The program should be available for viewing at [http://onlinelc.isba.org/store/seminar/seminar.php?seminar=52168]. Immigration law continues to be a dynamic and hot practice area that impacts family law, criminal defense, employment and labor law, and other practice areas. With numerous cases bubbling in the federal and state courts, legislative activity, and executive action, 2016 will be no different. The 2016 presidential election will highlight the importance of immigration programs that will define the country for the next 4 or more years. Be sure to keep up to date with the 2017 update, which will also focus on the Supreme Court's decision in Texas v. USA and the nationwide impact of this decision.

Does the Immigration and Nationality Act allow discrimination based on religion?

BY CINDY G. BUYS

On December 7, 2015, U.S. Presidential hopeful Donald Trump issued a Press Release in which he called for "a total and complete shutdown of Muslims entering the United States until our country's representatives can figure out what is going on." His statement triggered much controversy, including denouncements from legal scholars who contend it would violate U.S. constitutional and international law. This article briefly considers his proposal from a different perspective — whether such a ban is prohibited under the Immigration and Nationality Act (INA).

Mr. Trump’s statement immediately brought to mind the nondiscrimination provision of the INA, section 202(a)(1), which bans discrimination in the issuance of immigrant visas on a variety of grounds including “race, sex, nationality, place of birth and place of residence.” Interestingly, however, the provision does not expressly ban discrimination based on religion.

Why would Congress ban discrimination on these other common grounds, but not include religion?

The answer to that question appears to lie in the history of this provision of the INA. Beginning in the late 1800s, federal immigration law increasingly included racially discriminatory provisions that primarily were aimed at excluding Chinese, Japanese, and other Asians from the United States. Following World War I, there were concerns about immigrant radicals and anarchists, particularly with respect to persons from southern and eastern Europe. In response, Congress enacted the Quota Law of 1921 which introduced numerical limitations on immigration for the first time. With some exceptions, the law allocated quotas to each nationality totaling three percent of the foreign-born persons residing in the United States in 1910 up to 350,000 visas annually. Because the majority of foreign-born persons living in the United States in 1910 were from northern and western Europe, persons from those countries received a greater number of visas. Congress enacted even stricter national origin quotas which further restricted immigration from southern and eastern Europe on a more permanent basis in 1924. Then in 1952, influenced by the cold war atmosphere, Congress passed the McCarran-Walter Act which continued the national origins quota system for the Eastern Hemisphere; favored immigration from northern and western Europe; and exempted the Western Hemisphere from numerical limitations.

President Truman opposed the 1952 Act. He appointed a special Commission on Immigration and Nationalization to study the immigration system. That Commission issued a lengthy report urging the abolition of the national origins system and recommending quotas without regard to national origin, race, creed or color. Despite support from Presidents Truman and Eisenhower, these recommendations did not gain sufficient Congressional support for passage until the Kennedy Administration. In 1965, Congress made several significant changes to the INA, including: (1) ending the national origins quota system; (2) abolishing the special immigration restrictions relating to Orientals and prohibiting immigration discrimination because of race, sex, nationality, place of birth, or place of residence; (3) establishing a unified immigration quota for areas outside the Western Hemisphere; (4) establishing categories of immigrants exempt from the worldwide numerical restrictions; and (5) ending the exemption of Western Hemisphere natives, other than immediate relatives of American citizens, from numerical restriction.

As mentioned above, one of the amendments to the Act in 1965 "forbade immigration discriminations because of race, sex, nationality, place of birth, or place of residence." The recommendation and adoption of a provision banning racial discrimination was a direct response to the racial discrimination that had been
codified in the INA for the previous seventy years. Discrimination based religion was never mentioned in the amendment likely because such discrimination had never been codified in the Act.

The idea that there was no need to expressly prohibit discrimination based on religion because it had not been the primary issue finds support in the legislative history. The 1965 amendments derived in part from Senate Bill 500, which was proposed "to eliminate the national origins quota system of selecting immigrants." The main theme of the legislative discussion was "what the bill will do." The proponents stated that the bill was "designed to establish the principle of equality and fair play for the people of all nations."

During the legislative debate, Senator Ervin of North Carolina pointed out to Senator Scott of South Carolina that he did not see "a provision in [the Act] which excludes any man on account of his religion." Senator Scott responded: "I would say it is rather the discrimination on the basis on national origin which operates to admit—if you believe in the historical pattern—more people of some countries having one religion than people of another country having another . . . ."

In another discussion, Senator Ervin stated again, "When this hearing started there was something said about the national origins system of the Walter-McCarran Act being discriminatory against people on the basis of their religion. That has been pretty well abandoned by all witnesses. I do not understand you to say it is based on discrimination on account of religion. You charge discrimination because of ethnic origin or race." To which Senator Carey of Minnesota responded: "Nothing so specifically stated. But if you have religions say in the Far East and if you are on a national origins basis, in discriminating against people from the Far East, you would be discriminating against the Buddhists and some others of longstanding."

Senator Ervin, again, responded: "The fundamental discrimination that you charge is on the basis on race or ethnic origin or nationality rather than religion."

Thus, the senators viewed any religious discrimination as a secondary effect of discrimination based on ethnicity or national origin rather than as a freestanding issue that required separate redress. Consequently, there were no proposals to amend the nondiscrimination language of the INA to expressly address religious discrimination.

Returning to the original motivation for this examination, it appears then that nothing in the INA expressly prohibits Mr. Trump's proposal to ban Muslims from entering the United States. That said, there may be other laws, such as the equal protection clause of the U.S. Constitution, and certain international law, that would ban this type of religious discrimination, at least for some immigrants. However, a discussion of those laws is beyond the scope of the present article.

Cindy G. Buys is a Professor of Law and Director of International Law Programs at the Southern Illinois University School of Law. She is a member of both the International and Immigration Law Section Council and the Women and the Law Committee of the Illinois State Bar Association.

3. 8 U.S.C. § 1151(a)(1). This provision does not mention nonimmigrant visas.
5. Id. at 57.
6. Id.
9. Id. at 68.
10. Id.
12. Id.
14. Id. at 1.
15. Id. at 2.
16. Id. at 138.
17. Id.
18. Id. at 484.
19. Id.
20. Id.