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Travel Ban III: Why the Court Does Not Have to Second-Guess Any (Nonexistent) Presidential National Security Decisions

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There's already been a great deal written about yesterday's oral argument in *Trump v. Hawaii*. Most observers have focused on whether, for purposes of the Religion Clauses of the First Amendment, the Court should or must (or will) accept the facially neutral reasons offered for the "Travel Ban III" Proclamation or whether, instead, the Court may—and should—look behind the surface of the Proclamation to determine whether it is, in fact, the product of a presidential design to disfavor Muslims' entry into the United States, in order to make good on his campaign promises to that effect.

My focus here, however, is on the challengers' principal argument—namely, that although 8 U.S.C. 1182(f) delegates to the President a great deal of discretion to *supplement* Congress's conditions on entry in response to new and unforeseen circumstances, the President has not been delegated the authority to (in Neal Katyal's words) "take a wrecking ball to the statute and countermand Congress's fine-grained judgments." At several places in the argument, some of the Justices appeared to be uncertain about whether this is, indeed, such a case where the President is countermanding a specific congressional judgment, rather than one in which he is acting to address a new and unforeseen emergency situation involving an emerging threat to national security. I'd like to offer a few words here to explain why Neal Katyal was right that the Proclamation falls in the first category, not the second—that is to say, why this is *not* a case in which the courts are being asked, as Justice Kennedy put it, to review a presidential judgment about "whether or not there is . . . a national exigency."

Katyal's lead argument, in a nutshell, was this, from his opening:

Congress has already specified a three-part solution to the *very same problem* the Order addresses–aliens seeking entry from countries that don't cooperate with the United States in vetting, including "state sponsors of terrorism and countries that provide inaccurate information." **First**, aliens have to go through the individualized vetting process with the burden placed on them [to establish that they are eligible to receive a visa and are not inadmissible]. **Second**, when Congress became aware that some countries were failing to satisfy the very same baseline [information-sharing] criteria [identified in the Proclamation], Congress rejected a ban [on entry of all nationals of those countries]. Instead, it used carrots [in particular, the Visa Waiver Program]. When countries cooperated, they'd get [a] faster track for admission.

Legislation to use big sticks like nationality bans failed. And **third**, Congress was aware circumstances could change on the ground, so it required reporting to them so it could change the law.

At one point when Katyal was reiterating this argument, the Chief Justice interjected that "it seems to me a difficult argument to say that Congress was prescient enough to address any particular factual situation that might arise." What if, for example, the President is privy to "more particular problems in light of particular situations developing on the ground"? To similar effect was this exchange immediately preceding the Chief Justice's remarks, among Katyal and Justices Alito and Kennedy:

> JUSTICE ALITO: Can you imagine any situation in which the threat of the infiltration of the United States by terrorists was so severe with respect to a particular country that the other measures that you have mentioned could be deemed by a President to be inadequate?
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> KATYAL: Yes, I can. And the President would have a robust authority to deal with that. That is not our argument.
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> JUSTICE KENNEDY: And your argument is that courts have the duty to review whether or not there is such a national exigency; that's for the courts to do, not the President?
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> KATYAL: No. I think you'd have wide deference [to the President], Justice Kennedy. . . .Presidents have wide berth in this area . . . if there's any sort of emergency . . . . But when you have a statute that considers *the very same problem* and there's nothing new that they've identified in this worldwide review process that Congress didn't consider—exactly the same types of things: it is a perennial problem that countries do not cooperate with the United States when it comes to vetting. . . .

It appeared, in these and other places in the argument, that perhaps some Justices are under the impression that the President's September Proclamation identified, or was predicated upon, some sort of newly emergent or newly discovered "national exigency," or "particular situations developing on the ground," such as a "threat of infiltration of the United States by terrorists" so "severe with respect to a particular country that the [statutory] measures Congress has adopted] could be deemed by a President to be inadequate."

It is very important to understand that *that is not this case*.

To be sure, in section 1(f) of the *second* travel ban executive order, in March 2017, the President made a finding that in light of the conditions in six identified countries, "the risk of erroneously permitting entry of a national of one of these countries who intends to commit terrorist acts or otherwise harm the national security of the United States" was "unacceptably high" until the interagency "assessment of current screening and vetting procedures," mandated by that executive order, would be completed. (I am dubious that this finding was based upon any evidence of such a terrorism risk—the President did not cite, or state that he had been made aware of, any such evidence—but that's not relevant here.)

It is telling, however, that *following* that extensive, six-month interagency assessment, the President did not, in the September Proclamation, make any findings at all about any new, or

unacceptable, risk of terrorism being committed by the nationals of the countries covered by the Proclamation. This is hardly surprising, given that no one from these countries has killed anyone in a terrorist attack in the United States in over four decades; in the words of the Cato Institute amicus brief, "there is a total disconnect between the countries chosen and countries whose nationals, historically, have committed acts of terrorism or other crimes on U.S. soil."

Of even greater significance here, the President's Proclamation also did *not* find, or even suggest, that the highly reticulated scheme that Congress has chosen to deal with the problem the Proclamation *does* address—the failure or refusal of some countries to adequately assist U.S. vetting of their nationals—has resulted in any additional harm, or risk of harm, to the national security. (Even some who have found the Proclamation's findings to be legally inadequate have missed this point. Judge Keenan, for example, wrote in the Fourth Circuit case that "[t]he Proclamation merely exclaims that the countries' faulty protocols *create a security risk for the United States*." But the Proclamation does not say any such thing about the "faulty protocols" creating a national security risk.)

This is not simply a formalist, "gotcha" point about a failure of the President to intone some magic words. For one thing, if the agencies *had* found any basis for believing there were such a heightened national security risk, one can be certain that's something the President would have been included in the Proclamation, as part of its justification. For another, the Proclamation would make little sense if its purpose were to prevent the entry of categories of people who pose a heightened risk of terrorism, because it *allows* the nationals of, e.g., Iran, Libya, and Yemen to continue to enter the U.S. with certain forms of nonimmigrant visas, even though the vetting for such visas is typically less robust than the vetting for immigrant visas that the Proclamation prohibits for such persons.

More importantly, however, **the actual, operative effect of the Proclamation itself is *not* to exclude the entry of nationals, even on immigrant visas, who pose a risk of terrorism—indeed, its overwhelming, if not exclusive, function is to exclude nationals of the covered countries who do *not* pose such a risk.**

To see why that's so, let's look at the presidential finding at the heart of the Proclamation. Section 1182(f) authorizes the President to suspend the entry of specified aliens, or a class of aliens, whenever he finds that the entry of such aliens "would be detrimental to the interests of the United States." How would the entry of the aliens barred by the Proclamation be detrimental to the interests of the nation? In the Proclamation, the President states the following: "The restrictions and limitations imposed by this proclamation are, in my judgment, necessary to prevent the entry of those foreign nationals *about whom the United States Government lacks sufficient information to assess the risks they pose to the United States*."

Notably, this is not a finding that the entry of the excluded persons in question would be detrimental because they pose a heightened risk of committing terrorist acts. Concededly, however, it *is* an assertion that their entry would be "detrimental" because the government lacks the information to *assess* whether or not they pose such risks. As the Solicitor General put the point in his opening brief, in explaining how the Proclamation is said to satisfy the 1182(f) condition (and quoting the President's finding): "Entry of the restricted foreign nationals would be detrimental to the national interest because 'the United States Government lacks sufficient information to assess the risks they pose to the United States.'"

Here's the rub, however: Even *without* the Proclamation—that is to say, under the rules that Congress has already insisted upon and that were in place before the Proclamation took effect—if the U.S. government "lacks sufficient information to assess the risks" that a national of the covered countries poses to the United States, the government *does not allow the entry of that individual*.

This follows from, among other things, 8 U.S.C. 1361, which provides that:

Whenever any person makes application for a visa or any other document required for entry, or makes application for admission, or otherwise attempts to enter the United States, **the burden of proof shall be upon such person to establish that he is eligible to receive such visa or such document, or is not inadmissible under any provision of this chapter**, and, if an alien, that he is entitled to the nonimmigrant, immigrant, special immigrant, immediate relative, or refugee status claimed, as the case may be. If such person fails to establish to the satisfaction of the consular officer that he is eligible to receive a visa or other document required for entry, no visa or other document required for entry shall be issued to such person, **nor shall such person be admitted to the United States unless he establishes to the satisfaction of the Attorney General that he is not inadmissible under any provision of this chapter.**

Consider, for example, a case involving exactly the sorts of cooperation inadequacies identified in the Proclamation itself: Say, for instance, that a national of one of the covered countries applies for a visa, makes application for admission, or otherwise attempts to enter the United States, and his home country has failed to issue him a passport "embedded with data to enable confirmation of identity," or has failed to respond to a U.S. request for "identity-related information not included in its passports," or for information that nation possesses about the alien's "known or suspected terrorist and criminal history."

In such a case, because of the country's failure or refusal to adequately cooperate with the United States, the alien will typically not be able to meet his burden of establishing that he is not inadmissible, and therefore he will not be allowed to enter. This explains why, even without the Proclamation, the State Department refused to issue visas for aliens from the countries in question at far higher rates than for other aliens (see Cato amicus brief at 22).

The actual effect, and design, of the Proclamation, then, is not, as the presidential finding suggests, to preclude entry of those nationals about whom the Government "lacks sufficient information to assess the risks they pose to the United States." To the contrary, it is, instead, to preclude entry of many thousands of the nationals of the countries in question for whom the U.S. government *has* sufficient information to assess that they pose no such risks—for example, individuals who because of (very young or old) age, or disability, or established opposition to terrorism, cannot reasonably be considered a threat; or individuals who otherwise are able to provide compelling, reliable evidence that they are not inadmissible, despite their home country's failure to do so; or nationals of one of the designated countries who have for many years been living in a third country in which they have not demonstrated any grounds for inadmissibility, and who have not recently visited the designated country of which they are a national.

The Solicitor General, undoubtedly aware of this extreme mismatch between the problem identified in the Proclamation (the alleged "detriment" to the United States) and the restrictions that it imposes, repeatedly fell back at oral argument on the *other* rationale mentioned in the

Proclamation—namely, that the Proclamations' vast required exclusions, even of nationals who meet the burden of proving that they are *not* a risk or otherwise inadmissible, are necessary in order to exert "pressure" on the governments in question to improve their cooperation with the United States (i.e., in the words of the Proclamation, "to *elicit* improved identity-management and information-sharing protocols and practices from foreign governments").

It is not obvious that such an "inducement" theory satisfies the statutory requirement in section 1182(f) of a finding that the *entry of the individuals* would itself be "detrimental to the interests of the United States," any more than it would be the case—to use Justice Kagan's example from argument—that the entry of Israelis would be "detrimental" to the United States where the President wanted to "put pressure on Israel . . . to vote a certain way in the U.N." and thus tried to exclude entry of all Israelis in order to accomplish that end. (In such a case, it's not so much that the entry is detrimental as that the *exclusion* is said to be useful to another end, extraneous to the excluded aliens themselves.)

But even if the Court were to conclude that such a "pressure-inducing" rationale might come within the four corners of the terms of section 1182(f), the critical point here is, as Katyal emphasized, that this is not a new problem, or one that has proved to be more acute or consequential than Congress assumed: Congress has long been well aware of exactly the problem the President identified, and has deliberately chosen *not* to use an across-the-board "exclusion-of-nondangerous-nationals" method to address it. Congress has, instead, chosen a different, comprehensive series of steps to induce countries to improve their identity-management or information-sharing policies and practices. As Justice Frankfurter put the point in the *Youngstown* "Steel Seizure" case, in explaining how the Congress there had "unequivocally put aside" President Truman's desired remedy for a labor impasse (seizure of the factories) by enacting an alternative, highly reticulated scheme for dealing with such "potential dangers": "[N]othing can be plainer than that Congress made a conscious choice of policy in a field full of perplexity and peculiarly within legislative responsibility for choice." "On a balance of considerations, Congress chose not to lodge this power in the President."

Likewise in this case: If the President believes that the means chosen by Congress to induce greater information-sharing and identity-management cooperation are insufficient to address the very problem that Congress has already considered, his officers can say so in their reports to Congress, and he can propose legislation to alter the current detailed statutory response. But there is no new "exigency" here—no new "situations developing on the ground" related to information-sharing and identity-management—that was unforeseen by Congress, let alone any "situation in which the threat of the infiltration of the United States by terrorists was so severe with respect to a particular country that the other measures [prescribed by Congress] could be deemed by a President [or were deemed] to be inadequate" to the task. Nor has the President even *alleged* or asserted such an exigency.

This is not, in other words, a case in which the Court is being asked to "second-guess" a national security determination of the President. The Court could resolve the case simply by holding that although section 1182(f) authorizes the President to *supplement* Congress's immigration regime in situations where he is presented with evidence that entry of certain aliens would result in harms that Congress did not contemplate, he may not use that delegated power to supplant the decisions that Congress itself has already made with respect to harms that the legislature has already thoroughly considered.