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### **Brief for Amici Curiae Scholars of Immigration Law in Support of Plaintiffs-Appellees and Affirmance in HAWAII v. TRUMP, 2017 U.S. 9th Cir.**

Anita Sinha

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# HAWAII v. TRUMP

17-17168

United States Court of Appeals for the Ninth Circuit

November 22, 2017

## Reporter

2017 U.S. 9th Cir. Briefs LEXIS 150 \*

STATE OF HAWAII; ISMAIL ELSHIKH; JOHN DOES, 1 & 2; MUSLIM ASSOCIATION OF HAWAII, INC., Plaintiffs-Appellees, STATE OF CALIFORNIA; STATE OF MARYLAND; STATE OF MASSACHUSETTS; STATE OF NEW YORK; STATE OF OREGON; STATE OF WASHINGTON, Intervenors-Pending, v. DONALD J. TRUMP, in his official capacity as President of the United States; U.S. DEPARTMENT OF HOMELAND SECURITY; JOHN F. KELLY, in his official capacity as Secretary of Homeland Security; U.S. DEPARTMENT OF STATE; REX W. TILLERSON, in his official capacity as Secretary of State; UNITED STATES OF AMERICA, Defendants-Appellants.

**Type:** Amicus Brief

**Prior History:** On Appeal from the United States District Court for the District of Hawaii, No. 1:17-cv-00050-DKW-KSC (Judge Derrick K. Watson).

## Counsel

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## Title

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**Brief for Amici Curiae Scholars of Immigration Law in Support of Plaintiffs-Appellees and Affirmance**

## Text

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### INTEREST OF AMICI CURIAE n1

Amici curiae are law professors who teach and publish scholarship about United States immigration law. Amici have collectively studied the implementation and history of the Immigration and Nationality Act ("INA") for decades, and

have written extensively on the topic. They accordingly have an abiding interest in the proper interpretation and administration of the Nation's immigration laws, particularly the INA. Amici are:<sup>2</sup>

Richard Boswell, University of California, Hastings College of the Law  
Gabriel J. Chin, University of California, Davis School of Law  
Marisa S. Cianciarulo, Dale E. Fowler School of Law, Chapman University  
Maryellen Fullerton, Brooklyn Law School  
Pratheepan Gulasekaram, Santa Clara University  
Alan Hyde, Rutgers Law School  
Daniel Kanstroom, Boston College Law School  
Stephen Legomsky, Washington University School of Law  
Matthew Lindsay, University of Baltimore School of Law  
Peter Margulies, Roger Williams University School of Law  
Michael A. Olivas, University of Houston Law Center  
David Rubenstein, Washburn University School of Law  
Anita Sinha, American University, Washington College of Law  
Shoba Wadhia, Penn State Law

## SUMMARY OF ARGUMENT

By indefinitely suspending immigration from designated countries, President Trump's third iteration of his travel ban (the "Proclamation") engages in precisely the kind of discrimination that Congress prohibited in the landmark Immigration and Nationality Act ("INA") amendments of 1965 and runs roughshod over the carefully calibrated system of checks and balances Congress sought to impose on the President's exercise of discretion in administering immigration law. See Pub. L. No. 89-236, [79 Stat. 911 \(1965\)](#). Prior to 1965, the INA supported a quota system that limited visa issuance based on national origin and ancestry. Over time, a political consensus formed that recognized that quotas operated inequitably and inefficiently and undermined the foreign affairs objectives of the [\*2] United States. Congress remedied these ills by abolishing the quota system in the 1965 amendments and prohibiting discrimination on the basis of nationality in the issuance of visas. See [8 U.S.C. § 1152\(a\)\(1\)\(A\)](#) (the "Nondiscrimination Provision"). In furtherance of its goals, Congress also specifically sought to constrain executive discretion in the allocation of visas.

Despite these amendments, the Government claims in this case that a provision of the INA enacted in 1952, [8 U.S.C. § 1182\(f\)](#) (the "Entry Provision"), supports the Proclamation's legality. The Government's unchecked interpretation of § 1182(f), however, discounts the 1965 amendments and incorrectly assumes that § 1182(f) is an uncabined source of executive authority. Instead, § 1182(f) authorizes executive action only on a temporary basis in emergency situations, not for indefinite periods. And while the Government claims that its interpretation is consistent with past executive actions limiting immigration to the United States, see Appellants' Br. 30-32, the Proclamation in fact is unprecedented in nature and asserts executive authority far beyond the bounds [\*3] of § 1182(f).

## ARGUMENT

### I. THE PROCLAMATION RESUSCITATES THE NATIONAL-ORIGIN DISCRIMINATION CONGRESS SOUGHT TO BAR IN THE 1965 AMENDMENTS

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<sup>2</sup> Institutional affiliations are listed for purposes of identification only.

As Plaintiffs have explained, there are powerful textual and structural arguments why the President's authority under § 1182(f) is cabined by the Nondiscrimination Provision, which prohibits any executive action that would discriminate against immigrants based on national origin. Appellees' Br. 48-51. The history of the Nondiscrimination Provision further demonstrates that Congress enacted the provision to narrow the power that it delegated to the President under the INA.

## **A. The Proclamation Runs Afoul Of Congress's Purposes Behind The 1965 Amendments To The INA**

Congress amended the INA in 1965 to eliminate the quota system and bar national-origin discrimination in immigration law. Congress had at least four goals in mind when it amended the statute. The Proclamation frustrates each of those objectives.

### **1. Eliminating the unfairness and discrimination inherent in a quota system**

"During most of its history, the United States openly discriminated against individuals on the basis of race and national origin in its [\*4] immigration laws." *Olsen v. Albright*, 990 F. Supp. 31, 37 (D.D.C. 1997). Those laws were consolidated and codified in the Immigration and Nationality Act of 1952, which preserved preexisting quotas on immigration from particular countries. In his message vetoing the Act, President Truman noted the regime's abiding unfairness, observing that "the present quota system ... discriminates, deliberately and intentionally, against many of the peoples of the world." 98 Cong. Rec. 8021, 8083 (1952).

Truman singled out for particular opprobrium the quotas that suppressed immigration by persons from Asia and of Asian ancestry. Until 1952, racial restrictions in the immigration statute had barred naturalization of most Asian noncitizens and suppressed immigration. See S. Rep. No. 89-748, at 14 (1965) ("Senate Judiciary Report"). The 1952 statute, while eliminating race as an absolute bar to immigration, subjected nationals from the Asia-Pacific triangle to particularly narrow and rigid quotas. *Id.* A total of only 2,000 visas per year were available to all countries in the entire region. *Id.* Moreover, the 1952 Act provided that immigration to the U.S. of persons of [\*5] Asian ancestry anywhere in the world would count against the quota applicable to the Asia-Pacific triangle. *Id.* In other words, persons of Asian descent who were nationals of countries in other regions, such as Europe, Africa, the Caribbean, or Latin America, were nonetheless subject to the parsimonious 2,000-person quota. Truman denounced the impact of "this invidious discrimination" and lamented the dissonance between the quota system and "our national ideals." 98 Cong. Rec. at 8084-8085. Congress overrode Truman's veto.

President Eisenhower reiterated his predecessor's concerns, again observing that the quota system "operate[d] inequitably," Cong. Research Serv., *U.S. Immigration Law and Policy: 1952-1979*, at 115 (1979) (quoting Message from the President Relative to Immigration Matters, H.R. Doc. No. 85-85, at 1 (1957)) ("*CRS Report*"),<sup>3</sup> and advising Congress that "the present national-origins method of admitting aliens needs to be reexamined, and a new system adopted," *id. at 112* (quoting Message from the President Transmitting Recommendations Relative to Our Immigration and Nationality Laws, H.R. Doc. No. 84-329, at 2 (1956)). In 1960, Eisenhower [\*6] noted that "[i]n the world of today our immigration law badly needs revision." *Id. at 117* (quoting Message from the President Relative to Urging the Liberalization of Some of Our Existing Restrictions upon Immigration, H.R. Doc. No. 86-360, at 2 (1960) ("Liberalization Message")). Eisenhower urged a doubling in the number of immigrants granted admission under the quotas then in effect, explaining that this would "moderate the features of existing law which operate unfairly in certain areas of the world." Liberalization Message 2. Eisenhower also strongly recommended the elimination of the ceiling of 2,000 annual immigrant visas from the Asia-Pacific Triangle. *Id.* In addition, he proclaimed on May 19, 1959 a shortly ensuing twelve-month period as "World Refugee Year as a practical means of securing increased assistance for refugees throughout the world." Proclamation No. 3292, in H.R. Rep. No. 86-1433, at 4 (1960).

[\*7]

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<sup>3</sup> The report is reprinted at 3 *Immigr. & Nat'lity L. Rev.* 95 (1980).

By the early 1960s, the political branches agreed that the national-origin quota system was "an anachronism ... [that] discriminates among applicants for admission into the United States on the basis of accident of birth." Pres. John F. Kennedy, Letter to the President of the Senate and to the Speaker of the House on Revision of the Immigration Laws (July 23, 1963) ("Kennedy Letter"). In his message to Congress in July 1963, President Kennedy highlighted the unfairness of national-origin quotas in stressing the urgent need for their abolition. He noted that the quota system was "without basis in either logic or reason." *Id.* President Johnson was just as forthright in his State of the Union message shortly after Kennedy's assassination. Echoing a well-known passage from Kennedy's Inaugural Address, Johnson observed that "a nation that was built by the immigrants of all lands can ask those who now seek admission: 'What can you do for our country?' But we should not be asking: 'In what country were you born?'" Annual Message to the Congress on the State of the Union (Jan. 8, 1964).

Appearing before the House Judiciary Committee in 1964, Secretary of State Dean Rusk cited Presidents [\*8] Kennedy and Johnson in reiterating the quota system's unfairness. Rusk explained: "We in the United States have learned to judge our fellow Americans on the basis of their ability, industry, intelligence, integrity and all the other factors which truly determine ... value to society. We do not reflect this judgment of our fellow citizens when we hold to immigration laws which classify ... according to national and geographical origin." *Immigration: Hearings on H.R. 7700 Before Subcomm. No. 1 of the H. Comm. on the Judiciary*, 88th Cong., at 386 (1964) ("*Hearings on H.R. 7700*").<sup>4</sup>

The centerpiece of Congress's efforts to address these concerns was the Nondiscrimination Provision, which [\*9] prohibits discrimination "in the issuance of an immigrant visa because of [a] person's race, sex, nationality, place of birth, or place of residence." The exceptions to the provision are surpassingly narrow. *See, e.g., 8 U.S.C. § 1101(a)(27)(D)-(G)*. The provision accordingly reflects an abiding commitment to nondiscrimination on the basis of national origin in the administration of the Nation's immigration laws. That commitment was critical to effecting Congress's remaining purposes in removing the quota system.

## 2. Prioritizing family reunification

The 1965 amendments provided a detailed structure for immigrant admissions that prioritized close family relationships.<sup>5</sup> As the Senate Judiciary Committee noted, the revisions to the statute included "a new system of allocation based on a system of preferences which extends priorities ... to close relatives of U.S. citizens and [lawful permanent residents]," along with certain "members of the professions, arts, or sciences," whose skills or other attributes were needed in the U.S. economy, and refugees. Senate Judiciary Report 11. The Committee Report declared that "[r]eunification of families is [\*10] to be the foremost consideration." *Id.* at 13.

The 1965 amendments decisively rejected the system of national-origin quotas because it lacked the "required degree of flexibility" to handle such factors as "the reuniting of families." Senate Judiciary Report 13. Because of this flaw-and as discussed in further detail below-Congress repeatedly resorted to "special legislation" to be appropriately "generous and sympathetic" to the needs of families and others. *Id.* In spring Congress from this continual recourse to special legislation, the Judiciary Committee pointedly praised the 1965 amendments' replacement of the quota system with a family-based visa program that was to be "fair, rational, humane, and in the national [\*11] interest." *Id.*

## 3. Remediating the substantial inefficiency the quota system created in the legislative process

As noted, the United States' commitment to family reunification was complicated by the existence of the quota system. So too was the Nation's commitment to refugees and others who sought entry. As a result, in the period

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<sup>4</sup> Echoing Truman's concern on the subject, the 1965 Senate Judiciary Report stressed the particularly adverse impact of quota provisions governing the Asia-Pacific triangle. The Report declared that in the future, there would be "no differentiation" in the treatment of Asian immigrants. Senate Judiciary Report 15.

<sup>5</sup> *8 U.S.C. §§ 1151*, 1153; *cf. Margulies, Bans, Borders, and Sovereignty: Judicial Review of Immigration Law in the Trump Administration*, Mich. St. L. Rev. (forthcoming 2018), available at <http://ssrn.com/abstract=3029655>.

between the 1952 Act and the 1965 amendments, Congress repeatedly passed ad hoc legislation to admit relatives of U.S. citizens, refugees, and others over and above the quotas. These recurring ad hoc efforts drained legislative time, effort, and deliberation.

The Refugee Relief Act of 1953, Pub. L. No. 83-203, [67 Stat. 400 \(1953\)](#), amended by Pub. L. No. 83-751, [68 Stat. 1044 \(1954\)](#), provided for admission beyond the otherwise applicable quotas of a broad swath of foreign nationals, including refugees, escapees from Communist countries, persons expelled from such countries, and relatives of U.S. citizens. *CRS Report* 113.

In 1957, Congress, in a bill whose principal sponsor was then-Senator John F. Kennedy, Pub. L. No. 85-316 **[\*12]**, [71 Stat. 639 \(1957\)](#), enacted still more ad hoc adjustments within the overall structure of the quota system. *CRS Report* 115. First, the 1957 Act, as a temporary expedient to mitigate the harshness of the quota system, provided that foreign national visa applicants on whose behalf petitions had been filed by a "specified date" would qualify for visas without regard to the quota system. *Id.* at 116. This relief, to a cohort of foreign nationals whose admission would otherwise have been severely delayed by the quota system's operation, was the "first of a series" of ad hoc adjustments that Congress made to provisions for such nationals. *Id.* Along the same lines, on September 22, 1959, Congress again made ad hoc time-bound adjustments to certain petitions for foreign nationals who were relatives of United States citizens in service of "the recognized principle of avoiding separation of families." *Id.* at 118 (quoting Auerbach, *Immigration Legislation, 1959*, Department of State Bulletin 600 (Oct. 26, 1959) (quoting H.R. Rep. No. 86-582, at 2 (1959))).

Moreover, members of Congress compensated for the rigidity of national-origin quotas with **[\*13]** what President Eisenhower, who strongly favored comprehensive reform of the quota system, called an "avalanche ... of private bills." H.R. Doc. No. 84-329, at 3 (1956). In the 85th Congress, fully "[t]wenty percent of all legislation" stemmed from 4,364 private immigration bills providing relief to 5,282 persons who would otherwise have been caught up in delays attributable to the quota system. *CRS Report* 120. Because of Congress's persistence in fashioning continual ad hoc adjustments through special and private legislation, less than half of the over 2.5 million immigrants admitted between 1951 and 1960 entered under the quota system. *Id.*

This same exhausting regime of ad hoc adjustments continued through the early 1960s. In the Act of September 26, 1961, Pub. L. No. 87-301, [75 Stat. 650 \(1961\)](#), Congress again enacted a temporary program for the admission outside the quota system of certain foreign nationals. *CRS Report* 140. Since certain visa categories were severely backlogged because of the quota system, the 1961 Act authorized temporary non-quota admission for a discrete cohort of petitions. *Id.* at 141. Legislation **[\*14]** passed in 1962 accomplished the same result. *Id.* (citing Pub. L. No. 87-885, [76 Stat. 1247 \(1962\)](#)). In overall terms, this legislation "reflect[ed] a gradual shift in focus, at least on an ad hoc basis," from national-origin quotas to "values" such as the "reunification of families." *Id.*

In crucial testimony before the House Judiciary Committee in 1964, Secretary of State Rusk acknowledged the adverse impact that the quota system had on legislative efficiency. Rusk put a diplomatic spin on these extensive, iterative efforts, noting that Congress had repeatedly found it "desirable" to pass "special laws" allowing admission outside the quota system. *Hearings on H.R. 7700*, at 386. Rusk reminded Congress of the fitfully spinning wheels caused by the need for additional legislation, noting that from 1953 to 1962, only 34 percent of immigrants to the United States were quota immigrants. *Id.*

#### **4. Addressing the foreign-policy implications of American immigration law**

In 1965, Congress explicitly recognized what presidents since Truman had noted regarding the 1952 Act's hardening of quotas: the "quota system [was] **[\*15]** ... unrealistic in the face of present world conditions ... [and] a constant handicap in the conduct of our foreign relations." 98 Cong. Rec. at 8083. President Truman urged Congress to abandon quotas and enact a "decent policy of immigration—a fitting instrument for our foreign policy and a true reflection of the ideals we stand for, at home and abroad." *Id.* Indeed, Truman reiterated his contention that the need for a replacement of the quota system was nothing short of a national "emergency." *Id.*

President Eisenhower was equally vocal in noting the foreign policy costs of the quota system. Urging that Congress pass legislation that would result in "[a]bandonment of the concept of race and ethnic classifications within our population" and an increase in the number of immigrants allowed and of refugee admissions, Eisenhower noted that victims of persecution who at that time had to wait long periods for admission "will become worthwhile citizens and will keep this Nation strong and respected as a contributor of thought and ideals." Liberalization Message 2.

President Kennedy continued this emphasis on liberalizing or eliminating quotas. In a July 1963 message to Congress, [\*16] Kennedy denied that the quota system "satisfies a national need[] or accomplishes an international purpose." Kennedy Letter. Critiquing the quota system as counterproductive to American interests, Kennedy observed that "[o]ur investment in new citizens has always been a valuable source of our strength." *Id.*

In hearings before the House Judiciary Committee in 1964, Secretary of State Rusk alluded to Presidents Kennedy and Johnson and added his own assessment of the foreign policy reasons for abolishing the quota system. As Rusk put it: "Since the end of World War II, the United States has been placed in the role of critical leadership in a troubled and constantly changing world. We are concerned to see that our immigration laws reflect our real character and objectives. What other peoples think about us plays an important role in the achievement of our foreign policies." *Hearings on H.R. 7700*, at 386. Rusk added that because America's immigration laws are "the basis of how we evaluate others around the world," we can readily detect "their effect on people abroad and consequently on our influence." *Id.*

Speaking about the Asia-Pacific Triangle quota, Secretary Rusk was [\*17] even more pointed in his critique, observing that, "[t]here have been times in the past when we have been accused of preoccupation with the peoples of the West to the neglect of Asian peoples in the Far East." *Hearings on H.R. 7700*, at 386. Rusk warned Congress that "the national origins system gives a measure of support and credence to these observations." *Id.* Responding to committee members' questions, Rusk further noted that perceptions of American discrimination in immigration policy were "picked up by people unfriendly to the United States and made an issue" in other countries around the world, "caus[ing] political disturbances in the good relations which we would hope to establish." *Id.* at 390. Rusk described this political blowback as a "matter of frequent discussion ... with foreign ministers of other countries." *Id.* Summing up the tone and tenor of discourse with foreign officials occasioned by the quota system, Rusk described the quotas as creating an "unwholesome atmosphere." *Id.* Rusk thus echoed the calls of Presidents Eisenhower through Johnson for the quotas' demise.

Faced with these concerns, the 1965 Congress chose to accept the political branches' [\*18] shared view that the quota system undermined the Nation's foreign affairs objectives. The 1965 amendments abolished the quota system to permanently heal the wounds inflicted by our discriminatory policies.

\* \* \*

The Proclamation, if allowed to take effect, would reopen these wounds. As the foregoing discussion makes clear, Congress specifically intended the Nondiscrimination Provision to prohibit the formulation of immigration policy that turned on national origin. Congress identified particular ills with the old system and viewed the elimination of national-origin discrimination as critical to remedying them. The Proclamation, however, imposes an indeterminate bar on the entry of immigrants from designated nations, thus reprising precisely the form of discrimination Congress eliminated in the 1965 amendments. It does so without regard for family reunification, which Congress in 1965 declared was the "foremost consideration" in the allocation of visas. Senate Judiciary Report 13. The Proclamation indefinitely delays reunification of close relatives from listed countries with American citizens and lawful permanent residents, and it shifts the default position from the equitable visa [\*19] allocation that Congress envisioned in 1965 back to the nationality-based system that President Kennedy declared to be an "anachronism" in 1963 and that Congress rejected in 1965. Kennedy Letter.

As was the case with the national-origin quota system, congressional efforts to override or adjust the Proclamation would create a sustained spectacle of inefficiency. The recurring need to pass special legislation imposed substantial costs on pre-1965 Congresses, requiring time, effort, and deliberation that legislators could otherwise

have devoted to other matters of public importance. The point of the 1965 amendments was to "eliminate the need for th[e]se special bills." *Hearings on H.R. 7700*, at 421. But the Proclamation would redouble that need. Finally, the Proclamation risks precisely the adverse impact on foreign relations that the 1965 amendments were meant to address. It singles out for adverse treatment the citizens of nations located in critical parts of the world, compromising the "good relations which we would hope to establish" with those nations and their neighbors and defenders. *Id.* at 390.

In sum, the Proclamation undoes much of the work Congress accomplished [\*20] in the 1965 amendments, which were decades in the making. Nothing in the INA gives the President the authority to so thoroughly undermine Congress's handiwork in a domain over which it has plenary power. See [Kleindienst v. Mandel, 408 U.S. 753, 766 \(1972\)](#).

### **B. The Proclamation Asserts The Kind Of Unbridled Discretion That The 1965 Amendments Sought Specifically To Constrain**

In enacting the 1965 amendments-including the Nondiscrimination Provision-Congress sought specifically to constrain executive power. More to the point, it sought specifically to prevent the President from making immigration decisions based on national origin. Indeed, a review of legislative history reveals that members of Congress were gravely concerned with executive encroachment upon the legislature's authority to regulate immigration. The Chair of the House Immigration Subcommittee, Rep. Michael Feighan of Ohio, repeatedly expressed his desire to cabin administrative discretion that might perpetuate vestiges of the quota system.

As originally drafted, the bill that reached Feighan's subcommittee provided for an Immigration Board that could recommend funneling visas in a "quota reserve" [\*21] to particular countries. See *Hearings on H.R. 7700*, at 387-388, 392 (testimony of Secretary of State Rusk). Representative Feighan resisted leaving such discretion with the Executive Branch (either the presidential administration or the proposed board), arguing that the best approach was to enact comprehensive legislation. *Id.* at 392-393.

Skeptical about the proposed deference to executive discretion, Feighan probed Secretary Rusk's defense of the "Immigration Board" concept, inquiring whether "Congress is inadequate for the task of establishing a clear and all-inclusive immigration policy." See *Hearings on H.R. 7700*, at 392. And Rusk conceded that "[b]oth under the Constitution and under the practices of our system of government, it is for the Congress to establish the basic policy and the basic legislation" regarding immigration. *Id.*

Rep. Feighan also objected to the administration's proposal of establishing an Immigration Board due to the absence of "checks and balances" on administrative discretion in the draft proposal of the bill. See *Hearings on H.R. 7700*, at 99. Because of the absence of such safeguards in the draft bill, Feighan suggested that the Immigration [\*22] Board would be "subject to all sorts of charges as well as pressures, thus creating more problems than we already have." *Id.* at 422. Feighan also resisted the proposal to lodge in the executive branch "broad authority ... to allocate quotas, to actually set preferences and priorities ... to admit 10 percent per country by Presidential determination, and similar discretionary authority." *Id.* at 423.

The President's assertion of authority to promulgate the Proclamation, regardless of its conflict with the Nondiscrimination Provision, runs roughshod over Congress's clear intent to cabin executive discretion in the administration of the immigration laws. As the evolution of the 1965 amendments makes plain, the nondiscrimination mandate in [8 U.S.C. § 1152\(a\)\(1\)\(A\)](#) ensured that administrative discretion would not backslide to the discredited practices of the quota system. See [Russello v. United States, 464 U.S. 16, 23 \(1983\)](#) (using the "evolution of ... statutory provisions" as evidence of congressional intent).

## **II. THE PROCLAMATION'S INDEFINITE BAR IS AN IMPROPER EXERCISE OF EXECUTIVE DISCRETION**

In imposing a ban of indeterminate [\*23] duration on the entry of immigrants from particular countries, the Proclamation not only runs afoul of the Nondiscrimination Provision, but it also breaches the prescribed limitations of Section 1182(f), the ban's purported source of statutory authority. The Entry Provision allows the President to act

quickly and decisively when situations require an exigent response, but it does not authorize actions of indefinite duration, which require a more substantial justification as they are more likely to interfere with the INA's overall plan—including the Nondiscrimination Provision.

The Government's invocation of § 1182(f) to justify the Proclamation's indefinite alteration of Congress's reticulated immigration scheme lacks a coherent limiting principle. Extended to the "limit of its logic," *Korematsu v. United States*, 323 U.S. 214, 246 (1944) (Jackson, J., dissenting) (quotation marks omitted), the government's reading would render superfluous the Nondiscrimination Provision. It would also strain the entire structure of visa allocation that Congress sought to erect in 1965 and in subsequent amendments to the INA. Fortified merely by a thin claim that admission of immigrants [\*24] from countries X, Y, and Z would be "detrimental to the interests of the United States," 8 U.S.C. § 1182(f), the President could sweep aside Congress's commitment to a uniform system of per-country visa allocation and its prohibition on discrimination in the issuance of immigrant visas. The result would be a de facto return to the national-origin-based system that Congress decisively rejected in 1965 and to the broad discretion that Congress sought to combat by insisting on the Nondiscrimination Provision.

Similarly, the government's interpretation of § 1182(f) would undermine the intricately constructed latticework of inadmissibility grounds that Congress has enacted in § 1182 of the INA. Armed with an unchecked reading of § 1182(f), the President could unilaterally add revisions of indefinite duration to § 1182's list of inadmissibility grounds. Supplementing that list in exigent circumstances may be permissible. However, an executive decree of an indefinite ban on otherwise admissible individuals from several countries is not.

#### **A. Congress Enacted § 1182(f) Against The Backdrop Of Tailored Presidential Authority To Limit Entry**

The statutory pedigree [\*25] of § 1182(f) illustrates its limited scope. *See generally* Resp. Br. 31, *Trump v. Hawaii*, No. 16-1540 (U.S. filed Sept. 11, 2017). Following American entry into World War I, President Wilson sought to create "a very definite and particular control over the entrance and departure of all persons into and from the United States." State of the Union (Dec. 4, 1917). In recognizing the need to limit the entry and departure of immigrants during wartime, Congress empowered the President to implement such limitations "if the President shall find that the public safety requires." Travel Control Act and the Entry & Departure Control Act, Pub. L. No. 65-154, 40 Stat. 559, 559 (1918).

The legislation also contained provisions regarding authority to set rules governing passports issued to Americans for travel abroad. Pub. L. No. 65-154, § 2. President Wilson issued a proclamation restricting entry and departure of persons whose admission would be "prejudicial to the interests of the United States." Proclamation No. 1473, §§ 1-2 (1918).

The political branches' activity during World War II reflected the same tailored [\*26] model. In the months before the Pearl Harbor attack and America's entry into World War II, President Roosevelt sought authority from Congress to limit both departure and entry "whenever ... the President shall deem that the interests of the United States require it." H.R. Rep. No. 77-754, at 1 (1941). This time, Congress pushed back. Senator Robert Taft, presaging concerns about executive discretion raised by Rep. Feighan almost twenty-five years later, cautioned that codifying the broad language proposed by the White House would add "another statute which would give the President unlimited power, under any circumstances, to make the law of the United States and to prescribe the terms upon which any person—any American or any other person—might leave the United States." 87 Cong. Rec. 5286, 5326 (1941). Taft warned about the prospect that the "extreme" power granted to the President under the proposal would apply not only during wartime, but also to "any time that war exists anywhere in the world and the President desires to exercise the power." *Id.* at 5386. Addressing Taft's warning, Senator Van Nuys explained that the State Department had provided assurances that the wartime authority [\*27] granted to the President would be used only to deter "subversive activities." *Id.*

Congress enacted the bill with no material changes, *see* Defense Entry and Departure Act, Pub. L. No. 77-114, 55 Stat. 252, 252-253 (1941), and President Roosevelt tailored exercise of his new statutory authority to persons suspected of working on behalf of hostile foreign powers. See 6 Fed. Reg. 5929, 5931-5932 (1941) (deeming "prejudicial to the interests of the United States" the entry of certain categories of persons, including foreign

nationals "affiliated with ... a political organization associated with or carrying out the policies of any foreign government opposed to the measures adopted by the Government of the United States in the public interest," or who possessed "unauthorized secret information concerning ... the national defense of the United States," or conducted "activities designed to obstruct, impede, retard, delay, or counteract the effectiveness of the measures adopted by the Government of the United States for the defense of the United States or any other country").

Congress was aware of this backdrop when [\*28] it enacted the Immigration and Nationality Act of 1952. To provide authority in wartime and emergencies, Congress enacted a precursor of [8 U.S.C. § 1185\(a\)\(1\)](#), rendering it unlawful for foreign nationals to depart from or enter the United States in wartime except under rules prescribed by the President. See Pub. L. No. 82-414, § 215, [66 Stat. 163, 190 \(1952\)](#). Congress also enacted the present § 1182(f) in 1952 to supplement that wartime authority.

Reading these provisions as a "harmonious whole," see [FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 133 \(2000\)](#). Congress must be understood to have authorized nothing more than the limited exigent authority successfully sought by presidents Wilson and Roosevelt, see [Kent v. Dulles, 357 U.S. 1, 130 \(1958\)](#) (declining to hold that executive branch "has been silently granted" a "larger, more pervasive power" to restrict travel). Indeed, it would have been particularly odd to expand the President's *peacetime* power *beyond* the power that Congress had granted the President to address the exigencies of war.<sup>6</sup>

[\*29]

## **B. The Proclamation Is Inconsistent With Past Invocations Of § 1182(f)**

Defenders of the Proclamation have pointed to purported historical precedent to buttress executive authority under § 1182(f). But none of the cited precedents lends credence to the government's claim of authority. Rather, historical invocations of § 1182(f) demonstrate that past presidents used this authority to address discrete bilateral diplomatic disputes or control the migration of persons who were already inadmissible under the INA. In marked contrast to the tailored nature of these historical invocations, the Proclamation's indefinite ban sweeps incredibly broadly.

President Carter used authority under the INA<sup>7</sup> in response to Iran's illegal seizure and imprisonment of U.S. diplomatic personnel in 1979. See [Narenji v. Civiletti, 617 F.2d 745, 747-748 \(D.C. Cir. 1979\)](#). The measures taken by President Carter to respond to this illegal act included requiring Iranian students in the United States to report to a government office with updated information showing compliance with the terms of their visas, *id.* at 746, and suspending issuance of new immigrant visas to [\*30] Iranian nationals, apart from those required for humanitarian reasons, see Pres. Jimmy Carter, *Sanctions Against Iran Remarks Announcing U.S. Actions* (Apr. 7, 1980).

In upholding the first measure, the D.C. Circuit cited the INA's requirement that student visa-holders maintain their nonimmigrant status and comply with conditions pertinent to that status. [Narenji, 617 F.2d at 747](#). The second measure, suspending issuance of new immigrant visas apart from those issued on humanitarian grounds, was a tailored response to the Iranian regime's violation of international law regarding protection of diplomats. Cf. [Sosa v. Alvarez-Machain, 542 U.S. 692, 715 \(2004\)](#) (describing "infringement of the rights of ambassadors" as a core violation of international law [\*31] that was universally acknowledged during the days of the "early Republic").

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<sup>6</sup> The Government argues that Congress sought to expand the President's authority beyond the wartime context in a series of INA amendments made in 1978. See Appellants' Br. 29. The Government's position is misguided for two reasons: First, as discussed above, the INA already authorized the President to restrict entry during peacetime, but this authority was understood to be used only in limited circumstances. Second, the 1978 amendments actually *constrained* executive authority in important ways, notably by barring the President from imposing categorical restrictions on citizens' travel abroad. See Pub. L. No. 95-426, § 124, [92 Stat. 963, 971 \(1978\)](#); see also S. Rep. No. 95-842, at 14-15 (1978) (justifying curbs on executive discretion by noting that "[t]he committee can conceive of no sound reason ... for the re-establishment of a U.S. passport policy which identifies certain countries as being politically or ideologically taboo").

<sup>7</sup> Carter invoked authority under [8 U.S.C. § 1185\(a\)\(1\)](#) to regulate entry into and departure from the United States. Here, the government has treated §§ 1185(a)(1) and 1182(f) as interchangeable.

President Reagan's invocation of § 1182(f) in 1986 to suspend immigration from Cuba stemmed from a diplomatic dispute regarding inadmissible foreign nationals. See Pres. Ronald Reagan, Proclamation 5517: *Suspension of Cuban Immigration* (Aug. 22, 1986). President Reagan's action was one salvo in an extended dispute between the United States and Cuba with wide effects on immigration and travel between the two countries. In a policy repeatedly upheld by the Supreme Court, the United States had for a quarter-century limited travel of U.S. nationals to Cuba, to deprive the Castro regime of resources for foreign incursions that endangered U.S. interests. See [Zemel v. Rusk, 381 U.S. 1, 12 \(1965\)](#); [Regan v. Wald, 468 U.S. 222 \(1984\)](#). Cuba had contributed to this longstanding dispute by alternating rigid control of immigration to the United States with episodes, such as the Mariel Boatlift of 1980, in which Cuban officials knowingly facilitated the migration to the United States of over 130,000 persons, including individuals with criminal records or other conditions that rendered [\*32] them inadmissible. See [Benitez v. Wallis, 337 F.3d 1289, 1290 n.1 \(11th Cir. 2003\)](#), *rev'd & remanded on other grounds sub nom. Clark v. Suarez Martinez, 543 U.S. 371 (2005)*; Maddux, *Ronald Reagan and the Task Force on Immigration*, 74 Pac. Hist. Rev. 195, 202 (2005).

President Reagan issued the 1986 proclamation in response to Cuba's repudiation of a 1984 agreement curbing this confounding pattern. In that agreement, Cuba had committed itself to accept the return of almost 3,000 of its nationals with known criminal records or other disqualifying conditions. See Weinraub, *U.S. and Cuba Gain an Accord on Repatriation*, N.Y. Times, Dec. 15, 1984, at A1. To persuade Cuba to accept return of these individuals and exercise future due diligence in its immigration policy, the Reagan Administration had agreed to issue immigrant visas to an additional cohort of Cuban nationals who had close relatives in the United States. *Id.* When Cuba reneged on the agreement, President Reagan proclaimed that the United States would also return to the pre-agreement status quo. In taking this step, President Reagan hoped to exert some leverage over Cuba to promote [\*33] compliance with the 1984 agreement's terms.

President Reagan's action was both tailored and transactional, responding in a measured way to a discrete problem with a single foreign state. This tailored approach was entirely consistent with the INA's overall scheme. In contrast, the Proclamation's indefinite ban is programmatic, not transactional. No country subject to the ban has emulated Cuba by knowingly engineering the migration to the United States of inadmissible foreign nationals. Indeed, with the exception of Iran, the countries designated in the Proclamation cooperate with the United States on immigration, while many countries *not* on the list do *not* cooperate with the United States. See Bier, *Travel Ban is Based on Executive Whim, Not Objective Criteria*, Cato at Liberty (Oct. 9, 2017). Far from responding to a particularly exigent crisis, the Proclamation appears untethered to any emergent foreign policy issue. Moreover, unlike President Reagan's 1986 Proclamation, which targeted only one country, the Proclamation is an indefinite ban on immigration from several countries.

Deterrence of the "attempted mass migration" of inadmissible foreign nationals played [\*34] a role in another prominent use of § 1182(f) by President Reagan. See [Haitian Centers Council v. Sale, 509 U.S. 155, 187-188 \(1993\)](#) (discussing Proclamation 4865: *High seas interdiction of illegal aliens* (Sept. 29, 1981)). Addressing efforts by thousands of Haitians who sought to escape political oppression and economic privation by securing passage to the United States from smugglers-often on unseaworthy vessels-President Reagan "suspended" the entry of undocumented persons from the high seas and ordered the Coast Guard to interdict vessels engaged in this activity. President Reagan's proclamation did not suspend the granting of visas to Haitian nationals or other persons. Any foreign national with a close family relationship with a U.S. citizen or lawful permanent resident could still apply for and receive a visa if she had a qualifying relationship with a citizen or lawful permanent resident and did not fall within any of the INA's express exclusion grounds, such as those concerning health, criminal history, or national security. See [8 U.S.C. § 1182\(a\)\(1\)-\(3\)](#).

President Reagan's proclamation, subsequently followed by Presidents George [\*35] H.W. Bush and Bill Clinton, applied only to persons who lacked a visa and were therefore *already inadmissible* under [8 U.S.C. § 1182\(a\)\(7\)\(A\)\(i\)\(I\)](#) (providing that foreign national who applies for admission to the United States without "valid

unexpired immigrant visa ... or other valid entry document" is inadmissible).<sup>8</sup> President Reagan's order had no effect *at all* on the issuance of immigrant visas in Haiti or elsewhere. The contrast is marked with the Proclamation, which expressly restricts issuance of immigrant visas for nationals of the countries named.

**[\*36]**

In sum, past practice under § 1182(f) and related statutory authority has been limited to resolution of discrete bilateral diplomatic disputes or other exigent matters such as the Iranian hostage crisis and efforts to deter or redress entry of persons who were *inadmissible* under the INA. Cf. Manuel, Cong. Research Serv., *Executive Authority to Exclude Aliens: In Brief*, 7-12 (Jan. 23, 2017) (discussing background and past practice regarding § 1182(f)). In contrast, a presidentially decreed *indefinite* ban on otherwise *admissible* individuals from several countries threatens Congress's carefully wrought structure. It also defies the "checks and balances" that Chairman Feighan and his fellow legislators sought to inscribe in the INA. This Court should reject the government's invitation to so undermine the statutory scheme.

## CONCLUSION

The district court's order preliminarily enjoining the Proclamation should be affirmed.

Respectfully submitted,

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<sup>8</sup>

Under the procedure provided for in the proclamation, U.S. State Department and immigration officials would interview foreign nationals interdicted under the proclamation who alleged that they had a well-founded fear of persecution if they were returned to their country of origin. Those who made this showing were transported to the United States. Cox & Rodríguez, *The President and Immigration Law*, [119 Yale L.J. 458, 495-496 \(2009\)](#).

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Signature of Attorney or Unrepresented Litigant

/s/ Alan E. Schoenfeld

("s/" plus typed name is acceptable for electronically-filed documents)

Date Nov 22, 2017

#### **CERTIFICATE OF SERVICE**

I, Alan E. Schoenfeld, hereby certify that on this 22nd day of November, 2017, I served true and correct copies of the foregoing on all counsel of record via ECF.

/s/ Alan E. Schoenfeld

ALAN E. SCHOENFELD