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Malevolence Tempered by Incompetence: Trump's Horrifying Executive Order on Refugees and Visas

By [Benjamin Wittes](#) Saturday, January 28, 2017, 10:58 PM

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The malevolence of President Trump's Executive Order on visas and refugees is mitigated chiefly—and perhaps only—by the astonishing incompetence of its drafting and construction.

NBC is reporting that the document was not reviewed by DHS, the Justice Department, the State Department, or the Department of Defense, and that National Security Council lawyers were prevented from evaluating it. Moreover, the *New York Times* writes that Customs and Border Protection and U.S. Citizen and Immigration Services, the agencies tasked with carrying out the policy, were only given a briefing call while Trump was actually signing the order itself. Yesterday, the Department of Justice gave a “no comment” when asked whether the Office of Legal Counsel had reviewed Trump's executive orders—including the order at hand. (OLC normally reviews every executive order.)

This order reads to me, frankly, as though it was not reviewed by competent counsel at all.

CNN offers extraordinary details:

Administration officials weren't immediately sure which countries' citizens would be barred from entering the United States. The Department of Homeland Security was left making a legal analysis on the order after Trump signed it. A Border Patrol agent, confronted with arriving refugees, referred questions only to the President himself, according to court filings.

...

It wasn't until Friday -- the day Trump signed the order banning travel from seven Muslim-majority countries for 90 days and suspending all refugee admission for 120 days -- that career homeland security staff were allowed to see the final details of the order, a person with the familiar the matter said.

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The policy team at the White House developed the executive order on refugees and visas, and largely avoided the traditional interagency process that would have allowed the Justice Department and homeland security agencies to provide operational guidance, according to numerous officials who spoke to CNN on Saturday.

Homeland Security Secretary John Kelly and Department of Homeland Security leadership saw the final details shortly before the order was finalized, government officials said.

Friday night, DHS arrived at the legal interpretation that the executive order restrictions applying to seven countries -- Iran, Iraq, Libya, Somalia, Syria, Sudan and Yemen -- did not apply to people who with lawful permanent residence, generally referred to as green card holders.

The White House overruled that guidance overnight, according to officials familiar with the rollout. That order came from the President's inner circle, led by Stephen Miller and Steve Bannon. Their decision held that, on a case by case basis, DHS could allow green card holders to enter the US.

As I shall explain, in the short term, the incompetence is actually good news for people who believe in visa and refugee policies based on criteria other than—let's not be coy about this—bigotry and religious discrimination. The President has created a target-rich environment for litigation that will make his policies, I suspect, less effective than they would have been had he subjected his order to vetting one percent as extreme as the vetting to which he proposes to subject refugees from Bashar al-Assad and the bombing raids of Vladimir Putin.

Indeed, even as I write these words, the ACLU has already succeeded in petitioning a federal court for a class-wide stay of deportations of immigrants and refugees trapped in airports by Trump's order. And a federal judge in Virginia has issued a temporary restraining order

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preventing the removal of green card holders detained in Dulles International Airport and requiring that these legal residents of the United States have access to counsel.



In the broader sense, however, it is most emphatically not good news to have a White House that just makes decisions with no serious thought or interagency input into what those decisions might mean. In fact, it's really dangerous.

Let's start with the malevolence of [the document](#), which [Amira Mikhail summarized](#) and [Adham Sahloul analyzed](#) earlier today. I don't use the word "malevolence" here lightly. As readers of my work know, I believe in strong counterterrorism powers. I defend non-criminal detention. I've got no problem with drone strikes. I'm positively enthusiastic about American surveillance policies. I was much less offended than others were by the CIA's interrogations in the years after September 11. I have defended military commissions.

Some of these policies were effective; some were not. Some worked out better than others. And I don't mean to relitigate any of those questions here. My sole point is that all of these policies were conceptualized and designed and implemented by people who were earnestly trying to protect the country from very real threats. And the policies were, to a one, proximately related to important goals in the effort. While some of these policies proved tragically misguided and caused great harm to innocent people, *none of them was designed or intended to be cruel to vulnerable, concededly innocent people*. Even the CIA's interrogation program, after all, was deployed against people the agency believed (mostly correctly) to be senior terrorists of the most dangerous sort and to garner information from them that would prevent attacks.

I actually cannot say that about Trump's new executive order—and neither can anyone else.

Here's how the order describes its purpose:

Section 1. Purpose. The visa-issuance process plays a crucial role in detecting individuals with terrorist ties and stopping them from entering the United States. Perhaps in no instance was that more apparent than the terrorist attacks of September 11, 2001, when State Department policy prevented consular officers from properly scrutinizing the visa applications of several of the 19 foreign nationals who went on to murder nearly 3,000 Americans. And while the visa-issuance process was reviewed and amended after the September 11 attacks to better detect would-be terrorists from receiving visas, these measures did not stop attacks by foreign nationals who were admitted to the United States.

Numerous foreign-born individuals have been convicted or implicated in terrorism-related crimes since September 11, 2001, including foreign nationals who entered the United States after receiving visitor, student, or employment visas, or who entered through the United States refugee resettlement program. Deteriorating conditions in certain countries due to war, strife, disaster, and civil unrest increase the likelihood that terrorists will use any means possible to enter the United States. The United States must be vigilant during the visa-issuance process to ensure that those approved for admission do not intend to harm Americans and that they have no ties to terrorism.

In order to protect Americans, the United States must ensure that those admitted to this country do not bear hostile attitudes toward it and its founding principles. The United States cannot, and should not, admit those who do not support the Constitution, or those who would place violent ideologies over American law. In addition, the United States should not admit those who engage in acts of bigotry or hatred (including "honor" killings, other forms of violence against women, or the persecution of those who practice religions different from their own) or those who would oppress Americans of any race, gender, or sexual orientation.

Color me skeptical that this is the real purpose. After all, if this is the real purpose, then the document is both wildly over-inclusive and wildly under-inclusive. On the over-inclusive side, it will keep tens of thousands of innocent refugees who have been subject to unspeakable violence outside of the protection of the United States on the vanishingly small chance that these people might be terrorists—indeed, to make it impossible for them *even to apply* for refugee admission if they are Syrian. It will prevent untold numbers of people about whom there is no whiff of suspicion from coming here as students, as professionals, as tourists. It overtly treats members of a particular religion differently from other people.

On the underinclusive side, the order wouldn't have blocked the entry of many of the people responsible for the worst recent terrorist attacks. There is, in fact, simply no rational relationship between cutting off visits from the particular countries that Trump targets (Muslim countries that don't happen to be close U.S. allies) and any expected counterterrorism goods. The 9/11 hijackers, after all, didn't come from Somalia or Syria or Iran; they came from Saudi Arabia and Egypt and a few other countries not affected by the order. Of the San Bernardino attackers (both of Pakistani origin, one a U.S. citizen and the other a lawful permanent resident), the Orlando shooter (a U.S. citizen whose parents were born in Afghanistan), and the Boston marathon bombers (one a naturalized U.S. citizen, one a

green card holder who arrived in Massachusetts from Kyrgyzstan), none came from countries listed in the order. One might argue, I suppose, that the document is tied to current threats. But come now, how could Pakistan *not* be on a list guided by current threat perception?

What's more, the document also takes steps that strike me as utterly orthogonal to any relevant security interest. If the purpose of the order is the one it describes, for example, I can think of no good reason to burden the lives of students individually suspected of nothing who are here lawfully and just happen to be temporarily overseas, or to detain tourists and refugees who were mid-flight when the order came down. I have trouble imagining any reason to raise questions about whether green card holders who have lived here for years can leave the country and then return. Yes, it's temporary, and that may lessen the costs (or it may not, depending on the outcome of the policy review the order mandates), but temporarily irrational is still irrational.

Put simply, I don't believe that the stated purpose is the real purpose. This is the first policy the United States has adopted in the post-9/11 era about which I have ever said this. It's a grave charge, I know, and I'm not making it lightly. But in the rational pursuit of security objectives, you don't marginalize your expert security agencies and fail to vet your ideas through a normal interagency process. You don't target the wrong people in nutty ways when you're rationally pursuing real security objectives.

When do you do these things? You do these things when you're elevating the symbolic politics of bashing Islam over any actual security interest. You do them when you've made a deliberate decision to burden human lives to make a public point. In other words, this is not a document that will cause hardship and misery because of regrettable incidental impacts on people injured in the pursuit of a public good. It will cause hardship and misery for tens or hundreds of thousands of people *because that is precisely what it is intended to do*.

To be sure, the executive order does not say anything as crass as: "Sec. 14. Burdening Muslim Lives to Make Political Point." It doesn't need to. There's simply no reason in reading it to ignore everything Trump said during the campaign, during which he repeatedly called for a ban on Muslims entering the United States.

Even while he was preparing to sign the order itself, he declared, "This is the 'Protection of the Nation from Foreign Terrorist Entry into the United States.' We all know what that means." Indeed, we do. This document is the implementation of a campaign promise to keep out Muslims moderated only by the fact that certain allied Muslim countries are left out because the diplomatic repercussions of including them would be too detrimental.

Many years ago, the great constitutional law scholar Charles Black Jr., contemplating the separate but equal doctrine, asked:

does segregation offend against equality? Equality, like all general concepts, has marginal areas where philosophic difficulties are encountered. But if a whole race of people finds itself confined within a system which is set up and continued for the very purpose of keeping it in an inferior station, and if the question is then solemnly propounded whether such a race is being treated "equally," I think we ought to exercise one of the sovereign prerogatives of philosophers—that of laughter.

I think we can, without drawing any kind of equivalence between this order and Jim Crow, make a similar point here: Is this document a reasonable security measure? There are many areas in which security policy affects innocent lives but within which we do not presumptively say that the fact that some group of people faces disproportionate burdens renders that policy illegitimate. But if an entire religious grouping finds itself irrationally excluded from the country for no discernible security benefit following a lengthy campaign that overtly promised precisely such discrimination and exactly this sort of exclusion, if the relevant security agencies are excluded from the policy process, and if the question is then solemnly propounded whether the reasonable pursuit of security is the purpose, I think we ought to exercise one of the sovereign prerogatives of philosophers—that of laughter.

So yes, the order is malevolent. But here's the thing: Many of these malevolent objectives were certainly achievable within the president's lawful authority. The president's power over refugee admissions is vast. His power to restrict visa issuances and entry of aliens to the United States is almost as wide. If the National Security Council had run a process of minimal competence, it could certainly have done a lot of stuff that folks like me, who care about refugees, would have gnashed our teeth over but which would have been solidly within the President's authority. It could have all been implemented in a fashion that didn't create endless litigation opportunities and didn't cause enormous diplomatic friction.

How incompetent is this order? An immigration lawyer who works for the federal government wrote me today describing the quality of the work as "look[ing] like what an intern came up with over a lunch hour. . . . My take is that it is so poorly written that it's hard to tell the impact." One of the reasons there's so much chaos going on right now, in fact, is that nobody really knows what the order means on important points.

Some examples:

- Sec. 3(c) bans "entry"—which to the best of my knowledge has had no meaning in the Immigration and Nationality Act (INA) since the passage of the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) in 1996. Pre-IIRIRA law did use the term "entry," but that is no longer the case.
- Section 3(g) talks of waivers on a case-by-case basis for people who are otherwise denied visas or other benefits under the immigration laws pursuant to the order. If a person needs a waiver to obtain "other benefits," does that mean that nationals of the seven countries are denied *any* benefit under the INA without a waiver, benefits such as naturalization, adjustment of status, or temporary protected status, even if they are already in the US?

- On its face, the order bars entry of both immigrants and non-immigrants. Again, as entry is not defined, and no one was given any time to draft implementing guidance or to clarify any points, it's no surprise that Customs and Border Protection doesn't seem to know how to apply it to lawful permanent residents (LPRs). The INA, at section 101(a)(13)(C), says that green card holders will not be deemed as seeking admission absent the factors enumerated therein—factors that do not include an executive order banning entry. Yet Reuters and The Guardian are both reporting quotations from a DHS public relations official, stating that the order *does* apply to LPRs. If that interpretation lasts, look for DHS to get its ass handed to it on a platter in federal court—a defeat it will richly deserve.
- Another big mystery is how the order will apply to asylees. Will people even be allowed to apply? On the one hand, the right to seek asylum is right there in the INA. But to apply for asylum, you have to be interviewed by a U.S. Citizen and Immigration Services officer to determine if you have a credible fear of persecution. Is that interview a benefit under the act? And if so, is it barred? From what I hear, right now anyway, Customs and Border Protection is not allowing anyone to claim asylum and have a credible fear interview.

I could go on, but you get the point. This order is a giant birthday present to the ACLU and other immigration litigators. And godspeed to them in going after it—which, as I noted above, they are already succeeding in doing.

But the incompetence actually does not stop at running a process that causes legal chaos and probable manhandling by the federal courts.

Consider, for example, the likely diplomatic fallout. In his first week in office, Trump has managed to create a major rift with Mexico, our peaceable neighbor to the south with whom we have no earthly reason to be spatting and haven't had bilateral problem this serious since Pancho Villa. Trump's new order seems certain to raise tensions with other countries too—and not just the countries whose nationals it targets (Iran, for example, which today restricted travel by U.S. nationals in retaliation; a great many U.S. citizens have family in Iran and now can't visit them).

Because the order applies to dual nationals, where a person is a citizen of one restricted country and one non-restricted country, it appears to bar entry to hundreds of thousands of citizens of the U.K. and Canada—including a British Member of Parliament and a Canadian-Iranian consultant who lives in the United States but now can no longer safely travel to her business's headquarters in Toronto without being blocked from reentry. British Prime Minister Theresa May wasn't showing a lot of spine today over the matter, but what happens when she starts getting political blowback at home for the not standing up to the U.S. over its treatment of her nationals?

And Canadian Prime Minister Justin Trudeau is already making noise. He tweeted today:



Justin Trudeau ✓

@JustinTrudeau

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In some ways, the most stunning incompetence in the document appears in one of the least discussed sections: The section at the end that mandates reporting on the nefarious terrorist activities of foreigners in the United States. This section requires regular reports from DHS on terrorism-related offenses by foreign nationals, and gender-based violence and honor killings by foreign nationals (because remember, Mexico sends us their rapists and Muslims all kill their daughters when they date Americans).

The White House appears to have included this section because the Trumpists think it will show that large numbers of foreigners are coming to the United States and committing acts of terrorism here. But that is delusional, and the data will not show that—as I suspect someone at DHS would have pointed out had they had the chance. [Here's *Politifact*](#) summarizing the extant data on the citizenship status of the authors of terrorist attacks in the United States:

The New America Foundation, a Washington think tank that promotes data-driven research for social and economic policy, did an analysis of "homegrown extremism" since 2000. The foundation compiled data on 499 extremists, who either adhered to jihadist ideology inspired by al-Qaida or were motivated by right- or left-wing political beliefs. This database includes attacks as well as those accused of terrorism-related offenses, such as plotting attacks or fundraising.

New America found that about 64 percent of the extremists were U.S.-born citizens and 80 percent were either American-born or naturalized citizens. The database shows eight out of 499 extremists were illegal residents; all eight were jihadists.

A New York Times analysis cited by many experts we interviewed found that half of the jihadist attacks since 2001 were committed by men born in the United States. Many others were naturalized citizens. Some were noncitizens but were traveling legally, such as Richard Reid, the attempted shoe bomber in Miami in 2001, who didn't need a visa because he was from Britain.

Overall, databases of terrorist acts in the United States show that many were committed by Americans or naturalized citizens, though some high-profile incidents have involved legal immigrants.

"Empirically, domestic terrorism is carried out by citizens—not immigrants—with right-wing terrorism, racial hate crimes, and the sovereign-citizen movement making up a majority of domestic terrorist incidents," said Joel Day, assistant professor of security and global studies at the University of Massachusetts Lowell. "Other domestic incidents have indeed been carried out by those who came here through legal channels."

In other words, the executive order sets up a reporting mechanism that will almost certainly falsify its own premise.

I would wax triumphant about the mitigating effect of incompetence on this document, but alas, I can't do it. The president's powers in this area are vast, as I say, and while the incompetence is likely to buy the administration a world of hurt in court and in diplomacy in the short term, this order is still going to take more than a few pounds of flesh out of a lot of innocent people.

Moreover, it's a very dangerous thing to have a White House that can't with the remotest pretense of competence and governance put together a major policy document on a crucial set of national security issues without inducing an avalanche of litigation and wide diplomatic fallout. If the incompetence mitigates the malevolence in this case, that'll be a blessing. But given the nature of the federal immigration powers, the mitigation may be small and the blessing short-lived; the implications of having an executive this inept are not small and won't be short-lived.

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