On January 27, 2017, President Donald Trump issued Executive Order ("EO") 13769: "Protecting the Nation from Foreign Terrorist Entry into the United States." The EO makes several changes to U.S. immigration law, for the stated purpose of "ensur[ing] that those admitted to this country do not bear hostile attitudes towards it and its founding principles." The EO has been the subject of a temporary restraining order issued by a U.S. District Court in Washington and upheld by the Ninth Circuit Court of Appeals. In that lawsuit, the plaintiffs argued that the EO violates both U.S. constitutional and statutory law. This article analyzes the authority of the President under the Immigration and Nationality Act ("INA") to issue those portions of the Order that have been the subject of several legal challenges.

Breakdown the Executive Order

The two sections of the EO that immediately drew multiple legal challenges are sections 3 and 5. Section 3(b) of the EO suspends for 90 days entry into the United States of both immigrants and nonimmigrants from countries referred to in section 217(a)(12) of the Act. Section 217 of the INA establishes a visa waiver program that makes it easier for tourists from designated countries to enter the United States for less than 90 days. Subsection 217(a)(12) excludes from the visa waiver program persons who are nationals of or who have been present in Iraq or Syria or any other designated country of concern since March 1, 2011. The additional countries of concern under section 217 are Iran, Libya, Somalia, Sudan, and Yemen. Section 3 of the EO also calls for various reviews of other countries that may be added to the list. Section 3(g) gives the Secretaries of State and Homeland Security the ability to issue visas to individuals subject to this section on a case-by-case basis when in the national interest.

"The impact of the Executive Order was immediate and widespread."

As a result of this provision, the Department of Homeland Security immediately began denying entry to the United States to persons from those seven countries. As stated by the Ninth Circuit Court of Appeals in *State of Washington v. Donald J. Trump*: “The impact of the Executive Order was immediate and widespread. It was reported that

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5. More than a dozen lawsuits were filed around the country challenging the Executive Order on various grounds. See Lauren Peare and James Hill, *13 Legal Actions Challenging Trump’s Immigration Executive Order*, ABC News (Feb. 1, 2017), [http://abcnews.go.com/Politics/legal-actions-challenging-trumps-immigration-executive-order/story?id=45175192](http://abcnews.go.com/Politics/legal-actions-challenging-trumps-immigration-executive-order/story?id=45175192). Valid arguments may be made that the Order violates the United States’ international obligations as well as domestic law, but those arguments are beyond the scope of this article.
7. The Executive Order exempts certain diplomatic visas.
thousands of visas were immediately canceled, hundreds of travelers with such visas were prevented from boarding airplanes bound for the United States or denied entry upon arrival, and some travelers were detained.” In response to public outcry, White House Counsel issued “authoritative guidance” shortly after the Order took effect that it would not be applied against U.S. lawful permanent residents (i.e., immigrants).10

Section 5 of the EO suspends the U.S. Refugee Admissions Program for 120 days, during which time, the Secretaries of State and Homeland Security and the Director of National Intelligence are to review the refugee admission program “to ensure those approved for refugee admission do not pose a threat to the security and welfare of the United States.” Upon the expiration of the 120-day period, refugee admissions will be resumed only for nationals of countries whom the three department heads jointly determine have procedures adequate to ensure the security and welfare of the United States. Section 3(b) further instructs government officials upon resumption of the refugee admissions, “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.” Subsection 5(c) indefinitely suspends the admission of all Syrian refugees as detrimental to the interests of the United States. Subsection 5(d) caps refugee admissions at 50,000 for 2017.11 However, notwithstanding section 5(a) of the Order, subsection 5(d) allows the admission of refugees on a case-by-case basis if the Secretaries of State and Homeland Security jointly determine, in their discretion, that the admission of an individual as a refugee would be in the national interest.

Potentially Competing Provisions of the U.S. Immigration and Nationality Act

In issuing the EO, President Trump relied primarily on the authority granted to him under section 212(f) of the INA, which gives the President broad authority to exclude aliens or classes of aliens who he believes would be detrimental to the interests of the United States:

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

Previous U.S. Presidents have relied on this authority to deny entry to persons who were banned from travel pursuant to United Nations-sanctioned travel bans; persons who had engaged in serious human rights abuses; persons who participated in military coups;

9 Ninth Circuit Order at 4-5.
and persons who engaged in international corruption and other international criminal behavior, among other examples. Thus, previous use of this authority focused mainly on conduct of an intending immigrant or nonimmigrant, not on a person’s nationality or religion.

Section 212(f) was added to the INA in the early years of the cold war as part of the McCarran-Walter Act of 1952. That Act was controversial at the time in part because it contained a number of provisions that discriminated against persons based on nationality, making it easier for persons from Northern and Western Europe and the Western Hemisphere to immigrate to the United States as compared to those from other parts of the world.

In 1965, following the lead of President Kennedy, 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; and (3) modifying the existing quota system.

“This nondiscrimination provision appears to directly conflict with President Trump’s Executive Order banning persons from certain countries from immigrating to the United States.”

As mentioned above, one of the amendments to the INA in 1965, section 202(a)(1), prohibits discrimination in the issuance of immigrant visas on the grounds of race, sex, nationality, place of birth, or place of residence. The recommendation and adoption of a provision banning racial and national origin discrimination was a direct response to the discrimination that had been codified in the INA for the previous seventy years. This nondiscrimination provision appears to directly conflict with President Trump’s Executive Order banning persons from certain countries from immigrating to the United States.

“….Congress must have intended to limit the president’s power to discriminate... when it amended the INA...”

In the recent State of Washington v. Donald Trump case challenging sections 3 and 5 of the EO, Washington argued that the EO violates the INA’s nondiscrimination provision and that section 202(a)(1)(A) supersedes the earlier enacted section 212(f) because the 1965 amendments to the INA were intended to do and mark a “profound change” in the law. They were enacted alongside the Civil Rights Act of 1964 and the

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18 President Reagan relied on section 212(f) authority to temporarily cut off most immigration from Cuba in response to the Mariel Boatlift and President Fidel Castro’s refusal to take back Cubans who were deemed ineligible to immigrate to the United States. See id. This action was in response to a specific international crisis with a particular country and contained several exceptions. As a result, it was quite different from the broad immigration ban of the current Executive Order.
19 See CRS Brief, supra note 11, at 1.
Voting Rights Act of 1965, during a time when Congress was focused on eliminating discriminatory statutory provisions. Thus, Congress must have intended to limit the president’s power to discriminate under the INA when it amended the INA to add the nondiscrimination provision.\textsuperscript{20}

When interpreting statutes, courts should adopt an interpretation that avoids conflicts between statutory provisions and instead should adopt an interpretation that produces a harmonious whole.\textsuperscript{21} The best way to read the president’s authority under section 212(f) consistently with the nondiscrimination provision is to interpret the INA to allow the president the authority to deny an alien or a class of aliens entry to the United States on a case-by-case basis upon a showing that such entry would be harmful to the national interest. Under this interpretation, the president would retain the authority to protect the country, but would not do it in a discriminatory way that bans entire countries of persons from entering the United States without individualized determinations. Such an interpretation would also be consistent with Section 11(b) of the EO which states: “The order shall be implemented consistent with applicable law and subject to the availability of appropriations.”

In the Washington case, the United States Government argued that the courts lack authority to enjoin enforcement of the EO because the President has “unreviewable authority to suspend the admission of any class of aliens,” even if those actions potentially contravene constitutional rights and protections.\textsuperscript{22} While it is well established that “courts owe substantial deference to the immigration and national security policy determinations of the political branches,” the Ninth Circuit rejected the idea that such decisions are unreviewable.\textsuperscript{23} The court stated that this “claimed unreviewability . . . runs contrary to the fundamental structure of our constitutional democracy.”\textsuperscript{24} The court continued by discussing several cases involving the INA in which courts had reviewed the constitutionality of the federal government’s actions and concluded that it is the court’s role to ensure that the government has chosen constitutionally permissible means.\textsuperscript{25} The court further concluded that “although courts owe considerable deference to the President’s policy determinations with respect to immigration and national security, it is beyond question that the federal judiciary retains the authority to adjudicate constitutional challenges to executive action.”\textsuperscript{26}

\textsuperscript{19} “issuance of an immigrant visa”, “it would be rendered meaningless if it did not equally prohibit attempts, like President Trump’s, to deny an immigrant entry into the country altogether.”
\textsuperscript{20} See Washington TRO Motion, supra note 18, at 20.
\textsuperscript{21} See id. The State of Washington also argued that the Executive Order violates the INA’s provisions that create a right to petition the government for asylum. See Washington TRO Motion, supra note 18, at 18. However, an asylum applicant generally must be physically present in the United States to make an asylum application. Because the Executive Order is focused on persons seeking entry, it generally would not apply to those already present in the United States. It is more likely that he Executive Order’s provisions on refugees violate U.S. constitutional law and international law, but that is beyond the scope of this article.
\textsuperscript{22} See Waggoner v. Gonzales, 488 F.3d 632, 636 (5th Cir. 2007) (“When interpreting statutes, we begin with the plain language used by the drafters. Furthermore, each part or section of a statute should be construed in connection with every other part or section to produce a harmonious whole.”)
\textsuperscript{23} Ninth Circuit Order, at 13.
\textsuperscript{24} See id. at 14-15.
\textsuperscript{26} Ninth Circuit Order at 18.
In assessing whether to grant the federal government’s motion to stay the district court’s order, the Ninth Circuit ultimately held that Washington had demonstrated a likelihood of success on the merits because the EO violates due process by failing to provide notice and a hearing prior to restricting an individual’s right to travel. In this regard, the court noted that lawful permanent residents of the United States are entitled to due process, including notice and opportunity to be heard when returning to the United States from abroad. The Ninth Circuit further held that Washington had raised “serious allegations” and “significant constitutional questions” relating to religious discrimination based on statements made by President Trump about his intent to implement a “Muslim ban” and the EO’s implementation of that ban in sections 3 and 5. Accordingly, the Ninth Circuit Court of Appeals denied the federal government’s motion for an emergency stay of the district court’s TRO.

Conclusion

Following the Ninth Circuit’s February 9 decision, the parties returned to the U.S. District Court to pursue arguments relating to an injunction and a hearing on the merits. However, the federal government asked the U.S. District Court to put the proceedings on hold because the Trump Administration plans to issue a new executive order. As of this writing, the revised executive order has not been issued. To correct the problems with Executive Order 13769, it would be prudent for the federal government to adopt a process by which aliens who are denied entry into the United States are given some form of individual consideration that is not based solely on their religion or nationality.

Cindy Galway Buys is a Professor of Law and the Director of International Law Programs at the Southern Illinois University (SIU) School of Law, where she teaches International Law-related courses as well as Immigration Law and Constitutional Law. Professor Buys has held leadership positions in the Illinois State Bar Association, the American Bar Association, the American Society of International Law, and the American Association of Law Schools. Prior to joining the SIU School of Law faculty in 2001, Professor Buys spent ten years in public and private practice in Washington, D.C.

37 Id. at 19.
38 See id. at 21, citing Landon v. Plascencia, 459 U.S. 21, 33-34 (1982). The Ninth Circuit further stated that the “authoritative guidance” issued by the White House stating the Executive Order does not apply to lawful permanent residents was not sufficient to overcome this problem.
39 See id. at 24-26.