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CHAPTER 1

Nationality, Citizenship, and Immigration

A. NATIONALITY, CITIZENSHIP, AND PASSPORTS

1. Derivative Citizenship: *Morales-Santana*

The United States Supreme Court issued its decision in the *Morales-Santana* case in June 2017. As discussed in *Digest 2016* at 1-12 and *Digest 2015* at 1-6, the case involves the constitutionality of the statutory provisions governing when a child born abroad out of wedlock is granted U.S. citizenship at birth. Plaintiff Morales-Santana was born out of wedlock in the Dominican Republic to a Dominican mother and a U.S. citizen father. His U.S. citizen father did not have the physical presence required under the relevant provision of the Immigration and Nationality Act ("INA") to transmit U.S. citizenship to Morales-Santana. Morales-Santana later challenged his deportation from the United States, arguing that the differing requirements for out of wedlock citizen fathers and mothers to transmit U.S. citizenship violate the Fifth Amendment's equal protection clause. The Court of Appeals for the Second Circuit invalidated the ten-year physical presence requirement for out of wedlock fathers, requiring them to instead show the same one-year continuous physical presence required for out of wedlock mothers.

The Supreme Court held that the differing requirements for unwed mothers and fathers violate the equal protection clause, but the Court did not extend the shorter one-year residency requirement to convey citizenship to Morales-Santana, as the Court of Appeals had. Excerpts below from the Court's opinion (with footnotes omitted) discuss the issue of statelessness, as well as the reasoning for the remedy directed by the Court.

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The Government maintains that Congress established the gender-based residency differential in §1409(a) and (c) to reduce the risk that a foreign-born child of a U. S. citizen would be born stateless. Brief for Petitioner 33. This risk, according to the Government, was substantially greater for the foreign-born child of an unwed U.S.-citizen mother than it was for the foreign-born child of an unwed U.S.-citizen father. *Ibid.* But there is little reason to believe that a statelessness concern prompted the diverse physical-presence requirements. Nor has the Government shown that the risk of statelessness disproportionately endangered the children of unwed mothers.

As the Court of Appeals pointed out, with one exception, nothing in the congressional hearings and reports on the 1940 and 1952 Acts "refer[s] to the problem of statelessness for children born abroad." 804 F. 3d, at 532–533. … Reducing the incidence of statelessness was the express goal of *other* sections of the 1940 Act. See 1940 Hearings 430 ("stateless[ness]" is "object" of section on foundlings). The justification for §1409's gender-based dichotomy, however, was not the child's plight, it was the mother's role as the "natural guardian" of a nonmarital child. …It will not do to "hypothesiz[e] or inven[t]" governmental purposes for gender classifications "*post hoc* in response to litigation." *Virginia*, 518 U. S., at 533, 535–536.

Infecting the Government's risk-of-statelessness argument is an assumption without foundation. "[F]oreign laws that would put the child of the U.S.-citizen mother at risk of statelessness (by not providing for the child to acquire the father's citizenship at birth)," the Government asserts, "would *protect* the child of the U.S.-citizen father against statelessness by providing that the child would take his mother's citizenship." Brief for Petitioner 35. The Government, however, neglected to expose this supposed "protection" to a reality check. Had it done so, it would have recognized the formidable impediments placed by foreign laws on an unwed mother's transmission of citizenship to her child. See Brief for Scholars on Statelessness as *Amici Curiae* 13–22, A1–A15.

Experts who have studied the issue report that, at the time relevant here, in "at least thirty countries," citizen mothers generally could not transmit their citizenship to nonmarital children born within the mother's country. *Id.*, at 14; see *id.*, at 14–17. "[A]s many as forty-five countries," they further report, "did not permit their female citizens to assign nationality to a nonmarital child born outside the subject country with a foreign father." *Id.*, at 18; see *id.*, at 18-21. In still other countries, they also observed, there was no legislation in point, leaving the nationality of nonmarital children uncertain. *Id.*, at 21–22; see Sandifer, A Comparative Study of Laws Relating to Nationality at Birth and to Loss of Nationality, 29 Am. J. Int'l L. 248, 256, 258 (1935) (of 79 nations studied, about half made no specific provision for the nationality of non-marital children). Taking account of the foreign laws actually in force, these experts concluded, "the risk of parenting stateless children abroad was, as of [1940 and 1952], and remains today, substantial for unmarried U. S. fathers, a risk perhaps greater than that for unmarried U.S. mothers." Brief for Scholars on Statelessness as *Amici Curiae* 9–10; see *id.*, at 38–39. One can hardly characterize as gender neutral a scheme allegedly attending to the risk of statelessness for children of unwed U.S.-citizen mothers while ignoring the same risk for children of unwed U.S.-citizen fathers.

In 2014, the United Nations High Commissioner for Refugees (UNHCR) undertook a ten-year project to eliminate statelessness by 2024. See generally UNHCR, Ending Statelessness Within 10 Years, online at http://www.unhcr.org/en-us/protection/statelessness/546217229/special-report-ending-statelessness-10-years.html (all Internet materials as last visited June 9, 2017). Cognizant that discrimination against either mothers or fathers in citizenship and

nationality laws is a major cause of statelessness, the Commissioner has made a key component of its project the elimination of gender discrimination in such laws. UNHCR, The Campaign To End Statelessness: April 2016 Update 1 (referring to speech of UNHCR "highlight[ing] the issue of gender discrimination in the nationality laws of 27 countries—a major cause of statelessness globally"), online at http://www.unhcr.org/ibelong/ wp-content / uploads / Campaign-Update-April-2016.pdf; UNHCR, Background Note on Gender Equality, Nationality Laws and Statelessness 2016, p. 1 ("Ensuring gender equality in nationality laws can mitigate the risks of statelessness."), online at http://www.refworld.org/docid/ 56de83ca4.html. In this light, we cannot countenance risk of statelessness as a reason to uphold, rather than strike out, differential treatment of unmarried women and men with regard to transmission of citizenship to their children.

In sum, the Government has advanced no "exceedingly persuasive" justification for §1409(a) and (c)'s gender-specific residency and age criteria. Those disparate criteria, we hold, cannot withstand inspection under a Constitution that requires the Government to respect the equal dignity and stature of its male and female citizens.

IV

While the equal protection infirmity in retaining a longer physical-presence requirement for unwed fathers than for unwed mothers is clear, this Court is not equipped to grant the relief Morales-Santana seeks, *i.e.*, extending to his father (and, derivatively, to him) the benefit of the one-year physical-presence term §1409(c) reserves for unwed mothers.

There are "two remedial alternatives," our decisions instruct, *Westcott*, 443 U. S., at 89 (quoting *Welsh* v. *United States*, 398 U. S. 333, 361 (1970) (Harlan, J., concurring in result)), when a statute benefits one class (in this case, unwed mothers and their children), as §1409(c) does, and excludes another from the benefit (here, unwed fathers and their children). "[A] court may either declare [the statute] a nullity and order that its benefits not extend to the class that the legislature intended to benefit, or it may extend the coverage of the statute to include those who are aggrieved by exclusion." *Westcott*, 443 U. S., at 89 (quoting *Welsh*, 398 U. S., at 361 (opinion of Harlan, J.)). "[W]hen the 'right invoked is that to equal treatment,' the appropriate remedy is a mandate of equal treatment, a result that can be accomplished by withdrawal of benefits from the favored class as well as by extension of benefits to the excluded class." *Heckler* v. *Mathews*, 465 U. S. 728, 740 (1984) (quoting *Iowa-Des Moines Nat. Bank* v. *Ben- nett*, 284 U. S. 239, 247 (1931); emphasis deleted). "How equality is accomplished . . . is a matter on which the Constitution is silent." *Levin* v. *Commerce Energy, Inc.*, 560 U. S. 413, 426–427 (2010).

The choice between these outcomes is governed by the legislature's intent, as revealed by the statute at hand. …Ordinarily, we have reiterated, "extension, rather than nullification, is the proper course." *Westcott*, 443 U. S., at 89. …

The Court has looked to Justice Harlan's concurring opinion in *Welsh* v. *United States*, 398 U. S., at 361–367, in considering whether the legislature would have struck an exception and applied the general rule equally to all, or instead, would have broadened the exception to cure the equal protection violation. In making this assessment, a court should " 'measure the intensity of commitment to the residual policy'"—the main rule, not the exception—"'and consider the degree of potential disruption of the statutory scheme that would occur by extension as opposed to abrogation.' " *Heckler*, 465 U. S., at 739, n. 5 (quoting *Welsh*, 398 U. S., at 365 (opinion of Harlan, J.)).

The residual policy here, the longer physical-presence requirement stated in §§1401(a)(7) and 1409, evidences Congress' recognition of "the importance of residence in this country as the talisman of dedicated attachment." *Rogers* v. *Bellei*, 401 U. S. 815, 834 (1971); see *Weedin* v. *Chin Bow*, 274 U. S. 657, 665–666 (1927) (Congress "attached more importance to actual residence in the United States as indicating a basis for citizenship than it did to descent. . . . [T]he heritable blood of citizenship was thus associated unmistakeably with residence within the country which was thus recognized as essential to full citizenship." (internal quotation marks omitted)). And the potential for "disruption of the statutory scheme" is large. For if §1409(c)'s one-year dispensation were extended to unwed citizen fathers, would it not be irrational to retain the longer term when the U.S.-citizen parent is married? Disadvantageous treatment of marital children in comparison to nonmarital children is scarcely a purpose one can sensibly attribute to Congress.

Although extension of benefits is customary in federal benefit cases, see *supra*, at 23–24, n. 22, 25, all indicators in this case point in the opposite direction. Put to the choice, Congress, we believe, would have abrogated §1409(c)'s exception, preferring preservation of the general rule.

V

The gender-based distinction infecting §§1401(a)(7) and 1409(a) and (c), we hold, violates the equal protection principle, as the Court of Appeals correctly ruled. For the reasons stated, however, we must adopt the remedial course Congress likely would have chosen "had it been apprised of the constitutional infirmity." *Levin*, 560 U. S., at 427. Although the preferred rule in the typical case is to extend favorable treatment, see *Westcott*, 443 U. S., at 89–90, this is hardly the typical case. Extension here would render the special treatment Congress prescribed in §1409(c), the one-year physical-presence requirement for U.S.-citizen mothers, the general rule, no longer an exception. Section 1401(a)(7)'s longer physical-presence requirement, applicable to a substantial majority of children born abroad to one U.S.-citizen parent and one foreign-citizen parent, therefore, must hold sway. Going forward, Congress may address the issue and settle on a uniform prescription that neither favors nor disadvantages any person on the basis of gender. In the interim, as the Government suggests, §1401(a)(7)'s now-five-year requirement should apply, prospectively, to children born to unwed U.S.-citizen mothers. …

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2. Attempts to Challenge Passport Denial under the APA: *Hinojosa* and *Villafranca*

The United States filed appellate briefs in two federal cases in 2017 in which litigants who were denied a U.S. passport while overseas, on the basis that they had not established U.S. citizenship, relied on the Administrative Procedure Act ("APA") as a basis for challenging the denial. The lower courts in both cases agreed with the U.S. government that the APA does not provide a remedy under these circumstances because an administrative remedy is provided in 8 U.S.C. § 1503(b)-(c), which allows an applicant who has been denied a right or privilege on grounds of non-nationality to seek lawful entry into the United States by applying at a U.S. diplomatic or consular office for a certificate of identity for the purpose of travelling to a U.S. port of entry and applying for admission. Under 8 U.S.C. § 1503(c), a determination at the port of entry that the

person is not entitled to admission to the United States is subject to judicial review in habeas corpus.

In *Hinojosa v. Horn*, No. 17-40077 (5th Cir.), the applicant claimed she was born in Texas, contrary to indications in her birth record and certificate of baptism that she was born in Mexico. With her application for a U.S. passport, the applicant submitted an affidavit from her purported birth father and a report of DNA testing. After she failed to provide any further evidence in response to the State Department's request, her passport application was denied on the grounds that she had provided insufficient documentation to establish that she had been born in the United States. She then proceeded to file a case in federal court, which proceeded to the U.S. Court of Appeals for the Fifth Circuit. The following is the summary of the U.S. government's argument in its brief on appeal, filed on April 18, 2017. The brief is available in full at https://www.state.gov/s/l/c8183.htm.

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Congress has provided a remedy for an individual, like Hinojosa, who is denied a right or privilege on the ground that she is not a U.S. citizen. For an individual who is outside the United States or who does not reside in the United States, that remedy is set forth at 8 U.S.C. § 1503(b)-(c): she may seek a certificate of identity from a U.S. consulate that she can then use to seek entry to the United States, and, if she is denied entry, may then seek review of that denial in habeas. Hinojosa would rather bypass the procedures set forth at Section 1503(b)-(c) and seek immediate habeas relief or a review of the State Department's action under the APA. But neither the habeas statute nor the APA grants courts jurisdiction over her efforts to evade the statutory scheme. This Court should affirm the District Court's dismissal of her claims.

First, the District Court lacked subject matter jurisdiction over Hinojosa's habeas claim at this point because Hinojosa is not "in custody" as required to establish jurisdiction under the habeas statute. As the Magistrate Judge and the District Court correctly concluded, Hinojosa "is not being subjected to restraints that are not shared by all U.S. citizens," who must bear a U.S. passport to lawfully re-enter the United States, and "are required to prove their citizenship prior to receiving a passport." ROA.153. Her location outside of the United States does not convert the denial of a passport application into "custody." If Hinojosa were correct, analogous government actions that remove individuals from the United States would result in those individuals' continuing (and arguably indefinite) "custody." The Fifth Circuit, however, has rejected that theory and held that such aliens cannot be considered "in custody" for purposes of the habeas statute. See *Merlan v. Holder*, 667 F.3d 538, 539 (5th Cir. 2011).

Second, the District Court also properly dismissed Hinojosa's habeas claim for failure to exhaust her administrative remedies, a precondition to seeking habeas relief in federal court. The Court correctly found no exceptions excusing Hinojosa from that exhaustion requirement. This Court should affirm the District Court's dismissal of Hinojosa's habeas claims on both grounds.

The District Court also properly dismissed Hinojosa's APA claim. The APA's waiver of sovereign immunity applies only where there is no alternative statutorily provided remedy or where the alternative remedy is inadequate. Here, however, Section 1503(b) and (c) provide an adequate remedy for Hinojosa to seek admission and, ultimately, judicial review of her claim of citizenship. Where such an adequate, alternative remedy exists, the APA does not permit Hinojosa to bypass that remedy.

Rusk v. Cort, 369 U.S. 367 (1962), a case in which Hinojosa places extensive but misplaced reliance, does not permit a different conclusion. That case held that the APA provided jurisdiction for an individual to challenge, while still abroad, the involuntary forfeiture of his citizenship, and did not require him, as Section 1503 would have, to travel to the United States to face criminal charges and incarceration related to the reasons the Government believed he had forfeited his citizenship. *Rusk* fails to support Hinojosa's argument, for two reasons. First, as the District Court correctly held, *Rusk* had assumed that the APA was an independent grant of subject-matter jurisdiction, a position the Supreme Court expressly abrogated in *Califano v. Sanders*, 430 U.S. 99, 105 (1977). And second, nothing in *Rusk* suggests that its holding—that an undisputed U.S. citizen at birth should not have to travel to the United States and face criminal penalties to seek relief for an allegedly unconstitutional revocation and deprivation of his citizenship—should extend to an individual who has never been adjudicated to be a U.S. citizen and challenges only the factual finding that she was not. The District Court properly found, instead, that in view of the remedy available to Hinojosa at Section 1503(b)-(c), there is no "final agency action for which there is no other adequate remedy in a court," 5 U.S.C. § 704, and therefore the APA's waiver of sovereign immunity does not apply. This Court should affirm that decision.

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On May 1, 2017, the United States filed its brief on appeal in *Villafranca v. Tillerson*, No. 17-40134 (5th Cir.). In this case, Ms. Villafranca's passport was revoked after her Mexican birth certificate listing Mexico as her place of birth was discovered. The State Department sent the notice revoking the passport while Ms. Villafranca was in Mexico and advised her that she could pursue the remedy in 8 U.S.C. § 1503(b)-(c), which is described *supra*. The following is the summary of the U.S. argument in its brief on appeal in *Villafranca*. The full text of the brief is available at https://www.state.gov/s/l/c8183.htm.

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The district court properly granted Defendants' Motion to Dismiss for lack of subject matter jurisdiction because Ms. Villafranca cannot pick and choose her own remedies to challenge her passport revocation when Congress has already outlined her appropriate remedy. The district court correctly dismissed her claim for relief under 8 U.S.C. § 1503(a) because that provision is only available to persons bringing suit from within the United States. It correctly dismissed her habeas claim because it is possible for her to obtain relief from § 1503(b)-(c). It also correctly dismissed her APA claim because § 1503(b)-(c) provides her an adequate alternative to APA

review of her passport revocation. Accordingly, the Court should affirm the district court's decision to dismiss Ms. Villafranca's complaint.

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3. U.S. Passports Invalid for Travel to North Korea

On July 21, 2017, Secretary Tillerson made the determination that "the serious risk to United States nationals of arrest and long-term detention represents imminent danger to the physical safety of United States nationals traveling to and within the Democratic People's Republic of Korea (DPRK)," pursuant to 22 CFR 51.63(a)(3). Accordingly, "all United States passports are declared invalid for travel to, in, or through the DPRK unless specially validated for such travel, as specified at 22 CFR 51.64." The restriction on travel to the DPRK was effective 30 days after publication of in the Federal Register, which occurred August 2, 2017. 82 Fed. Reg. 36,067 (Aug. 2, 2017). The action was authorized by 22 U.S.C. § 211a and Executive Order 11295 and 22 CFR 51.63(a)(3). The restriction remains in effect for one year unless extended or revoked by the Secretary of State.

B. IMMIGRATION AND VISAS

1. Consular Nonreviewability

a. Morfin v. Tillerson

In September 2017, the United States filed a brief in the Supreme Court opposing the petition for certiorari in *Morfin v. Tillerson*, No. 17-98. The case involves the reviewability of a consular decision to deny an immigrant visa to an alien spouse of a U.S citizen based on 8 U.S.C. 1182(a)(2)(C)(i), which relates to aliens for whom there is "reason to believe" they have been "an illicit trafficker in any controlled substance." The Supreme Court denied the petition for certiorari on October 30, 2017. Excerpts follow (with footnotes omitted) from the U.S. brief opposing cert. See *Digest 2015* at 15-20 for discussion of the Supreme Court's decision in *Kerry v. Din*.

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Petitioners contend … that the court of appeals adopted an erroneous interpretation of 8 U.S.C. 1182(a)(2)(C)(i), which renders inadmissible an alien whom a consular officer has "reason to believe" is or was involved in illicit drug trafficking, and that its holding implicates a disagreement among the courts of appeals on the meaning of that provision. This case, however, does not present that question. Instead, the court of appeals held that petitioner Morfin's constitutional challenge to the decision to refuse a visa to petitioner Ulloa—an unadmitted,

nonresident alien abroad—is foreclosed because the decision rests on a facially legitimate and bona fide reason, and that therefore no further review of the consular officer's decision is available. That conclusion is correct and does not conflict with any decision of another court of appeals. Further review is not warranted.

1. a. The court of appeals correctly determined that petitioners' challenge to the consular officer's denial of a visa to Ulloa is foreclosed by this Court's decisions in *Kleindienst v. Mandel*, 408 U.S. 753 (1972), and *Kerry* v. *Din*, 135 S. Ct. 2128 (2015), and the principles that those cases embody.

i. "The exclusion of aliens is a fundamental act of sovereignty" that the Constitution entrusts to the political branches. *United States ex rel. Knauff* v. *Shaughnessy*, 338 U.S. 537, 542 (1950). "The right to" exclude aliens "stems not alone from legislative power but is inherent in the executive power to control the foreign affairs of the nation." *Ibid.* This Court thus "ha[s] long recognized the power to * * * exclude aliens as a fundamental sovereign attribute exercised by the Government's political departments largely immune from judicial control." *Fiallo* v. *Bell*, 430 U.S. 787, 792 (1977) (quoting *Shaughnessy* v. *United States ex rel. Mezei*, 345 U.S. 206, 210 (1953)). "[A]ny policy toward aliens is vitally and intricately interwoven with contemporaneous policies in regard to the conduct of foreign relations, the war power, and the maintenance of a republican form of government." *Harisiades* v. *Shaughnessy*, 342 U.S. 580, 588-589 (1952).

In accordance with this constitutional foundation, this Court has long recognized Congress's "plenary power to make rules for the admission of aliens," including by establishing statutory grounds of inadmissibility. *Mandel*, 408 U.S. at 766. Indeed, "[t]his Court has repeatedly emphasized that over no conceivable subject is the legislative power of Congress more complete than it is over the admission of aliens." *Fiallo*, 430 U.S. at 792 (citation and internal quotation marks omitted). "The conditions of entry for every alien, the particular classes of aliens that shall be denied entry altogether, the basis for determining such classification, the right to terminate hospitality to aliens, [and] the grounds on which such determination shall be based" are "wholly outside the power of this Court to control." *Id.* at 796 (citation omitted). Through the INA, Congress has "confer[red] upon consular officers exclusive authority to review applications for visas * * * subject to the eligibility requirements in the statute and corresponding regulations." *Saavedra Bruno v. Albright*, 197 F.3d 1153, 1156-1157 (D.C. Cir. 1999). The Department of State's regulations provide that "[a] visa can be refused only upon a ground specifically set out in the law or implementing regulations." 22 C.F.R. 40.6.

To be sure, Congress generally "may, if it sees fit, * * * authorize the courts to" review a decision to exclude an alien based on the eligibility requirements that it has created. *Nishimura Ekiu* v. *United States*, 142 U.S. 651, 660 (1892). Absent such affirmative authorization, however, judicial review of the exclusion of aliens outside the United States is ordinarily unavailable. Cf. *Knauff*, 338 U.S. at 542-547 (holding that the Attorney General's decision to exclude at the border the alien wife of a U.S. citizen "for security reasons" was "final and conclusive"). Courts have distilled from these fundamental and longstanding principles the rule—sometimes referred to in shorthand as "the doctrine of consular nonreviewability"—that the denial or revocation of a visa for an alien abroad "is not subject to judicial review * * * unless Congress says otherwise." *Saavedra Bruno*, 197 F.3d at 1159; see *id.* at 1157-1162 (tracing history of nonreviewability doctrine).

Congress has not "sa[id] otherwise," *Saavedra Bruno*, 197 F.3d at 1159, but instead has declined to provide for judicial review of decisions to exclude aliens abroad. It has not authorized any judicial review of visa refusals— even by the alien affected, much less by third parties like Morfin here. *E.g.*, 6 U.S.C. 236(f) ("Nothing in this section shall be construed to create or authorize a private right of action to challenge a decision of a consular officer or other United States official or employee to grant or deny a visa."); see 6 U.S.C. 236(b)(1) and (c)(1). Congress also has expressly forbidden any "judicial review" of the revocation of a visa (subject to a narrow exception if the alien is in removal proceedings in the United States and the only ground of removal is revocation of the visa, an exception inapplicable to aliens abroad). 8 U.S.C. 1201(i).

Indeed, when this Court once held that aliens physically present in the United States—but not aliens abroad —could seek review of their exclusion orders under the APA, see *Brownell* v. *Tom We Shung*, 352 U.S. 180, 184-186 (1956), Congress intervened to foreclose such review. Congress expressly precluded APA suits challenging exclusion orders and permitted review only through habeas corpus—a remedy that is unavailable to an alien seeking entry from abroad. See Act of Sept. 26, 1961, Pub. L. No. 87-301, §5(a), 75 Stat. 651-653 (8U.S.C. 1105a(b) (1994)). And even in *Tom We Shung*, the Court took it as given that review by aliens abroad was unavailable. See 352 U.S. at 184 n.3 ("We do not suggest, of course, that an alien who has never presented himself at the borders of this country may avail himself of the declaratory judgment action by bringing the action from abroad.").

To be sure, Congress has created in the APA, 5 U.S.C. 702, "a general cause of action" for "persons 'adversely affected or aggrieved by agency action within the meaning of a relevant statute.' " *Block* v. *Community Nutrition Inst.*, 467 U.S. 340, 345 (1984) (citation omitted). But that cause of action does not permit review of the denial of entry to an alien abroad because the APA does not displace the general rule barring review of decisions to exclude such aliens. See *Saavedra Bruno*, 197 F.3d at 1157-1162. The APA does not apply at all "to the extent that * * * statutes preclude judicial review," 5 U.S.C. 701(a)(1), and the conclusion is "unmistakable" from the historical context that "the immigration laws 'preclude judicial review' of the consular visa decisions," *Saavedra Bruno*, 197 F.3d at 1160 (citation omitted). In addition, Section 702 itself contains a "qualifying clause" providing that " '[n]othing herein'—which includes the portion of § 702 from which the presumption of reviewability is derived—'affects other limitations on judicial review or the power or duty of the court to dismiss any action or deny relief on any other appropriate legal or equitable ground.' " *Id.* at 1158 (quoting 5 U.S.C. 702(1)). "[T]he doctrine of consular nonreviewability— the origin of which predates passage of the APA—thus represents one of the 'limitations on judicial review' unaffected by [Section] 702's opening clause granting a right of review to persons suffering 'legal wrong' from agency action." *Id.* at 1160 (citation omitted). In short, Congress has emphatically maintained the bar to judicial review of the denial of entry to aliens abroad. See *id.* at 1157-1162.

ii. The exclusion of aliens abroad typically raises no constitutional questions because aliens abroad lack any constitutional rights regarding entry. "[A]n alien who seeks admission to this country may not do so under any claim of right"; instead, "[a]dmission of aliens to the United States is a privilege granted by the sovereign United States Government," and "only upon such terms as the United States shall prescribe." *Knauff*, 338 U.S. at 542; see *United States* v. *Verdugo-Urquidez*, 494 U.S. 259, 265 (1990); *Mandel*, 408 U.S. at 762.

This Court, however, has twice engaged in limited judicial review when a U.S. citizen contended that the refusal of a visa to an alien abroad impinged upon the citizen's *own* constitutional rights. In *Mandel*, the Executive denied admission—through the denial of a waiver of an inadmissibility—to a Belgian journalist, Ernest Mandel, who wished to speak about communism. 408 U.S. at 756-759. As the Court explained, the alien himself could not seek review because he "had no constitutional right of entry to this country." *Id.* at 762. The Court addressed (and rejected) only the claim of U.S. citizens that the alien's exclusion violated their own constitutional rights. *Id.* at 770. That claim necessarily failed, the Court held, because the Attorney General (through his delegee) gave "a facially legitimate and bona fide reason" for Mandel's exclusion: Mandel had violated the conditions of a previous visa. *Ibid.*; see *id.* at 759, 769. When the Executive supplies such a reason, *Mandel* concluded, "the courts will neither look behind the exercise of that discretion, nor test it by balancing its justification against the" asserted constitutional rights of U.S. citizens. *Id.* at 770. The Court expressly did not decide whether review would be available even where no reason was given for denial of a visa. *Id.* at 769.

In *Din*, the Court considered but denied a claim by a U.S. citizen that due process entitled her to a more extensive explanation for the denial of a visa to her alien husband. 135 S. Ct. at 2131-2138 (opinion of Scalia, J.); *id.* at 2139-2141 (Kennedy, J., concurring in the judgment). The plurality concluded that the claim failed because the U.S. citizen had no due-process right in this context. *Id.* at 2131-2138. Concurring in the judgment, Justice Kennedy (joined by Justice Alito) concluded that, assuming without deciding that the U.S. citizen had some liberty interest in her spouse's visa application, any requirements of due process were satisfied because the government provided a facially legitimate and bona fide reason for denying her husband a visa. *Id.* at 2140-2141 (finding that the government's citation of the statutory basis for the refusal provided a facially legitimate reason under *Mandel* and "indicate[d]" that it "relied upon a bona fide factual" basis for denying the visa). The concurring Justices then stated that, "[a]bsent an affirmative showing of bad faith on the part of the consular officer who denied [the] visa—which [the U.S.-citizen plaintiff] ha[d] not plausibly alleged with sufficient particularity—*Mandel* instructs [courts] not to 'look behind' the Government's exclusion of [the husband] for additional factual details beyond what its express reliance on [the statute] encompassed." *Id.* at 2141.

Mandel and *Din* reflect the Constitution's "exclusive[]" vesting of power over the admission of aliens in the "political branches." *Mandel*, 408 U.S. at 765 (citation omitted); see *Fiallo*, 430 U.S. at 792-796 (applying *Mandel* 's test to an equal-protection challenge to a statute governing admission of aliens). They also reflect that aliens abroad seeking a visa and initial admission have no constitutional rights at all regarding entry into the country.

iii. The court of appeals correctly applied these principles in rejecting petitioners' claims here. Although much of petitioners' argument is directed to whether the consular officer correctly applied the INA in finding that there was "reason to believe" that Ulloa was involved in drug trafficking, 8 U.S.C. 1182(a)(2)(C)(i); see Pet. 9-21, such statutory challenges to a decision to deny a visa are not reviewable at all. … And as an alien abroad, Ulloa himself has no constitutional rights in connection with entry into this country. …

The only contention that the lower courts arguably could entertain (and did entertain) was Morfin's assertion that the decision to deny a visa to Ulloa violated Morfin's own due-process rights. See Pet. App. 3a-8a, 13a-14a. The court of appeals correctly held that— assuming arguendo that any such due-process rights exist, a question *Din* did not resolve—Morfin's claim fails under *Mandel* and *Din* because the consular officer gave a "facially legitimate and bona fide

reason," which courts "will n[ot] look behind." *Mandel*, 408 U.S. at 770; see *Din*, 135 S. Ct. at 2141 (Kennedy, J., concurring in the judgment). As in *Din*, the consular officer's citation of Section 1182(a)(2)(C)(i) "indicates" that the officer "relied upon a bona fide factual basis for denying a visa." 135 S. Ct. at 2140. Indeed, the consular officer's invocation of that provision—which was even more specific than the statutory provision cited by the consular officer in *Din*, see *id.* at 2141 (addressing 8 U.S.C. 1182(a)(3)(B))— reflects a determination that there was "reason to believe" that Ulloa had been involved in illicit drug trafficking, rendering him inadmissible. 8 U.S.C. 1182(a)(2)(C)(i); see Pet. App. 6a-7a.

The concurring Justices in *Din* stated that, "[a]bsent an affirmative showing of bad faith on the part of the consular officer who denied [the alien spouse] a visa—which [the U.S.-citizen plaintiff] ha[d] not plausibly alleged with sufficient particularity—*Mandel* instructs [courts] not to 'look behind' the Government's exclusion of [the alien] for additional factual details beyond what its express reliance on [the statute] encompassed." *Din*, 135 S. Ct. at 2141 (Kennedy, J., concurring in the judgment). Petitioners have made no showing of bad faith here. See Pet. App. 7a. Petitioners have not shown that the consular officer lacked a "bona fide factual basis" for his decision. *Din*, 135 S. Ct. at 2140 (Kennedy, J., concurring in the judgment). To the contrary, as the court of appeals explained, the consular officer clearly identified such a basis. Pet. App. 6a. Accordingly, even assuming that Morfin has a protected due-process interest in this context, there is no occasion to consider that situation here.

b. Petitioners' counterarguments lack merit. Petitioners contend (Pet. 24) that *Mandel* and *Din* do not preclude "visa denials at consulates from review for legal error." See Pet. 22-25. That is incorrect. Nothing in either decision says or suggests that review is generally available for any purported legal error in a consular officer's decision to refuse a visa. And the limited judicial review of constitutional claims of U.S. citizens conducted in *Mandel* and *Din*—which only assumed but did not decide that the constitutional provisions at issue required some explanation for the visa denial—was rooted in an acceptance of the longstanding principle that such decisions generally are *not* reviewable at all. See pp. 12-14, *supra*; Pet. App. 2a-6a; *Saavedra Bruno*, 197 F.3d at 1157-1162. Petitioners do not grapple with this principle or its history. Moreover, *Mandel*'s rule restricting review of First Amendment challenges by U.S. citizens to the exclusion of aliens abroad—limiting review to at most determining whether the responsible official gave a facially legitimate and bona fide reason— would make no sense if garden-variety claims of legal error by consular officers were universally subject to judicial review.

Petitioners assert (Pet. 25) that this understanding of *Mandel* and *Din* would create an incongruity in the immigration laws by making the same alleged error reviewable in removal proceedings (and other matters involving aliens in the United States) but not where an alien abroad challenges the refusal of a visa. But that simply reflects that both the general rule of consular nonreviewability, and *Mandel*'s holding that a constitutional challenge must be rejected at least where a "facially legitimate and bona fide reason" is given, 408 U.S. at 770, applies to the denial of entry to aliens abroad. See pp. 12-14, *supra*. That distinction also reflects the underlying principle that aliens abroad have no constitutional rights regarding their initial admission to the United States. See pp. 12-13, *supra*. Moreover, the fact that Congress *has* provided for limited review of certain issues in the removal context, see 8 U.S.C. 1201(i), 1252, but has provided no review of a consular officer's visa-denial decisions abroad, shows that what petitioners criticize as an inconsistency is in fact a basic feature of the statutory scheme.

Petitioners' related contention (Pet. 25) that "there is no reason to believe that Congress intended to prevent courts from engaging in review of consular determinations for legal error" similarly disregards the relevant history. Petitioners focus (Pet. 25-26) on the express preclusion of judicial review in 8 U.S.C. 1252(a)(2)(B) of certain discretionary matters. But that preclusion is included in a section of the INA addressing judicial review of removal orders, see 8 U.S.C. 1252(a)(1), which are entered against aliens in the United States or stopped at the border; it makes clear that discretionary determinations in that setting are not reviewable. Section 1252 does not provide for judicial review of the denial of visas to aliens abroad at all, so subsection (a)(2)(B) of that provision is irrelevant here. And indeed, the fact that Congress did not at the same time affirmatively provide for judicial review of such visa denials reinforces the conclusion that such review is foreclosed.

In pointing to Section 1252(a)(2)(B), moreover, petitioners again do not grapple with the decades-long historical backdrop, which makes clear that "[t]here was no reason for Congress to" preclude review of consular decisions "expressly." *Saavedra Bruno*, 197 F.3d at 1162. "Given the historical background against which it has legislated over the years * * * , Congress could safely assume that aliens residing abroad were barred from challenging consular visa decisions in federal court unless legislation specifically permitted such actions." *Ibid.*

* * * *

2. Petitioners principally argue (Pet.9-21) that review is warranted because the court of appeals misread Section 1182(a)(2)(C)(i)'s "reason to believe" standard, and that the decision below implicates an existing conflict on that question. Petitioners are mistaken.

a. The court of appeals' holding concerned only Morfin's constitutional challenge to the denial of a visa to Ulloa—the only claim petitioners could arguably assert. Pet. App. 3a-8a. The court was not confronted with the statutory question whether the consular officer was correct to find Ulloa inadmissible. No such statutory claim would have been reviewable at all. See pp. 8-12, *supra*. Instead, the court of appeals decided only that, as a constitutional matter, the consular officer's stated reason was facially legitimate and bona fide, which under *Mandel* and *Din* required rejection of Morfin's due-process claim. See Pet. App. 3a-8a.

* * * *

b. Petitioners' contention (Pet. 10-15) that the decision below implicates an existing conflict among the courts of appeals on the correct interpretation of Section 1182(a)(2)(C)(i) fails for the same reason. The court of appeals' holding here did not squarely address that issue of statutory interpretation. Any inconsistency in other courts' articulation of the standard therefore is not relevant here. Cf. *Pacific Coast Supply, LLC* v. *NLRB*, 801 F.3d 321, 334 n.10 (D.C. Cir. 2015) ("[D]icta does not a circuit split make.").

* * * *

b. Allen v. Milas

As discussed in *Digest 2016* at 22-23, the district court's decision in *Allen v. Milas*, No. 15-705 (E.D. Cal. 2016) relied on *Din* to reject a challenge to the denial of an application for an immigrant visa for plaintiff's spouse. The plaintiff appealed. The U.S. brief on appeal, filed January 17, 2017, in the U.S. Court of Appeals for the Ninth Circuit, is excerpted below and available at https://www.state.gov/s/l/c8183.htm.

_____

* * * *

This Court should affirm the dismissal. Mr. Allen challenges an actual decision made by the consular officer. He expressly abandons the constitutional argument he made before the district court. … What remains is an argument that goes to the heart of what is insulated from judicial review by the doctrine of consular nonreviewability. Allen's claims of legal error are inapposite. There is no error in the decision of the consular officer, but even if there were, the doctrine of consular nonreviewability would still bar judicial review of the visa refusal.

* * * *

I. Circuit precedent forecloses Allen's argument that APA review exists to challenge consular decisions.

The doctrine of consular nonreviewability is a common law doctrine with deep historical roots. Under the doctrine, federal courts lack subject matter jurisdiction to review a consular officer's issuance or refusal of a visa. *Li Hing of Hong Kong, Inc. v. Levin*, 800 F.2d 970, 970-71 (9th Cir. 1986). The doctrine of consular nonreviewability also precludes the Court from reviewing the findings of a consular officer under the guise of the APA, which the doctrine of consular nonreviewability predates. *Li Hing*, 800 F.2d at 971; *see also Bruno v. Albright*, 197 F.3d 1153, 1160-62 (D.C. Cir. 1990).

The doctrine of consular nonreviewability is broad, and precludes the judicial review of a consular officer's visa decision even if the allegation is that the consular officer erred. *Li Hing*, 800 F.2d at 970-71; *Loza-Bedoya v. INS*, 401 F.2d 343, 347 (9th Cir. 1969); *Capistrano v. Dept of State*, 267 Fed. Appx. 593, 594-95 (9th Cir. 2008). Allen's argument that there is legal error in the decision of the consular officer, and that that legal error provides a hook for jurisdiction under the APA, is foreclosed by this circuit precedent. To create an avenue for judicial review of consular decisions on the basis of alleged legal error, this Court would have to revisit its prior decisions en banc.

The Supreme Court has repeatedly recognized the principle that "the power to exclude aliens is inherent in sovereignty, necessary for maintaining normal international relations and defending the country against foreign encroachments and dangers—a power to be exercised exclusively by the political branches of government." *Kleindienst v. Mandel*, 408 U.S. 753, 765 (1972); *see also U.S. ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 543 (1950) ("[I]t is not within the province of any court, unless expressly authorized by law, to review the determination of the political branch of the Government to exclude a given alien."); *Fiallo v. Bell*, 430 U.S. 787, 792

(1977) ("over no conceivable subject is the legislative power of Congress more complete than it is over" the admission of aliens) (quotations omitted).

This principle gives rise to the doctrine of consular nonreviewability. *Li Hing*, 800 F.2d at 970 ("Exercising jurisdiction over this case would, therefore, violate the long-recognized judicial nonreviewability of a consul's decision to grant or deny a visa."). This doctrine holds that a "consular official's decision to issue or withhold a visa is not subject either to administrative or judicial review." *Id.* at 971.

When Congress passed the INA, it mandated that an alien shall apply for a visa with the consular officer in her country, essentially conferring upon those officials the exclusive discretionary authority to issue and refuse visas. 8 U.S.C. §§ 1104(a)(1), 1201(g)(1). Given the extensive historical deference to consular visa decisions, "Congress could safely assume that aliens residing abroad were barred from challenging consular visa decisions in federal court unless legislation specifically permitted such actions." *Bruno*, 197 F.3d at 1159-62.

In discussing the doctrine of consular nonreviewability, the Ninth Circuit has noted the history of the INA, and Congress's rejection of a proposal to create a "semijudicial board, similar to the Board of Immigration Appeals, with jurisdiction to review consular decisions pertaining to the granting or refusal of visas." *Ventura-Escamilla v. INS*, 647 F.2d 28, 30-31 (9th Cir. 1981)…. The INA expressly precludes even the Secretary of State from reviewing consular officer visa determinations. …

Allen challenges an actual decision made by the consular officer. His claims of error are precisely what is insulated from judicial review by the doctrine of consular nonreviewability. *Ventura-Escamilla*, 647 F.2d at 30 ("Essentially the relief sought is a review of the Consul's decision denying their application for a visa. Such a review is beyond the jurisdiction of the Immigration Judge, the BIA and this court."); *Loza-Bedoya*, 410 F.2d at 347; *Braude v. Wirtz*, 350 F.2d 702, 706 (9th Cir. 1965). The doctrine of consular nonreviewability is a near-total bar to judicial review of consular officer decisions. The district court correctly held that to the extent that the court may have jurisdiction, it was only to confirm that the refusal was facially legitimate and bona fide.… Because Allen has now abandoned his constitutional challenge to the consular officer's refusal, that narrow slice of judicial review has gone away. … What remains of Allen's arguments are entirely barred by the doctrine of consular nonreviewability.

There is no error in the decision of the consular officer in this case. But, even if there were, the doctrine of consular nonreviewability would still be a bar to this Court's jurisdiction. *Loza-Bedoya*, 410 F.2d at 347 ("Though erroneous this Court is without jurisdiction to order any American consular officer to issue a visa to any alien whether excludable or not."). The Ninth Circuit is part of the consensus that the consular nonreviewability bar is not lifted for an allegation of error. *Centeno v. Shultz*, 817 F.2d 1212, 1213 (5th Cir. 1987) (no jurisdiction where allegation was consul's decision not authorized by the INA); *Burrafato v. Dept' of State*, 523 F.2d 554, 557 (2d Cir. 1975) (no jurisdiction where allegation was State Department failed to follow its own regulations); *Chun v. Powell*, 223 F.Supp.2d 204, 206 (D.D.C. 2002) (holding that consular nonreviewability applies "where the decision is alleged to have been based on a factual or legal error.").

Allen now faults the district court for applying the *Mandel* "facially legitimate and bona fide" standard of review. But Allen asked for this type of review in his complaint. … Now before this Court, Allen is expressly disavowing any type of constitutional challenge to the consular decision. … Allen is arguing only that there is legal error in the refusal. … Allen rejects application of the "facially legitimate and bona fide" standard to his case. … Allen then goes on

to make the striking argument that while only the narrow "facially legitimate and bona fide" review is available for constitutional claims, full APA review should be available for claims of legal error.…

This argument makes no sense. There cannot be minimal review available for constitutional claims but wide open review for legal claims. *Mandel* (and *Bustamante* and *Din*) limited judicial review to constitutional claims by U.S. citizen spouse petitioners relating to consular decisions. Since Allen now concedes he is not making a constitutional claim, that small window of review is closed. Not even the "facially legitimate and bona fide" standard of review applies in this case. There is no judicial review whatsoever available to raise a nonconstitutional challenge to the decision of the consular officer. *Loza-Bedoya* 410 F.2d at 347; *Li Hing*, 800 F.2d at 970; *Ventura-Escamilla*, 647 F.2d at 30.

Notwithstanding the precedential force of *Li Hong*, *Loza-Bedoya*, and *Ventura-Escamilla*, Allen argues that there are cases in which this Court has reviewed alleged errors of law in the decision of consular officers. But none of these cases involves the decision of a consular officer to issue or refuse a visa, which is the scope of the doctrine of consular nonreviewability. Allen cites: *ASSE Int'l, Inc. v. Kerry*, 803 F.3d 1059 (9th Cir. 2015), a case challenging the State Department's imposition of sanctions against an exchange program sponsor. AOB at 18-19. *ASSE Int'l* was not about a visa adjudication by a consular officer, and the doctrine of consular nonreviewability was not discussed. 803 F.3d at 1079.

Next, Allen cites *Singh v. Clinton*, 618 F.3d 1085 (9th Cir. 2010), and *Patel v. Reno*, 134 F.3d 929 (9th Cir. 1997), two cases from the broader category of cases that challenge the authority of the consul to take or fail to take action. … These cases establish that there may be mandamus relief available where the claim is one of consular inaction—but Allen makes no such allegation in this case. Instead he is challenging the meat of the decision by the consular officer. *Singh* and *Patel* have no bearing on this case.

Next, Allen cites *Wong v. Department of State*, 789 F.2d 1380 (9th Cir. 1986). …*Wong* involved a challenge to the State Department's revocation of a visa; the Ninth Circuit held that the doctrine of consular nonreviewability does not apply to visa revocations—it applies only to the consul's initial decision to grant or refuse a visa. *Li Hing*, 800 F.2d at 970. Allen's is not a case involving the revocation of a visa that she previously held, so any jurisdiction that could be available to challenge a visa revocation is not available here.

Finally, Allen cites *Braude*, 360 F.2d at 703. … *Braude* is one of the earliest articulations in this circuit of the doctrine of consular nonreviewability: "we are constrained to hold that no right of judicial review exists on the part of these nonresident aliens of determinations made by the executive branch acting pursuant to Congressional directive." 350 F.2d at 706. *Braude* does go on to analyze the would-be visa sponsors' claims under the APA, ultimately holding that the sponsors lacked standing to bring suit. 350 F.2d at 707. The precedent set in *Braude* is therefore that these visa sponsors lack standing to bring suit—not that the APA is a back door means for reviewing the merits of a visa refusal.

The law on this question has been settled for at least 30 years in the Ninth Circuit. *Ventura-Escamilla*, 647 F.2d at 32 ("We repeat: This court is without power to substitute its judgment for that of a Consul, acting pursuant to valid regulations promulgated by the Secretary, on the issue of whether a visa should be granted or denied."). The APA does not provide a cause of action to assert a claim otherwise barred by the doctrine of consular nonreviewability. *Bruno*, 197 F.3d at 1158-60. Only by ignoring the Ninth Circuit cases directly on point—*Li Hing*, *Ventura-Escamilla*, *Loza-Bedoya*— and analogizing to peripheral cases can Allen advance the

argument that somehow, after all these years, APA review is now available to challenge the decision of the consular officer on the refusal of a particular visa.

* * * *

c. Chehade v. Tillerson

On October 27, 2017, the U.S. Court of Appeals for the Ninth Circuit issued its decision in *Chehade v. Tillerson*, No. 16-55236, affirming the lower court's dismissal of a challenge to the denial of a visa for Rana Chehade, the mother of Rola Chehade. Relying on *Kleindienst v. Mandel*, 408 U.S. 753, 762 (1972) and *Kerry v. Din*, 135 S.Ct. 2128, 2131 (2015) (plurality opinion), the court found that Rana Chehade had no constitutional right of review and no cause of action, but it assumed that the daughter, a United States citizen, had a protected liberty interest in her relationship with her mother such that she could challenge the process of denying her mother's visa. Applying the reasoning in the plurality opinion in *Kerry v. Din*, the Ninth Circuit concluded that because the consular officer provided a facially legitimate reason for denying the visa application by citing § 1182(a)(3)(B), and the daughter had not shown that the consular officer denied her mother's visa application in bad faith, the case was properly dismissed.

d. Hazama v. Tillerson

On March 20, 2017, the U.S. Court of Appeals for the Seventh Circuit affirmed the lower court's dismissal of a challenge to a consular official's unfavorable decision on a visa application, but held that the lower court erroneously based its dismissal on lack of subject matter jurisdiction rather than the failures to state a clam and to meet the criteria for mandamus relief. *Hazama v. Tillerson*, No. 15-2982. Samira Hazama is a U.S. citizen, married to Ahmed Abdel Hafiz Ghneim, a citizen and resident of the Palestinian Authority. Hazama filed a petition seeking a permanent resident visa for Ghneim, but the consular officer denied the application for three of the reasons enumerated in 8 U.S.C. § 1182(a): the commission of a crime of moral turpitude; previous removal from the United States; and unlawful presence in the United States. Later, a consular officer again denied Ghneim's application for having personally engaged in terrorist activities, another basis listed at 8 U.S.C. § 1182(a)(3)(B)(i). Hazama and Ghneim filed a petition for a writ of mandamus. The Seventh Circuit pointed out that mandamus is proper only if the order would inflict irreparable harm, is not effectively reviewable at the end of the case, and far exceeds the bounds of judicial discretion. Applying *Din*, the Seventh Circuit assumed that Hazama had a sufficient interest in the grant of a visa to her husband to bring a claim, but held that she did not show that the consular decision was not facially legitimate and bona fide.

2. Visa Regulations and Restrictions

a. Nonimmigrant Visas

On September 5, 2017, the State Department published a final rule clarifying procedures regarding waiver of documentary requirements, due to an unforeseen emergency, for nonimmigrants seeking admission to the United States. 82 Fed. Reg. 41,883 (Sep. 5, 2017). The final rule "substantially reinstates a 1999 Department of State regulatory amendment that was invalidated by court order in *United Airlines, Inc.* v. *Brien,* 588 F.3d 158 (2d Cir. 2009)." *Id*. The notice of proposed rulemaking was issued by the State Department in 2016 and includes additional background. 81 Fed. Reg. 12,050 (Mar. 8, 2016). That background explains:

> Pursuant to Section 212(a)(7)(B)(i) of the Immigration and Nationality Act (INA), a nonimmigrant is inadmissible to the United States if he or she does not present an unexpired passport and valid visa at the time of application for admission. 8 U.S.C. 1182(a)(7)(B)(i). Either or both of these requirements may be waived by the Secretary of Homeland Security and the Secretary of State, acting jointly, in specified situations, as provided in INA section 212(d)(4) (8 U.S.C. 1182(d)(4)). One circumstance in which this requirement may be waived is when a nonimmigrant is unable to present a valid visa or unexpired passport due to an unforeseen emergency. In accordance with INA section 212(d)(4) (8 U.S.C. 1182(d)(4)), the Department of State and the Department of Homeland Security have consulted and are acting jointly to propose amendments to 8 CFR 212.1 and 22 CFR 41.2.

b. Presidential Actions

(1) Executive Orders on Foreign Terrorist Entry into the United States

On January 27, 2017, the President issued Executive Order 13769 "Protecting the Nation from Foreign Terrorist Entry into the United States." 82 Fed. Reg. 8977 (Feb. 1, 2017). Section 3(a) of E.O. 13769 directs the Departments of State and Homeland Security to "conduct a review to determine the information needed from any country to adjudicate any visa, admission, or other benefit under the INA (adjudications) in order to determine that the individual seeking the benefit is who the individual claims to be and is not a security or public-safety threat." E.O. 13769 suspended for 90 days the entry of certain aliens from seven countries: Iran, Iraq, Libya, Somalia, Sudan, Syria, and Yemen.

Litigation in multiple federal courts in the United States barred implementation of Executive Order 13769. A stay issued by the U.S. Court of Appeals for the Ninth Circuit on February 9, 2017 applied nationwide. In response, the President revoked Executive Order 13769 and replaced it with Executive Order 13780 of March 6, 2017. 82 Fed. Reg. 13,209 (Mar. 9, 2017), excluding from the suspensions categories of aliens that

prompted judicial concerns and otherwise clarifying and refining the previous order. E.O. 13780 retains in section 2(a) the call in E.O. 13769 for a comprehensive review to identify additional information needed from foreign countries to adjudicate visas and admissions under the INA in order to ensure that individuals admitted are not security or public safety threats. Excerpts follow from E.O. 13769.

* * * *

Sec. 2. *Temporary Suspension of Entry for Nationals of Countries of Particular Concern During Review Period.* (a) The Secretary of Homeland Security, in consultation with the Secretary of State and the Director of National Intelligence, shall conduct a worldwide review to identify whether, and if so what, additional information will be needed from each foreign country to adjudicate an application by a national of that country for a visa, admission, or other benefit under the INA (adjudications) in order to determine that the individual is not a security or public-safety threat. The Secretary of Homeland Security may conclude that certain information is needed from particular countries even if it is not needed from every country.

(b) The Secretary of Homeland Security, in consultation with the Secretary of State and the Director of National Intelligence, shall submit to the President a report on the results of the worldwide review described in subsection (a) of this section, including the Secretary of Homeland Security's determination of the information needed from each country for adjudications and a list of countries that do not provide adequate information, within 20 days of the effective date of this order. The Secretary of Homeland Security shall provide a copy of the report to the Secretary of State, the Attorney General, and the Director of National Intelligence.

(c) To temporarily reduce investigative burdens on relevant agencies during the review period described in subsection (a) of this section, to ensure the proper review and maximum utilization of available resources for the screening and vetting of foreign nationals, to ensure that adequate standards are established to prevent infiltration by foreign terrorists, and in light of the national security concerns referenced in section 1 of this order, I hereby proclaim, pursuant to sections 212(f) and 215(a) of the INA, 8 U.S.C. 1182(f) and 1185(a), that the unrestricted entry into the United States of nationals of Iran, Libya, Somalia, Sudan, Syria, and Yemen would be detrimental to the interests of the United States. I therefore direct that the entry into the United States of nationals of those six countries be suspended for 90 days from the effective date of this order, subject to the limitations, waivers, and exceptions set forth in sections 3 and 12 of this order.

(d) Upon submission of the report described in subsection (b) of this section regarding the information needed from each country for adjudications, the Secretary of State shall request that all foreign governments that do not supply such information regarding their nationals begin providing it within 50 days of notification.

(e) After the period described in subsection (d) of this section expires, the Secretary of Homeland Security, in consultation with the Secretary of State and the Attorney General, shall submit to the President a list of countries recommended for inclusion in a Presidential proclamation that would prohibit the entry of appropriate categories of foreign nationals of countries that have not provided the information requested until they do so or until the Secretary of Homeland Security certifies that the country has an adequate plan to do so, or has adequately shared information through other means. The Secretary of State, the Attorney General, or the

Secretary of Homeland Security may also submit to the President the names of additional countries for which any of them recommends other lawful restrictions or limitations deemed necessary for the security or welfare of the United States.

(f) At any point after the submission of the list described in subsection (e) of this section, the Secretary of Homeland Security, in consultation with the Secretary of State and the Attorney General, may submit to the President the names of any additional countries recommended for similar treatment, as well as the names of any countries that they recommend should be removed from the scope of a proclamation described in subsection (e) of this section.

(g) The Secretary of State and the Secretary of Homeland Security shall submit to the President a joint report on the progress in implementing this order within 60 days of the effective date of this order, a second report within 90 days of the effective date of this order, a third report within 120 days of the effective date of this order, and a fourth report within 150 days of the effective date of this order.

Sec. 3. *Scope and Implementation of Suspension.*

(a) *Scope.* Subject to the exceptions set forth in subsection (b) of this section and any waiver under subsection (c) of this section, the suspension of entry pursuant to section 2 of this order shall apply only to foreign nationals of the designated countries who:

(i) are outside the United States on the effective date of this order;

(ii) did not have a valid visa at 5:00 p.m., eastern standard time on January 27, 2017; and

(iii) do not have a valid visa on the effective date of this order.

(b) *Exceptions.* The suspension of entry pursuant to section 2 of this order shall not apply to:

(i) any lawful permanent resident of the United States;

(ii) any foreign national who is admitted to or paroled into the United States on or after the effective date of this order;

(iii) any foreign national who has a document other than a visa, valid on the effective date of this order or issued on any date thereafter, that permits him or her to travel to the United States and seek entry or admission, such as an advance parole document;

(iv) any dual national of a country designated under section 2 of this order when the individual is traveling on a passport issued by a non-designated country;

(v) any foreign national traveling on a diplomatic or diplomatic-type visa, North Atlantic Treaty Organization visa, C-2 visa for travel to the United Nations, or G-1, G-2, G-3, or G-4 visa; or

(vi) any foreign national who has been granted asylum; any refugee who has already been admitted to the United States; or any individual who has been granted withholding of removal, advance parole, or protection under the Convention Against Torture.

(c) *Waivers.* Notwithstanding the suspension of entry pursuant to section 2 of this order, 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. Unless otherwise specified by the Secretary of Homeland Security, any waiver issued by a consular officer as part of the visa issuance process will be effective both for the issuance of a visa and any subsequent entry on that visa, but will leave all

other requirements for admission or entry unchanged. Case-by-case waivers could be appropriate in circumstances such as the following:

(i) the foreign national has previously been admitted to the United States for a continuous period of work, study, or other long-term activity, is outside the United States on the effective date of this order, seeks to reenter the United States to resume that activity, and the denial of reentry during the suspension period would impair that activity;

(ii) the foreign national has previously established significant contacts with the United States but is outside the United States on the effective date of this order for work, study, or other lawful activity;

(iii) the foreign national seeks to enter the United States for significant business or professional obligations and the denial of entry during the suspension period would impair those obligations;

(iv) the foreign national seeks to enter the United States to visit or reside with a close family member (*e.g.*, a spouse, child, or parent) who is a United States citizen, lawful permanent resident, or alien lawfully admitted on a valid nonimmigrant visa, and the denial of entry during the suspension period would cause undue hardship;

(v) the foreign national is an infant, a young child or adoptee, an individual needing urgent medical care, or someone whose entry is otherwise justified by the special circumstances of the case;

(vi) the foreign national has been employed by, or on behalf of, the United States Government (or is an eligible dependent of such an employee) and the employee can document that he or she has provided faithful and valuable service to the United States Government;

(vii) the foreign national is traveling for purposes related to an international organization designated under the International Organizations Immunities Act (IOIA), 22 U.S.C. 288 *et seq.*, traveling for purposes of conducting meetings or business with the United States Government, or traveling Start Printed Page 13215to conduct business on behalf of an international organization not designated under the IOIA;

(viii) the foreign national is a landed Canadian immigrant who applies for a visa at a location within Canada; or

(ix) the foreign national is traveling as a United States Government-sponsored exchange visitor.

Sec. 4. *Additional Inquiries Related to Nationals of Iraq.* An application by any Iraqi national for a visa, admission, or other immigration benefit should be subjected to thorough review, including, as appropriate, consultation with a designee of the Secretary of Defense and use of the additional information that has been obtained in the context of the close U.S.-Iraqi security partnership, since Executive Order 13769 was issued, concerning individuals suspected of ties to ISIS or other terrorist organizations and individuals coming from territories controlled or formerly controlled by ISIS. Such review shall include consideration of whether the applicant has connections with ISIS or other terrorist organizations or with territory that is or has been under the dominant influence of ISIS, as well as any other information bearing on whether the applicant may be a threat to commit acts of terrorism or otherwise threaten the national security or public safety of the United States.

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Also on March 6, 2017, the President issued a Memorandum "Implementing Immediate Heightened Screening and Vetting of Applications for Visas and Other Immigration Benefits, Ensuring Enforcement of All Laws for Entry Into the United States, and Increasing Transparency Among Departments and Agencies of the Federal Government and for the American People." 82 Fed. Reg. 16,279 (Apr. 3, 2017). Section 2 of the March 6, 2017 Memorandum directs the Secretaries of State and Homeland Security, in consultation with the Attorney General, to "implement protocols and procedures as soon as practicable that in their judgment will enhance the screening and vetting of applications for visas and all other immigration benefits, so as to increase the safety and security of the American people."

On June 26, 2017, the U.S. Supreme Court issued a decision on Executive Order 13780. See State Department media note, available at https://www.state.gov/r/pa/prs/ps/2017/06/272184.htm. The Supreme Court decided that most provisions in E.O. 13780 could go into effect. Senior officials in the administration provided a background briefing on implementation of E.O. 13780 on June 29, 2017. The briefing is available at https://www.state.gov/r/pa/prs/ps/2017/06/272281.htm, and excerpted below.

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…We at State will be implementing the executive order in compliance with the Supreme Court's decision and in accordance with the presidential memorandum issued on June 14th, 2017. We have worked closely with our interagency partners to ensure that this is an orderly rollout. We will, as said before, instruct our posts to begin implementation at 8 o'clock p.m. Eastern Daylight Time, June 29th.

Our plan is not to cancel previously scheduled visa application appointments, so individuals should continue to come in for their visa interviews as scheduled. Our consular officers have then been given detailed instructions to make case-by-case determinations on whether individuals would qualify for visas under the new guidance.

We will first be applying the traditional screening to these individuals. That is, we will be assessing whether they qualify under the Immigration and Nationality Act, and we will then see, if they do qualify under the INA, whether they qualify under the guidance. Individuals who are qualified will then be subjected to all vetting as normal. All security and screening vetting will be applied to anybody who is deemed qualified for a visa.

* * * *

…The executive order does not bar entry for individuals who are excluded from the suspension provision under the terms of the EO who obtain a waiver from State or Customs or who demonstrate a bona fide relationship. USCIS is going to be working in coordination with Department of State and Justice. They have developed guidance for their workforce regarding to the adjudication of refugee applications. Both CBP and CIS … have guidance for their employees and have been working to make sure the employees are well versed in how the EO will be implemented.

* * * *

…I just want to provide a brief update to the extent we have it on the schedule going forward. There is no schedule yet as far as briefings, but the Solicitor General's Office expects that briefs will be due over the summer and that the arguments will likely take place the week of October 1st, which is the beginning of the next Supreme Court term. Again, we don't have finality on that, but that is the expectation within the Department of Justice. And the arguments obviously and the briefing will cover the entire injunction. Obviously, a significant piece of that injunction was lifted, but we will be … arguing the whole case come October.

* * * *

On September 24, 2017, the President issued Proclamation 9645 on "Enhancing Vetting Capabilities and Processes for Detecting Attempted Entry Into the United States by Terrorists or Other Public-Safety Threats." 82 Fed. Reg. 45,161 (Sep. 27, 2017). The first paragraphs of the Presidential Proclamation state:

> In Executive Order 13780 of March 6, 2017 (Protecting the Nation from Foreign Terrorist Entry into the United States), on the recommendations of the Secretary of Homeland Security and the Attorney General, I ordered a worldwide review of whether, and if so what, additional information would be needed from each foreign country to assess adequately whether their nationals seeking to enter the United States pose a security or safety threat. This was the first such review of its kind in United States history. As part of the review, the Secretary of Homeland Security established global requirements for information sharing in support of immigration screening and vetting. The Secretary of Homeland Security developed a comprehensive set of criteria and applied it to the information-sharing practices, policies, and capabilities of foreign governments. The Secretary of State thereafter engaged with the countries reviewed in an effort to address deficiencies and achieve improvements. In many instances, those efforts produced positive results. By obtaining additional information and formal commitments from foreign governments, the United States Government has improved its capacity and ability to assess whether foreign nationals attempting to enter the United States pose a security or safety threat. Our Nation is safer as a result of this work.
>
> Despite those efforts, the Secretary of Homeland Security, in consultation with the Secretary of State and the Attorney General, has determined that a small number of countries—out of nearly 200 evaluated—remain deficient at this time with respect to their identity-management and information-sharing capabilities, protocols, and practices. In some cases, these countries also have a significant terrorist presence within their territory

Section 1(g) of the Presidential Proclamation identifies the following countries as having "inadequate" identity-management protocols, information-sharing practices, and risk factors: Chad, Iran, Libya, North Korea, Syria, Venezuela, and Yemen. As a result, entry restrictions and limitations were imposed for those countries. Sections 2 and 3 of the September 24 Proclamation follow.

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Sec. 2. *Suspension of Entry for Nationals of Countries of Identified Concern.* The entry into the United States of nationals of the following countries is hereby suspended and limited, as follows, subject to categorical exceptions and case-by-case waivers, as described in sections 3 and 6 of this proclamation:

(a) *Chad.*

(i) The government of Chad is an important and valuable counterterrorism partner of the United States, and the United States Government looks forward to expanding that cooperation, including in the areas of immigration and border management. Chad has shown a clear willingness to improve in these areas. Nonetheless, Chad does not adequately share public-safety and terrorism-related information and fails to satisfy at least one key risk criterion. Additionally, several terrorist groups are active within Chad or in the surrounding region, including elements of Boko Haram, ISIS-West Africa, and al-Qa'ida in the Islamic Maghreb. At this time, additional information sharing to identify those foreign nationals applying for visas or seeking entry into the United States who represent national security and public-safety threats is necessary given the significant terrorism-related risk from this country.

(ii) The entry into the United States of nationals of Chad, as immigrants, and as nonimmigrants on business (B–1), tourist (B–2), and business/tourist (B–1/B–2) visas, is hereby suspended.

(b) *Iran.*

(i) Iran regularly fails to cooperate with the United States Government in identifying security risks, fails to satisfy at least one key risk criterion, is the source of significant terrorist threats, and fails to receive its nationals subject to final orders of removal from the United States. The Department of State has also designated Iran as a state sponsor of terrorism.

(ii) The entry into the United States of nationals of Iran as immigrants and as nonimmigrants is hereby suspended, except that entry by such nationals under valid student (F and M) and exchange visitor (J) visas is not suspended, although such individuals should be subject to enhanced screening and vetting requirements.

(c) *Libya.*

(i) The government of Libya is an important and valuable counterterrorism partner of the United States, and the United States Government looks forward to expanding on that cooperation, including in the areas of immigration and border management. Libya, nonetheless, faces significant challenges in sharing several types of information, including public-safety and terrorism-related information necessary for the protection of the national security and public safety of the United States. Libya also has significant inadequacies in its identity-management protocols. Further, Libya fails to satisfy at least one key risk criterion and has been assessed to be not fully cooperative with respect to receiving its nationals subject to final orders of removal

from the United States. The substantial terrorist presence within Libya's territory amplifies the risks posed by the entry into the United States of its nationals.

(ii) The entry into the United States of nationals of Libya, as immigrants, and as nonimmigrants on business (B–1), tourist (B–2), and business/tourist (B–1/B–2) visas, is hereby suspended.

(d) *North Korea.*

(i) North Korea does not cooperate with the United States Government in any respect and fails to satisfy all information-sharing requirements.

(ii) The entry into the United States of nationals of North Korea as immigrants and nonimmigrants is hereby suspended.

(e) *Syria.*

(i) Syria regularly fails to cooperate with the United States Government in identifying security risks, is the source of significant terrorist threats, and has been designated by the Department of State as a state sponsor of terrorism. Syria has significant inadequacies in identity-management protocols, fails to share public-safety and terrorism information, and fails to satisfy at least one key risk criterion.

(ii) The entry into the United States of nationals of Syria as immigrants and nonimmigrants is hereby suspended.

(f) *Venezuela.*

(i) Venezuela has adopted many of the baseline standards identified by the Secretary of Homeland Security and in section 1 of this proclamation, but its government is uncooperative in verifying whether its citizens pose national security or public-safety threats. Venezuela's government fails to share public-safety and terrorism-related information adequately, fails to satisfy at least one key risk criterion, and has been assessed to be not fully cooperative with respect to receiving its nationals subject to final orders of removal from the United States. There are, however, alternative sources for obtaining information to verify the citizenship and identity of nationals from Venezuela. As a result, the restrictions imposed by this proclamation focus on government officials of Venezuela who are responsible for the identified inadequacies.

(ii) Notwithstanding section 3(b)(v) of this proclamation, the entry into the United States of officials of government agencies of Venezuela involved in screening and vetting procedures—including the Ministry of the Popular Power for Interior, Justice and Peace; the Administrative Service of Identification, Migration and Immigration; the Scientific, Penal and Criminal Investigation Service Corps; the Bolivarian National Intelligence Service; and the Ministry of the Popular Power for Foreign Relations—and their immediate family members, as nonimmigrants on business (B–1), tourist (B–2), and business/tourist (B–1/B–2) visas, is hereby suspended. Further, nationals of Venezuela who are visa holders should be subject to appropriate additional measures to ensure traveler information remains current.

(g) *Yemen.*

(i) The government of Yemen is an important and valuable counterterrorism partner, and the United States Government looks forward to expanding that cooperation, including in the areas of immigration and border management. Yemen, nonetheless, faces significant identity-management challenges, which are amplified by the notable terrorist presence within its territory. The government of Yemen fails to satisfy critical identity-management requirements, does not share public-safety and terrorism-related information adequately, and fails to satisfy at least one key risk criterion.

(ii) The entry into the United States of nationals of Yemen as immigrants, and as nonimmigrants on business (B–1), tourist (B–2), and business/ tourist (B–1/B–2) visas, is hereby suspended.

(h) *Somalia.*

(i) The Secretary of Homeland Security's report of September 15, 2017, determined that Somalia satisfies the information-sharing requirements of the baseline described in section 1(c) of this proclamation. But several other considerations support imposing entry restrictions and limitations on Somalia. Somalia has significant identity-management deficiencies. For example, while Somalia issues an electronic passport, the United States and many other countries do not recognize it. A persistent terrorist threat also emanates from Somalia's territory. The United States Government has identified Somalia as a terrorist safe haven. Somalia stands apart from other countries in the degree to which its government lacks command and control of its territory, which greatly limits the effectiveness of its national capabilities in a variety of respects. Terrorists use under-governed areas in northern, central, and southern Somalia as safe havens from which to plan, facilitate, and conduct their operations. Somalia also remains a destination for individuals attempting to join terrorist groups that threaten the national security of the United States. The State Department's 2016 Country Reports on Terrorism observed that Somalia has not sufficiently degraded the ability of terrorist groups to plan and mount attacks from its territory. Further, despite having made significant progress toward formally federating its member states, and its willingness to fight terrorism, Somalia continues to struggle to provide the governance needed to limit terrorists' freedom of movement, access to resources, and capacity to operate. The government of Somalia's lack of territorial control also compromises Somalia's ability, already limited because of poor record- keeping, to share information about its nationals who pose criminal or terrorist risks. As a result of these and other factors, Somalia presents special concerns that distinguish it from other countries.

(ii) The entry into the United States of nationals of Somalia as immigrants is hereby suspended. Additionally, visa adjudications for nationals of Somalia and decisions regarding their entry as nonimmigrants should be subject to additional scrutiny to determine if applicants are connected to terrorist organizations or otherwise pose a threat to the national security or public safety of the United States.

Sec. 3. *Scope and Implementation of Suspensions and Limitations.* (a) *Scope.* Subject to the exceptions set forth in subsection (b) of this section and any waiver under subsection (c) of this section, the suspensions of and limitations on entry pursuant to section 2 of this proclamation shall apply only to foreign nationals of the designated countries who:

(i) are outside the United States on the applicable effective date under section 7 of this proclamation;

(ii) do not have a valid visa on the applicable effective date under section 7 of this proclamation; and

(iii) do not qualify for a visa or other valid travel document under section 6(d) of this proclamation.

(b) *Exceptions.* The suspension of entry pursuant to section 2 of this proclamation shall not apply to:

(i) any lawful permanent resident of the United States;

(ii) any foreign national who is admitted to or paroled into the United States on or after the applicable effective date under section 7 of this proclamation;

(iii) any foreign national who has a document other than a visa—such as a transportation letter, an appropriate boarding foil, or an advance parole document—valid on the applicable effective date under section 7 of this proclamation or issued on any date thereafter, that permits him or her to travel to the United States and seek entry or admission;

(iv) any dual national of a country designated under section 2 of this proclamation when the individual is traveling on a passport issued by a non-designated country;

(v) any foreign national traveling on a diplomatic or diplomatic-type visa, North Atlantic Treaty Organization visa, C–2 visa for travel to the United Nations, or G–1, G–2, G–3, or G–4 visa; or

(vi) any foreign national who has been granted asylum by the United States; any refugee who has already been admitted to the United States; or any individual who has been granted withholding of removal, advance parole, or protection under the Convention Against Torture.

(c) *Waivers.* Notwithstanding the suspensions of and limitations on entry set forth in section 2 of this proclamation, a consular officer, or the Commissioner, United States Customs and Border Protection (CBP), or the Commissioner's designee, as appropriate, may, in their discretion, grant waivers on a case-by-case basis to permit the entry of foreign nationals for whom entry is otherwise suspended or limited if such foreign nationals demonstrate that waivers would be appropriate and consistent with subsections (i) through (iv) of this subsection. The Secretary of State and the Secretary of Homeland Security shall coordinate to adopt guidance addressing the circumstances in which waivers may be appropriate for foreign nationals seeking entry as immigrants or nonimmigrants.

(i) A waiver may be granted only if a foreign national demonstrates to the consular officer's or CBP official's satisfaction that:

(A) denying entry would cause the foreign national undue hardship;

(B) entry would not pose a threat to the national security or public safety of the United States; and

(C) entry would be in the national interest.

(ii) The guidance issued by the Secretary of State and the Secretary of Homeland Security under this subsection shall address the standards, policies, and procedures for:

(A) determining whether the entry of a foreign national would not pose a threat to the national security or public safety of the United States;

(B) determining whether the entry of a foreign national would be in the national interest;

(C) addressing and managing the risks of making such a determination in light of the inadequacies in information sharing, identity management, and other potential dangers posed by the nationals of individual countries subject to the restrictions and limitations imposed by this proclamation;

(D) assessing whether the United States has access, at the time of the waiver determination, to sufficient information about the foreign national to determine whether entry would satisfy the requirements of subsection (i) of this subsection; and

(E) determining the special circumstances that would justify granting a waiver under subsection (iv)(E) of this subsection.

(iii) Unless otherwise specified by the Secretary of Homeland Security, any waiver issued by a consular officer as part of the visa adjudication process will be effective both for the issuance of a visa and for any subsequent entry on that visa, but will leave unchanged all other requirements for admission or entry.

(iv) Case-by-case waivers may not be granted categorically, but may be appropriate, subject to the limitations, conditions, and requirements set forth under subsection (i) of this subsection and the guidance issued under subsection (ii) of this subsection, in individual circumstances such as the following:

(A) the foreign national has previously been admitted to the United States for a continuous period of work, study, or other long-term activity, is outside the United States on the applicable effective date under section 7 of this proclamation, seeks to reenter the United States to resume that activity, and the denial of reentry would impair that activity;

(B) the foreign national has previously established significant contacts with the United States but is outside the United States on the applicable effective date under section 7 of this proclamation for work, study, or other lawful activity;

(C) the foreign national seeks to enter the United States for significant business or professional obligations and the denial of entry would impair those obligations;

(D) the foreign national seeks to enter the United States to visit or reside with a close family member (*e.g.*, a spouse, child, or parent) who is a United States citizen, lawful permanent resident, or alien lawfully admitted on a valid nonimmigrant visa, and the denial of entry would cause the foreign national undue hardship;

(E) the foreign national is an infant, a young child or adoptee, an individual needing urgent medical care, or someone whose entry is otherwise justified by the special circumstances of the case;

(F) the foreign national has been employed by, or on behalf of, the United States Government (or is an eligible dependent of such an employee), and the foreign national can document that he or she has provided faithful and valuable service to the United States Government;

(G) the foreign national is traveling for purposes related to an international organization designated under the International Organizations Immunities Act (IOIA), 22 U.S.C. 288 *et seq.*, traveling for purposes of conducting meetings or business with the United States Government, or traveling to conduct business on behalf of an international organization not designated under the IOIA;

(H) the foreign national is a Canadian permanent resident who applies for a visa at a location within Canada;

(I) the foreign national is traveling as a United States Government-sponsored exchange visitor; or

(J) the foreign national is traveling to the United States, at the request of a United States Government department or agency, for legitimate law enforcement, foreign policy, or national security purposes.

* * * *

After the September 24, 2017 presidential actions, the Supreme Court canceled the oral arguments scheduled in the previously-filed cases challenging E.O. 13780 and dismissed the cases. Federal courts are considering challenges to the September 24, 2017 Presidential Proclamation.[*]

[*] Editor's note: On January 19, 2018, the U.S. Supreme Court granted a petition for certiorari in a case challenging the Presidential Proclamation.

On October 17, 2017, the State Department issued a press statement on follow-up with one of the countries identified as deficient in the Presidential Proclamation: Chad. The October 17, 2017 press statement on visa restrictions for Chad, available https://www.state.gov/r/pa/prs/ps/2017/10/274877.htm, relate that U.S. National Security Adviser Lieutenant General H. R. McMaster had spoken to President Idriss Deby Itno of Chad regarding partnering with the United States in countering terrorism and that the government of Chad had shown a willingness to work on identity management practices and information sharing requirements so that vetting capabilities would improve and visa restrictions could be lifted.

On December 8, 2017, the State Department issued a media note announcing that the September 24, 2017 Presidential Proclamation was being fully implemented as of that day. The media note is excerpted below and available at https://www.state.gov/r/pa/prs/ps/2017/12/276376.htm.

* * * *

The Department of State is fully implementing Presidential Proclamation 9645 *(Enhancing Vetting Capabilities and Processes for Detecting Attempted Entry into the United States by Terrorists or other Public-Safety Threats)*, as the Supreme Court's December 4, 2017 orders permit. The Department began implementing the full Proclamation at the opening of business (local time) at U.S. embassies and consulates overseas today, Friday, December 8, 2017.

National security is our top priority in visa operations. Our embassies and consulates around the world are fully implementing Presidential Proclamation 9645 to protect the American people, now that U.S. Supreme Court orders permit us to do that and based on extensive guidance provided to them by the Department.

All countries share responsibility to prevent terrorist attacks, transnational crime, and immigration fraud. The Presidential Proclamation directed the Departments of State and Homeland Security to restrict the entry of nationals of Chad, Iran, Libya, North Korea, Syria, Somalia, Venezuela, and Yemen in order to protect the security and welfare of the United States. These restrictions follow an extensive review and engagement with countries around the world involving an assessment of whether countries met certain information sharing criteria. Restrictions are tailored to each country, reflecting the unique factors in place for each.

No visas will be revoked under the Proclamation, and the restrictions are not intended to be permanent. The restrictions are conditional and may be lifted as countries work with the U.S. government to ensure the safety of Americans. Most countries in the world now meet the new requirements, which is an important element of ensuring our security.

The entry restrictions in the Proclamation do not apply to certain categories of individuals, including those who were inside the United States or who had a valid visa on the effective date of the Proclamation, as defined in Section 7 of the Proclamation, even after their visa expires or they leave the United States.

* * * *

(2) Executive Order on "Buy American and Hire American"

On April 18, 2017, the President issued an executive order on "Buy American and Hire American." 82 Fed. Reg. 18,837 (Apr. 21, 2017). Section 2(b) states:

> In order to create higher wages and employment rates for workers in the United States, and to protect their economic interests, it shall be the policy of the executive branch to rigorously enforce and administer the laws governing entry into the United States of workers from abroad, including section 212(a)(5) of the Immigration and Nationality Act (8 U.S.C. 1182(a)(5)).

Section 5 provides as follows:

> Ensuring the Integrity of the Immigration System in Order to "Hire American." (a) In order to advance the policy outlined in section 2(b) of this order, the Secretary of State, the Attorney General, the Secretary of Labor, and the Secretary of Homeland Security shall, as soon as practicable, and consistent with applicable law, propose new rules and issue new guidance, to supersede or revise previous rules and guidance if appropriate, to protect the interests of United States workers in the administration of our immigration system, including through the prevention of fraud or abuse.
>
> (b) In order to promote the proper functioning of the H-1B visa program, the Secretary of State, the Attorney General, the Secretary of Labor, and the Secretary of Homeland Security shall, as soon as practicable, suggest reforms to help ensure that H-1B visas are awarded to the most-skilled or highest-paid petition beneficiaries.

c. Visa restrictions

On December 6, 2017, the State Department issued a press statement announcing visa restrictions on individuals responsible for undermining Cambodian democracy. The press statement is excerpted below and available at https://www.state.gov/r/pa/prs/ps/2017/12/276288.htm.

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As the White House stated in a November 16, press statement, the United States is taking concrete steps to respond to the Cambodian government's actions that have undermined the country's progress in advancing democracy and respect for human rights. These actions—which run counter to the Paris Peace Agreements of 1991 that ended a tragic conflict and accorded the Cambodian people democratic rights—include the dissolution of the main opposition political

party and banning of its leaders from electoral politics, imprisonment of opposition leader Kem Sokha, restriction of civil society, and suppression of independent media.

In direct response to the Cambodian government's series of anti-democratic actions, we announce the Secretary of State will restrict entry into the United States of those individuals involved in undermining democracy in Cambodia. In certain circumstances, family members of those individuals will also be subject to visa restrictions.

We call on the Cambodian government to reverse course by reinstating the political opposition, releasing Kem Sokha, and allowing civil society and media to resume their constitutionally protected activities. Such actions could lead to a lifting of these travel restrictions and increase the potential for Cambodia's 2018 electoral process to regain legitimacy.

We will continue to monitor the situation and take additional steps as necessary, while maintaining our close and enduring ties with the people of Cambodia.

* * * *

d. Presidential signing statement on CAATSA

The Countering America's Adversaries Through Sanctions Act of 2017, Public Law 115–44, Aug. 2, 2017, 131 Stat. 886 (22 U.S.C. 9401 *et seq.*) ("CAATSA") was signed into law on August 2, 2017. The President's signing statement includes the following:

> [some of the law's] provisions…would require me to deny certain individuals entry into the United States, without an exception for the President's responsibility to receive ambassadors under Article II, section 3 of the Constitution. My Administration will give careful and respectful consideration to the preferences expressed by the Congress in these various provisions and will implement them in a manner consistent with the President's constitutional authority to conduct foreign relations.

3. Cuba Policy

On January 12, 2017, the United States and Cuba signed a joint statement regarding migration between the two countries, which modifies the Joint Communiqués dated December 14, 1984 and September 9, 1994 and the Joint Statement of May 2, 1995, all of which are collectively known as "Migration Accords." Excerpts follow from the January 12, 2017 Joint Statement.

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* * * *

The United States of America and the Republic of Cuba have agreed to take a major step toward the normalization of their migration relations, in order to ensure a regular, safe and orderly migration. … This Joint Statement is not intended to modify the Migration Accords with respect to the return of Cuban nationals intercepted at sea by the United States or the return of migrants found to have entered the Guantanamo Naval Base illegally.

In this framework, the United States of America shall henceforth end the special parole policy for Cuban nationals who reach the territory of the United States (commonly referred to as the wet foot-dry foot policy), as well as the parole program for Cuban health care professionals in third countries. The United States shall henceforth apply to all Cuban nationals, consistent with its laws and international norms, the same migration procedures and standards that are applicable to nationals of other countries, as established in this Joint Statement.

1. From the date of this Joint Statement, the United States of America, consistent with its laws and international norms, shall return to the Republic of Cuba, and the Republic of Cuba, consistent with its laws and international norms, shall receive back all Cuban nationals who after the signing of this Joint Statement are found by the competent authorities of the United States to have tried to irregularly enter or remain in that country in violation of United States law.

The United States of America and the Republic of Cuba state their intention to promote changes in their respective migration laws to enable fully normalized migration relations to occur between the two countries.

2. The United States of America and the Republic of Cuba shall apply their migration and asylum laws to nationals of the other Party avoiding selective (in other words, discriminatory) criteria and consistent with their international obligations.

3. The United States of America shall continue ensuring legal migration from the Republic of Cuba with a minimum of 20,000 persons annually.

4. The United States of America and the Republic of Cuba, determined to strongly discourage unlawful actions related to irregular migration, shall promote effective bilateral cooperation to prevent and prosecute alien smuggling and other crimes related to migration movements that threaten their national security, including the hijacking of aircraft and vessels.

5. The Republic of Cuba shall accept that individuals included in the list of 2,746 to be returned in accordance with the Joint Communiqué of December 14, 1984, may be replaced by others and returned to Cuba, provided that they are Cuban nationals who departed for the United States of America via the Port of Mariel in 1980 and were found by the competent authorities of the United States to have tried to irregularly enter or remain in that country in violation of United States law. The Parties shall agree on the specific list of these individuals and the procedure for their return.

6. The Republic of Cuba shall consider and decide on a case-by-case basis the return of other Cuban nationals presently in the United States of America who before the signing of this Joint Statement had been found by the competent authorities of the United States to have tried to irregularly enter or remain in that country in violation of United States law. The competent authorities of the United States shall focus on individuals whom the competent authorities have determined to be priorities for return.

As from the date of signing of this Joint Statement, the Parties shall carry out the necessary procedures for its implementation. The Parties may meet and revise such procedures from time to time to ensure effective implementation.

The competent authorities of the United States of America and the Republic of Cuba shall meet on a regular basis to ensure that cooperation under these Migration Accords is carried out in conformity with their respective laws and international obligations.

* * * *

Effective January 13, 2017, the U.S. Department of Homeland Security ("DHS") eliminated the exception from expedited removal proceedings for Cuban nationals who arrive in the United States at a port of entry by aircraft. 82 Fed. Reg. 4769 (Jan. 17, 2017). The exception, as provided in 235(b)(1)(F) of the Immigration and Nationality Act ("INA"), 8 U.S.C. 1225(b)(1)(F), stated that expedited removal ''shall not apply to an alien who is a native or citizen of a country in the Western Hemisphere with whose government the United States does not have full diplomatic relations and who arrives by aircraft at a port of entry.'' *Id*. The exception had long applied to Cuban nationals due to the lack of full diplomatic relations between the United States and Cuba. As discussed in *Digest 2014* at 336, *Digest 2015* at 340-47, and *Digest 2016* at 363-68, the United States and Cuba re-established diplomatic relations in 2015. The Department of Justice issued a notice in parallel with the DHS notice, revising the Executive Office for Immigration Review ("EOIR") regulations to eliminate the categorical exception from expedited removal proceedings for Cuban nationals who arrive in the United States at a port of entry by aircraft. 82 Fed. Reg. 4771 (Jan. 17, 2017).

At the same time, the exception from expedited removal proceedings for aliens who arrive by sea for Cuban nationals was also eliminated. 82 Fed. Reg. 4902 (Jan. 17, 2017). As summarized in the Federal Register notice:

> On November 13, 2002, the former Immigration and Naturalization Service (INS) of the Department of Justice issued a notice designating certain aliens who arrive by sea, either by boat or other means, as eligible for placement in expedited removal proceedings, with an exception for Cuban citizens or nationals (hereinafter ''Cuban nationals''). On August 11, 2004, DHS issued a notice designating certain aliens in the United States as eligible for placement in expedited removal proceedings, also with an exception for Cuban nationals. In light of recent changes in the relationship between the United States and Cuba, the Department has determined that the exceptions for Cuban nationals, contained in the designations of November 13, 2002 and August 11, 2004, are no longer warranted and are thus hereby eliminated. The rest of the November 13, 2002 and August 11, 2004 designations, including any implementing policies, are unaffected by this notice and remain unchanged.

4. Removals and Repatriations

The Department of State works closely with the Department of Homeland Security in effecting the removal of aliens subject to final orders of removal. It is the belief of the United States that every country has an obligation to accept the return of its nationals who cannot remain in the United States or any other country.

On May 31, 2017, the President of the United States and the Prime Minister of Vietnam issued a joint statement on enhancing their partnership, which includes the following on removals:

> Prime Minister Nguyen Xuan Phuc affirmed that Vietnam will work actively with the United States to expeditiously return Vietnamese nationals subject to final orders of removal, using the 2008 United States-Vietnam Agreement on the Acceptance of the Return of Vietnamese Citizens as a basis. The two leaders pledged to set up a working group to discuss this issue.

The joint statement is available in full at https://www.whitehouse.gov/briefings-statements/joint-statement-enhancing-comprehensive-partnership-united-states-america-socialist-republic-vietnam//.

5. Agreements on Preventing and Combating Serious Crime

Three agreements on preventing and combating serious crime ("PCSC Agreements") entered into force in 2017. Such agreements provide a mechanism for the parties' law enforcement authorities to exchange personal data, including biometric (fingerprint) information, for use in detecting, investigating, and prosecuting terrorists and other criminals. For background, see *Digest 2008* at 81–83, *Digest 2009* at 66, and *Digest 2010* at 57-58. The agreement with Chile on Enhancing Cooperation in Preventing and Combating Serious Crime, signed at Washington May 30, 2013, entered into force on September 20, 2017. The agreement with Romania on Enhancing Cooperation in Preventing and Combating Serious Crime, signed at Washington October 5, 2015, entered into force on November 8, 2017. And the agreement with New Zealand signed at Washington March 20, 2013 entered into force on December 12, 2017.

C. ASYLUM, REFUGEE, AND MIGRANT PROTECTION ISSUES

1. Temporary Protected Status

Section 244 of the Immigration and Nationality Act ("INA" or "Act"), as amended, 8 U.S.C. § 1254a, authorizes the Secretary of Homeland Security, after consultation with appropriate agencies, to designate a state (or any part of a state) for temporary protected status ("TPS") after finding that (1) there is an ongoing armed conflict within the state (or part thereof) that would pose a serious threat to the safety of nationals

returned there; (2) the state has requested designation after an environmental disaster resulting in a substantial, but temporary, disruption of living conditions that renders the state temporarily unable to handle the return of its nationals; or (3) there are other extraordinary and temporary conditions in the state that prevent nationals from returning in safety, unless permitting the aliens to remain temporarily would be contrary to the national interests of the United States. The TPS designation means that eligible nationals of the state (or stateless persons who last habitually resided in the state) can remain in the United States and obtain work authorization documents. For background on previous designations of states for TPS, see *Digest 1989–1990* at 39–40; *Cumulative Digest 1991–1999* at 240-47; *Digest 2004* at 31-33; *Digest 2010* at 10-11; *Digest 2011* at 6-9; *Digest 2012* at 8-14; *Digest 2013* at 23-24; *Digest 2014* at 54-57; *Digest 2015* at 21-24; and *Digest 2016* at 36-40. In 2017, the United States extended TPS designations for Somalia, South Sudan, and Honduras; extended and redesignated Yemen; and announced the termination of TPS for Sudan, Haiti, and Nicaragua, as discussed below.

a. Yemen

On January 4, 2017, the Department of Homeland Security ("DHS") announced the extension of the designation of Yemen for TPS for 18 months, from March 4, 2017, through September 3, 2018, and the redesignation of Yemen for TPS for 18 months, effective March 4, 2017, through September 3, 2018. 82 Fed. Reg. 859 (Jan. 4, 2017). The extension and redesignation are based on the determination that the conditions in Yemen that prompted the 2016 TPS redesignation continue to exist, specifically, the ongoing armed conflict and other extraordinary and temporary conditions that have persisted and pose a serious threat to the personal safety of Yemeni nationals if they were required to return to their country. *Id*. at 860-61.

b. Somalia

On January 17, 2017, DHS announced the extension of the designation of Somalia for TPS for 18 months from March 18, 2017 through September 17, 2018. 82 Fed. Reg. 4905 (Jan. 17, 2017). The extension was based on the determination that conditions in Somalia supporting the TPS designation continue to be met, namely, ongoing armed conflict and extraordinary and temporary conditions that prevent Somali nationals from returning in safety. *Id.*

c. Haiti

On May 24, 2017, DHS announced the extension of the designation of Haiti for TPS for six months, from July 23, 2017 through January 22, 2018. 82 Fed. Reg. 23,830 (May 24, 2017). The extension was based on the determination that conditions that formed the basis for the designation in the aftermath of the January 2010 earthquake persist, although Haiti has made significant progress in recovering. *Id*.

On November 20, 2017, DHS determined, after reviewing country conditions and consulting with the appropriate U.S. Government agencies, that conditions in Haiti no longer support its designation for TPS. 83 Fed. Reg. 2648 (Jan. 18, 2018). Termination is effective July 22, 2019, in order to allow for an orderly transition.

d. South Sudan

On September 21, 2017, the Department of Homeland Security ("DHS") announced the extension of the designation of South Sudan for TPS for 18 months, from November 3, 2017, through May 2, 2019. 82 Fed. Reg. 44,205 (Sep. 21, 2017). The extension was based on the determination that the conditions in South Sudan that prompted the 2016 TPS redesignation continue to exist, specifically, the ongoing armed conflict and other extraordinary and temporary conditions that have persisted and pose a serious threat to the personal safety of South Sudanese nationals if they were required to return to their country. *Id*. at 44,206.

e. Sudan

On October 11, 2017, DHS announced the termination of the designation of Sudan for TPS, effective November 2, 2018. 82 Fed. Reg. 47,228 (Oct. 11, 2017). The termination was based on the determination that the conditions in Sudan have sufficiently improved and that ongoing armed conflict no longer prevents the return of nationals of Sudan to all regions of Sudan without posing a serious threat to their personal safety. *Id*. at 47,230. The Federal Register notice further elaborates on the rationale for termination as follows:

> Conflict in Sudan is limited to Darfur and the Two Areas (South Kordofan and Blue Nile states). As a result of the continuing armed conflict in these regions, hundreds of thousands of Sudanese have fled to neighboring countries. However, in Darfur, toward the end of 2016 and through the first half of 2017, parties to the conflict renewed a series of time-limited unilateral cessation of hostilities declarations, resulting in a reduction in violence and violent rhetoric from the parties to the conflict. The remaining conflict is limited and does not prevent the return of nationals of Sudan to all regions of Sudan without posing a serious threat to their personal safety.
>
> Above-average harvests have moderately improved food security across much of Sudan. While populations in conflict-affected areas continue to experience acute levels of food insecurity, there has also been some improvement in access for humanitarian actors to provide much-needed humanitarian aid.
>
> Although Sudan's human rights record remains extremely poor in general, conditions on the ground no longer prevent all Sudanese nationals from returning in safety.

> Taking into account the geographically limited scope of the conflict, the renewed series of unilateral cessation of hostilities declarations and concomitant reduction in violence and violent rhetoric from the parties to the conflict, and improvements in access for humanitarian actors to provide aid, the Secretary has determined that the ongoing armed conflict and extraordinary and temporary conditions that served as the basis for Sudan's most recent designation have sufficiently improved such that they no longer prevent nationals of Sudan from returning in safety to all regions of Sudan. Based on this determination, the Secretary has concluded that termination of the TPS designation of Sudan is required because Sudan no longer meets the statutory conditions for designation. To provide for an orderly transition, this termination is effective November 2, 2018, twelve months following the end of the current designation. DHS estimates that there are approximately 1,040 nationals of Sudan (and aliens having no nationality who last habitually resided in Sudan) who currently receive TPS benefits.

f. Honduras

The Secretary of Homeland Security did not make a determination on Honduras's TPS designation by November 6, 2017, the statutory deadline. Accordingly, the TPS designation of Honduras was automatically extended for 6 months, from January 6, 2018 through July 5, 2018. 82 Fed. Reg. 59,630 (Dec. 15, 2017).

g. Nicaragua

On December 15, 2017, the Department of Homeland Security provided public notice of the determination to terminate the designation of Nicaragua for TPS. 82 Fed. Reg. 59,636 (Dec. 15, 2017). The termination is effective January 5, 2019, to allow twelve months for an orderly transition after the end of the current designation. *Id*. The notice in the Federal Register provides the following explanation of the rationale for termination:

> DHS has reviewed conditions in Nicaragua. Based on the review, including input received from other relevant U.S. Government agencies, the Secretary has determined that conditions for Nicaragua's 1999 designation for TPS on the basis of environmental disaster due to the damage caused by Hurricane Mitch are no longer met. It is no longer the case that Nicaragua is unable, temporarily, to handle adequately the return of nationals of Nicaragua. Recovery efforts relating to Hurricane Mitch have largely been completed. The social and economic conditions affected by Hurricane Mitch have stabilized, and people are able to conduct their daily activities without impediments directly related to damage from the storm.
>
> Nicaragua received a significant amount of international aid to assist in its Hurricane Mitch-related recovery efforts, and many reconstruction projects have

> now been completed. Hundreds of homes destroyed by the storm have been rebuilt. The government of Nicaragua has been working to improve access to remote communities and has built new roads in many of the areas affected by Hurricane Mitch, including the first paved road to connect the Pacific side of the country to the Caribbean Coast, which is nearly completed. Access to drinking water and sanitation has improved. Electrification of the country has increased from 50% of the country in 2007 to 90% today. Nearly 1.5 million textbooks have been provided to 225,000 primary students of the poorest regions of the country. Internet access is also now widely available.
>
> In addition, Nicaragua's relative security has helped attract tourism and foreign investment. The Nicaraguan economy has strengthened due to increased foreign direct investment and exports of textiles and commodities.
>
> Nicaragua's Gross Domestic Product (GDP) reached an all-time high of $13.23 billion (USD) in 2016, has averaged over 5% growth since 2010, and Nicaragua's GDP per capita is higher today than in 1998. Public infrastructure investment has been a high priority for the government, and the government has demonstrated its ability to provide basic services to its citizens. The U.S. Department of State does not have a current travel warning for Nicaragua. DHS estimates that there are approximately 5,300 nationals of Nicaragua (and aliens having no nationality who last habitually resided in Nicaragua) who hold TPS under Nicaragua's designation.

Id. at 59,637.

2. Refugee Admissions in the United States

Presidential Determination No. 2017-13 of September 29, 2017 authorized the admission of up to 45,000 refugees to the United States during Fiscal Year 2018. 82 Fed. Reg. 49,083 (Oct. 23, 2017). The determination includes regional allocations of 19,000 from Africa; 5,000 from East Asia; 2,000 from Europe and Central Asia; 1,500 from America/Caribbean; and 17,500 from Near East/South Asia.

a. Status of the U.S. Refugee Admissions Program

Executive Order 13780, discussed *supra*, mandated a 120-day U.S. government review of the U.S. Refugee Admissions Program ("USRAP") to identify additional national security processes. Section 6 of E.O. 13780, "Realignment of the U.S. Refugee Admissions Program for Fiscal Year 2017," follows.

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* * * *

(a) The Secretary of State shall suspend travel of refugees into the United States under the USRAP, and the Secretary of Homeland Security shall suspend decisions on applications for refugee status, for 120 days after the effective date of this order, subject to waivers pursuant to subsection (c) of this section. During the 120-day period, the Secretary of State, in conjunction with the Secretary of Homeland Security and in consultation with the Director of National Intelligence, shall review the USRAP application and adjudication processes to determine what additional procedures should be used to ensure that individuals seeking admission as refugees do not pose a threat to the security and welfare of the United States, and shall implement such additional procedures. The suspension described in this subsection shall not apply to refugee applicants who, before the effective date of this order, have been formally scheduled for transit by the Department of State. The Secretary of State shall resume travel of refugees into the United States under the USRAP 120 days after the effective date of this order, and the Secretary of Homeland Security shall resume making decisions on applications for refugee status only for stateless persons and nationals of countries for which the Secretary of State, the Secretary of Homeland Security, and the Director of National Intelligence have jointly determined that the additional procedures implemented pursuant to this subsection are adequate to ensure the security and welfare of the United States.

(b) Pursuant to section 212(f) of the INA, I hereby proclaim that the entry of more than 50,000 refugees in fiscal year 2017 would be detrimental to the interests of the United States, and thus suspend any entries in excess of that number until such time as I determine that additional entries would be in the national interest.

(c) Notwithstanding the temporary suspension imposed pursuant to subsection (a) of this section, the Secretary of State and the Secretary of Homeland Security may jointly determine to admit individuals to the United States as refugees on a case-by-case basis, in their discretion, but only so long as they determine that the entry of such individuals as refugees is in the national interest and does not pose a threat to the security or welfare of the United States, including in circumstances such as the following: the individual's entry would enable the United States to conform its conduct to a preexisting international agreement or arrangement, or the denial of entry would cause undue hardship.

(d) It is the policy of the executive branch that, to the extent permitted by law and as practicable, State and local jurisdictions be granted a role in the process of determining the placement or settlement in their jurisdictions of aliens eligible to be admitted to the United States as refugees. To that end, the Secretary of State shall examine existing law to determine the extent to which, consistent with applicable law, State and local jurisdictions may have greater involvement in the process of determining the placement or resettlement of refugees in their jurisdictions, and shall devise a proposal to lawfully promote such involvement.

* * * *

On June 26, 2017, the Supreme Court issued its opinion in a case challenging E.O. 13780, in which it allowed some provisions of the order to take effect, but blocked others from taking full effect. *Trump v. International Refugee Assistance Project*, No. 16-1436. In accordance with that opinion, an alien with a bona fide relationship with a

person or entity in the United States was still able to travel to and be resettled as a refugee in the United States. What constituted "a bona fide relationship with an entity" following the Supreme Court's ruling was the subject of further litigation. In particular, after the U.S. Court of Appeals for the Ninth Circuit affirmed a lower court ruling that an assurance by a resettlement agency constitutes such a bona fide relationship, the Supreme Court determined on September 12, 2017 that such an assurance did not constitute a bona fide relationship. *Trump v. Hawaii*, No. 16-1540.

The State Department held a briefing on June 29, 2017, after the Supreme Court allowed provisions of E.O. 13780 to take effect. The briefing transcript is available at https://www.state.gov/r/pa/prs/ps/2017/06/272281.htm, and includes the following regarding refugee admissions:

> For the aspects related to refugees of the executive order, Section 6 is important, and it has two pieces: Section 6(a), which put in place 120-day suspension on the admission of any refugees to the United States, although that section includes an exception for those refugees who are in transit and booked for travel; and Section 6(b), which set a 50,000 limit on the admission of refugees for Fiscal Year 2017. There is an exemption for those individuals who have bona fide relationships, and that applies to both pieces—both 6(a) and 6(b).
>
> Let me just say very briefly that those relationships have been described already, and we're already giving information out to the field so they can implement it. On the family side, those relationships have been defined to include parents, spouses, children, adult son or daughters, sons and daughter-in-laws, and siblings.[**]
>
> As regards relationships with entities in the United States, these need to be formal, documented, and formed in the ordinary course of events rather than to evade the executive order itself. Importantly, I want to add that the fact that a resettlement agency in the United States has provided a formal assurance for refugees seeking admission is not sufficient, in and of itself, to establish a bona fide relationship under the ruling. We're going to provide additional information to the field on this.
>
> But I do want to note that based on our discussions with Department of Justice, we have already informed the field and our various partners that under the in-transit exception, refugees will be permitted to travel if they've been booked to travel through July 6th. And we're going to be addressing what happens to those who've been booked to travel after that time and those who are covered by the relationships.

[**] Editor's note: Upon further review, fiancés were added to the list of relationships qualifying as close family members.

On October 23, 2017, the State Department, Department of Homeland Security, and Director of National Intelligence sent the President a memorandum providing their determinations: that there should be a 90-day further review of some aspects of the refugee program; that there should be a temporary suspension of a category of refugees called "follow to join" refugees; and that enhanced vetting procedures would be adopted with the resumption of the USRAP based on the 120-day review. The October 23, 2017 agency memo is available at https://www.dhs.gov/sites/default/files/publications/17_1023_S1_Refugee-Admissions-Program.pdf, and excerpted below.

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Pursuant to section 6(a) [of E.O. 13780], this memorandum reflects our joint determination that the improvements to the USRAP vetting process identified by the 6(a) working group are generally adequate to ensure the security and welfare of the United States, and therefore that the Secretary of State may resume travel of refugees into the United States and that the Secretary of Homeland Security may resume making decisions on applications for refugee status for stateless persons and foreign nationals, subject to the conditions described below.

Notwithstanding the additional procedures identified or implemented during the last 120 days, we continue to have concerns regarding the admission of nationals of, and stateless persons who last habitually resided in, 11 particular countries previously identified as posing a higher risk to the United States through their designation on the Security Advisory Opinion (SAO) list. The SAO list for refugees was established following the September 11th terrorist attacks and has evolved over the years through interagency consultations. The current list of countries was established in 2015. To address these concerns, we will conduct a detailed threat analysis and review for nationals of these high risk countries and stateless persons who last habitually resided in those countries, including a threat assessment of each country, pursuant to section 207(c) and applicable portions of section 212(a) of the Immigration and Nationality Act (INA), 8 U.S.C. 1157(c) and l 182(a), section 402(4) of the Homeland Security Act of 2002, 6 U.S.C. 202(4), and other applicable authorities. During this review, the Secretary of State and the Secretary of Homeland Security will temporarily prioritize refugee applications from other non-SAO countries. DHS and DOS will work together to take resources that may have been dedicated to processing nationals of, or stateless persons who last habitually resided in, SAO countries and, during the temporary review period, reallocate them to process applicants from non-SAO countries for whom the processing may not be as resource intensive.

While the temporary review is underway, the Secretaries of Homeland Security and State will cooperate to carefully scrutinize the applications of nationals of countries on the SAO list, or of stateless persons who last habitually resided in those countries, and will consider individuals for potential admission whose resettlement in the United States would fulfill critical foreign policy interests, without compromising national security and the welfare of the United States. As such, the Secretary of Homeland Security will admit on a case-by-case basis only refugees whose admission is deemed to be in the national interest and poses no threat to the security or welfare of the United States. We will direct our staff to work jointly and with law enforcement agencies to complete the additional review of the SAO countries no later than 90 days from the

date of this memorandum, and to determine what additional safeguards, if any, are necessary to ensure that the admission of refugees from these countries of concern does not pose a threat to the security and welfare of the United States.

Further, it is our joint determination that additional security measures must be implemented promptly for derivative refugees—those who are "following-to-join" principal refugees that have already been resettled in the United States—regardless of nationality. At present, the majority of following-to-join refugees, unlike principal refugees, do not undergo enhanced DHS review, which includes soliciting information from the refugee applicant earlier in the process to provide for a more thorough screening process, as well as vetting certain nationals or stateless persons against classified databases. We have jointly determined that additional security measures must be implemented before admission of following-to-join refugees can resume. Based on an assessment of current systems checks, as well as requirements for uniformity identified by Section 5, we will direct our staffs to work jointly to implement adequate screening mechanisms for following-to-join refugees that are similar to the processes employed for principal refugees, in order to ensure the security and welfare of the United States. We will resume admission of following-to-join refugees once those enhancements have been implemented.

* * * *

On October 24, 2017, the State Department issued a fact sheet on the status of the USRAP. The fact sheet is excerpted below and available at https://www.state.gov/r/pa/prs/ps/2017/10/275074.htm.

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While the Departments of State, Homeland Security, and Office of the Director of National Intelligence have jointly determined that the screening and vetting enhancements to the USRAP are generally adequate to ensure the security and welfare of the United States and therefore that the Secretary of State and Secretary of Homeland Security may resume that program, they have also concluded that additional in-depth review is needed with respect to refugees of 11 nationalities previously identified as potentially posing a higher risk to the United States. Admissions for applicants of those 11 potentially higher-risk nationalities will resume on a case-by-case basis during a new 90-day review period.

For family members who are "following-to-join" refugees that have already been resettled in the United States, additional security measures must also be implemented for all nationalities. Admissions of following-to-join refugees will resume once those enhancements have been implemented.

The United States will continue to resettle more refugees than any other country in the world, and we will continue to offer protection to the most vulnerable refugees while upholding the safety and security of the American people. The United States remains the world's leader in humanitarian assistance to refugees and displaced persons, providing more than $8 billion in FY 2017.

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U.S. Secretary of State Rex W. Tillerson delivered a press statement on Executive Order 13780 on October 25, 2017. That statement is available at https://www.state.gov/secretary/20172018tillerson/remarks/2017/10/275082.htm.

b. Central American Minors Program

In a November 8, 2017 State Department media note, the U.S. government announced the end of the Central American Minors ("CAM") refugee program in fiscal year 2018. The media note, available at https://www.state.gov/r/pa/prs/ps/2017/11/275415.htm, provides the following background on the program:

> The CAM refugee program became effective on December 1, 2014, and allowed certain parents lawfully present in the United States to request a refugee resettlement interview for their children and eligible family members who are nationals of El Salvador, Guatemala, and Honduras.

The media note also explains that, "[t]he decision to end the CAM refugee program was made as part of the overall U.S. government review of the U.S. Refugee Admissions Program for FY 2018."

3. Migration

On June 22, 2017, at the 35th session of the Human Rights Council, the United States delivered a statement on a proposed resolution on the protection of human rights of migrants. U.N. Doc. A/HRC/35/L.28. The U.S. statement follows and is available at https://geneva.usmission.gov/2017/06/22/statement-on-the-protection-of-the-human-rights-of-migrants-resolution/.

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The United States joins consensus on the "Protection of the Human Rights of Migrants" resolution and looks forward to working with Member States during the remainder of the intergovernmental consultations and negotiations leading to the adoption of a global compact for safe, orderly, and regular migration in 2018.

In joining consensus on the resolution, we would like to clarify our views on several elements in the text. First, we underscore our understanding that none of the provisions in this resolution create or affect rights or obligations of States under international law. The United States will pursue the commitments in the resolution consistent with U.S. law and policy and the federal government's authority. In pursuing these goals, the United States will also continue to

take steps to ensure national security, protect territorial sovereignty, and maintain the health and safety of its people, including by exercising its rights and responsibilities to prevent irregular migration and control its borders, consistent with international obligations.

With respect to the preambular language related to the best interest of children and due process, the U.S. government draws from a wide range of available resources to safely process migrant children, in accordance with applicable laws and is committed to ensuring that migrant children are treated in a safe, dignified, and secure manner. The United States believes that its current practices with respect to children are consistent with this commitment. Further, the United States provides appropriate procedural safeguards for all migrants, including asylum seekers, and we interpret the resolution's reference to due process and other protections, including in the context of returns, to be consistent with our existing national laws and policies in this regard.

The United States dissociates from the language concerning the criminalization of irregular migration. The United States supports the language expressing concern regarding xenophobia and hostility to migrants, which is an increasing problem that all should address. However, consistent with the statement which recalls "that each State has a sovereign right to determine whom to admit to its territory, subject to that State's international obligations," the United States maintains its right to enforce its immigration laws, including through its criminal laws, consistent with its national security interests and in accordance with its domestic laws. We find no need to express concern in this regard. We view this as a separate issue from combatting xenophobia, and regret that the concepts were linked in the same paragraph in the resolution.

The United States looks forward to advancing the objectives of this resolution, including through voluntary practical actions to be elaborated during the negotiation of the non-binding global compact on safe, orderly, and regular migration in 2018.

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On December 3, 2017, Secretary Tillerson announced in a press statement that the United States was ending its participation in the UN process to develop a Global Compact on Migration("GCM"). The press statement is excerpted below and available at https://www.state.gov/secretary/20172018tillerson/remarks/2017/12/276190.htm.

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Negotiations on the GCM will be based on the New York Declaration, a document adopted by the UN in 2016 that commits to "strengthening global governance" and contains a number of policy goals that are inconsistent with U.S. law and policy.

While we will continue to engage on a number of fronts at the United Nations, in this case, we simply cannot in good faith support a process that could undermine the sovereign right of the United States to enforce our immigration laws and secure our borders.

The United States supports international cooperation on migration issues, but it is the primary responsibility of sovereign states to help ensure that migration is safe, orderly, and legal.

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Cross References

Lin v. United States *(nationality of residents of Taiwan),* **Ch. 5.C.3**
Diplomatic relations (including with Cuba), **Ch. 9.A.**