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US IMMIGRATION & NATIONALITY LAW

# MORE ALTERNATIVE FACTS: THE ORWELLIAN ABUSE OF LANGUAGE IN CONNECTION WITH DONALD TRUMP'S RECENT EXECUTIVE ORDERS ON IMMIGRATION

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Following an incident in which White House press secretary Sean Spicer provided false numbers regarding the size of the crowds at the inauguration of Donald Trump as President, Trump senior advisor Kellyanne Conway memorably stated on NBC's "Meet the Press" that Mr. Spicer had merely been providing "alternative facts." This claim has, deservedly, been the subject of much ridicule. As host Chuck Todd stated during that same interview in response to what one article rightly termed an "Orwellian turn of phrase": "Alternative facts are not facts. They're falsehoods." Such disregard for the truth has been a common feature of the early days of the Trump Administration.

The same Orwellian approach to language has been evident in the Trump Administration's recently issued executive orders regarding immigration. Both the January 25, 2017, Executive Order entitled "Enhancing Public Safety in the Interior of the United States" and the January 27, 2017, Executive Order entitled "Protecting the Nation from Foreign Terrorist Entry Into the United States," involve in different ways a very troubling relationship with the notion of truth. (The orders also have a number of other deeply objectionable aspects, too many to fully address in one blog post, although many other blog posts, editorials, and op-eds by other authors on the subject are well worth reading.)

The January 25 executive order, among other changes to enforcement policy, creates a list of priorities for removal which, at first glance, is intended to focus in large part on criminals. As the New York Times explained in an article

published the day the order was issued, however, the executive order in effect defines the notion of a criminal for these purposes to include people charged with a criminal offense but never convicted of anything, as well as anyone who has "committed acts that constitute a chargeable criminal offense" (or, more precisely, anyone believed by the immigration authorities to have done so).

These priorities thus include people quite far afield from any traditional notion of what it means to be a "criminal". It is, or used to be, a tradition of long standing in this country that one charged with a crime is presumed innocent until proven guilty. The mere fact that someone has "been charged with any criminal offense, where such charge has not been resolved," to quote from Section 5(b) of the January 25 executive order, does not make them a criminal. They might be innocent of any wrongdoing, and might be acquitted as the criminal case moved forward. The idea that any technically removable person will become a high priority by virtue of an unresolved charge, of which they may be completely innocent, is therefore very troubling. While merely being a priority is not itself a basis for removal, the executive order implies that the Administration could pursue removal of someone facing unresolved criminal charges who had overstayed a nonimmigrant admission for a short period of time, or failed to file a change of address and could not sufficiently establish that the failure was non-willful or excusable.

The notion that anyone who has "committed acts that constitute a chargeable criminal offense" will be a priority for removal even if not convicted of any charge is also troubling, and has broader implications than may be apparent at first glance. Entry without inspection is a misdemeanor under 8 U.S.C. 1325, for example, so this priority could be read to apply to anyone who crossed the border without authorization, at least as an adult—even if that entry took place many years ago.

The January 27 executive order, which bars entry by nationals of Syria, Iraq, Iran, Somalia, Yemen, and Libya for 90 days subject to possible future extensions, and suspends all refugee admissions for 120 days, rests even more fully on a disconnect from the truth. It purports to be focused on protecting the U.S. from "Terrorist" entry, and yet it applies to many people who are extremely unlikely to be terrorists. Besides a distaste for refugee admissions generally, it seems to be based on antagonism towards predominantly Muslim countries, and has thus been referred to as a "Muslim ban"—although it ironically does not apply to the few predominantly Muslim countries whose citizens were

responsible for the attacks against the United States on September 11, 2001 that it invokes, such as Saudi Arabia, the country of citizenship of 15 of the 19 September 11th hijackers. (It has been pointed out that the ban appears to leave out countries where Donald Trump has done business.) Instead, the entry ban focuses on countries which either Congress or DHS previously deemed worthy of being a basis for exclusion from the Visa Waiver Program in the event that an otherwise VWP-eligible person had dual nationality in them or had visited them—an exclusion which, while it had some perverse effects, simply meant that such people had to apply for visas and thus be subjected to additional scrutiny. This new order, however, applies to people who already have been granted visas (or documents to travel to the United States as refugees, which are not technically quite the same thing), following intense scrutiny and under circumstances that make it quite unlikely they would actually be terrorists.

Perhaps the first and most obvious example of those who can be deemed potential "terrorists" only by Orwellian abuse of the word are those who were granted permission to immigrate specifically due to their service to the United States, such as the special immigrants issued visas based on their work for the U.S. military in Iraq. The lead plaintiff in the ACLU lawsuit that resulted in the first temporary injunction blocking deportation of those affected by the executive order, Hameed Khalid Darweesh, was a former U.S. Army translator in Iraq who had received his special immigrant visa based on that service and had been twice targeted by terrorists in Iraq because of that service. The Pentagon has now indicated that it will submit to the White House a list of Iraqis who have worked alongside the United States so that they may possibly be exempted from the entry ban. That there was no exemption of such people from the January 27th executive order, and no promise even now that such people will be exempted, is even more outrageous than the executive order itself. The notion that blocking Mr. Darweesh's entry would protect the U.S. from "terrorists" is a falsehood much graver than Mr. Spicer's original alternative facts regarding crowd size.

While perhaps the most obvious example, however, those who served the U.S. military in Iraq are far from the only people affected by the January 27 executive order who cannot reasonably be associated with terrorism. The executive order at least temporarily bars refugees from all countries of the

world, including countries with no connection whatsoever to any past terrorist attack against the United States. It also bars refugees persecuted by the very same extremist groups which might seek to do us harm, and whose cases have undergone extensive vetting before they reach the stage of applying for admission. The January 27 executive order seemingly ignores the extensive screening that already exists for all refugees and visa applicants.

Despite all this, the Administration has sought to remove people covered by the January 27 executive order from the United States as soon as they arrive, without taking any time to investigate whether they might conceivably be reasonably suspected of any connection with terrorism. Fortunately, the courts have stepped in, with both the aforementioned injunction in Mr. Darweesh's class action and several others. These injunctions did not come soon enough for all of the innocent victims of the executive order, however. At least one habeas plaintiff was removed from the United States while an application for a temporary restraining order was pending, although Judge Dolly Gee of the U.S. District Court for the Central District of California has now ordered that Ali Vayeghan be returned to the United States. Others, however, were removed or coerced to withdraw their applications for admission under circumstances that make their return less likely.

The Administration even initially sought to apply the entry ban to Lawful Permanent Residents (LPRs) of the United States with citizenship in one of the 7 affected countries—that is, people with "green cards", who have already been cleared to live here permanently. That was extremely legally questionable in the view of this author, given that the power relied upon by the January 27 executive order, section 212(f) of the Immigration and Nationality Act, authorizes the President to suspend the "entry" of certain aliens, and many LPRs returning from brief trips are under section 101(a)(13)(C) of the INA not to "be regarded as seeking an admission into the United States". Since section 101(a)(13)(A) of the INA defines "admission" as "the lawful entry of the alien into the United States after inspection and authorization by an immigration officer," it would appear to follow that one who is inspected, and should not be regarded as seeking admission, also should not be regarded as seeking entry. That would also be consistent with the purpose of section 101(a)(13)(C) to codify a modified version of the Supreme Court's decision in *Rosenberg v. Fleuti*, 374 U.S. 449 (1963), which held under prior law that an LPR did not make an "entry" following an innocent, casual, and brief departure from the United

States. The issue may not need to be resolved in litigation in the near future, however, because the DHS Secretary, General John Kelly, determined Sunday that "the entry of lawful permanent residents is in the national interest", and so "absent significant derogatory information indicating a serious threat to public safety and welfare, lawful permanent resident status will be a dispositive factor in case-by-case determinations." That is, LPRs from the affected countries will be allowed to return to the United States in most instances. It is consistent with the theme of this blog, though, that the Administration initially sought to redefine "entry" as something other than what it ought to mean under immigration law, and still evidently reserves the right to do so if it feels it is in possession of "significant derogatory information."

Nor are the redefinition of "entry" and the basic disconnect regarding the relevance of this entry ban to "terrorism" the only alternative facts underpinning the January 27 executive order. The order indicates that when refugee admissions resume, preference is to be given to religious minorities, which has been understood as intended to mean Christians in predominantly Muslim countries (although there are countries where Muslims are in the minority as well). Mr. Trump's suggestion that Christian refugees had previously had "no chance" of coming to the United States is, however, also untrue. As the New York Times has explained, "In 2016, the United States admitted almost as many Christian refugees (37,521) as Muslim refugees (38,901), according to the Pew Research Center." Many Christian leaders have denounced the entry ban.

There is also Mr. Trump's false claim that "My policy is similar to what President Obama did in 2011 when he banned visas for refugees from Iraq for six months." In fact, the narrowly focused increase in screening of refugees and applicants for Special Immigrant Visas from one country, during which some Iraqis nonetheless continued to be admitted to the United States each month of the six months in question, is in no way "similar" to a months-long outright ban on entry of nearly all citizens from seven countries. Moreover, the heightened screening created in 2011 is still in place, so the fact that scrutiny of Iraqi refugees and visa applicants was increased six years ago cannot reasonably be offered as a reason for suspending their entry now.

The fictional Superman was known for defending "truth, justice, and the American way." Based on his disregard for the truth, Donald Trump has perpetrated a great injustice, one inconsistent with the American way of

hospitality towards immigrants and refugees. Several Democratic leaders have indicated that they will propose bills in Congress to overturn the January 27 executive order, and Democratic Senate leader Chuck Schumer unsuccessfully attempted Monday to get consent for a vote on such a bill. Such bills face highly uncertain prospects in the Republican Congress, given that House Speaker Paul Ryan seemed to express support for the executive orders in his statement on the subject, but we can hope—and, for those of us whose representatives are not already on record in favor, can contact them to urge their support. Donations to the ACLU in connection with its pending lawsuit against the January 27 executive order are another way to show opposition to the entry ban.

Alternative facts are bad enough when they concern something as trivial as crowd size. That they would be relied upon to harm innocent immigrants is unacceptable.