devastating Defeat' in Iraq and Syria*, CNSNEWS.COM (Oct. 17, 2017), <https://www.cnsnews.com/news/article/susan-jones/military-spokesman-isis-verge-devastating-defeat-iraq-and-syria> [<https://perma.cc/E8QR-CRMW>].

9. *See* Exec. Order No. 13,769 § 3(c), 82 Fed. Reg. 8977, 8977 (Jan. 27, 2017) (revoked & replaced with Exec. Order 13,780, 82 Fed. Reg. 13,209 (Mar. 9, 2017)); 8 U.S.C. § 1187(a)(12) (2016).

10. Exec. Order No. 13,769 § 5(c), 82 Fed. Reg. 8977, 8979 (Jan. 27, 2017) (revoked & replaced with Exec. Order No. 13,780, 82 Fed. Reg. 13,209 (Mar. 9, 2017)).

11. *Id.* § 5(b) ("Upon the resumption of USRAP admissions, the Secretary of State, in consultation with the Secretary of Homeland Security, is further directed to make changes, to the extent permitted by law, to prioritize refugee claims made by individuals on the basis of religious-based persecution, provided that the religion of the individual is a minority religion in the individual's country of nationality. Where necessary and appropriate, the Secretaries of State and Homeland Security shall recommend legislation to the President that would assist with such prioritization.")

12. *Id.* § 5(a). The Immigration and Nationality Act of 1965 establishes the criteria for asylum. The Act provides:

The Secretary of Homeland Security or the Attorney General may grant asylum to an alien who has applied for asylum in accordance with the

The Original Order sparked debate over whether such provisions were within the statutory and constitutional authority of the President of the United States, and whether they violated the Establishment Clause of the First Amendment. A few days after President Trump signed the Original Order, the States of Washington and Minnesota challenged it in the United States District Court for the Western District of Washington.¹³ Judge James Robart ruled in favor of the challengers, and issued a nationwide injunction against enforcement of the Original Order.¹⁴ During the President's subsequent motion to stay in the Ninth Circuit, the parties put forward many of the best arguments for and against the Original Order's legality.¹⁵ Ultimately, however, the Ninth Circuit denied the motion to stay Judge Robart's ruling.¹⁶

President Trump rescinded and replaced the Original Order in March 2017.¹⁷ Executive Order 13,780 (the "Revised Order") kept the 90-day ban for six of the original countries, but removed Iraq;¹⁸ kept the 120-day suspension of refugees, but removed the indefinite ban on Syrian refugees;¹⁹ specified that

requirements and procedures established by the Secretary of Homeland Security or the Attorney General under this section if the Secretary of Homeland Security or the Attorney General determines that such alien is a refugee within the meaning of section 101(a)(42)(A) of this title.

Immigration and Nationality Act of 1965, 8 U.S.C. § 1158(b)(1)(A) (2012). The Act defines "refugee" as one "who is persecuted or who has a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion." *Id.* § 1101(a)(42)(A). The burden of proof is on the applicant to demonstrate that "race, religion, nationality, membership in a particular social group, or political opinion was or will be at least one central reason for persecuting the applicant." *Id.* § 1158(b)(1)(B). Asylum status confers a right to work in the United States, but not a permanent right to remain; it can also be revoked if conditions change in the refugee's country of origin eliminating his well-founded fear of persecution. *See* § 1151(c).

13. *Washington v. Trump*, No. C17-0141JLR, 2017 U.S. Dist. LEXIS 16012 at *2 (W.D. Wash. Feb. 3, 2017), *aff'd*, 847 F.3d 1151 (9th Cir.), *cert. denied*, *Golden v. Washington*, 138 S. Ct. 448.

14. *Id.* at *3, *10.

15. *See generally* *Washington v. Trump*, 847 F.3d 1151 (9th Cir. 2017), *cert. denied*, *Golden v. Washington*, 138 S. Ct. 448.

16. *Id.* at 1156.

17. Exec. Order No. 13,780, 82 Fed. Reg. 13,209, 13,212 (Mar. 9, 2017) (replacing the Original Order).

18. *Id.* § 1(f), (g), at 13,211–12.

19. *See id.* § 6(a), at 13,215.

the Revised Order is inapplicable to lawful permanent residents,²⁰ persons with valid visas on the effective date of the Original Order²¹ or the Revised Order,²² or refugees scheduled for travel to the United States before the effective date of the Revised Order;²³ authorized the Secretary of State and Secretary of Homeland Security to jointly make case-by-case exceptions to the refugee suspension²⁴ and consular officials to make exceptions to the travel restrictions;²⁵ and eliminated (but defended²⁶) the provision giving preference to members of minority religions.²⁷ In June 2017, the Supreme Court—taking up two new challenges to the Revised Order—ordered a partial stay, holding that the Revised Order could only be enforced against foreign nationals “who can[not] credibly claim a bona fide relationship with a person or entity in the United States.”²⁸

This Note will explore the contours of the debate over the validity of the Original Order, and argue that the Original Order was lawful, but a poor policy choice. The first part of this Note argues that the Original Order was within the lawful constitutional and statutory authority of the President of the United States and did not violate the Establishment Clause of the First Amendment. The second part of this Note, however, argues that giving preference to individual refugees on the condition that the “religion of the individual is a minority religion in the individual’s country of nationality” is a poor policy choice, reflecting an oversimplification of and common misconception of religious persecution. Determining whether a refugee has a suitable country of refuge closer to him than the United States, and prioritizing refugees accordingly, could be a more effective way of stopping religious persecution.

20. *Id.* § 3(b)(i), at 13,213.

21. *Id.* § 3(a)(ii).

22. *Id.* § 3(a)(iii).

23. *Id.* § 6(a), at 13,215.

24. *Id.* § 6(c), at 13,216.

25. *Id.* § 3(c), at 13,214.

26. *Id.* § 1(b)(iv), at 13,210.

27. *See id.* § 1(h)(i), at 13,212.

28. *Trump v. Int’l Refugee Assistance Project*, 137 S. Ct. 2080, 2089 (2017).

I. THE STATUTORY AND CONSTITUTIONAL AUTHORITY
FOR THE ORIGINAL ORDER

This part first provides an evaluation of who had standing to challenge the order. Next, it argues that the Immigration and Nationality Act provided statutory authority for the President's Order. This part concludes by explaining why the Original Order did not violate the Establishment Clause or the Religious Freedom Restoration Act.

A. *Standing*

A preliminary question is whether anyone had standing to challenge the constitutionality of the Original Order. The Ninth Circuit held that the States of Washington and Minnesota had standing to challenge the Original Order under third-party standing doctrine, because the Supreme Court has held that schools may vindicate the rights of their students²⁹ and no one has challenged that state universities are branches of the state.³⁰

This is problematic, however, because the doctrine presumes that the third party is vindicating rights that another party actually has. The Ninth Circuit cited precedent that the Fifth Amendment's Due Process Clause "appl[ies] to all 'persons' within the United States, including aliens," and "certain aliens attempting to reenter the United States after traveling abroad."³¹ Yet aliens seeking initial admission to the United States enjoy no constitutional rights regarding their application.³² In addition to aliens attempting to reenter, the court identified refugees and "applicants who have a relationship with a U.S. resident or an institution that might have rights of its own to assert" as potential groups on behalf of which the

29. *Washington v. Trump*, 847 F.3d 1151, 1160 (9th Cir. 2017) (first citing *Runyon v. McCrary*, 427 U.S. 160, 175 & n.13 (1976); then citing *Pierce v. Soc'y of Sisters*, 268 U.S. 510, 536 (1925); then citing *Parks Sch. of Bus., Inc. v. Symington*, 51 F.3d 1480, 1487–88 (9th Cir. 1995); and then citing *Ohio Ass'n of Indep. Sch. v. Goff*, 92 F.3d 419, 422 (6th Cir. 1996)), *cert. denied*, *Golden v. Washington*, 138 S. Ct. 448.

30. *Id.* at 1159.

31. *Id.* at 1165 (first quoting *Zadvydas v. Davis*, 533 U.S. 678, 693 (2001); then citing *Landon v. Plasencia*, 459 U.S. 21, 33–34 (1982)).

32. *See Landon v. Plasencia*, 459 U.S. 21, 32 (1982); *Knauff v. Shaughnessy*, 338 U.S. 537, 542 (1950).

States could assert due process rights.³³ The Ninth Circuit reasoned that some of the foreign nationals prevented from entering the country will be barred from being students, faculty, or researchers at state universities, and that some will not be able to return if they leave.³⁴ Washington alleged that two prospective visiting scholars, three prospective employees, and two interns from countries covered by the Executive Order were unable to enter the United States.³⁵ The Ninth Circuit held that these injuries gave the States standing³⁶ without finding that any specific, university-affiliated, foreign national had been in the country previously, was a refugee, or had “a relationship with a U.S. resident or an institution that might have rights of its own to assert.”³⁷ The court merely asserted that “the existence of such persons is obvious.”³⁸

Reasoning that the universities have standing, because they are asserting the constitutional rights of people whose constitutional rights are based on their relationship with a university, which possesses its own constitutional rights, would be circular. As mentioned previously, aliens seeking initial admission have no recognized constitutional rights. Universities cannot assert the constitutional rights of people who have no constitutional rights. Thus, the finding of standing did not meet the standard the court itself gave.

B. *Statutory Authority*

Even if a plaintiff had standing to challenge the Original Order, it was nonetheless authorized by existing statutory law. The Constitution gives the President the authority to “take Care that the Laws be faithfully executed.”³⁹ The Original Order cited the Immigration and Nationality Act of 1952 for authority:

Whenever the President finds that the entry of any aliens or of any class of aliens into the United States would be detri-

33. *Trump*, 847 F.3d at 1166.

34. *Id.* at 1161.

35. *Id.* at 1159–60.

36. *Id.* at 1161.

37. *Id.* at 1166.

38. *Id.*

39. U.S. CONST. art. II, § 3.

mental to the interests of the United States, he may by proclamation, and for such period as he shall deem necessary, suspend the entry of all aliens or any class of aliens as immigrants or nonimmigrants, or impose on the entry of aliens any restrictions he may deem to be appropriate.⁴⁰

The State of Washington, however, alleged that the Original Order violated Section 1152 of the Immigration and Nationality Act of 1965, which provides:

Except as specifically provided in paragraph (2) and in sections 101(a)(27), 201(b)(2)(A)(i), and 203 [8 U.S.C. §§ 1101(a)(27), 1151(b)(2)(A)(i), 1153], no person shall receive any preference or priority or be discriminated against in the issuance of an immigrant visa because of the person's race, sex, nationality, place of birth, or place of residence.⁴¹

It should be noted at the outset that this statute does not prohibit religious discrimination, so this is only a challenge to Section Three of the Original Order⁴² (barring entry based on nationality) and the portion of Section Five postponing indefinitely the admission of Syrian refugees.⁴³ The statute has no bearing on the portion of Section Five that gave preference to religious minorities.⁴⁴

Preliminarily, it is problematic that the States of Washington and Minnesota made a Section 1152 challenge on behalf of a state university's potential visiting scholars, faculty, researchers, employees, interns, and students. Section 1152 only prohibits discrimination in the issuance of immigration visas. It seems likely that most, if not all, of the foreign nationals in the categories represented by the states would be applying for non-immigration visas, such as student visas⁴⁵ or employment visas.⁴⁶

40. 8 U.S.C. § 1182(f) (2012).

41. *Id.* § 1152(a)(1)(A).

42. Exec. Order No. 13,769 § 3(c), 82 Fed. Reg. 8977, 8978 (Jan. 27, 2017) (revoked & replaced with Exec. Order 13,780, 82 Fed. Reg. 13,209 (Mar. 9, 2017)).

43. *Id.* § 5(c), at 8979.

44. *Id.* § 5(b).

45. See *Students and Employment*, U.S. CITIZENSHIP & IMMIGRATION SERV., <https://www.uscis.gov/working-united-states/students-and-exchange-visitors/students-and-employment> [<https://perma.cc/4GF5-T5TA>] ("The F-1 Visa (Academic Student) allows you to enter the United States as a full-time student at an accredited college, university, seminary, conservatory, academic high school, ele-

In any event, historical practice,⁴⁷ statutory context, and the canons of construction all refute the states' argument. Historically, President Donald Trump is not the first United States president to stop all immigration from a particular country. Even after the passage of the Immigration and Nationality Act of 1965, President Jimmy Carter invalidated the visas of all Ira-

mentary school, or other academic institution or in a language training program. You must be enrolled in a program or course of study that culminates in a degree, diploma, or certificate and your school must be authorized by the U.S. government to accept international students."); *id.* (To qualify for the F-1 Visa: "You must be enrolled in an 'academic' educational program, a language-training program, or a vocational program. Your school must be approved by the Student and Exchange Visitors Program, Immigration & Customs Enforcement. You must be enrolled as a full-time student at the institution. You must be proficient in English or be enrolled in courses leading to English proficiency. You must have sufficient funds available for self-support during the entire proposed course of study. You must maintain a residence abroad which you have no intention of giving up.").

46. See *H-2B Temporary Non-Agricultural Workers*, U.S. CITIZENSHIP & IMMIGRATION SERV., <https://www.uscis.gov/working-united-states/temporary-workers/h-2b-temporary-non-agricultural-workers> [<https://perma.cc/NTH6-2HQF>] ("The H-2B program allows U.S. employers or U.S. agents who meet specific regulatory requirements to bring foreign nationals to the United States to fill temporary non-agricultural jobs."); *O-1 Visa: Individuals with Extraordinary Ability or Achievement*, U.S. CITIZENSHIP & IMMIGRATION SERV., <https://www.uscis.gov/working-united-states/temporary-workers/o-1-visa-individuals-extraordinary-ability-or-achievement> [<https://perma.cc/NV8S-F83W>] ("The O-1 nonimmigrant visa is for the individual who possesses extraordinary ability in the sciences, arts, education, business, or athletics, or who has a demonstrated record of extraordinary achievement in the motion picture or television industry and has been recognized nationally or internationally for those achievements.").

47. See *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 610–11 (1952) (Frankfurter, J., concurring) ("The Constitution is a framework for government. Therefore the way the framework has consistently operated fairly establishes that it has operated according to its true nature. Deeply embedded traditional ways of conducting government cannot supplant the Constitution or legislation, but they give meaning to the words of a text or supply them. It is an inadmissibly narrow conception of American constitutional law to confine it to the words of the Constitution and to disregard the gloss which life has written upon them. In short, a systematic, unbroken, executive practice, long pursued to the knowledge of the Congress and never before questioned, engaged in by Presidents who have also sworn to uphold the Constitution, making as it were such exercise of power part of the structure of our government, may be treated as a gloss on 'executive Power' vested in the President by § 1 of Art. II."); *cf.* THE FEDERALIST NO. 37, at 172 (James Madison) (Terence Ball ed., 2003) ("All new laws, though penned with the greatest technical skill, and passed on the fullest and most mature deliberation, are considered as more or less obscure and equivocal, until their meaning be liquidated and ascertained by a series of particular discussions and adjudications.").

nian citizens during the Iranian Hostage Crisis.⁴⁸ Similarly, President Ronald Reagan halted all immigration from Cuba, with certain exceptions for relatives of U.S. citizens and other preferred immigrants.⁴⁹

Other portions of the Immigration and Nationality Act of 1965 expressly discriminate on the basis of national origin, suggesting that not all such discrimination is verboten. Section 1187(a)(12)(A)(ii) excepts from a visa waiver program nationals of Iraq and Syria and nationals from other countries designated as areas of concern by administrative agencies.⁵⁰ In fact, the countries from which the Original Order temporarily banned entry are those countries "referred to in . . . 8 U.S.C. 1187(a)(12)," that is, in the Immigration and Nationality Act of 1965.⁵¹ Similarly, Section 1152(a)(2)(A) of the 1965 Act establishes quotas limiting the number of immigrants from each country.⁵² This treats foreign nationals differently based on their nationality. A potential immigrant from a country from which more people desire to immigrate to the United States (Mexico, for instance) has to wait much longer than an immigrant from a country from which fewer people are attempting to immigrate (Switzerland, for example).⁵³ A reading of Section 1182(f) of the Immigration and Nationality Act of 1965 that prohibited the Original Order would thus be inconsistent with Sections 1187(a)(12)(A)(ii) and 1152(a)(2)(A) of the same Act.

As the government noted in oral argument, a principle of statutory construction is that when two statutes potentially conflict, they should be interpreted in a way that gives effect to both statutes if possible.⁵⁴ A court can give effect to both immi-

48. Jimmy Carter, Sanctions Against Iran Remarks Announcing U.S. Actions, 1 PUB. PAPERS 611, 611-12 (Apr. 7, 1980), available at <http://www.presidency.ucsb.edu/ws/?pid=33233> [<https://perma.cc/KQ6K-SNVT>].

49. Proclamation No. 5517, 51 Fed. Reg. 30,470 (Aug. 26, 1986).

50. 8 U.S.C. § 1187(a)(12)(A)(ii) (2012).

51. Exec. Order No. 13,769 § 3(c) (Jan. 27, 2017) (revoked & replaced with Exec. Order 13,780, 82 Fed. Reg. 13,209 (Mar. 9, 2017)).

52. 8 U.S.C. § 1152(a)(2)(A) (2012).

53. See Josh Blackman, *The Statutory Legality of Trump's Executive Order on Immigration: Part IV*, JOSH BLACKMAN'S BLOG (Feb. 11, 2017), <http://joshblackman.com/blog/2017/02/11/the-statutory-legality-of-trumps-executive-order-on-immigration-part-iv/> [<https://perma.cc/KPM7-F3FT>].

54. See Verbatim Report of Proceedings at 37, *Washington v. Trump*, No. C17-0141JLR, 2017 U.S. Dist. LEXIS 16012 (W.D. Wash. Feb. 3, 2017); see also THE FED-

gration statutes because Section 1152 of the Immigration and Nationality Act of 1965 bars discrimination in the issuance of visas,⁵⁵ whereas Section 1182 of the Immigration and Nationality Act of 1952 authorizes the President to bar entry of foreign nationals.⁵⁶ The issuance of visas and authorization of entry are distinct;⁵⁷ a foreign national in possession of a valid visa may still be denied entry to the United States if, for example, the foreign national showed symptoms of a communicable disease⁵⁸ or expressed an intention to violate the terms of his visa,⁵⁹ or if an inspector believed the foreign national attested to fraudulent information on his visa application.⁶⁰ Though the title of Section 3 of the Original Order is “Suspension of the Issuance of Visas . . .,” nothing in the Original Order or the Revised Order directs any action regarding visas. After the issuance of the Original Order, many visas were revoked, but the visas were revoked in accordance with a memorandum from the Deputy Assistant Secretary of State.⁶¹ Additionally, the Immigration and Nationality Act of 1965 only bars discrimination in the issuance of visas, not the revocation of visas.⁶² Moreover, Section 1152(a)(1)(B) contains an exception for procedures: “Nothing in this paragraph shall be construed to limit the authority of the Secretary of State to determine the proce-

ERALIST NO. 78, *supra* note 47, at 380 (Alexander Hamilton) (“So far as they [clashing statutes] can, by any fair construction, be reconciled to each other, reason and law conspire to dictate that this should be done.”)

55. 8 U.S.C.S. § 1152 (a)(1)(A) (2012).

56. *Id.* § 1182(f).

57. See Josh Blackman, *The Statutory Legality of Trump’s Executive Order on Immigration*, JOSH BLACKMAN’S BLOG (Feb. 5, 2017), <http://joshblackman.com/blog/2017/02/05/the-statutory-legality-of-trumps-executive-order-on-immigration/> [<https://perma.cc/E8TU-U5QW>].

58. *Id.*

59. See, e.g., *Brumme v. INS*, 275 F. 3d 443, 445 (5th Cir. 2001) (holding that a German national with a non-immigrant visa who told an inspector that she intended to become an immigrant was subject to expedited removal.).

60. Josh Blackman, *The Statutory Legality of Trump’s Executive Order on Immigration: Part III*, JOSH BLACKMAN’S BLOG (Feb. 6, 2017), <http://joshblackman.com/blog/2017/02/06/the-statutory-legality-of-trumps-executive-order-on-immigration-part-iii/> [<https://perma.cc/7MVF-78EE>].

61. Memorandum from Edward J. Ramotowski, Deputy Assistant Sec’y of State, Bureau of Consular Affairs (Jan. 27, 2017), available at <https://www.politico.com/?id=00000159-f6bd-d173-a959-ffff671a0001> [<https://perma.cc/MCV3-UP4W>].

62. 8 U.S.C. § 1152 (a)(1)(A) (2012).

dures for the processing of immigrant visa applications”⁶³ This carve-out implies that procedures could discriminate by nationality.⁶⁴

The government also contended that the principle of constitutional avoidance⁶⁵ supported its argument that the Immigration and Nationality Act of 1965 does not limit the authority given to the President in the Immigration and Nationality Act of 1952.⁶⁶ The government explained that a reading of the Immigration and Nationality Act of 1965 that limits the President's authority under the Immigration and Nationality Act of 1952 could impermissibly infringe the President's constitutional authority⁶⁷ over “foreign affairs, national security, and immigration.”⁶⁸ An interpretation of the Act that would prohibit the Original Order would also prohibit the Executive from banning entry of persons from a country with which the United States was at war.⁶⁹

Such an interpretation might also violate the canon against absurdity. Under that doctrine, courts must avoid interpreting

63. *Id.* § 1152(a)(1)(B).

64. See Blackman, *supra* note 57.

65. See *Zadvydas v. Davis*, 533 U.S. 678, 689 (2001) (“[I]t is a cardinal principle of statutory interpretation, however, that when an Act of Congress raises ‘a serious doubt’ as to its constitutionality, ‘this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided.’” (alteration in original) (quoting *Crowell v. Benson*, 285 U.S. 22, 62 (1932))); *NLRB v. Catholic Bishop of Chi.*, 440 U.S. 490, 500 (1979) (“[A]n Act of Congress ought not be construed to violate the Constitution if any other possible construction remains available.”); *Ashwander v. TVA*, 297 U.S. 288, 348 (1936) (Brandeis, J., concurring) (“When the validity of an act of the Congress is drawn in question, and even if a serious doubt of constitutionality is raised, it is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided.” (quoting *Crowell v. Benson*, 285 U.S. 22, 62 (1932))).

66. Verbatim Report, *supra* note 54.

67. *Id.*

68. Emergency Motion for Administrative Stay and Motion for Stay Pending Appeal at 4, *Washington v. Trump*, 847 F.3d 1151 (9th Cir. 2017) (No. 17-35105) (citing *Knauff v. Shaughnessy*, 338 U.S. 537, 542 (1950) (“The exclusion of aliens is a fundamental act of sovereignty . . . inherent in the executive power to control the foreign affairs of the nation.”)).

69. *Id.* at 15.

statutes in a way that would “lead to ‘patently absurd consequences’ that ‘Congress could not *possibly* have intended.’”⁷⁰

Because a reading of the Immigration and Nationality Act of 1965 that would prohibit the Executive Order would be inconsistent with historical practice after the passage of the Act, invalidate other sections of the same Act, possibly unconstitutionally infringe upon presidential authority, and lead to the absurd result of the President being unable to ban enemy nationals, it is likely that the Immigration and Nationality Act of 1965 did not bar the Original Order.

C. Constitutional Authority

When evaluating the constitutionality of the Original Order, one should consider that the federal government is at the height of its powers when regulating its border;⁷¹ that courts traditionally give great deference to the political branches, and especially the executive, in the areas of immigration and national security;⁷² and that presidential power is at its zenith when acting in response to a clear grant of authority from Congress.⁷³ In light of such considerations, courts have held that the Search and Seizure Provision of the Fourth Amendment provides less protection when entering and departing the country.⁷⁴ By virtue of the principle of national sovereignty, the

70. *Pub. Citizen v. U.S. Dep’t of Justice*, 491 U.S. 440, 470 (1989) (Kennedy, J., concurring) (citations omitted) (first quoting *United States v. Brown*, 333 U.S. 18, 27 (1948); then quoting *FBI v. Abramson*, 456 U.S. 615, 640 (1982) (O’Connor, J., dissenting)); *see also* *United States v. Kirby*, 74 U.S. (7 Wall.) 482, 486 (1868) (“All laws should receive a sensible construction. General terms should be so limited in their application as not to lead to injustice, oppression, or an absurd consequence.”).

71. *See* *Chae Chan Ping v. United States*, 130 U.S. 581, 606–07 (1889) (“The power of the government to exclude foreigners from the country whenever, in its judgment, the public interests require such exclusion, has been asserted in repeated instances, and never denied by the executive or legislative departments.”).

72. *See, e.g., Cardenas v. United States*, 826 F.3d 1164, 1169 (9th Cir. 2016); *Holder v. Humanitarian Law Project*, 561 U.S. 1, 33–34 (2010).

73. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952) (Jackson, J., concurring); *see also* *Zivotofsky, ex rel. Zivotofsky v. Kerry* (*Zivotofsky II*), 135 S. Ct. 2076, 2083–84 (2015).

74. *See, e.g., United States v. Montoya de Hernandez*, 473 U.S. 531, 541 (1985) (holding that “the detention of a traveler at the border, beyond the scope of a routine customs search and inspection, is justified at its inception if customs agents, considering all the facts surrounding the traveler and her trip, reasonably suspect

government has substantial authority to regulate the nation's borders.⁷⁵

The State of Washington alleged that Sections Three (banning immigrants from the seven countries) and Five (giving preference to religious minorities) of the Original Order violated the Establishment Clause of the First Amendment, which "prohibits the federal government from officially preferring one religion over another."⁷⁶ Washington alleged that the Executive Order, "together with statements made by Defendants concerning their intent and application, are intended to disfavor Islam and favor Christianity."⁷⁷ Harvard Law School Professor Noah Feldman described the original Executive Order as "a shameful display of discrimination against people who are by legal definition innocent and in danger of their lives" and asserted that it "also violates the constitutional value of equal religious liberty."⁷⁸

The Original Order, however, was consistent with the Establishment Clause. The First Amendment provides "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof"⁷⁹ In a previous challenge to the Original Order, the District of Massachusetts found that Section Five is "neutral with respect to religion," because it applies to all refugees, not just those from the seven Muslim-majority countries, and so it could give preference to Muslims being religiously persecuted in a country where Christians form the majority.⁸⁰ The language of the Original Order was not facially discriminatory as between religious groups; there is

that the traveler is smuggling contraband," as opposed to the more stringent probable cause standard when not at a border).

75. See *Ping*, 130 U.S. at 607 ("The control of the people within its limits, and the right to expel from its territory persons who are dangerous to the peace of the State, are too clearly within the essential attributes of sovereignty to be seriously contested." (quoting Mr. Fish, Secretary of State under President Ulysses S. Grant)).

76. Complaint for Declaratory & Injunctive Relief at 9, *Washington v. Trump*, No. C17-014JLR (W.D. Wash. Jan. 30, 2017).

77. *Id.*

78. Noah Feldman, *Trump's Travel Ban Is an Attack on Religious Liberty*, BLOOMBERG VIEW (Jan. 30, 2017), <https://www.bloomberg.com/view/articles/2017-01-30/trump-s-travel-ban-is-an-attack-on-religious-liberty> [<https://perma.cc/XJQ5-XFEP>].

79. U.S. CONST. amend. I.

80. *Louhghalam v. Trump*, 230 F. Supp. 3d 26, 35 (D. Mass. 2017).

no mention of Christianity or Islam.⁸¹ The Ninth Circuit did not consider this fact dispositive. Instead, it considered campaign statements made by President Trump⁸² as evidence of intent, asserting that “[i]t is well established that evidence of purpose beyond the face of the challenged law may be considered in evaluating Establishment and Equal Protection Clause claims.”⁸³ But the Ninth Circuit’s citation of *Church of the Lukumi Babalu Aye, Inc. v. Hialeah*⁸⁴ in support of this proposition is misleading. Even if the holding of *Lukumi*—a free exercise case—applies to the Establishment Clause, the portion of the opinion that explicitly considered evidence of legislators’ subjective motives only commanded a plurality.⁸⁵ The Ninth Circuit quoted from Part II-A-1 of the *Lukumi* opinion,⁸⁶ yet Section 1 arguably does not establish that legislators’ subjective motives should be taken into account. At least, that is how Chief Justice Rehnquist and Justice Scalia seem to have interpreted it: they joined Part II-A-1, but declined to join Part II-A-2, the portion of the opinion explicitly taking into consideration legislators’ subjective motives. Instead, Justice Scalia, joined by the Chief Justice wrote in a concurrence:

I do not join that section because it departs from the opinion’s general focus on the object of the *laws* at issue to consider the subjective motivation of the *lawmakers*, *i.e.*, whether the Hialeah City Council actually intended to disfavor the religion of Santeria. As I have noted elsewhere, it is virtually

81. Section Five does give preference to refugees who are being persecuted on the basis of religion, as opposed to alternative bases, which could be viewed as unconstitutional by those who consider the government favoring religion over non-religion to violate the First Amendment, but that is not what the state of Washington argued.

82. *Washington v. Trump*, 847 F.3d 1151, 1167–68 (9th Cir. 2017); see also Complaint for Declaratory & Injunctive Relief at 9, *Washington v. Trump*, No. C17-014JLR (W.D. Wash. Jan. 30, 2017) (alleging that the Executive Order, “together with statements made by Defendants concerning their intent and application, are intended to disfavor Islam and favor Christianity”).

83. *Trump*, 847 F.3d at 1169.

84. 508 U.S. 520 (1993).

85. *Id.* at 523, 540–42 (Part II-A-2).

86. See *Trump*, 847 F.3d at 1167 (“The Free Exercise Clause, like the Establishment Clause, extends beyond facial discrimination Official action that targets religious conduct for distinctive treatment cannot be shielded by mere compliance with the requirement of facial neutrality.”).

impossible to determine the singular “motive” of a collective legislative body.^[87]

Perhaps there are contexts in which determination of legislative motive *must* be undertaken. But I do not think that is true of analysis under the First Amendment (or the Fourteenth, to the extent it incorporates the First). The First Amendment does not refer to the purposes for which legislators enact laws, but to the effects of the laws enacted: “Congress shall make no law . . . prohibiting the free exercise [of religion] . . .” This does not put us in the business of invalidating laws by reason of the evil motives of their authors.⁸⁸

By joining Section 1 and not Section 2, Chief Justice Rehnquist and Justice Scalia seem to show that they have interpreted the “target[ing]” (from the quotation from Section 1) and “object”⁸⁹ to mean that the statute objectively targets the religion: that the object of the statute, in its effect, is the religion. Section 2, conversely, considers evidence that the officials subjectively intended to target the religion.

The Ninth Circuit also cited *Village of Arlington Heights v. Metropolitan Housing Development Corp.*⁹⁰ as an example in support of the proposition,⁹¹ but *Arlington Heights* was about racial discrimination, not the Establishment Clause. In his concurrence in *Lukumi*, Justice Scalia explained that legislative purpose is particularly irrelevant for the First Amendment, because the text refers to the effects of the laws enacted.⁹² The Ninth Circuit also cited *Larson v. Valente*,⁹³ a case in which the

87. It might arguably be easier to determine the intent of an individual President than the intent of a multifarious body such as a legislature. Yet, Justice Scalia notes that the problem with subjective intent is not just that it is hard to discern, but that it is constitutionally irrelevant: “Had the ordinances here been passed with no motive on the part of any councilman except the ardent desire to prevent cruelty to animals (as might in fact have been the case), they would nonetheless be invalid.” *Lukumi*, 508 U.S. at 559 (Scalia, J., concurring).

88. *Id.* at 558 (Scalia, J., concurring).

89. *Id.* at 535.

90. 429 U.S. 252 (1977).

91. *Trump*, 847 F.3d at 1168.

92. *Lukumi*, 508 U.S. at 558 (Scalia, J., concurring) (“The First Amendment does not refer to the purposes for which legislators enact laws, but to the effects of the laws enacted . . .”).

93. 456 U.S. 228 (1982).

Supreme Court considered legislative history in determining that a facially neutral statute violated the Establishment Clause.⁹⁴ But prior drafts of the statute, coupled with discussion in the legislative body,⁹⁵ are likely to be more indicative of intent than statements made by the President while he was campaigning,⁹⁶ because the drafts and discussion are undoubtedly related to the legislation, whereas the President's campaign statements regarding Muslims are not necessarily related to the Original Order. At the time of the drafting of the Original Order, the President may have already abandoned the ideas he had while campaigning, or may have intended to implement his intentions regarding Muslims in another way. Moreover, in the time period after *Larson*, the influence of Justice Scalia led the Supreme Court to place less reliance on legislative history and more reliance on the text of the statute itself.⁹⁷

The Ninth Circuit's assertion that "evidence of purpose" is considered in Establishment Clause claims appears not to have commanded a majority of the Justices of the Supreme Court in *Lukumi*. Yet, a majority of the Justices embraced the principle that the inquiry of whether a statute discriminates between religious groups, and thus is subject to strict scrutiny, includes analysis of both the statute's text and its effects.⁹⁸ Even consid-

94. See *Trump*, 847 F.3d at 1167.

95. See *Larson*, 456 U.S. at 254–55.

96. See Complaint for Declaratory & Injunctive Relief at 9, *Washington v. Trump*, No. C17-014JLR (W.D. Wash. Jan. 30, 2017).

97. See Brett Kavanaugh, *Fixing Statutory Interpretation*, 129 HARV. L. REV. 2118, 2118 (2016) (reviewing ROBERT A. KATZMANN, *JUDGING STATUTES* (2014) (noting the extraordinary influence of Justice Scalia, and quoting Justice Kagan as saying "we're all textualists now")); see also, e.g., *King v. Burwell*, 135 S. Ct. 2480, 2503 (2015) (Scalia, J., dissenting) ("The purposes of a law must be 'collected chiefly from its words,' not 'from extrinsic circumstances.' Only by concentrating on the law's terms can a judge hope to uncover the scheme of the statute, rather than some other scheme that the judge thinks desirable." (quoting *Sturges v. Crowninshield*, 17 U.S. 122, 202 (1819) (Marshall, C.J.))). See generally ANTONIN SCALIA, *A MATTER OF INTERPRETATION* 29–30 (Amy Gutmann ed., 1997) ("My view that the objective indication of the words, rather than the intent of the legislature, is what constitutes the law leads me, of course, to the conclusion that legislative history should not be used as an authoritative indication of a statute's meaning. This was the traditional English, and the traditional American, practice.").

98. *Church of the Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520, 535 (1993) ("Apart from the text, the effect of a law in its real operation is strong evidence of

ering the effects of Sections Three and Five of the Original Order, however, the Original Order did not “single[] out”⁹⁹ any particular religion as the ordinances singled out the Santeria religion in *Lukumi*. In *Lukumi*, the Court explained that the combination of ordinances were “gerrymandered” to affect almost exclusively the Santeria adherents.¹⁰⁰ Though the immigrants barred in Section Three of the order are those from Muslim-majority countries, Section Three temporarily bans all immigrants from those countries, thus affecting many non-Muslims as well. An argument could be made that like the combination of ordinances at issue in *Lukumi*, Section Three in combination with Section Five had the effect of targeting Muslims: Section Five effectively provided an exception for Christians, given their minority status in the banned countries. This is not the case, however, because Section Five would not have come into effect until the 90-day ban established by Section Three concluded.¹⁰¹ Additionally, as mentioned above, Section Three gave preference to all refugees, not just refugees from the banned countries, and Christians are not a minority religion in every country. Religiously persecuted Shi'a Muslims in a Sunni Muslim-majority country could have been given preference through Section Five. For these reasons, Sections Three and Five of the Original Order should not be considered discriminatory, and thus should not be subjected to strict scrutiny.

When a law is found to be non-discriminatory, the Supreme Court frequently invokes the *Lemon v. Kurtzman*¹⁰² test to determine if the statute violates the Establishment Clause. The *Lemon* test is not universally invoked by the Court in Establishment Clause cases,¹⁰³ and this Note does not endorse its

its object.”); *id.* at 558 (Scalia, J., concurring) (“The First Amendment does not refer to the purposes for which legislators enact laws, but to the effects of the laws enacted . . .”).

99. *Id.* at 559 (Scalia, J., concurring).

100. *Id.* at 535–36 (majority opinion).

101. Exec. Order No. 13,769 § 5, 82 Fed. Reg. 8979–80 (Jan. 27, 2017) (revoked & replaced with Exec. Order 13,780, 82 Fed. Reg. 13,209 (Mar. 9, 2017)).

102. 403 U.S. 602 (1971). The test consists of three prongs: the government action must have a secular purpose, a secular effect, and must not create an excessive entanglement with religion.

103. Justice Scalia compared the *Lemon* test to a “ghoul in a late-night horror movie that repeatedly sits up in its grave and shuffles abroad, after being repeat-

use.¹⁰⁴ Nevertheless, even using the *Lemon* test, the Original Order does not violate the Establishment Clause under current precedent.

The first requirement of the *Lemon* test is that the government action have a secular purpose. The Original Order stated that its purpose was to “ensure that those approved for admission do not intend to harm Americans and that they have no ties to terrorism,” and that “the United States should not admit those who engage in acts of bigotry or hatred (including ‘honor’ killings, other forms of violence against women, or the persecution of those who practice religions different from their own) or those who would oppress Americans of any race, gender, or sexual orientation.”¹⁰⁵ That is consistent with the prohibition in the Immigration and Nationality Act against giving asylum to an “alien [who] ordered, incited, assisted, or otherwise participated in the persecution of any person on account of race, religion, nationality, membership in a particular social group, or political opinion.”¹⁰⁶ The countries from which entry to the United States is banned are those “referred to in . . . 8 U.S.C. 1187(a)(12),”¹⁰⁷ which excepts nationals of certain countries which are “area[s] of concern” from a visa-waiver program.¹⁰⁸ Congress identifies Iraq and Syria as two of the countries and directs that nationals from other countries identified by certain administrative agencies are also excepted.¹⁰⁹ The cur-

edly killed and buried . . .” *Lamb’s Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 398 (1993) (Scalia, J., dissenting). He continued:

It is there to scare us . . . when we wish it to do so, but we can command it to return to the tomb at will. When we wish to strike down a practice it forbids, we invoke it, when we wish to uphold a practice it forbids, we ignore it entirely.

Id. at 399 (citations omitted).

104. The *Lemon* test reflects a strict separationist or neutrality approach to the Establishment Clause, but the original meaning of the religion clauses is that the federal government should accommodate religion. See Gabriel A. Moens, *The Menace of Neutrality in Religion*, 2004 BYU L. REV. 535, 538 (“[T]he Founders aimed to protect religion from the state, not the state from religion . . .” (footnote omitted)).

105. Exec. Order No. 13,769 § 1, 82 Fed. Reg. 8977, 8977 (Jan. 27, 2017) (revoked & replaced with Exec. Order 13780, 82 Fed. Reg. 13,209 (Mar. 9, 2017)).

106. 8 U.S.C. § 1158(b)(2)(A)(i) (2012).

107. Exec. Order No. 13,769 § 3(c), 82 Fed. Reg. 8977, 8978 (revoked & replaced with Exec. Order 13780, 82 Fed. Reg. 13,209 (Mar. 9, 2017)).

108. 8 U.S.C. § 1187(a)(12)(A)(ii) (2012).

109. *Id.*

rent “areas of concern” were identified under the Obama administration.¹¹⁰ Prohibiting entry by nationals of countries designated as areas of concern could legitimately have the purpose designated in the Original Order of ensuring that people entering the United States “do not intend to harm Americans.”¹¹¹

The second requirement of the *Lemon* test requires that the government action have a secular effect—that “its principal or primary effect must be one that neither advances nor inhibits religion.”¹¹² The Supreme Court has recently used the symbolic endorsement test for this prong—whether the law gives the appearance of government endorsement of a particular religion or religion in general.¹¹³ This seems to be what Professor Feldman alluded to when writing, “Trump’s explanations reflect a symbolic preference for Christian refugees. This is analogous to declaring the U.S. a Christian country.”¹¹⁴ Professor Feldman cited an interview President Trump gave to Christian Broadcasting Network¹¹⁵ and one of President Trump’s Twitter

110. See Verbatim Report, *supra* note 54, at 27.

111. Exec. Order No. 13,769 § 1 (Jan. 27, 2017) (revoked & replaced with Exec. Order 13,780, 82 Fed. Reg. 13209 (Mar. 9, 2017)).

112. *Lemon v. Kurtzman*, 403 U.S. 602, 612 (1971) (quoting *Bd. of Educ. v. Allen*, 392 U.S. 236, 243 (1968)).

113. See, e.g., *Bd. of Educ. v. Mergens*, 496 U.S. 226 (1990).

114. Feldman, *supra* note 78.

115. President Trump responded “Yes” to the interviewer’s question, “Persecuted Christians, we’ve talked about this, the refugees overseas. The refugee program, or the refugee changes you’re looking to make. As it relates to persecuted Christians, do you see them as kind of a priority here?” Interview by David Brody with Donald Trump, President of the United States, in Washington, D.C. (Jan. 27, 2017), <http://www1.cbn.com/thebrodyfile/archive/2017/01/27/brody-file-exclusive-president-trump-says-persecuted-christians-will-be-given-priority-as-refugees> [<https://perma.cc/8LLT-K5D8>] [hereinafter *Trump Interview*]. President Trump then added:

They’ve been horribly treated. Do you know if you were a Christian in Syria it was impossible, at least very tough to get into the United States? If you were a Muslim you could come in, but if you were a Christian, it was almost impossible and the reason that was so unfair, everybody was persecuted in all fairness, but they were chopping off the heads of everybody but more so the Christians. And I thought it was very, very unfair. So we are going to help them.

Id.

comments, “Christians in the Middle-East have been executed in large numbers. We cannot allow this horror to continue!”¹¹⁶

The introductory paragraph of this Note describes the situation of Christians and Yazidis in Iraq. Expressing horror at a formally declared genocide against a religious group and expressing a desire to stop it can hardly be characterized as a government endorsement of that religion.¹¹⁷ Indeed, a United Nations Convention to which the United States is a party provides, “The Contracting Parties confirm that genocide, whether committed in time of peace or in time of war, is a crime under international law which they undertake to prevent and to punish.”¹¹⁸

Moreover, answering affirmatively that persecuted Christians are “kind of a priority”¹¹⁹ does not exclude the possibility of other religiously persecuted groups being prioritized as well, as the District Court of Massachusetts held Section Five of the Original Order could do: it prioritized *all* refugees persecuted for being religious minorities¹²⁰ and not just those from the Muslim-majority countries in Section Three.¹²¹ Section Three of the Original Order showed that the government is against religious persecution, and President Trump’s statements may indicate that the government opposes the genocide of Christians, but being opposed to genocide of minority Christian groups does not make the United States “a Christian country” or demonstrate a symbolic preference for Christianity.

116. Donald Trump (@realDonaldTrump), TWITTER (Jan. 29, 2017, 7:03 AM), <https://twitter.com/realDonaldTrump/status/825721153142521858> [<https://perma.cc/K9YV-QXE8>].

117. See, e.g., USCIRF REPORT 2016, *supra* note 1, at 100 (USCIRF in December 2015 and U.S. Secretary of State John Kerry in March 2016 declaring ISIS genocide against Yazidis, Christians, and Shi’a Muslims.).

118. No. 1021. United Nations Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 78 U.N.T.S. 1021.

119. *Trump Interview*, *supra* note 115.

120. For instance, the Original Order could have been applied to prioritize the Rohingya Muslims being persecuted in Buddhist-majority Myanmar. See *Persecution of all Muslims in Myanmar on the rise, rights group says*, REUTERS (Sept. 4, 2017, 11:42 PM), <https://www.reuters.com/article/us-myanmar-rohingya-muslims/persecution-of-all-muslims-in-myanmar-on-the-rise-rights-group-says-idUSKCN1BG0AT> [<https://perma.cc/4LQB-KXGY>].

121. See *Louhghalam v. Trump*, 230 F. Supp. 3d 26, 35 (D. Mass. 2017).

Condemnation of the Holocaust¹²² did not make the United States “a Jewish country.” Nor are we “a Muslim country” because President Trump condemned the “[h]orrible and cowardly terrorist attack on innocent and defenseless worshipers in Egypt” on November 24, 2017.¹²³ The Original Order appeared to have a secular effect and did not appear to indicate a symbolic preference for any religious group.

The third requirement of the *Lemon* test is that the government action not create excessive entanglement with religion. In *Lemon*, a government action that required “comprehensive, discriminating, and continuing state surveillance” was found to violate the Establishment Clause.¹²⁴ Government implementation of Section Three involved no government entanglement with religion. The only involvement with religion required by Section Five was a determination of whether the applicant was requesting asylum for being persecuted for belonging to a religion that is a minority in his country. Determining whether an applicant is eligible for asylum already entails determining whether his claim that he is being religiously persecuted is valid. The only additional inquiry required by the Executive Order would have been whether the religion is a minority in his country of origin, which should have been quickly ascertainable and is not a rapidly changing situation. Thus, because it would not require “comprehensive, discriminating, and continuing state surveillance,”¹²⁵ the Original Order met the third prong of the *Lemon* test.

The Original Order did not violate any of three requirements of the *Lemon* test. However, as discussed previously, the Original Order would only be evaluated under the *Lemon* test if it were non-discriminatory. What if a court found the order to be discriminatory, or what if the President issued an Executive

122. See, e.g., Franklin Delano Roosevelt, The President Asks That Frontiers Be Opened to Victims of Nazi Oppression and Declares That War Criminals Will Be Tried and Punished, 13 PUB. PAPERS 103, 103-04 (Mar. 24, 1944), available at <http://www.historyplace.com/worldwar2/holocaust/h-roos-statement.htm> [https://perma.cc/JXM9-783G].

123. Donald Trump (@realDonaldTrump), TWITTER (Nov. 24, 2017, 10:27 AM), <https://twitter.com/realDonaldTrump/status/934080974773776384> [https://perma.cc/V7DF-WPYM].

124. *Lemon v. Kurtzman*, 403 U.S. 602, 619 (1971).

125. *Id.*

Order that explicitly prioritized Christian refugees? An order that explicitly prioritized Christian refugees would be facially discriminatory among religious groups. An order that is discriminatory is subject to strict scrutiny,¹²⁶ which requires that it be “closely fitted” to achieve a “compelling governmental interest.”¹²⁷ Preventing genocide could certainly be considered a “compelling government interest.” But a statute that prioritized Christian refugees could be considered under-inclusive, because other religious groups, such as Yazidis and Shi’a Muslims, have also officially been declared the objects of the genocide being carried out by ISIS.

Yet, there could be justification for prioritizing Christian refugees exclusively. Although religiously persecuted Muslims in the Middle East have many close countries where they could seek asylum, such as Saudi Arabia¹²⁸ and Jordan, Christians do not.¹²⁹ Additionally, Kurdish fighters from Turkey and Syria have assisted Yazidis in fleeing from Iraq to Turkey and Syria,¹³⁰ but no one is assisting the Christians.¹³¹

126. See *Larson v. Valente*, 456 U.S. 228, 246 (1982).

127. *Id.* at 247.

128. Though Saudi Arabia has a Sunni majority, the Crown Prince is “encourag[ing] a more moderate and tolerant” form of Islam. Elliot C. McLaughlin, *Saudi crown prince promises “a more moderate Islam,”* CNN (Oct. 25, 2017, 1:24 PM), <https://www.cnn.com/2017/10/24/middleeast/saudi-arabia-prince-more-moderate-islam/index.html>, [<https://perma.cc/4F2L-RG8U>]. The Crown Prince is also leading a coalition to combat terrorism, having been “galvanized” by the November 24, 2017 Egyptian mosque terror attack. *UPDATE 1-Egypt attack to spur on Saudi-backed Muslim military alliance - crown prince*, REUTERS (Nov. 26, 2017, 1:24 PM), <https://af.reuters.com/article/africaTech/idAFL8N1NW0AQ> [<https://perma.cc/US6D-ST94>].

129. Israel could be a possibility for Christian refugees, but it is plagued by security concerns, including the vandalism and burning of Christian churches by extremists. See Giles Fraser, *You’d think that Israel, of all places, would respect its refugees*, GUARDIAN (June 16, 2016, 12:27 PM), <https://www.theguardian.com/commentisfree/belief/2016/jun/16/you-d-think-that-israel-of-all-places-would-respect-its-refugees> [<https://perma.cc/R59P-GHDH>]. Cyprus could also be a possibility for Christian refugees, but admitting a large number of Christian refugees could possibly reignite the dormant conflict there between the Greek Orthodox Christians (78% of the current population) and the Sunni Muslim Turkomen (18% of the population). See Sewell Chan, *Cyprus: Why One of the World’s Most Intractable Conflicts Continues*, N.Y. TIMES (Nov. 7, 2016), <https://www.nytimes.com/2016/11/08/world/europe/cyprus-reunification-talks.html> [<https://nyti.ms/2klHO2e>].

130. Avi Asher-Schapiro, *Who Are the Yazidis, the Ancient, Persecuted Religious Minority Struggling to Survive in Iraq?*, NAT’L GEOGRAPHIC NEWS (Aug. 11, 2014),

The State of Washington also alleged that Section Three violated the Religious Freedom Restoration Act (RFRA),¹³² which “prohibits the federal government from substantially burdening the exercise of religion, even if the burden results from a rule of general applicability” unless the “application of the burden to the person—(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest.”¹³³ Washington asserted that Section Three would “result in substantial burdens on the exercise of religion by non-citizen immigrants by, for example, preventing them from exercising their religion while in detention, returning to their religious communities in Washington, and/or taking upcoming, planned religious travel abroad.”¹³⁴

Yet no provision in Section Three mandated anything that would burden the religious exercise of detained persons, or even that anyone be detained in the first place. If university personnel were being detained (perhaps at airports) and not being permitted to practice their religion, that could be challenged, but that would not provide grounds to challenge the entirety of Section Three. Moreover, prisons satisfy RFRA and the Religious Land Use and Institutionalized Persons Act (RLUIPA) by allowing inmates to engage in their religious practices within the institution,¹³⁵ and those detained at air-

<http://news.nationalgeographic.com/news/2014/08/140809-iraq-yazidis-minority-isil-religion-history/> [<https://perma.cc/37QP-LHLP>].

131. See Eliza Griswold, *Is this the End of Christianity in the Middle East?*, N.Y. TIMES, July 22, 2015, (Magazine) <https://www.nytimes.com/2015/07/26/magazine/is-this-the-end-of-christianity-in-the-middle-east.html> [<https://nyti.ms/2k6ba4Q>] (“A week later, the Kurdish forces, known as the peshmerga, whom the Iraqi government had charged with defending Qaraqosh, retreated. (‘We didn’t have the weapons to stop them,’ Jabbar Yawar, the secretary general of the peshmerga, said later.) The city was defenseless; the Kurds had not allowed the people of the Nineveh Plain to arm themselves and had rounded up their weapons months earlier.”).

132. See Complaint for Declaratory & Injunctive Relief at 9, *Washington v. Trump*, No. C17-014JLR (W.D. Wash. Jan. 30, 2017).

133. Religious Freedom Restoration Act, 42 U.S.C. § 2000bb-1(a), 1(b) (2012).

134. Complaint for Declaratory & Injunctive Relief at 9, *Washington v. Trump*, No. C17-014JLR (W.D. Wash. Jan. 30, 2017).

135. See *Patel v. U.S. Bureau of Prisons*, 515 F.3d 807 (8th Cir. 2008) (holding that the inmate did not present sufficient information for a reasonable fact-finder to conclude that the inmate’s ability to practice his religion was substantially bur-

ports could be likewise permitted to engage in religious practices for the duration of any detention.

In considering the allegations that the Original Order violated RFRA and the Free Exercise Clause, one of the difficulties was the confusion over to whom Section Three applies. Five days after the Executive Order was issued:

White House counsel issued a clarification to the Acting Secretary of State, the Attorney General and the Secretary of Homeland Security that Sections 3(c) (the 90-day suspension) and 3(e) (making a list of countries that did not comply with information production requirements from which to prohibit entry) do not apply to lawful permanent residents.¹³⁶

However, the Ninth Circuit did not find the clarification dispositive.¹³⁷ The court doubted whether counsel's guidance could supersede an Executive Order, because the White House counsel is not the President.¹³⁸ Additionally, the Ninth Circuit questioned whether the White House counsel, who is not considered part of the chain of command of the Executive Departments charged with enforcing the Original Order, could issue a binding clarification.¹³⁹ Moreover, because the government changed its position about lawful permanent residents since the issuance of the Original Order, the court suspected that the government could change its position again.¹⁴⁰

The rights of non-immigrant visaholders (and lawful permanent residents if the Original Order applies to them) to return to their religious communities and travel abroad for religious reasons could have been considered substantially burdened by Section Three. One potential mitigation of this burden is contained in the Revised Order, which directs:

dened where halal food was available in the cafeteria and available for purchase at the commissary).

136. Emergency Motion for Administrative Stay & Motion for Stay Pending Appeal at 4, *Washington v. Trump*, 847 F.3d 1151 (9th Cir. 2017).

137. *Washington v. Trump*, 847 F.3d 1151, 1165 (9th Cir. 2017).

138. *Id.* at 1165–66.

139. *Id.*

140. *Id.* The Revised Order, by contrast, explicitly states that it does not apply to lawful permanent residents. Exec. Order No. 13,780 § 3(b)(i), 82 Fed. Reg. 13,209, 13,213 (Mar. 9, 2017).

[A] consular officer, or, as appropriate, the Commissioner, U.S. Customs and Border Protection (CBP), or the Commissioner's delegee, may, in the consular officer's or the CBP official's discretion, decide on a case-by-case basis to authorize the issuance of a visa to, or to permit the entry of, a foreign national for whom entry is otherwise suspended if the foreign national has demonstrated to the officer's satisfaction that denying entry during the suspension period would cause undue hardship, and that his or her entry would not pose a threat to national security and would be in the national interest.¹⁴¹

Yet, the examples of circumstances that may justify case-by-case waivers make no mention of specifically burdening religious exercise.¹⁴² Even if the Original Order substantially burdened religious exercise, protecting the United States from terrorism would likely be considered a "compelling government interest."¹⁴³ The point of contention would likely be whether Section Three was "the least restrictive means of furthering" that interest. Considering the latitude allowed the Executive Branch in immigration and national security,¹⁴⁴ it is likely that the Original Order was "the least restrictive means," particularly because of the limited duration of the Original Order and because of its limitation to countries Congress and the prior Administration designated as areas of concern.

II. POLICY ANALYSIS OF THE ORIGINAL ORDER

Though the Original Order was lawful, it was a poor policy choice. The President's original Executive Order gave preference to religious minorities. But people are persecuted because of religion even in places where they are in the national majori-

141. *Id.* § 3(c), at 13,214.

142. *Id.* § 3(c)(i)–(ix), at 13,214–15.

143. See *Holder v. Humanitarian Law Project*, 561 U.S. 1, 28 (2010) ("Everyone agrees that the Government's interest in combating terrorism is an urgent objective of the highest order."); *Jifry v. FAA*, 370 F.3d 1174, 1183 (D.C. Cir. 2004) ("[N]o government interest is more compelling than the security of the Nation." (quoting *Haig v. Agee*, 453 U.S. 280, 307 (1981))).

144. See, e.g., *Humanitarian Law Project*, 561 U.S. at 33–34; *Cardenas v. United States*, 826 F.3d 1164, 1169 (9th Cir. 2016).

ty. In Iraq, the majority are Shi'a Muslims,¹⁴⁵ yet the Shi'a are being persecuted by Sunni-dominated ISIS. Historically, the largest concentration of the forty-five million Christians who have been killed for their faith since the time of Jesus was in the Soviet Union, with twenty-five million and eight million murdered in Russia and Ukraine, respectively.¹⁴⁶ This happened even though both countries were at least nominally predominantly Christian. More recently, large numbers of Christians have been killed for their faith in Christian-dominated Latin America and the Democratic Republic of Congo.¹⁴⁷ Though minority status can be an indicator of persecution, most Christians killed for their faith in the twentieth century were in Christian-majority countries.¹⁴⁸ As Americans, we may tend to forget that a minority can hold tyrannical sway over nominal majorities. It matters little whether a person being religiously persecuted is of a minority or the majority religion of his country; perhaps there is another criterion that would be relevant in determining which religiously persecuted refugees should be admitted to the United States.

Although the Geneva Convention does not establish a hard-and-fast rule that refugees must seek asylum in the nearest safe country, some of its provisions suggest such a principle. The Convention only prohibits nations from prosecuting refugees for violating immigration laws if those refugees come directly from the country from which they are fleeing.¹⁴⁹ Additionally, one of the exceptions to the prohibition of removing refugees is if the refugees are removed to a safe third country.¹⁵⁰

145. BUREAU OF DEMOCRACY, HUMAN RIGHTS & LABOR, INTERNATIONAL RELIGIOUS FREEDOM REPORT 2003, <https://www.state.gov/j/drl/rls/irf/2003/24452.htm> [<https://perma.cc/2ACD-YC4N>].

146. JOHN L. ALLEN, JR., THE GLOBAL WAR ON CHRISTIANS: DISPATCHES FROM THE FRONT LINES OF ANTI-CHRISTIAN PERSECUTION 176 (2013).

147. A significant percentage of the average of 100,000 Christians killed every year over the past decade were killed in the predominantly Christian Democratic Republic of Congo. *Id.*

148. *See id.*

149. United Nations Convention Relating to the Status of Refugees, art. 31, July 28, 1951, 189 U.N.T.S. 150, available at <http://www.unhcr.org/protection/basic/3b66c2aa10/convention-protocol-relating-status-refugees.html> [<https://perma.cc/XQM4-5K6V>].

150. *Id.* at art. 32.

Perhaps in prioritizing refugees the United States should consider what alternatives members of persecuted religious groups have other than coming to the United States. It would be an efficient use of resources to consider whether members of different religious groups have the ability to seek asylum in a country in the same region as their country of origin and prioritize our refugee admissions accordingly. As previously discussed, Yazidis and particularly Muslims in the Middle East may have more safe alternatives than Christians in the region. Perhaps diplomatic pressure could be exerted on the leadership of countries like Saudi Arabia and Jordan to encourage them to accept Muslim refugees. Although prioritizing adherents of the minority religions of a country makes little sense, prioritizing members of religious groups with no country of refuge near their home country would be a rational choice.

III. CONCLUSION

Though President Trump's Original Order was repealed and replaced, the new Revised Order poses many of the same questions regarding its legality as the original Order.¹⁵¹ This Note used the Original Order as a vehicle to examine some troubling areas of modern standing, statutory interpretation, and Establishment Clause jurisprudence. Although the President was executing lawful authority in the Original Order, its repeal—particularly the repeal of the provision granting preference to minority religions—can open the way for an asylum policy that could do more to stop genocide and other forms of severe religious persecution.

Jennifer Lee Barrow

151. Both the Original Order and the Revised Order face the same statutory questions, because they both implement a ninety-day travel ban for nationals of listed countries. There is also the question of whether the Revised Order violates RFRA. *See supra* Part I.