The Green Card

Welcome to the Newsletter of the FBA's Immigration Law Section

Betty Stevens, Chair

Quote of the Month

I have been impressed with the urgency of doing. Knowing is not enough; we must apply. Being willing is not enough, we must do.
--- Leonardo da Vinci, 1452-1519

Message from the Chair

I am honored to be selected as the Chair of the FBA's Immigration Law Section for 2017-2018. I joined the ILS Board of Directors in 2010, pleased to have found a congenial group of immigration lawyers who were more than willing to include a government litigator in their midst. I believe that professional diversity is key to the continued growth of the ILS – which has tripled in size since that time. We must continue to be a resource for education, not issue advocacy – especially if we hope to keep the government lawyers, including the immigration judges, as panelists for our seminars and conferences. The ILS speaks for all of its members, be they private bar, immigration judges and BIA members, agency attorneys, DOJ litigators, or federal judges. We welcome all to our various efforts – be it our yearly conference, luncheons, webinars, or seminars.

Over the next year, the Section faces two big issues: what to do about the proposed bylaws, approved by the Board this past year and returned without approval by National; and the future leadership of the section. The two issues are related, both prompted by the new policy enacted by the FBA National Board in June, which bars any officer from serving more than one term as Chair

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In This Issue

By Jason Dzubow

The Philosophy Behind the Asylum Affidavit

If you ask three lawyers how to write an asylum affidavit, you're likely to get three (or more) opinions.

An applicant's affidavit is the heart of her asylum case. It explains who she is, what happened to her, and why she needs protection. It's also an opportunity to address weak points in the case and to mitigate inconsistencies that may have come up in prior encounters with U.S. government officials.

Given how important it is, it's not surprising that different lawyers have different ideas about how to write a good affidavit. Some lawyers write long, very detailed affidavits. Others write short, perfunctory affidavits or do not write affidavits at all. Most of us--including me--fall somewhere in the middle.

There's probably no "right" answer here, but for me, at least, the arguments for a detailed--but not too detailed--affidavit are the most convincing.

One problem with providing a lot of detail in an affidavit is that it creates more opportunities for inconsistencies: If there are more facts in the affidavit, the applicant has more to remember. For example, if the written statement indicates that the applicant ate peppered tuna with Nicoise salad before he was arrested, he better say that he ate peppered tuna with Nicoise salad when he testifies. Otherwise, the adjudicator might take the inconsistency as a lie, which could cause the applicant to lose his case.

Taken to an extreme, the concern about consistency between the written and oral testimony might suggest that the best approach is a less-detailed affidavit, or even that no affidavit is needed at all. From the attorney's point of view, this would be nice, since the affidavit represents a large portion of the work we do. And it's always convenient when the best interest of the client (avoiding inconsistencies) and the best interest of the lawyer (laziness) are aligned.

However, I think there is a major risk involved with using a minimal (or non-existent) affidavit. First, under the REAL ID Act, an applicant is required to submit evidence when it is available. Typically, this consists of letters attesting to the persecution or other aspects of the case, medical reports, police records, and country condition information. Many of these documents will include dates (for example, a letter might indicate that the applicant was arrested on May 15, 2010) or other details. It is important that the applicant herself is aware of all these dates and details, and that her testimony be consist with them. Writing an affidavit, and having the applicant read it, is one way to help ensure consistency between the applicant's testimony and her supporting evidence.

Also, the affidavit is useful for ensuring consistency between all the different pieces of evidence. Instead of comparing each letter to every other letter, you need only compare each letter to the affidavit. As long as every document is consistent with the affidavit, every document should be consistent with every other document. And if everything is consistent, it bolsters the applicant's credibility.

I suppose you could write out the affidavit to help the applicant with his story and to help ensure consistency, but then not give the affidavit to the Asylum Officer or Immigration Judge. In this way, you would gain the benefits of having an affidavit while avoiding the risk of inconsistencies created by submitting the affidavit. But I'm not a fan of this approach, as I think the affidavit benefits the decision-maker in several ways. For one thing, it gives the decision-maker a detailed understanding of the case, which, if presented correctly, should go a long way towards producing a successful outcome.

Second, it allows the applicant to point out and mitigate weak points in his case. Most Asylum Officers and Immigration Judges are pretty smart, and they're experienced enough to hone in on problems in a case. If the problems can be overcome and explained in the affidavit, it will help satisfy the decision-maker before she even meets the applicant. This will allow the decision-maker to focus on the portions of the case that you want to emphasize.

In addition, in court, an applicant's oral testimony is often incomplete. Court testimony is commonly truncated to save time (especially where the Immigration Judge and DHS attorney are already familiar with the story from the affidavit and thus do not need to hear the applicant repeat his entire tale). Should the application for asylum be denied, the affidavit is useful on appeal, and many lawyers--including yours truly--have used affidavit testimony to help win an appeal with the Board of Immigration Appeals or the federal circuit court.

So for all these reasons, I think a comprehensive affidavit is beneficial to the case. But of course, it is possible to include too much detail, which can trip up an applicant. The trick is to find the balance between providing the necessary information to convince the decision-maker and to humanize the client, but not so much information that the client can't keep track of it all and the legally-relevant facts become obscured by irrelevant detail. Enough, but not too much. It's an art, not a science, and with experience, each lawyer develops a style that works for his clients and hopefully helps achieve the clients' goals.

Did Immigration Advocates Help Create Donald Trump?

As Donald Trump marches (goose steps?) toward the Republican nomination, there's been much hand wringing about the reasons for his rise. But if you listen to his supporters, there are a few themes that stand out.

One big issue is immigration. Last June, Mr. Trump called

Mexican immigrants "rapists" and he has advocated banning all Muslims from entering the United States. Indeed, for a time, the *only* issue on the Trump campaign website was immigration (or maybe more accurately, anti-immigration).

There are many explanations for why Mr. Trump's xenophobia has resonated with his supporters: Fear of terrorists and criminals, economic and cultural concerns, racism and white supremacism. In a way, these are not new. For most of our country's history, U.S. immigration policies have reflected such sentiments, and at various times, all sorts of people have been blocked from entering the United States.

Here, however, I am interested in a different question: Whether the work of immigration advocates to help asylum seekers has contributed to the climate that produced Donald Trump.

Now wait just one gosh-darned second here, you say. Isn't this like blaming Jews for the Holocaust or blaming African Americans for the KKK? I think there's a difference. Allow me to explain—

Over the last 20 or so years, we've seen a marked expansion in the types of people who qualify for asylum. Some of this was Congressionally sanctioned--protecting victims of forced abortion, for example--but mostly, it was the result of creative lawyers pushing the boundaries of the law to protect their clients. Litigation has resulted in protection for victims of female genital mutilation, domestic violence, and forced marriage. To a more limited extent, victims of criminal gangs can also qualify for protection (sometimes), and many talented attorneys are working hard to improve asylum-case outcomes for such people, whose lives often are at risk.

Until about 2012 or 2013, the effort to broaden the categories of protection was somewhat theoretical. More people were eligible, but the number of asylum seekers actually applying remained relatively stable. But then things changed.

Between 2009 and 2012, increasing numbers of people--mostly Central American--began arriving at the Southern border to seek asylum (in FY 2009, there were about 5,500 such asylum seekers; in FY 2012, there were over 13,600). Since 2013, the numbers have skyrocketed. The most recent data shows that well over 6,000 people *per month* are requesting asylum at the border.

Most of the Central American applicants don't easily fit within the traditional protected categories of asylum. They are fleeing criminal gangs and domestic violence, but given the expanded range of people who can qualify for protection, they now have a realistic possibility of receiving asylum.

As the number of migrants from Central America was on the upswing, activists for the DREAM Act began seeking asylum in order to highlight their own plight (the DREAM Act, which has been stalled in Congress, would grant residency to certain undocumented immigrants who were brought here as children and who have lived their lives in the United States, but who currently have no lawful immigration status). The DREAM activists received a lot of attention in the media, and they demonstrated in a public way that asylum seekers could arrive at the Southern border, request protection, and be paroled into the country to pursue their cases.

It seems likely that these two events--changes in the law wrought by litigation and wide-spread publicity about asylum seekers gaining entry into the U.S. at the border--helped lead to the current spike in migration. This is not to say that people coming here for asylum are not also fleeing severe violence in their home countries--they are: Honduras, El Salvador, and Guatemala are three of the most dangerous places on Earth. But when you look at data about violent crime in those countries, there is little evidence correlating increased violence with increased migration. In other words, these countries had previously been very violent; something else seems to have spurred the current wave of migration. Quite possibly, that «something else» includes an improved legal climate and publicity about asylum.

Added to all this is the Obama Administration's decision to allow an additional 10,000 Syrian refugees to resettle in the U.S. at a time when fear of terrorism seems to be at an all-time high. This decision was not made in consultation with Congress; the President has the power to make such a decision and he did. A slew of Republicans weighed in against the move.

We now return to Donald Trump.

The idea that "liberal elites" are making decisions to encourage more immigration, and that ordinary Americans (i.e., Trump supporters) have no say in these decisions, fits neatly into Mr. Trump's narrative. This world view is not unrelated to reality. Indeed, as we've seen, recent changes related to asylum and refugee policies likely have brought more immigrants to the United States, and these changes were not reached by consensus, or even by a democratic process. Rather, they were achieved through litigation and civil disobedience, or via executive action--all methods of choice for the "liberal elite."

Should we--the liberal elite--have done things differently? I'm not sure, but I certainly won't apologize for the work of advocates and activists to represent our clients and to expand the law. That is our job and our duty. The President's decision to bring more Syrian refugees here was also the right choice, and--to me at least--represents a fairly tepid response to a massive crisis.

But obviously there is a problem. Many people feel left out of the decision-making process, and that is wrong. Immigration profoundly affects who we are as a country, and Americans--all Americans--have a right to participate in the policy debate on that topic. In taking action to protect our clients and save lives, we "elites" have, to a certain extent, trampled over the democratic process.

Perhaps this is all dust in the wind: People who support xenophobes like Mr. Trump aren't likely to have their minds changed by refugee sob stories or even by evidence that immigration actually helps the country. The sad state of our national discourse has prevented the type of rational policy debate that we need to move towards a broader consensus. Against mounting evidence, the optimist in me still believes that democracy works. I'd like to see a little more of it in our national conversa-

tion about immigration.

When Lawyers Lie

The case of Detroit-area immigration lawyer David Wenger has been in the news lately. Mr. Wenger was recently sentenced to 18 months in prison for counseling his client to lie to the Immigration Court.

Mr. Wenger's client is a 45-year-old Albanian citizen who has lived in the U.S. since he was six months old. The client's family, including his daughter, live in the United States as well. Apparently, the client landed in removal proceedings due to a 2013 controlled-substance conviction, but the source of Mr. Wenger's troubles stem from the client's decades-old conviction for criminal sexual misconduct.

It seems that Mr. Wenger feared that if the Immigration Judge became aware of the sexual misconduct conviction, the client would have been deported. Having witnessed the tragedy of deportation many times, and particularly the pain it causes to the children of the deported, Mr. Wenger took matters into his own hands and tried to cover up the old conviction. It didn't work.

Now, Mr. Wenger is going to jail and the client--while still in the United States--faces an uncertain future.

Mr. Wenger's tale has caused some buzz among my fellow immigration lawyers. Mostly, it is described as "sad," and certainly there is an undercurrent of sympathy for a man whose advocacy crossed a line that we, as lawyers, are trained to approach. I've known criminal defense lawyers, for example, who say that if you don't go to jail for contempt once in a while, you're not doing your job. And certainly there is an element of truth to this: When you are advocating for an individual against The Man, you have to use all the tools at your disposal and push the limits of the law to protect your client. That is our job--and our duty--as lawyers. But such zealous advocacy has inherent risks, as Mr. Wenger's story reminds us.

So I suppose I understand Mr. Wenger's motivation to lie. But I do not understand how he thought he might get away with it in this particular case. The U.S. government keeps records of criminal convictions, and the DHS attorney in the case would likely have known about the old conviction. So even if you are not morally opposed to lying, I don't see the point of lying about something that the government knows already.

The temptations faced by Mr. Wenger are amplified in my practice area--asylum--where the U.S. government rarely has independent evidence about the problems faced by asylum seekers overseas, and significant portions of most such cases depend on the client's own testimony. I've encountered this myself a few times when clients have asked me to help them lie ("Would my case be stronger if I said X?"). How to handle such a request?

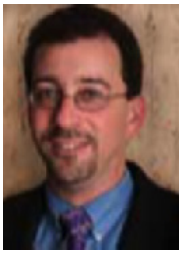
The easy answer, I suppose, is to tell the client to take a hike. That is not my approach. I am sympathetic to people fleeing persecution who do not understand the asylum system, and who think that lying is the only way to find safety (and who often come from places where lying to the government is necessary for survival). In many cases, such people need to be educated about the U.S. asylum system. When a client asks me to lie, I explain that as an attorney, I cannot misrepresent the truth. I also explain why lying will likely not help achieve the client's goal, and how we can present the actual case in a way that will succeed. Hopefully this is enough to convince the client to tell the truth.

For individual clients, of course, this type of honesty sometimes has its drawbacks: Cases may be lost, people may be deported--possibly to their deaths, and families will be separated. Some lawyers find this price too high. If you believe your client will be deported to his death and you can save him by lying, perhaps the lie is justified. Mr. Wegner, no doubt, felt that he was doing the right thing for his Albanian client (though a review of Mr. Wegner's disciplinary record reveals that he has not always served the best interests of his clients). And there are certainly attorneys who believe that the ends justify the means. But I am not one of them.

When all is said and done, I will not lie for a client. I don't think it is effective, and even if we get away with it in one case, I fear that it would hurt my credibility as a lawyer--and thus my ability to be an effective advocate--in all my other cases. I also feel that it damages the system, which hurts honest applicants.

In the final analysis, even if we ignore his other disciplinary issues, it is difficult for me to feel too sorry for Mr. Wegner. While a lawyer's zealous representation of his client is admirable, the willingness to cheat corrodes our immigration system and ultimately harms the very people that lawyers like Mr. Wegner purport to help. For me, even the argument that lying is a necessary form of civil disobedience in an unjust system falls flat. Civil disobedience is about sitting at the lunch counter; not stealing the food.

Despite all the imperfections of the immigration system, our primary job as lawyers is to work within that system to assist our clients. We also have a role to play in criticizing and improving the system. But when lawyers lie, we fail as both advocates and as reformers. ■



Jason Dzubow is one of the founders of Dzubow & Pilcher, PLLC. His practice focuses on immigration law, asylum, and appellate litigation. In 2011 and 2013, Washingtonian magazine recognized him as one of the best immigration lawyers in Washington, DC. He is an adjunct professor at George Washington University Law School in Washington, DC. His blog, the Asylumist, is the only blog in the U.S devoted exclusively to asylum law: www.asylumist.com

Hon. Juan P. Osuna, LEGENDARY IMMIGRATION FIGURE, DIES SUDDENLY – Was Chairman of BIA, Director of EOIR, High-Ranking DOJ Executive, Editor, Professor – Will Be Remembered As Kind, Gentle, Scholarly, Dedicated!

By Hon. Paul W. Schmidt

I have just learned that my friend and former colleague Juan P. Osuna tragically died suddenly of a heart attack last night. Until May of this year, Juan was the Director of EOIR. But, he was much more than that to those of us in the immigration world.

I first met Juan when he was an Editor for *Interpreter Releases,* the leading weekly immigration newsletter, working with one of my mentors, the late legendary Maurice A. Roberts. Juan later succeeded Maury as Editor and rose to a major editorial position within the West Publishing legal empire. He was serving in that position when I recommended him for a position as an Appellate Immigration Judge/ Board Member of the Board of Immigration Appeals during my tenure as BIA Chair. Juan was appointed to that position by Attorney General Janet Reno in 2000.

While serving together on the BIA, Juan and I often joined forces in seeking full due process and legal protections for migrants. Sometimes, our voices were heard together in dissent. In one of those cases, *Matter of J-E-*, 23 I&N Dec. 291 (BIA 2002) we joined in finding that our colleagues in the majority were interpreting the Convention Against Torture ("CAT") in an overly restrictive way. In another, *Matter of Andazola,* 23 I&N Dec. 219 (BIA 2003), we joined in finding that our colleagues in the majority had significantly undervalued the Immigration Judge's careful findings of "exceptional and extremely unusual hardship" to U.S. citizen children.

Following my reassignment from the BIA to the Arlington Immigration Court, Juan became the Vice Chair and eventually the Chair of the BIA after the departure of Lori Scialabba. But, Juan's meteoric rise through the DOJ hierarchy was by no means over. In 2009, Attorney General Eric Holder appointed Juan to the position of Deputy Assistant Attorney General for the Civil Division with responsibility for the Office of Immigration Litigation. Later, he was promoted to Associate Deputy Attorney General with responsibility for the Department's entire "immigration portfolio."

Not surprisingly, following the departure of EOIR Director Kevin Ohlson, Attorney General Eric Holder named Juan Director of EOIR. In that position, Juan shepherded the U.S. Immigration Courts through some of the most difficult times in EOIR history, involving astronomically increasing caseloads and resource shortages. Throughout all of it, Juan remained calm, cool, and collected.

He was a frequent public speaker and testified before Congress on a number of occasions. He was known for his honesty and "straight answers." Indeed, in one memorable television interview, Juan confessed that the Immigration Court system was "broken."

One of my most vivid recollections of Juan's sensitivity and humanity was when he occasionally stopped by the Arlington Immigration Court to "find out what's happening at the grass roots." After lunching with or meeting the judges, Juan invariably went to the desk of each and every staff member to ask them how their jobs were going and to thank them for their dedicated service. He understood that "the ship goes nowhere without a good crew."

Shortly before I retired, Juan called me up and said he wanted to come over for lunch. We shared some of our "old times" at the BIA, including the day I called to tell him that he was Attorney General Janet Reno's choice for a Board Member. We also batted around some ideas for Immigration Court reform and enhancing due process.

Back in my chambers, I thought somewhat wistfully that it was too bad that we hadn't had an opportunity to talk more since my departure from the BIA. Little did I suspect that would be the last time I saw Juan. At the time of his death, he was an Adjunct Professor at Georgetown Law, where I am also on the adjunct faculty. Ironically, Juan took over the "Refugee Law and Policy" course that I taught from 2012-14.

Juan will always be remembered as a gentleman, a scholar, and an executive who appreciated the role that "ordinary folks" — be they migrants, staff, interpreters, or guards, — play in building and sustaining a successful justice system. He will be missed as a friend and a leader in the immigration world.

My thoughts and prayers go out to Juan's wife, Wendy Young, President of Kids In Need of Defense ("KIND"), and the rest of Juan's family and many friends. Rest in peace, my friend, colleague, and champion of due process for all! ■

DENVER- 2017 Annual Immigration Conference a Success

Our annual conference and immigration CLE was held in Denver this year, at the Embassy Suites Downtown, May 11-13, 2017. This was our first year in Denver, and it was quite a success. Speakers included the FBA President, Hon. Michael J. Newman, FBA Past President, Hon. Gustavo Gelpi, and the cream of the immigration bar.

The conference broke records- the highest attendance (466) and the largest profit ($16,000, of which the Section's share will be $7500) in the history of the Section. We're looking forward to an even more fabulous annual conference in **MEMPHIS** May 17-19, 2018. **Save the date!**

AWARD RECIPIENTS – The following members received Section awards in Denver:

Attorney of the Year (tie):
Justin R. Burton, Chicago IL
David A. M. Ware, Metairie LA and Seattle WA

Barry Frager Award for Service to the Section:
Dr. Alicia J. Triche, Memphis TN

NGO Lawyer of the Year:
Gail Pendleton, ASISTA Immigration Assistance, Suffield CT

Government Lawyer of the Year:
Elizabeth (Betty) Stevens, Office of Immigration Litigation (ret.)

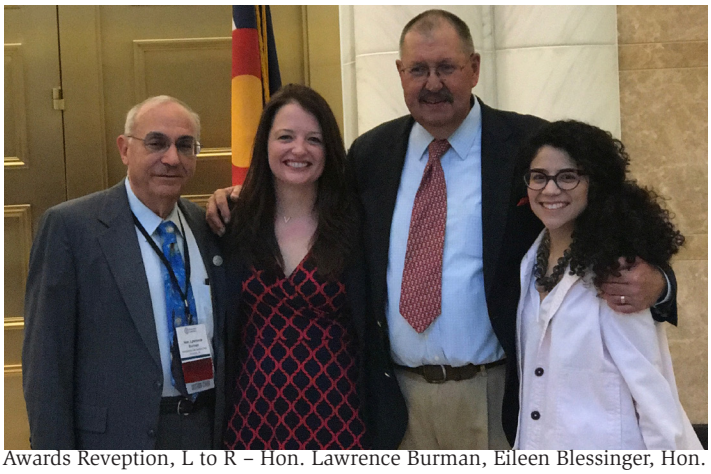
Younger Lawyer of the Year:
Eileen P. Blessinger, Falls Church VA

Outstanding New Member:
ShuTing Chen, San Francisco CA

SECTION ELECTIONS

There were no surprises this year, as no positions were contested. The officers for 2017-18 are:

CHAIR: Elizabeth Stevens
VICE CHAIR: Barry L. Frager
TREASURER: Mark Shmueli
SECRETARY: Hon. Amiena Khan



Awards Reveption, L to R – Hon. Lawrence Burman, Eileen Blessinger, Hon. Paul W. Schmidt, Claudia Cubas

Younger Lawyers Division Hosts Happy Hour at Annual Conference in Denver, Colorado

For the third year in a row, the Younger Lawyers Division of the Immigration Law Section (ILS-YLD) hosted a Happy Hour during the Annual Immigration Law Conference in Denver, Colorado.

Younger ILS members connected with more seasoned ILS members, and the event was superb! We hope to see you all at our Happy Hour at the Annual Immigration Law Conference next year. In the meantime, keep an eye out for our webinar series.

If you would like to get involved in the Younger Lawyers Division or have suggestions for the ILS-YLD Committee, we'd love to hear from you! Please reach out to me at: robin.trang-srud@gmail.com.

By Hon. Jeffery S. Chase

Former IJs and Board Members File Amicus Brief in Neguise Remand

An Amicus brief was recently filed with the BIA on behalf of seven former immigration judges (including myself) and a former BIA board member in the case of *Negusie v. Holder.* (In addition to the former Board member, one of the included IJs also served as a temporary Board member). The case was remanded by the U.S. Supreme Court in order for the Board to determine whether there is a duress exception to the bar to asylum which applies to those who have persecuted others on account of a protected ground.

The context for the brief is as follows. After initially ceding a limited duress exception to the Board, DHS recently changed its position. In now opposing such exception, DHS relies in part on its contention that the complex analysis such determinations require would overburden the currently backlogged immigration courts.

The amicus brief on behalf of the former IJs and Board member offers three primary points in rebuttal to this portion of DHS's claim. First, the brief points out that the immigration courts' present backlog is largely the result of policy decisions made by both EOIR and DHS itself. As the brief argues, it is disingenuous for DHS to create policies that contribute to the immigration courts' backlog, and then argue to limit immigration judge's decision-making authority as a means of alleviating its self-created burden. The brief adds that such "bureaucratic failures resulting in the immigration court backlog cannot be a reason to deny people their right to a fair and just outcome."

The brief continues that immigration judges are equipped to undertake the type of complex, fact-intensive analysis that duress exception determinations would entail, based on the powers and duties presently conferred upon them by regulation. It additionally notes that immigration judges already adjudicate matters requiring a comparable level of complexity. The brief finally argues that the judges' caseload would not be significantly impacted by the additional responsibility in light of the small number of cases in which the duress exception would arise, and the fact that the initial determination that the persecutor bar should apply (which must precede the duress exception inquiry) already entails a fact-intensive analysis, which largely overlaps with the factual and legal analysis then required to adjudicate the duress exception.

Having spent 22 years working for EOIR (including 12 years as an immigration judge), I believe that the new position taken by DHS is indeed disingenuous. Commonly cited causes of the present immigration court backlog are an increase in DHS raids and arrests, and the curtailing of the agency's policy under the Obama administration of exercising prosecutorial discretion in order to not burden the immigration courts with low priority cases involving, e.g., families with no criminal records. Prosecutorial discretion has long been a hallmark of the criminal court system; its application in the immigration court context was favorably viewed by attorneys within both DHS and the private sector, as well as by immigration judges and the BIA.

To translate DHS's position to the criminal context, imagine that prosecutors suddenly flooded the criminal court system with jaywalking cases, which they insisted all go to trial. Would an appeals court take seriously the district attorney's argument that because the criminal courts were so overburdened, defendants should not be able to raise, e.g., motions to suppress statements unlawfully obtained by the government, on the grounds that the complex analysis they entail would overwhelm the overburdened judges?

It should further be noted that amici are in no way arguing for a liberal application of a duress exception (if one is found to apply); its brief does not address what the legal standard should be. The persecutor bar should be taken most seriously. But in considering a limited duress exception, I believe we must distinguish adults who have made informed decisions to commit unconscionable acts from, e.g. the case of a child lacking both the ability to resist duress and to fully comprehend the nature of his/her actions. I attended a USCIS training a few years ago at which a country expert on Central America stated that gangs there were now recruiting boys as young as seven years old; Human Rights Watch and Human Rights First have noted that children being used as soldiers in Africa also include those as young as seven.

The amicus brief was filed by attorneys with the law firm of White & Case, LLP. It should be noted that this brief focused on the limited issue raised by DHS in its recent change of course. Other amicus briefs have been filed with the Board addressing additional issues relating to the feasibility of a duress exception. These include a brief submitted by AILA and the National Immigrant Justice Center (NIJC) on the broader issue of the availability of a duress exception under U.S. law; a brief filed by the Center for Gender and Refugee Studies (CGRS) of the University of California - Hastings College of Law on the need for a duress exception in light of the particular issues faced by vulnerable populations (including women and children), and a brief filed by the University of Idaho's Immigration Clinic and the Harvard Immigration and Refugee Law Clinic, stating the position of international refugee law scholars.

Matter of L-E-A-: The BIA's Missed Opportunity

On May 24, the Board of Immigration Appeals published its long-anticipated precedent addressing family as a particular social group, *Matter of L-E-A-*, 27 I&N Dec. 40 (BIA 2017). Thirteen amicus briefs were received by the Board addressing the issue of whether a "double nexus" is required in claims based on the particular social group of family. The good news is that the Board did not create a "double nexus" requirement for family-based PSG claims. In other words, the decision does not require an asylum applicant to prove both their inclusion in the social group of X's family, and then also establish that X's own fear is on account of a separate protected ground.

Nevertheless, the resulting decision was highly unsatisfying. The Board was provided a golden opportunity to adopt the interpretation of the U.S. Court of Appeals for the Fourth Circuit, which has held persecution to be "on account of" one's membership in the particular social group consisting of family where the applicant would not have been targeted *if not for* their familial relationship. Such approach clearly satisfies the statutory requirement that the membership in the particular social group be "at least one central reason for persecuting the applicant." If the asylum seeker would not have been targeted if not for the familial relationship, how could such relationship not be at least one central reason for the harm? *L-E-A-* rejected this interpretation, and instead adopted a much more restrictive "means to an end" test. Under *L-E-A-*, even though the respondent would not be targeted but for her familial relationship to her murdered husband, she would not be found to have established a nexus because the gangsters she fears do not wish to harm her because of an independent animus against her husband's family. Rather, targeting her would be a means to the end of self-preservation by attempting to silencing her to avoid their own criminal prosecution.

Under the fact patterns we commonly see from Mexico and the "northern triangle" countries of Central America, claims based on family as a particular social group will continue to be denied, as such fears will inevitably be deemed to be a means to some criminal motive of gangs and cartels (i.e. to obtain money through extortion or as ransom; to increase their ranks; to avoid arrest) as opposed to a desire to punish the family itself. Applying the same logic to political opinion, a popular political opponent of a brutal dictator could be denied asylum, as the dictator's real motive in seeking to imprison or kill the political opponent could be viewed as self-preservation (i.e. avoiding losing power in a free and fair election, and then being imprisoned and tried for human rights violations), as opposed to a true desire to overcome the applicant's actual opinions on philosophical grounds.

Sadly, the approach of *L-E-A-* is consistent with that employed in a line of claims based on political opinion 20 years ago (see *Matter of C-A-L-*, 21 I&N Dec. 754 (BIA 1997); *Matter of T-M-B-*, 21 I&N Dec. 775 (BIA 1997); *Matter of V-T-S-*, 21 I&N Dec. 792 (BIA 1997)) in which attempted guerrilla recruitment, kidnaping, and criminal extortion carried out by armed political groups were not recognized as persecution where the perpetrator's motive was to further a goal of his/her political organization as opposed to punishing the asylum applicant because of his/her own political opinion.

Nearly a decade earlier, an extreme application of this "logic" resulted in the most absurd Board result of to date. In *Matter of Maldonado-Cruz*, 19 I&N Dec. 509 (BIA 1988), the Board actually held that a deserter from an illegal guerrilla army's fear of being executed by a death squad lacked a nexus to a protected ground, because the employment of death squads by said illegal guerrilla army was "part of a military policy of that group, inherent in the nature of the organization, and a tool of discipline," (to quote from the headnotes). After three decades of following the course of such clearly result-oriented decision making, the Board missed an opportunity to right its course.

Making Your Trial Record: The Importance of Dates

In a recent unpublished decision, *Singh v. Sessions,* No. 16-161 (2d Cir. June 12, 2017), the U.S. Court of Appeals for the Second Circuit upheld an Immigration Judge's adverse credibility finding based on the respondent's wavering as to whether he was born in 1976 or 1977. The Court concluded that the IJ reasonably found such discrepancy regarding such a basic fact "'called into question [his] actual identity' as well as 'the veracity of the entire claim.'"

Reading this decision caused me to think of my start in private practice nearly 30 years ago. Most of my clients were from Afghanistan. One of the most difficult parts of preparing their asylum applications was determining dates - not only the dates relating to events critical to their claim (i.e. when they were arrested; when they fled), but even the most basic info: the dates of their birth. Looking at my clients' official government-issued Afghan identity card (*tazkira*), the date of birth would be entered as, e.g., "was approximately eight years old in 1982." As the official government record was a ballpark estimate, it was impossible to determine a precise birthdate; the task was further complicated by the fact that Afghanistan uses a completely different calendar from the west (for the record, one must add two months, 21 days and 621 years to convert the Afghan date to the western calendar). As both INS and EOIR required a specific day and month of birth, I would enter "January 1." When I once attended a Master Calendar hearing on January 2, the INS trial attorney joked that I must have been extremely busy the previous day, celebrating all of my clients' birthdays. More than twenty years later, I was surprised to learn from a December 31, 2013 *Washington Post* article ("In Afghanistan, January 1 is everyone's birthday" https://www.washingtonpost.com/world/in-afghanistan-its-everyones-birthday/2013/12/31/81c18700-7224-11e3-bc6b-712d770c3715_story.html?utm_term=.6fbc22055bee) that such practice had become a national phenomenon. The *Post* article attributed the problem to the lack of a system for registering births during the country's decades-long civil war, and noted that a similar problem existed in other war-torn countries, including Vietnam, Somalia, and Sudan.

Thus, the application of the principle approved in *Singh v. Sessions* , i.e. that an asylum applicant's confusion about the "basic fact" of his date of birth could be relied on to undermine the veracity of his/her entire claim, would have resulted in

most of my Afghan clients being incorrectly found incredible and denied asylum. For example, one of the Afghans cited in the *Washington Post* article stated that he was unsure of his real birthday, adding "I think it was sometime in the spring." The Second Circuit would apparently find it reasonable based on such an answer to question the individual's identity, as well as his overall credibility.

Other factors also impact a respondent's ability to recall dates. The most universal problem was summarized by attorney Jason Dzubow on his excellent blog *The Asylumist*: "Most events are not tied to a particular date in our memories." http://www.asylumist.com/2012/01/09/credibility-determinations-are-not-credible/ . Dzubow uses as an example a car accident he experienced; he remembers many details, but not the date. Testing this premise on myself, I know the date I was married, but although I remember other details clearly, I cannot remember the date I first met my wife, or even the date we became engaged. I was once mugged at knifepoint; not only can't I remember the day or month it occurred, I could only guess as to the year. As Dzubow points out, the respondent is not actually testifying in court to the date he actually remembers that an event occurred. Instead, the respondent is testifying to a date he or she memorized after calculating (or maybe estimating) it in his or her lawyers' office. Dzubow thus justly concludes that the ability to regurgitate such dates in immigration court "may be a decent test of the alien's memory, but it is of little value in assessing his credibility."

I will add my own observation to that, from my years as an immigration judge: the aforementioned testing of the respondent's ability to memorize dates may actually hurt the assessment of his or her credibility. The REAL ID Act allows triers of fact to base a credibility determination in part "on the demeanor, candor, or responsiveness of the applicant or witness." In my decisions, my credibility assessment would sometimes include a demeanor observation that "the respondent appeared to be reciting from a memorized script, and not from actual experience." I've seen similar language in reviewing the decisions of other IJs on appeal. Where an asylum applicant is forced to recount specific memorized dates multiple times in the course of their hearing, they may have to pause while trying to recall the date in question, often while assuming a facial expression that leads the immigration judge to make the above-cited credibility observation. Furthermore, where the respondent is honestly testifying to traumatic experiences, PTSD can act to hamper the recall of dates. A long pause while a traumatized applicant is struggling to recall a date may support a finding by the immigration judge that the respondent "was at times unresponsive."

Also, realize that in failing to remember the dates of our car accident and mugging, both Dzubow and I are educated professionals, living in a very date-oriented society, working in a very date-oriented profession. In western culture, one is expected to know their own date of birth and of marriage; the dates of birth of our spouses, children, parents, and other close friends and relatives. We are expected to know the year we graduated from high school, college, and if applicable, graduate school. Would we remember any of these dates if we lived in societies in which dates are not treated with the same importance? Or if we were farmers or sheepherders as opposed to lawyers?

So what strategies should a practitioner use to address these problems? The issues that may have contributed to your client's difficulties in recalling dates cannot be successfully argued or documented for the first time on appeal to the BIA. Board members commonly respond to the raising of a new issue on appeal by citing *Matter of Jiminez*, 21 I&N Dec. 567, 570 n. 2 (BIA 1996) to conclude that the issue, having not been raised before nor ruled on by the immigration judge, is not properly before the Board. The standard response to the submission of new evidence on appeal is that as an appellate body, the Board's function is to review, not create, a record.

It is therefore important to address this issue by creating a record while still before the immigration judge. You will first have to determine to what extent the written application for asylum and attached statement should rely on specific dates. Although we generally believe that the more detail that is included in the written application, the better the likelihood of establishing credibility, this rule will not hold true if the respondent cannot recall the dates while testifying. In preparing the application, it is therefore important to take the time to get to know your client's capabilities regarding dates. If they cannot consistently recall the specific date while recounting the claim in your office, how do they describe when an event occurred? Can they consistently recall that something happened, i.e., two years before they left their country? Two months after an election, cease-fire, or invasion? During the planting season? During Ramadan?

If, for example, your client consistently recalls that an event occurred at the midway point of Ramadan, two years before they departed their country, calculating that to a specific date and then writing that date in your client's statement will not be helpful if your client cannot then remember the date you came up with. I would instead suggest writing the statement just as your client is capable of describing it, i.e. "RIght around the midway point of Ramadan, two years before I left my country, I was attacked…"). Then provide documentation to the immigration judge as to the dates on which Ramadan occurred that year, and as to the date the respondent departed his country. See if you can obtain documentation (i.e. articles; a statement from a country expert) that this would be a common way to communicate a date in the respondent's community. Or have the respondent evaluated by a psychologist to see if there is a psychological reason (including PTSD) that is impeding your client's ability to recall dates.

While some immigration judges may not be persuaded by this approach, you will have created a record that will allow you to renew your arguments on appeal to the BIA and, if necessary, the circuit court. ■

The author formerly served as an immigration judge, and a staff attorney at the Board of Immigration Appeals.

Immigration Practice Advisory

Strategies For Obtaining SIJ Predicate Orders In Virginia Post- Canales V. Torres

BY CHRISTINE LOCKHART POARCH, AYUDA, AND LEGAL AID JUSTICE CENTER

This practice advisory analyzes the Virginia Court of Appeals' decision in *Canales v. Torres-Orellana*, Record No. 1073-16-4, and provides general practice strategies to help advocates continue to obtain predicate orders in Virginia's Juvenile & Domestic Relations District Courts and Circuit Courts subsequent to this decision, while the Legal Aid Justice Center appeals the decision to the Virginia Supreme Court.[1] Unless and until it is overturned on appeal, the *Canales* decision has the potential to complicate SIJ practice in Virginia, to the possible detriment of immigrant youth seeking protection.

In *Canales,* the Virginia Court of Appeals ruled on the authority of the Juvenile & Domestic Relations (J&DR) and Circuit Courts to make special immigrant juvenile (SIJ) findings. The first two holdings of the case—that J&DR and Circuit Courts are not authorized to make SIJ findings as an independent matter, and that while J&DR and Circuit Courts are *not required* to make SIJ findings, they *are permitted* to make the SIJ findings through the application of Virginia law in the normal course of business—were affirmations of the status quo in most courts in Virginia.

Unfortunately, substantial confusion has arisen from the third holding, that a Virginia court "has no authority to answer" the specific question of whether "it would not be in the alien's best interest to be returned" to his country of origin, where such a finding would add to or alter "the responsibilities of Virginia courts in adjudicating custody or other matters."[2]

Subsequent to the Court of Appeals decision in *Canales,* the Virginia Supreme Court's Office of the Executive Secretary (OES) issued a memorandum in its capacity as law clerk to the Virginia trial judges. This memorandum has not yet been publicly released, but various advocates have reported that J&DR judges mentioned its existence during proceedings on the record. The memorandum apparently characterizes the *Canales* holding as completely limiting any consideration of SIJ findings. Although a memorandum of this nature obviously lacks binding force of law, it represents another hurdle that advocates will have to surpass in obtaining SIJ predicate findings of fact in a post-*Canales* landscape, and advocates will have to argue that it lacks persuasive authority and judges should not look to it for guidance.

This practice advisory is intended to assist advocates in addressing any increase in judicial scrutiny resulting from an unduly narrow interpretation of the *Canales* holding. The authors summarize the holdings in the case, offer post-*Canales* legal arguments for advocates, address other critical practice strategies, and include an appendix of sample custody petitions and orders consistent with the court's holdings.

Canales: At a Glance

Virginia Courts Have No Authority to Hear Independent SIJ Petitions.

The Court of Appeals held that "[n]othing in Code § 16.1-241, the jurisdictional statute for the J&DR courts, authorizes a J&DR court to conduct a proceeding whose sole purpose is to render SIJ findings." The Court further analyzed whether the "federal statutory scheme" imposed any further "obligation on state courts to make SIJ findings *independent of their normal processes"* and determined that the statutory scheme is definitional and did not create new, independent state jurisdiction.[3] Accordingly, the Court held that SIJ findings must be ancillary to the primary purpose of the juvenile court order which is "to obtain relief from abuse, neglect, abandonment, or a similar basis under state law, and not primarily or solely to obtain an immigration benefit."[4]

This holding affirms a commonly held tenet of practice in Virginia, that the General Assembly has not created an independent jurisdictional basis that permits the Court to make SIJ findings absent child custody, delinquency, adoption or other state statutory grounds for jurisdiction. Subsequent to the issuance of *Canales*, most advocates report that trial court judges are relying on this holding to dismiss separately filed SIJS motions, especially where those motions are assigned a different docket number by the clerk. As discussed next, however, this does not mean that trial courts are no longer making the necessary SIJS factual findings; but they are making these findings as part and parcel of a custody order, as opposed to a separate order granting a separate motion.

Virginia Courts *May* Make SIJS Findings.

The Court also affirmed principles of judicial authority within the confines of the previously stated jurisdictional limitations, that lower courts *may* make SIJ findings, but that they are not mandated to do so. Because Virginia courts often do make decisions and determinations regarding abuse, neglect, and abandonment,[5] the Court unequivocally affirmed the lower courts' authority to make some of the SIJ findings by stating that:

"[T]here may be circumstances when a Virginia court, by rendering a custody determination *in the normal course*, will deliver a judgment and resulting order that may satisfy the SIJ requirements. So long as a Virginia court's judgment and subsequent order are the product of a proceeding that was authorized by the General Assembly to conduct and *result*

from the court's application of Virginia law in the normal course, the Virginia court has not exceeded its authority as granted by the General Assembly."[6]

This language is of critical importance, because it contradicts and belies any contention (including that of the OES memorandum mentioned above) that the ultimate result of *Canales* means that Virginia courts can no longer enter factual findings that would satisfy the SIJ requirements. Were it the case that the Court of Appeals meant to wholly bar trial courts from entering SIJ predicate findings of fact, this language would make no sense.

Turning to the specific SIJ factual findings contained in the definitional provisions of 8 U.S.C. § 1101(a)(27)(J) and USCIS guidance expanding on those requirements, the Court of Appeals agreed that "once a JDR court has decided the issue of custody, it has also made a finding of fact that could potentially be used during SIJ proceedings to show that the immigrant child is dependent upon a state juvenile court or is *dependent upon a state juvenile court* or is *appointed to the custody* of another."[7]

Similarly, the Court of Appeals agreed that several state statutory grounds could support the additional factual finding in 8 U.S.C. § 1101(a)(27)(J)(i) that the child was subject to abuse, neglect or abandonment, as that issue "may, and all too often does, arise in the course of a Virginia court's determination of child custody."[8] To make these findings, the Court of Appeals explained, "a Virginia court would turn to the best interests of the child factors found in Code § 20-124.3."[9] The Court then specifically listed the statutorily mandatory factors that the state court is authorized to consider and specific applications of the "best interests" test in which a court may make findings that incidentally support federal SIJ determinations.[10]

The two foregoing holdings affirm and formalize long-standing principles of SIJ practice in Virginia J&DR Courts around the Commonwealth, and make clear that the Court of Appeals' purpose in the *Canales* opinion was not to hammer a final nail into the coffin of SIJS in Virginia, but rather to clarify that petitioners seeking factual findings ancillary to custody cases have to make reference to Virginia Code, not U.S. Code, in justifying the need for the court to enter those findings.

Virginia Courts May Not Determine Whether A Child Cannot Return to Home Country Where Such a Finding Adds To or Alters the Responsibilities of Virginia Courts. The portion of the Court of Appeals opinion resulting in the most confusion among practitioners and lower-court judges lies in the subsection regarding whether the juvenile is one "for whom it has been determined in administrative or judicial proceedings that it would not be in the alien's best interest to be returned to the alien's or parent's previous country of nationality or country of last habitual residence."[11]

The Court of Appeals interpreted the term "administrative or judicial proceedings" to refer to "federal administrative or judicial proceedings" and rejected Canales's argument that "this subsection is part of the SIJ findings of fact and therefore is a determination made by state courts."[12] Holding that "a Virginia court has no authority to answer this specific question" (contained in 8 U.S.C. § 1101(a)(27)(J)(ii)), the Court stated in an expansive footnote that "any language that does not explicitly indicate that proceedings are to be adjudicated in a state forum should presumptively refer to federal proceedings."[13] In the same footnote, however, the Court offered an important conclusion that frames this holding:

[I]t is clear that the only 'best interests' analysis involving a state court is the one it would undertake through the application of state law pursuant to subsection (i) of the SIJ statute and whether or not the determination made by a state court satisfies subsection (ii) is beyond our purview; that question is reserved for the federal officials charged with the administration of the SIJ program.[14]

The Court of Appeals also implies that there is no specific authority to reach the question of whether it is in the child's best interest to return to the child or parent's home country, *if* issuing that finding would "add or alter the responsibilities of Virginia courts in adjudicating custody or other matters."[15] Therefore, the Court's holding reiterates that courts are permitted, but not required, to issue SIJ findings that fall within the normal statutory jurisdiction of the court, but "whether [a state court] judgment and supporting factual findings satisfy the definition of a special immigrant as contemplated by 8 U.S.C. § 1101(a)(27)(J) is solely a matter for determination by officials of the Department of Homeland Security."[16]

Evidentiary Standard.

Canales did not evaluate or alter what proof or evidence is required to issue SIJ findings of fact. The underlying findings of fact in the lower court were treated deferentially and were not disturbed on appeal.[17]

Strategies Post-*Canales*

As previously stated, the first two holdings in *Canales* are consistent with well-settled SIJ practice in Virginia. Given the problematic third holding, however, and given the OES memo that purportedly characterizes the *Canales* opinion as eliminating Virginia trial court judges' authority to enter SIJ predicate factual findings, much of the advocate's work in the courtroom may be to emphasize the way in which the Court of Appeals specifically and unequivocally acknowledged trial courts' authority to make SIJ findings.

Emphasize J&DR Courts' Broad Discretionary Powers.

The *Canales* opinion does not (and could not) strip J&DR judges of their broad discretion, set forth in the Virginia Code, to consider all issues relevant to the welfare of the child to further the purposes of the law. The law is intended

to be liberally construed, granting judges "all necessary and incidental powers and authority, whether legal or equitable in their nature" to "further the welfare of the child and the family."[18]

The J&DR court has broad discretion "in determining what promotes the children's best interests."[19] A court is empowered to make "decisions necessary to guard and to foster a child's best interests."[20] The court must consider the best interests of the child as paramount in any custody decision.[21] It must first consider all facts pertaining to custody and visitation arrangements before contemplating "*other considerations* arising in the matter."[22]

The Virginia Code's reference to "other considerations arising in the matter" necessarily provides for courts to consider issues beyond the factors listed in Code of Va. § 20-124.3. Virginia courts have analyzed and made findings concerning factors including relocation, the home environment, moral climate, living arrangements, and parental "devotion," among others not explicitly listed in that section of the statute.[23] In addition, courts consider any "material change in circumstances" for the purposes of modifying custody orders.[24] Ultimately, the court may consider all evidence and issues pertinent to determining a child's best interests.[25]

SIJ findings of fact are material to the minor's welfare and wellbeing, and often concern the minor's only alternative living arrangement. The court is empowered to reach the issues presented by the SIJ findings requested by a petitioner because they directly address the welfare and best interests of the child and impact the petitioner's ability to effectuate the custody order. It follows that reaching the issues presented by the SIJ findings are therefore necessary to guarding and fostering the minor's best interests, and to effectuate custody.[26] Failure to reach the issues presented by the SIJ findings undermines any possibility of the minor remaining with the petitioner in Virginia, regardless of whether the court grants the petitioner custody of the minor.

In short, emphasize that *Canales* reaffirmed that courts *may have jurisdiction* to issue some findings that may satisfy SIJ petitions. To support requests for SIJ findings, cite heavily to the Virginia Code and Virginia caselaw, not U.S. Code or the Immigration and Nationality Act (INA), to root the issuing of SIJ findings in the best interests of the child standard.

Emphasize Best Interest Factors (Code of Va. § 20-124.3)

The Court of Appeals agreed that lower courts can—and in some cases, must[27]—make findings on whether the minor has been abused, neglected, or abandoned by a parent. Similarly, courts routinely make findings in the context of custody proceedings regarding whether reunification with a parent is viable and whether it is in a child's best interests to return to a home in a different state or country, because these issues are central and material to a complete analysis of a custody case under the factors enumerated in Code of Va. § 20-124.3. The issues are commonly considered by courts in custody determinations and merely involve analysis of issues already required in a best interest of the child analysis by that section of Virginia Code.[28]

Review the best interests statute and relevant case law and be prepared to offer evidence on the specific factors, in addition to noting the Court of Appeals' own statements that several factors could support findings of fact that the federal agency may find support SIJ eligibility.[29]

On Issues of Abuse, Abandonment, and Neglect.

Considering whether a minor has been abused, neglected or abandoned by a parent falls within Code of Va. § 20-124.3 (3), requiring the court to evaluate the "relationship existing" between the minor and the parent.

Regarding Viability of Reunification.

In a custody proceeding, a court should consider the feasibility of contact with a parent and whether a relationship with that parent is appropriate. Code of Va. § 20-124.2(B). This consideration is important in evaluating the quality of the parental relationship and whether it needed to be protected through visitation or other means. Here, viability of reunification concerns the extent and feasibility of parental contact at the time of the decision.[30]

The meaning of "viable" is defined by Black's Law Dictionary as "capable of succeeding."[31] Under Code of Va. § 20-124.3(7), the Court is required to consider "the relative willingness and demonstrated ability of each parent to maintain a close and continuing relationship with the child, and the ability of each parent to cooperate in and resolve disputes regarding matters affecting the child" in a custody proceeding.[32] The SIJ finding that reunification with a parent is not viable simply requires consideration of the willingness and ability of the parent to maintain a "close and continuing" relationship with the minor under this factor.

A request to find that reunification with one parent is not viable can be analogized to asking for a finding concerning visitation, because it concerns if and how much the child may see the non-custodial parent. In *Eichelberger v. Eichelberger*, the Virginia Court of Appeals found that:

Each case may require a court to exercise considerable judgment in placing conditions upon the frequency, duration, place, and extent of visitation, depending upon such factors as the age, relationship, emotional and physical condition of the child or parent; the parents' maturity and ability to responsibly care for a child; the location, availability and desires of the child and parents—to list but a few.[33]

Determining whether a minor's reunification with a parent is viable is a determination of that parent's "ability to responsibly care for a child" and is an issue within the power of the court to consider.[34]

Not in best interests to return to home country.

After the *Canales* opinion, this factor is clearly the most problematic in terms of obtaining a custody order containing factual findings that USCIS will consider sufficient to grant an I-360 petition for Special Immigrant Juvenile Status. But

all hope is not lost, and advocates have reported that many trial court judges are still willing to issue the factual findings in an appropriate case where supported by argument based on Virginia Code and Virginia caselaw. Here, advocates face a difficult strategic decision: whether to seek a factual finding that "it is in the best interests of the child to remain in Virginia," where such language is clearly permitted by *Canales*, but ultimately may prove insufficient to satisfy USCIS; or, to seek a finding that "it is not in the best interests of the child to return to [country]," where such language will clearly satisfy USCIS, but may be more difficult to persuade the trial court judge that it is still permissible in light of *Canales*.

Either way, advocates should argue that the trial court can, and often must, take location into account when faced with a request to award custody to one parent, because the court must compare each parent's circumstances to determine "which home will provide the child with the greatest opportunity to fulfill his or her potential."[35] As stated above, it may also consider "the location, availability and desires of the child and parents."[36]

Code of Va. § 20-124.3 directs the court to consider the child's best interests for purposes of custody by applying a list of statutory factors. Advocates should argue that *on the particular facts of your case*, finding whether it is in the minor's best interests to return to his or her home country simply requires the court to engage in its usual duty under that statute to consider the minor's best interests for custody purposes and examine the factors enumerated in the "best interests" statute.[37] It does not require the court to reach new or novel issues,[38] or to evaluate in which country it is better to raise a child. Rather, the court's obligation is to examine the particular circumstances of the child's potential well-being should she or he be returned to home country, and determine whether it is in the child's best interests to return to those circumstances.

Further, determining whether it is in a minor's best interests to return to his or her home country is often analogous to a relocation decision when Virginia and the country of origin are the only two locations where the minor has potential caregivers. Unlike typical relocation cases, often the minor's primary caretaker is not seeking the relocation of the child.[39] However, the court's focus in relocation cases is not on the entity seeking authority for the move, but rather on the impact this new geographic location will have on the child's wellbeing.[40] Therefore, the court's consideration of where a minor should live is analogous to a relocation case because it involves deciding between two potential geographic homes based on the relative advantages of the two locations for the child.

Emphasize the Necessary and Proper Clause of the Best Interest Standard (20-124.3(10))

Under Code of Va. § 20-124.3, in determining the best interests of a child for the purposes of custody or visitation the court shall consider ten enumerated factors. Among these factors is a "catchall" provision, which provides that the court shall consider, "such *other factors* as the court deems necessary and proper to the determination."[41] It is clear from the statute that the legislature intended for the courts to consider factors not explicitly enumerated in Code of Va. § 20-124.3 (1)-(9) or foreseen in its child custody determinations, but nonetheless necessary and proper to custody determinations. In addressing these "other factors" specifically, the Supreme Court of Virginia held that "the controlling consideration in all child custody cases is always the child's welfare, and in determining the best interest of a child, the trial court must consider all facts . . ."[42]

Under Code of Va. § 20-124.3(10), Virginia courts have considered factors such as the home environment, moral climate, living arrangements, relationships with nonparents, and parental evasiveness with the court as necessary and proper to the determination of custody.[43] Therefore, it is well established in Virginia case law that factors, which may impact a minor's life either positively or negatively, are considered necessary and proper to the best interest analysis in the determination of custody.

The Supreme Court of Virginia held that under Code of Va. § 20-124.3(10), the court must consider all the facts that further the child's welfare and best interests.[44] In Virginia, abandonment by a parent and the viability of reunification with a parent are factors that must be considered in a court's best interest assessment.[45] For example, in *Smith v. Smith,* the City of Salem circuit court held,

[H]aving considered each and every one of the factors contained in § 20–124.3 . . . including the moral climate in which the children are currently being raised, as well as the father's choice to abandon his wife and children at his initial departure, the Court finds that the best interests of the children will be served by placing their joint legal custody with both father and mother and by placing their physical custody with their mother.[46]

In addition, where a child should live and whether that environment offers security and stability are factors that are often necessary and proper to custody determinations.[47] The question of whether it is in a minor's best interests to return to his or her home country is analogous to the issue of relocation because under Virginia law, the best interest of the child standard not only controls the issues of custody and visitation, but also the removal of a child to another jurisdiction.[48] In fact, "Virginia law . . . requires the court to consider and weigh the *necessary* factors in order to determine . . . whether relocation is in the best interest of the child."[49]

Generally, in relocation cases, the custodial parent is seeking to move the child to a distant or foreign jurisdiction. In SIJ cases, the petitioner is usually not seeking to relocate or move the minor from Virginia. Instead, the minor may be in deportation proceedings or be at risk of being placed in proceedings, and may be forced to leave Virginia, the jurisdic-

tion where custody is in question. In cases where relocation takes the child away from a secure and stable environment, the courts forbid the removal of the child from the state.[50] In Virginia, the minor often enjoys a secure and stable life with family or reliable adults. If deported, the minor may be returned to a dangerous community without an appropriate adult caretaker. Therefore, whether it's in a minor's best interest to return to his or her home country is necessary and proper to the determination of custody.

For these reasons, SIJ factual findings on abuse, abandonment, and neglect, whether reunification with a minor's parent is viable, and whether it is in the child's best interest to return to home country are necessary and proper to the determination of custody.

Practice Strategies

Practice in different jurisdictions and before different judges within the same jurisdiction varies, so some or all of these strategies may or may not be appropriate in your particular case. These are general practice strategies that we suggest going forward as appropriate.

Initial Filing.

Submit an attorney-drafted petition for custody and no separate SIJ motion. Include the factual basis for the petition for custody and the facts that give rise to the child's eligibility for SIJ. *See* Appendix for samples. Cite to state law and authority rather than the INA or Title 8 of U.S. Code, unless specific discussion of the child's pending removal proceedings proves necessary in the context of the case.

Post-*Canales,* many judges have dismissed separate SIJ motions. If you have a hearing on a case in which you have already submitted a motion for SIJ, be prepared to proceed with the custody case and propose the entry of a custody order which incorporates the SIJ findings.

If a docket clerk incorrectly dockets a previously filed SIJ motion under a separate docket number, make sure to file a formal Motion to Consolidate, bringing it back under the docket number of the custody petition. This should be done at the JDR level, but can also be done in Circuit Court if necessary.

Proposed Order.

Submit a proposed custody order that incorporates the SIJ findings, instead of two separate orders. Some courts prefer to make all findings post-*Canales* on the DC-573, the Court's form order. If you are appearing in one of these courts, draft specific findings into your prayer for relief to provide model language. As with the petition, refer to state authority and not federal statutes.

Regarding the "best interests not to return" finding, advocates need to make a difficult strategic decision whether to request that the Court make a "not in the best interests to return to [country]" finding in the exercise of their broad authority to act in the best interest of the child, or whether to submit a proposed order with wording such as "it is in the child's best interests to remain in Virginia." The former is preferable as it will clearly be found acceptable by USCIS, whereas advocates have reported mixed results with the latter in front of USCIS. In the few weeks since the *Canales* opinion came down, which judges will agree to enter which factual findings is fast-changing, and at the time of publishing this Practice Advisory, not all judges remain willing to enter a factual finding phrased as "not in the best interests to return." In addition, which formulation of the "best interests not to return" factual finding USCIS will accept is also subject to possible change as that federal agency reacts to *Canales*.

Additional Briefing.

If the judge indicates that they plan to refuse to make the requested factual findings, consider requesting additional time to brief their concerns if that is an option.

Preparing for Appeal.

Cases appealed from J&DR to Circuit Court are reviewed de novo. Once at the Circuit Court level, engage a court reporter prior to the hearing to create a record of live testimony of the Court's reasoning. In Circuit Court, the petitioner is responsible for the court reporter's scheduling and expense. If you receive an order in Circuit Court that does not contain the findings that you requested, preserve the case for appeal to the Virginia Court of Appeals by noting your objection to the entrance of the order as required in Rule 5A:18 of the Rules of the Supreme Court of Virginia. Be sure to note your objections with specificity. Per the *Canales* opinion, "[o]rdinarily, endorsement of an order '[s]een and objected to' is not specific enough to meet the requirements of Rule 5A:18." Feel free to contact any of the authors of this practice advisory to discuss case selection and strategies for any possible appeal to the Virginia Court of Appeals, and which cases might or might not be good cases to appeal to the Court of Appeals.

Finally, as noted above, if a court assigns two separate case numbers, one for the custody order and one for an order issuing SIJ findings, submit a motion to consolidate the cases into one case at the J&DR and/or Circuit Court level. ■

Please contact Christine Lockhart Poarch at Christine@Poarchlaw.com for sample petitions, supplemental briefing and orders .

Endnotes

[1]Unfortunately, while awaiting a favorable Virginia Supreme Court decision, *Canales* is binding on the lower courts. *See* Va. Code Ann. § 17.1-410. Virginia Supreme Court issued

[2]*Canales v. Torres Orellana,* No. 1073-16-4, 2017 Va. App. LEXIS 153, at *22 (Va. Ct. App. June 20, 2017) (citing 8 U.S.C. 1101(a)(27)(J)(ii)).

[3]*Canales*, 2017 Va. App. LEXIS 153, at *11-12 (emphasis added).

[4]*Id.* at *15-16 (citing 6 USCIS Policy Manual, Part J § (2)(D)(5) (2017)).

[5]*Id.* at *18.

[6]*Id.* at *20 (emphasis added).

[7]*Id.* at *17; *cf.* 8 U.S.C. § 1101(a)(27)(J)(i).

[8]*Id.* at *18.

[9]*Id.*

[10]*Id.*

[11]*Id.* at *21; *cf.* 8 U.S.C. § 1101(a)(27)(J)(ii).

[12]*Id.*

[13]*Id.* at *18 n.22.

[14]*Id.*

[15]*Id.* at *22.

[16]*Id.*

[17]*Id.* at *23-24.

[18]Va. Code Ann. § 16.1-227.

[19]*Brown v. Brown*, 30 Va. App. 532, 538 (1999).

[20]*Farley v. Farley,* 9 Va. App. 326, 328 (1990).

[21]Va. Code Ann. § 20-124.3(B).

[22]Va. Code Ann. § 20-124.3(A) (emphasis added).

[23]*See, e.g., Bottoms v. Bottoms,* 249 Va. 410, 419 (1995) (finding that "the nature of the home environment," a potential custodian's living arrangements, and the "moral climate" were important considerations in determining custody); *Goodhand v. Kildoo*, 37 Va. App. 591, 602 (2002) (analyzing a parent's "devotion" to the child); *Scinaldi v. Scinaldi*, 2 Va. App. 571, 576 (1986) (considering a father's relationship with another woman and past court order preventing him from allowing her to sleep over when his children were visiting).

[24]*See, e.g., Surles v. Mayer*, 48 Va. App. 146, 171 (2006).

[25]*See Joynes v. Payne*, 36 Va. App. 401, 416 (2001) (affirming the chancellor's consideration and weighing of factors beyond those listed in Va. Code Ann. § 20-124.3, including one parent's "forays" with another woman, in determining the child's best interests).

[26]*Farley v. Farley*, 9 Va. App. 326, 328 (1990).

[27]*Canales,* 2017 WL 2644214, at *18.

[28]*See Johnson v. Johnson*, 493 S.E.2d 668, 672 (Va. Ct. App. 1997) (holding that in determining relocation modification, "the trial court must make the child's best interests its primary concern"); *see also, Wheeler v. Wheeler,* 591 S.E.2d 698, 702 (Va. Ct. App. 2004) (considering whether relocation to Florida was in child's best interests).

[29]*See Canales v, Torres Orellana*, No. 1073-16-4, 2017 Va. App. LEXIS 153, at *18.

[30]*Cloutier v. Queen*, 35 Va. App. 413, 425 (2001).

[31]*Viable*, Black's Law Dictionary (10th ed. 2014).

[32]Va. Code Ann. § 20-124.3(7).

[33]2 Va. App. 409, 413 (1986).

[34]*Id.*

[35]*Turner v. Turner,* 3 Va. App. 31, 36 (1986).

[36]*Eichelberger,* 2 Va. App. at 413.

[37]*See* Va. Code Ann. § 20-124.3.

[38]*Eichelberger*, 2 Va. App. at 413.

[39]*See Ramsey v. Harvey*, 75 Va. Cir. 220, 223 (2008) (holding that a relocation case is where the primary caretaker is petitioning for the authority to move the children to a different state).

[40]*See Rupert v. Callahan*, 89 Va. Cir. 312, 312 (2014) (denying the mother's petition to relocate her son to Tennessee because although evidence suggested the relocation would benefit the mother, the court is bound to consider whether the relocation would independently benefit the child); *see also Stockdale v. Stockdale*, 33 Va. App. 179, 186 (2000) (holding that the removal of the children to New Jersey would serve their best interests because of evidence regarding the increased quality of the schools and the generally positive environment the new community would provide).

[41]Va. Code Ann. § 20-124.3(10) (emphasis added).

42*Brown v. Brown*, 218 Va. 196, 199 (1977).

43*See Bottoms,* 249 Va. at 417 (holding that that "other important considerations include the nature of the home environment and moral climate in which the child is to be raised."); *Kohut v. Osborne,* No. 2010-06-2, 2007 WL 445966, at *2 (Va. Ct. App. Feb. 13, 2007) (considering mother's evasiveness with the court as necessary and proper factor to the determination of custody); *O'Connor v. O'Connor*, No. 173024, 2003 WL 1563438 at *8 (Va. Cir. Ct., March 10, 2003) (considering the positive impact of the relationship between the child's mother and stepfather on the home environment as necessary and proper to the determination of custody); *Boardwine v. Bruce*, 88 Va. Cir. 218, 231 (2014) (considering the living arrangements of a non-custodial father necessary and proper to the determination of visitation).

[44]*See Brown,* 218 Va. at 199.

[45]47 Va. Cir. 517 (Dec. 28, 1998).

[46]*Id.* at 2.

[47]*See Bottoms,* 249 Va. at 417.

[48]*See Goodhand v. Kildoo*, 37 Va. App. 591, 599 (2002). *See also Cloutier v. Queen*, 35 Va. App. 413, 430 (2001) (quoting *Simmons v. Simmons,* 1 Va. App. 358, 362 (1986)).

[49]*Goodhand,* 37 Va. App. at 602 (emphasis added).

[50]*See Scinaldi v. Scinaldi*, 2 Va. App. 571, 573 (1986). *See also Wheeler v. Wheeler,* 42 Va. App. 282, 288 (2004); *Carpenter v. Carpenter,* 220 Va. 299, 302 (1979).

Warrantless Border Searches of Electronic Devices

By John B. Klow

The views expressed are those of the author, who is not an attorney. This publication contains no legal advice and may not be construed to create or limit any rights enforceable by law.

Recent news stories report American citizens having U.S. Customs and Border Protection (CBP) officers demanding their cell phones, requesting passwords, and conducting warrantless searches of those phones and other electronic devices as part of the border inspection process.

Department of Homeland Security data shows that cell-phone searches by border officers has increased by more than a factor or five, from fewer than 5,000 in 2015 to nearly 25,000 in 2016. Five thousand devices were searched in February, indicating that the 2017 total has great potential to eclipse prior yearly totals. The searches are not limited to crossings into the United States, but have been reported with passengers departing from the country.

As alarming as those figures may seem at first impression, the number of 25,000 cell phone searches must be balanced against the reality that nearly one million people enter the United States on average every day, with a similar number of departures.

Unlike traditional searches of vehicles, merchandise, and documents travelers have grown to anticipate as possibilities associated with border crossing, electronic device searches have the capability of disclosing extensive aspects of personal life, including the most private parts. In *Riley v California* in 2014[1], the unanimous United States Supreme Court noted that:

> "cell phones differ in both a quantitative and a qualitative sense from other objects that might be kept on an arrestee's person. … One of the most notable distinguishing features of modern cell phones is their immense storage capacity. Before cell phones, a search of a person was limited by physical realities and tended as a general matter to constitute only a narrow intrusion on privacy.
>
> …
>
> The storage capacity of cell phones has several interrelated consequences for privacy. First, a cell phone collects in one place many distinct types of information—an address, a note, a prescription, a bank statement, a video—that reveal much more in combination than any isolated record. Second, a cell phone's capacity allows even just one type of information to convey far more than previously possible. The sum of an individual's private life can be reconstructed through a thousand photographs labeled with dates, locations, and descriptions; the same cannot be said of a photograph or two of loved ones tucked into a wallet. Third, the data on a phone can date back to the purchase of the phone, or even earlier.
>
> …
>
> Finally, there is an element of pervasiveness that characterizes cell phones but not physical records."

The Supreme Court in *Riley* held that law enforcement officers needed a warrant to search electronic devices incidental to arrests. The *Riley* decision is applicable to warrantless searches incidental to arrests conducted as an exception to the general Fourth Amendment protection against unreasonable searches. Moreover, the *Riley* decision specifically stated that "other case-specific exceptions may still justify a warrantless search of a particular phone."[2] *Riley* made no mention of the border search exception to the Fourth Amendment protection against unreasonable searches[3].

Questions presented.

The question arises whether border searches, without warrant, are lawful and constitutional. Also, what consequences does a traveler face by refusing to facilitate the search by providing passwords or other assistance.

Statutory Authority.

CBP's web-site contains this advisory for travelers:

> **Authority to Search**
>
> All persons, baggage, and merchandise arriving in, or departing from, the United States are subject to inspection, search and detention … (to) determine the identity and citizenship of all persons seeking entry into the United States, determine the admissibility of foreign nationals, and deter the entry of possible terrorists, terrorist weapons, controlled substances, and a wide variety of other prohibited and restricted items.
>
> Various laws that CBP is charged to enforce authorize such searches and detention (see, for example, 8 U.S.C. § 1357 and 19 U.S.C. §§ 1499, 1581, 1582).
>
> …
>
> **Privacy and Civil Liberties Protection**
>
> In conducting border searches, CBP officers strictly adhere to all constitutional and statutory requirements, including those that are applicable to privileged, personal, or business confidential information. For example, the Trade Secrets Act (18 U.S.C. § 1905) prohibits federal employees from disclosing, without lawful authority, business confidential information to which they obtain access

as part of their official duties. Moreover, CBP has strict oversight policies and procedures that implement these constitutional and statutory safeguards. Further information on DHS and CBP privacy policy can be found at *www.dhs.gov/privacy*.

The laws cited give CBP officers authorities to interrogate persons, and to search persons, luggage, merchandise, cargo, vehicles, railway cars, conveyances, vessels, aircraft, and private lands in furtherance of their border security responsibility. CBP officers may detain cargo and merchandise for further examination (including forensic examination), and to make seizures for violations.

Constitutionality.

Even within the context of border searches, the reasonableness of the search will be the deciding consideration. While there has been no Supreme Court decision specifically deciding the constitutionality of a warrantless border search of electronic devices, the Fourth and Ninth Circuits have ruled on the issue.

In *UNITED STATES v. ICKES*, 393 F.3d 501 (2005), the Fourth Circuit held that "the government was authorized by 19 U.S.C. § 1581(a) to (conduct a warrantless border) search (of) Ickes's computer and disks."

> "Both Congress and the Supreme Court have made clear that extensive searches at the border are permitted, even if the same search elsewhere would not be. We refuse to undermine this well-settled law by restrictively reading the statutory language in 19 U.S.C. § 1581(a) or by carving out a First Amendment exception to the border search doctrine."

In *United States v. Arnold*, 523 F.3d 941 (9th Cir. 2008), the Ninth Circuit declined to "create a split with the Fourth Circuit's decision in Ickes."

> "Therefore, we are satisfied that reasonable suspicion is not needed for customs officials to search a laptop or other personal electronic storage devices at the border."

However, the Ninth Circuit, in *United States V. Cotterman*, 637 F.3d 1068 (9th Cir. 2011), held that reasonable suspicion was required for a forensic examination of electronic devices. (Petition for certiorari denied on January 13, 2013.)

Ickes, Arnold, and *Cotterman* were all "kiddie porn" cases. Defendants Ickes and Cotterman were United States citizens.[4]

The Ninth Circuit restriction about forensic examinations is controlling within that circuit jurisdiction. In the rest of the country, CBP appears to take the position that all electronic searches are permissible under the border search exception.

What happens when an electronic device is searched at the border?

The July 18, 2008, written policy issued by CBP best describes what may happen.

Border Search. "In the course of a border search, and absent individualized suspicion, officers can review and analyze the information transported by any individual attempting to enter, reenter, depart, pass through, or reside in the United States, subject to … requirements and limitations ….

Detention and Review. "Officers may detain documents and electronic devices, or copies thereof, for a reasonable period of time to perform a thorough border search. The search may take place on-site or at an off-site location."[5]

Retention and Sharing.

By CBP.

Retention with Probable Cause. "When officers determine there is probable cause of unlawful activity-based on a review of information in documents or electronic devices encountered at the border or on other facts and circumstances-they may seize and retain the originals and/or copies of relevant documents or devices, as authorized by law."

Other Circumstances. "Absent probable cause, CBP may only retain documents relating to immigration matters, consistent with the privacy and data protection standards of the system in which such information is retained."

Sharing. "Copies of documents or devices, or portions thereof, which are retained in accordance with this section, may be shared by CBP with Federal, state, local, and foreign law enforcement agencies only to the extent consistent with applicable law and policy."

Destruction. "Except as noted in this section, if after reviewing information, there exists no probable cause to seize the information, CBP will retain no copies of the information."

By assisting agencies and entities

During assistance. "All documents and devices, whether originals or copies, provided to an assisting Federal agency may be retained by that agency for the period of time needed to provide the requested assistance to CBP."

Return. "At the conclusion of the requested assistance, all information must be returned to CBP as expeditiously as possible. In addition, the assisting Federal agency or entity must certify to CBP that all copies of the information transferred to that agency or entity have been destroyed, or advise CBP in accordance with section (c) below.

(i) In the event that any original documents or devices are transmitted, they must not be destroyed; they are to be returned to CBP unless seized based on probable cause by the assisting agency."

(c) Retention with independent authority. "Copies may be retained by an assisting Federal agency or entity only if and to the extent that it has the independent legal authority to do so-for example, when

the information is of national security or intelligence value. In such cases, the retaining agency must advise CBP of its decision to retain information on its own authority."

Handling certain types of information.

Business information. "Officers encountering business or commercial information in documents and electronic devices shall treat such information as business confidential information and shall take all reasonable measures to protect that information from unauthorized disclosure. Depending on the nature of the information presented, the Trade Secrets Act, the Privacy Act, and other laws may govern or restrict the handling of the information."

Sealed letter class mail. "Officers may not read or permit others to read correspondence contained in sealed letter class mail (the international equivalent of First Class) without an appropriate search warrant or consent. Only articles in the postal system are deemed "mail." Letters carried by individuals or private carriers such as DHL, UPS, or Federal Express, for example, are not considered to be mail, even if they are stamped, and thus are subject to a border search …."

Attorney-client privileged materials. Although legal materials are not necessarily exempt from a border search, they may be subject to special handling procedures.

Correspondence, court documents, and other legal documents may be covered by attorney-client privilege. If an officer suspects that the content of such a document may constitute evidence of a crime or otherwise pertain to a determination within the jurisdiction of CBP, the officer must seek advice from the Associate/Assistant Chief Counsel or the appropriate U.S. Attorney's office before conducting a search of the document."

Identification documents. "Passports, Seaman's Papers, Airman Certificates, driver's licenses, state identification cards, and similar government identification documents can be copied for legitimate government purposes without any suspicion of illegality."

CBP's written policy was developed both to provide instruction to CBP's officers, and also to inform the public about what may happen when CBP officers conduct a warrantless border search of information. Additional searches may be conducted pursuant to other authorities such as a warrant or incident to an arrest.

Consequences for a traveler refusing to assist in search

Consequences will vary for the traveler who does not assist in the border search of an electronic device, depending on whether the traveler is a United States citizen, a lawful permanent resident, or a nonimmigrant applicant for admission.

For all travelers, CBP has publicly indicated that it may perform warrantless border searches.

United States citizens.

The warrantless Border Search authority applies to electronic devices carried by United States citizens. Citizens may decline to open password protected files and programs; however, the electronic device may detained for further examination, which may include copying. The opening of password protected files and programs does not protect them from copying by CBP officers.

U.S. citizens may not be prevented from entry into the United States, even if they refuse to assist CBP officers in the warrantless border search of their electronic devices.

Lawful permanent residents.

Permanent residents also may decline to assist CBP officers in warrantless border searches. Whether that refusal puts return to the United States at risk will depend on the totality of circumstances.

First, by law[6], permanent residents are not applicants for admission unless one of six specific conditions apply –

1. resident status is abandoned or relinquished;
2. continuous absence from the United States exceeds 180 days;
3. illegal activity occurs during absence;
4. departure from the United States occurred while under legal process seeking removal from the United States;
5. a crime described in section 212(a)(2) has been committed; and
6. entry is attempted at a time and place not designated, or has not been admitted after inspection and admission by an immigration officer.

It is possible that a search of a permanent resident's electronic device or other evidence may disclose evidence that one or more of the conditions described above may exist. In that instance, the government may be able to establish that the permanent resident is an applicant for admission and may be inadmissible to the United States. In that situation, CBP officers will charge inadmissibility, placing the permanent resident in removal proceedings.

Even if inadmissibility is not established, search of the permanent resident's electronic device may establish that the resident may be deportable. In that case, CBP or ICE officers may charge deportability, also placing the permanent resident in removal proceedings.

If either inadmissibility or deportability is charged, the permanent resident is entitled to all of the due process afforded in removal proceedings, including administrative appeal and review by the federal courts.

Nonimmigrant applicants for admission.

The situation is markedly different for a nonimmigrant applicant for admission for the primary reason that the nonimmigrant applicant for admission bears the burden of proof to establish that admissibility is established[7]. Refusing to make all files and applications on an electronic device available for examination by the inspecting CBP officer is likely to

be considered as a lack of cooperation with the inspections process, and thereby a failure to establish admissibility.

Several possibilities are available for CBP to take enforcement action against a nonimmigrant who does not establish admissibility, including:

- refusal under the Visa Waiver Program[8],
- expedited removal[9],
- referral for removal proceedings before an immigration judge[10],
- removal on security and related grounds[11],
- permit withdrawal of application for admission[12],
- parole for urgent humanitarian reasons or significant public benefit[13], or
- waive an unmet nonimmigrant visa requirement[14].

However, a CBP officer may not admit as a nonimmigrant a person who does not establish admissibility to the United States. Therefore, at a minimum, the applicant's nonimmigrant visa will be cancelled, and CBP will create a record of the enforcement action taken. Both actions will make future nonimmigrant visa issuance and admission to the United States more difficult.

Detention and Review. Even if a nonimmigrant is not admitted and an enforcement action is taken to enforce departure, CBP officers may detain and review the nonimmigrant's electronic device(s), which may include copying.

Public response.

Regular travelers may be showing an increasing awareness of the increased electronic device searches. Media reports are publicizing border searches. Anecdotal evidence is that some travelers are showing up at ports of entry with "clean" cell phones and other electronic devices.

Conclusion.

CBP's statutory border search authority is broad, with limited protection provided by the Fourth Amendment. Warrantless border searches of electronic devices have been upheld by the Fourth and Ninth Circuits. The Ninth Circuit has held that a warrantless border search forensic examination of an electronic device must be based upon reasonable suspicion, a holding that CBP appears to follow within the Ninth Circuit jurisdiction. The Supreme Court has declined certiorari on these three circuit decisions, and has not ruled on the issue of border searches of electronic devices. ■

Endnotes

[1]Riley v. California, 573 U.S. ____ (2014).

[2]*Riley*, supra. P. 26.

[3]"(t)he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated " U.S. Const. amend. IV

[4]Arnold appears to have been a U.S. resident, citizenship unknown.

[5]19 USC (c)(1) provides for review of merchandise within a 5 day period following the date on which merchandise is presented for examination. Merchandise not released within the 5 day period is considered detained. Notice of detention must be issued within 5 days after a decision is made to detain (8 USC (c)(2).

[6]INA § 101(a)(13)(C), *Matter of Gonzalez-Romo*, 26 I & N Dec. 743, 744; *See Matter of Pena*, 26 I&N Dec. 613, 615 (BIA 2015).

[7]INA § 240(c)(32)(A), 8 CFR § 1240.8(b).

[8]INA § 217(b), 8 CFR § 217.4.

[9]INA § 235(b)(1), 8 CFR § 235.3(b)(1).

[10]INA § 235(b)(2), 8 CFR § 235.6.

[11]INA § 235(b)(3), 8 CFR § 235.8.

[12]INA § 235(a)(4), 8 CFR § 235.4.

[13]INA § 212(d)(5)(A), 8 CFR § 212.5.

[14]INA § 212(d)(4), 8 CFR § 212(g

From the Editor

Effective October 1, Dr. Alicia J. Triche will take over as editor of the Green Card. Please send news items, photos, and articles (Word format please) to her at Aliciatricheclc@gmail.com.

Welcome All Immigrants, Sanctuary City Next Exit: Why President Trump's Attack on Sanctuary Cities Violates the Constitution

By Raquel L. Musconi

Introduction

"Give me your tired, your poor, / Your huddled masses yearning to breathe free, / The wretched refuse of your teeming shore. / Send these, the homeless, tempest-tost to me, / I lift my lamp beside the golden door!"[1] The words on the Statue of Liberty, placed at the main portal of arrival to the United States of America, displays the words of opportunity and freedom, which provide a welcoming message to all individuals that enter.[2] Thousands of immigrants traveled to America for a better life, to escape poverty, religious persecution, a lack of work in their home countries, and various other reasons.[3] A nation founded on immigration once welcomed immigrants with open arms as "a source of strength and vitality for a growing nation."[4]

Prior to the 1920's, immigration services paid little attention to border control, where most immigrants entered through Ellis Island or other sea ports.[5] This attitude quickly changed as Americans sought to regulate the borders and create deportation policies.[6] Historically, the states and local governments[7] have had the authority to regulate immigration law, so long as it does not conflict with federal law.[8] Today, the Federal Government relies on the states to enforce federal immigration law.[9] On the other hand, roughly 300 jurisdictions have developed policies that challenge federal immigration law enforcement and have identified themselves as "Sanctuary Cities."[10] These jurisdictions adopt a "don't ask, don't tell policy" regarding a person's lawful or unlawful immigration status.[11] Where the United States was once considered a "melting pot" or "land of immigrants," the country now represents the opposite by developing an "anti-immigrant" attitude—especially under the Trump Administration.[12]

This Note will explore the impact that President Donald Trump's Executive Order: Enhancing Public Safety in the Interior has on federalism and will argue that the Executive Order is unconstitutional. Part I explains the Separation of Powers Doctrine in the American Government pertaining to immigration law in light of congressional plenary power over immigration law, the role of each branch of government, and an individual's transition from the criminal system to the immigration system. Part II illustrates the connection between national security concerns and immigration policies and the varying responses to immigrants in American society. Part III argues that President Trump's Executive Order violates the Constitution and threatens the foundation of our federalist system. Part IV explains why the Executive Order is inconsistent with the Tenth Amendment and the states' right to choose whether to enforce federal immigration law and to establish Sanctuary City policies.

Background

The Separation of Powers Doctrine

The purpose behind the separation of powers within the Federal Government is to protect the checks and balances among the branches, to prevent tyranny of any one branch, and to promote efficiency of the administration as a whole.[13] The separation of powers can be viewed from both a formalist and functionalist theory.[14] Formalism is concerned with the general rule of law and the powers granted to each branch of government and functionalism suggests that checks and balances require dependability among the branches to fulfill the goal's of the Constitution.[15] Article I of the Constitution grants all legislative or rule making powers to Congress—the House of Representatives and the Senate.[16] Article II of the Constitution grants the executive powers to the President of the United States, whom "shall take care that the laws be faithfully executed."[17] Article III of the Constitution grants the judicial power to the Supreme Court, the court of final arbitration with original and appellate jurisdiction.[18]

The Plenary Power Doctrine

1. Congressional Plenary Power Over Immigration Law

It is well recognized that Congress has plenary authority over immigration, even if each branch of government has some authority over immigration law.[19] The Constitution does not expressly authorize the Federal Government to regulate immigration.[20] Yet, if Congress had no power over immigration, it would mean that the founders intended for open borders or left the power to the states.[21] The Supreme Court has held that Congress has the authority to exclude noncitizens.[22] Even where the Executive Branch expresses any authority over immigration law, it is because Congress, in its plenary authority, has handed over such power.[23] Where the Supreme Court reviews cases on immigration law it still recognizes congressional plenary power by deferring to Congress in its decisions.[24]

Congress drafted the Immigration Nationality Act ("INA") in 1952, which governs immigration law and is codified in the United States Code.[25] An immigration statute, § 1373, provides, in pertinent part, that "a Federal, State, or local government entity or official may not prohibit, or in any way restrict, any government entity or official from sending" a person's immigration status to the Federal Government.[26]

This law does not impose an obligation on states to seek information regarding an individual's immigration status, rather it prevents the states from prohibiting or restricting the exchange of information between the state and the Federal Government.[27] The statute refers solely to communications regarding immigration status, and does not mention immigration custody or detainer requests.[28] Congress rejected attaching conditional funds to § 1373.[29]

2. Congressional Spending Power

Article I, § 8 of the Constitution grants Congress spending power.[30] The Spending Clause directly impacts the states sovereignty and Tenth Amendment right through conditional funds.[31] In South Dakota v. Dole, the Supreme Court prohibited the Federal Government from coercing the states to achieve a federal goal.[32] The Spending Clause is limited to spending in pursuit of "the general welfare;" stating the conditions on the receipt of federal funds unambiguously; relating the grant to a national interest; may not be barred by other constitutional provisions; and may not be so coercive turning into compulsion.[33] Conditional funds granted to the states must be used to regulate the goal of the overall federal program—the states are not obligated to consent to conditional funding.[34] A state must comply with the conditions imposed in order to receive the funding attached to the specific federal program.[35]

3. Congressional Delegation of Power to the Executive Branch

The United States bifurcates immigration law between the Legislative and the Executive Branch, where Congress makes laws and the Executive Branch carries out laws.[36] Thus, the Executive Branch has some authority over immigration law.[37] This occurred when Congress drafted and passed the INA and delegated power to the Executive Branch through its agencies.[38] Congress hands over power to the Executive Branch through its entrustment of duties to executive agencies—the Department of Homeland Security, the Department of State, and the Department of Justice.[39]

The Constitution recognizes "all persons," regardless of lawful or unlawful immigration status.[40] The Due Process Clause is not confined to citizens and no state shall "deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."[41] Additionally, where Congress entrusts power to an officer or federal agency, that officer's discretionary authority is due process, such as through ports of entry at our borders.[42] Where Congress has plenary power over immigration laws, the Executive has plenary power over external affairs, and the two areas of law often coincide.[43] Therefore, the President has authority to pass regulations in the area of foreign affairs.[44]

Presidents have previously issued executive orders in the realm of immigration law.[45] The President's authority to create executive orders is unclear.[46] The source of power may be inferred from Article II of the Constitution, "[t]he executive power shall be vested in a President of the United States . . . he shall take care that the laws be faithfully executed."[47] The use of executive orders is thought to be necessary only in "times of emergency."[48] The President acts outside of his constitutional powers when his action requires Congress to act in furtherance of his goal.[49] Historically, in this realm of shared powers between the Executive and Legislative Branch, statutes have trumped executive actions.[50]

The Supreme Court's Review of Immigration Law

The Supreme Court has the authority to review actions of both the Executive and Legislative Branch.[51] It is hesitant to review immigration law due to congressional plenary power and the risk of a political question.[52] The Supreme Court reviews immigration statutes and interprets the legislative intent if a statute is ambiguous.[53] Additionally, the Supreme Court reviews statutes to determine constitutionality.[54] Specifically, the Supreme Court interpreted the mandatory detention statute for removal proceedings.[55] Furthermore, it analyzed when a noncitizen in removal proceedings shall be awarded a bond hearing in accordance with due process.[56]

The courts are hesitant to afford rights to undocumented immigrants because they are "breaking the law" by being present in the United States unlawfully.[57] However, the Supreme Court determined that once an "alien" or "noncitizen"[58] is within the territorial jurisdiction he or she is entitled to most constitutional rights.[59] The Supreme Court determined that the Due Process Clause is "designed to afford its protection to all within the boundaries of a State."[60] The right of liberty is at the center of detention—the restraint of freedom while being detained.[61] There are several constitutional concerns of detaining an individual beyond his or her criminal sentence.[62] "The Department of Homeland Security has said that complying with [detainer] requests is voluntary because keeping someone in jail without a warrant violates the 4th Amendment."[63]

Immigration and Customs Enforcement and Detainer Requests

"Crimmigration"[64] describes the merger of disciplines and the direct pipeline between the criminal justice system and the immigration system.[65] It depicts how the immigration authorities gain attention of noncitizens that have committed criminal offenses.[66] Specifically, a noncitizen is referred to Immigration and Customs Enforcement ("ICE") by the Criminal Alien Program which allows ICE to access state detention facilities to conduct interviews of individuals in custody.[67] The true nature of this pipeline occurred through the Secure Communities Initiative and "biometrics," a shared finger-print database between state police agencies and the Federal Bureau of Investigations ("FBI").[68] ICE receives information that a noncitizen is in the criminal justice system once an individual's fingerprints are transmitted to the FBI and then transferred to the Department of Homeland Security ("DHS").[69] ICE, an agency within DHS, may then send a detainer request to the state detention facility.[70]

A detainer is a request to keep a noncitizen in criminal

custody for forty-eight hours after the completion of his or her sentence.[71] The detainer allows ICE to gain physical custody of a noncitizen that may be subject to removal.[72] While in custody, during those forty-eight hours—pursuant to an ICE detainer—the noncitizen remains in the criminal system, rather than transferring to the immigration system.[73] A state's decision to honor an ICE detainer is entirely voluntary.[74] If a state denies the detainer request, the noncitizen will be released upon the completion of his or her criminal custody.[75] If a state honors the detainer request, the noncitizen will be held for forty-eight hours after the completion of his or her criminal custody and until ICE "picks up" on the detainer, or gains physical custody .[76] Under the Trump Administration this process differs where a detainer request may occur earlier in the process and prior to criminal proceedings.[77] Once ICE gains custody of an individual, the noncitizen is issued a Notice to Appear and removal proceedings are initiated.[78] This administrative review occurs in front of an Immigration Judge ("IJ"), under the authority of the Department of Justice, Executive Office of Immigration Review ("EOIR").[79]

The States' Authority Over Immigration Law

Where Congress has plenary power over immigration law, it is inherently federal law.[80] Yet, history suggests that the states have some authority over immigration law.[81] Prior to the drafting of the INA, Congress encouraged the states to enforce immigration policies and the Passenger Cases even allowed the states to exclude noncitizens.[82] Furthermore, the Supreme Court has interpreted exclusion policies as a shared power with Congress.[83]

If the Federal Government has complete authority over an area of law, the state may only regulate in that arena so long as the state law does not conflict with a federal law.[84] The Supreme Court reviewed and upheld one provision of a state immigration law, in Arizona, which authorizes state law enforcement officers to engage in warrantless searches where they have reasonable suspicion to believe an individual is undocumented. [85] Congress grants the states authority over immigration law, where the states may deputize their law enforcement officers as ICE officers by entering into a § 287(g) agreement.[86] Thus, such agreements allow state law enforcement officers to act as ICE officers, including the authority to detain a noncitizen and issue a Notice to Appear.[87] These agreements accelerate the pipeline of "crimmigration" and the transfer of a noncitizen from the criminal system to the immigration system.[88]

Sanctuary Cities

In recent years, several jurisdictions have become a "Sanctuary City," which is not a legal term, but defines jurisdictions that have limited or declined cooperation with immigration law enforcement.[89] The sanctuary movement is hardly a new phenomenon, as it began in the 1980's by religious communities that took in refugees from Central America.[90] These actions were a direct response to the government's denial of refugee applications from war torn countries like El Salvador and Guatemala.[91] A movement that once began as a moral obligation by a Presbyterian Pastor, that allowed refugees to "take sanctuary" in his church, progressed into a public concept adopted by major cities in America.[92]

Through state regulations, jurisdictions have created "sanctuary policies," which "forbid [state] law enforcement personnel to ask about immigration status or report illegal aliens to federal authorities, except in the cases of serious criminal offense."[93] Specifically, the City of Lawrence prohibits its city officials from arresting and detaining an individual based solely on immigration status.[94] The County of Santa Clara's only honors ICE detainers for "individuals with serious or violent felony convictions."[95]

A report, Federal Funding of America's Sanctuary Cities, determines that $27 billion of federal funding is granted to America's Sanctuary Cities.[96] This report concludes that only about $600 million of these cities' total federal funding is obtained through Department of Justice grants to local police departments.[97] New York City, New York, one of America's largest Sanctuary Cities, receives roughly a total of $7.5 billion in federal funding.[98] Furthermore, the largest portion of the city's federal funding is dedicated to the New York State Department of Education and the smallest amount of the city's federal funding is dedicated to the New York City Police Department.[99]

Executive Order: Enhancing Public Safety in the Interior

President Donald J. Trump, within his first twenty days in office, created numerous executive orders, including three orders regarding immigration law.[100] Specifically, the Executive Order: Enhancing Public Safety in the Interior of the United States is directed at Sanctuary Cities.[101] The Executive Order states its purpose is to "ensure public safety of the American people" and to "ensure that our Nation's immigration laws are faithfully executed."[102] The President affirms that the policy of the Executive Order is to "[e]nsure that jurisdictions that fail to comply with applicable Federal law do not receive Federal funds, except as mandated by law."[103]

The Executive Order asserts that "sanctuary jurisdictions," which is not a term of legal significance, "willfully violate Federal law in an attempt to shield aliens from removal from the United States."[104] It mentions only one statutory immigration law, § 1373.[105] The Defunding Provision suggests that all federal funds granted to these jurisdictions are at stake.[106] The Executive Order concedes that the President is not aware of the relevant federal grants "sanctuary jurisdictions" receive.[107] The current litigants have interpreted the Executive Order to threaten all federal funds, and because the Executive Order does not narrow the federal funding, the plaintiffs must read it broadly.[108] It imposes fines and penalties on "aliens unlawfully present" and those who facilitate them.[109]

The order creates a "sanctuary shame list," to highlight Sanctuary Cities by issuing a list of crimes committed by "aliens" and jurisdictions that choose not to honor detainers.[110] It promotes § 287(g) agreements with state law enforcement agencies and broadens ICE enforcement priorities.[111] President Donald J. Trump equates aliens as "criminals" and this Executive Order is his attempt to "eliminate" Sanctuary Cities.[112] President Trump's executive orders on immigration law are arguably the largest attempt at immigration reform since Illegal Immigration Reform and Immigrant Responsibility ("IIRIRA"), which vastly changed immigration law.[113]

Why is this Important?

National Security and Immigration Law

Historically, America's immigration policies have centered around fighting terrorism and have been affected by what groups society fears.[114] "The INA has historically provided for both the exclusion and deportation ("removal") of aliens who were deemed to pose a national security risk."[115] The assassination of President McKinley triggered the exclusion of "anarchists."[116] The McCarthy era prompted the addition of communists to the categories of excludable and deportable classes of people.[117] The Oklahoma City Bombing triggered the drafting of the Antiterrorism and Effective Death Penalty Act ("AEDPA") and IIRIRA.[118] September 11th triggered the drafting of the USA Patriot Act and REAL ID.[119]

Detention is at the center of immigration law and national security, and the mandatory detention statute permits the detention of suspected terrorists and noncitizens that are subject to removal.[120] This statute, along with America's fears, amplifies our nation's immigration policies which directly reflect our national security concerns.[121] This correlation, between the nation's fears and immigration policies, continues under the Trump Administration, where the President's executive orders have indicated that all "aliens" are "criminals" and that "Muslims" are bad.[122]

Immigrants Are Not Bad

Sanctuary Cities understand the benefits of immigrant communities.[123] These cities are not opposed to immigrants because they enhance society in a variety of ways, such as through economics, education, and various other aspects of America's workforce.[124] Research suggests that undocumented immigrants make up only 4% of the American population, and about half of the undocumented population entered the United States legally.[125] The Congressional Budget Office determined state spending on services to undocumented persons "makes up a small percentage of those governments' total spending."[126] It determined that 75% of undocumented immigrants comply with federal, state, and local tax laws.[127] Undocumented immigrants result in a positive economic gain, where workers contribute roughly $12 billion each year in state and local taxes, and do not withdraw from the system.[128] Thus, "undocumented [im]migrants contribute $6–7 billion in Social Security funds that they will be unable to claim."[129]

The perception that immigrants are "illegal," "criminals," or "terrorists" is mistaken and erratically erroneous as they are less likely to commit crimes than native born citizens and immigrants are productive additions to society.[130] Immigrants to the United States have substantially contributed to the business marketplace, which additionally explains the attraction of immigrant employment visas.[131] Several successful immigrants have impacted corporate America, such as the co-founder of Google or the co-founder of Intel Corporation.[132] Immigrants are more than simply the stereotypical jobs of house keepers or agricultural workers; they contribute to life sciences, software development, and computer science.[133] Popular and well-known companies have demonstrated their support for immigrants through an amicus brief filed in the Ninth Circuit Court of Appeals before the Court heard the appeal regarding Trump's "Travel Ban" Executive Order.[134]

The Reality of the Campaign Trail

During the 2016 Presidential Election, candidate Donald J. Trump expressed a clear concern for America's immigration policies and vowed to deport criminal aliens, build a wall along the southern border, and eliminate Sanctuary Cities.[135] Since the very beginning of his campaign, his bombastic rhetoric stirred up hate and was "drenched in xenophobia."[136] He used campaign slogans such as "criminal aliens" and used personal stories to light a fuse in America.[137] Within seven days of President Trump's inauguration, he signed three executive orders regarding immigration law.[138] America quickly realized that his rhetoric was not simply for the campaign trail and that same rhetoric that got him elected became reality.[139] Within hours of the Travel Ban: Executive Order, attorneys swarmed local airports, plaintiffs were gathered, and complaints were filed.[140] The public and legal opposition of President Trump's Sanctuary City: Executive Order has also made its way into federal courtrooms and state Sanctuary City policies continue to increase across the nation.[141]

Analysis

The Executive Order: Enhancing Public Safety in the Interior of the United States is Unconstitutional Because It Violates the Principles of Federalism.

President Donald J. Trump has Exceeded his Executive Authority

President Trump exceeds his presidential authority by regulating federal funds awarded to "sanctuary jurisdictions," which is an attack on Sanctuary Cities.[142] The Separation of Powers Doctrine is implemented in our federalist system to prevent one branch of government from gaining too much power.[143] The Legislative Branch may alleviate the dangers of executive orders; however, congressional silence enables the President to obtain the power perceived in an executive

order.[144] President Trump's Executive Order states that the policies enacted by the order will "[e]nsure that jurisdictions that fail to comply with applicable federal law do not receive federal funds."[145] He exceeds his presidential authority by regulating federal funds, a power constitutionally granted to Congress.[146] The Constitution vests the power of the Spending Clause to Congress.[147]

There is nothing in Article II of the Constitution that grants the President authority over federal funding.[148] "When the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb, for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter."[149] Where Congress broadly grants federal funds, with no conditions attached, the state or agency may allocate those funds from a "lump-sum appropriation" at its discretion.[150] Therefore, the only authority the President has is the reconfiguration of funds within an executive agency, where an agency is given discretion to use the funds any way it desires.[151]

"The Executive Order represents a gross overreach of executive power. This power grabs at the expense of powers constitutionally vested in the Congress, as well as state and local governments."[152] The President takes the authority upon himself to place conditions on a statute, where Congress did not link § 1373 to receipt of federal funds.[153] The President attributes his action of the "sweeping and unprecedented order" to the authority vested in him as the President by the Constitution and the INA, which actually gives him no law making authority over immigration law.[154] The Take Care Clause, under Article II of the Constitution, requires the President to "take care that the laws be faithfully executed," and does not grant the President any rule making authority.[155]

The INA does not link § 1373 to federal funding.[156] Congress considered conditioning compliance of § 1373 with federal funds, but denied the bill that proposed it.[157] This Executive Order is an overreach of executive authority, especially where the bill proposing the condition of federal funds with § 1373 was drafted by Senator Jeff Sessions, who has been confirmed as President Trump's Attorney General.[158] Furthermore, Attorney General Sessions played a prominent role in President Trump's executive orders and is said to be the "intellectual godfather" of Trump's "blizzard of executive orders."[159] The order "reworks the entire structure of our federal republic, granting the federal executive branch untrammeled discretion to punish state[s]," and should not be enforced.[160]

If an executive order requires congressional authorization, it may be obtained through ratification or congressional silence.[161] Congress may ratify § 1373 or another INA statute to link conditional funding to an immigration law; otherwise, congressional silence may be viewed as approval of this Executive Order.[162] When the Sanctuary City: Executive Order makes its way to the Supreme Court, the Court must interpret congressional silence before discussing the merits of the Executive Order.[163] If the Supreme Court determines congressional silence as approval of the Executive Order, it must then determine whether Congress intended to approve the Executive Order.[164] The President exceeds his executive authority through this Executive Order because he acts outside of his enumerated powers.[165] The Legislative and Judicial Branches must minimize the danger of this Executive Order and disfavor the President's abuse of power.[166]

The Executive Order Violates the Spending Clause Because It May Only Offer the States an Incentive and May not Coerce the States to Achieve a Federal Goal

Even if Congress delegates the President authority to grant conditional funds to the states, he may only encourage or give the states an incentive to participate in a federal program.[167] The President may not imply conditions that are "so coercive as to pass the point at which pressure turns into compulsion."[168] If the President wishes to have the states enforce federal immigration law, a financial incentive is limited by two restrictions: the states have no obligation to cooperate and a financial incentive may not force the states to cooperate.[169] The Executive Order does not give the states an incentive to enforce federal immigration law, where the language is overly coercive asserting, states that "willfully refuse to comply with 8 U.S.C. § 1373 (sanctuary jurisdictions) are not eligible to receive Federal grants."[170] The County of Santa Clara points out that a Department of Justice memorandum calls out the entire State of California as a jurisdiction that does not comply with § 1373 and the the County fears its federal funds, which are streamed through the State.[171] The Executive Order coerces all states, and especially Sanctuary Cities, by threatening to withhold all federal funds from "sanctuary jurisdictions."[172]

Even if Congress has delegated authority over federal funds to the President, the Executive Order violates the Spending Clause of the Constitution.[173] Federal funds granted to the states must meet the constitutional limitations and "further broad policy objectives by conditioning receipt of federal moneys upon compliance by the recipient with federal statutory and administrative directives."[174] Supposing the Executive Order's purpose of "national security and public safety in the United States" is in pursuit of "the general welfare," the Executive Order does not meet subsequent constitutional standards.[175] The ambiguity of the Executive Order fails to provide the states with proper notice to exercise a choice, where § 1373 or was never conditioned with federal funds.[176] The conditions that the President attaches to the Executive Order are ambiguous: "jurisdictions that fail to comply with applicable Federal law," "willfully violate Federal law," "willfully refuse to comply with § 1373."[177]

The Executive Order does not provide a sufficient nexus between the conditions imposed and the project funded.[178] The condition imposed is broad enforcement of federal immigration law, the funds attached are too general, reaching funds that do not relate to immigration law.[179] The Executive Order provides a caveat to withhold all federal

funds except funds "deemed necessary for law enforcement purposes," which is the exact opposite of the nexus requirement.[180] The President reverses the conditional nexus, where law enforcement funds are related to compliance with § 1373, and may arguably be the only category of funds the Federal Government may withhold.[181] However, not all federal law enforcement funds granted to the states correlate with immigration law, and should not be generally attached to the Executive Order.[182] A sufficient nexus between the Executive Order and immigration law may only withhold funds directly related to immigration, such as the Criminal Alien Assistance Program.[183]

Additionally, even if the Executive Order meets the principles of the Spending Clause, it may be barred by another constitutional standard—the Vagueness Doctrine.[184] The purpose of conditional funds is to prevent harm, which is a valid reason for the Supreme Court to uphold conditions; however, these conditions impose rather than prevent harm, and should not be upheld.[185] A regulation using the Spending Clause may not be upheld if the "coercive conditions" intend "merely to carry out a 'policy' of Congress or of the federal government at large."[186] Consent of the States participation in a federal program with conditional funds must be "voluntary and not coerced by threats to withhold large sums of badly needed money."[187]

The Executive Order is overly coercive and the price of the threat of "all federal funding" is so extreme that no rational state would reject the terms of the order.[188] Immediately after the Executive Order was issued, three complaints were filed in federal courts: City and County of San Francisco v. Donald J. Trump; City of Chelsea, City of Lawrence v. Donald J. Trump; and County of Santa Clara v. Donald J. Trump. [189] These Sanctuary Cities read the Executive Order broadly to conclude a threat of "all federal funding," and with the responsibility of planning annual budgets for the fiscal year, found it necessary to take action promptly.[190]

Threatening a jurisdiction's entire receipt of federal funding is "much more than 'relatively mild encouragement'—it is a gun to the head."[191] Permitting the President to force the States to impose a federal objective contradicts the essential foundation of our government's system.[192] "The Supreme Court has specifically rejected 'congressional action compelling state officers to execute federal laws.'"[193] When acting under the Spending Clause, the "danger [of abuse] is heightened" because the Federal Government can use a power to implement a policy that it could not within its enumerated powers.[194] The Executive Order threatens much more than a small percentage of a category of funding, such as in South Dakota v. Dole, where the conditional funds of 5% of federal highway funding was less than 0.5% of the state's overall budget.[195]

Rather it threatens a much larger portion of a Sanctuary City's entire annual budget, like in Sebelius, where the threatened loss was greater than 10% of the state's over all annual budget.[196] The Executive Order exceeds the threshold of a "gun to the head," set by the Supreme Court at 10% of a state's annual budget, and has left the current litigants with no choice.[197] The Executive Order is an unconstitutional use of the Spending Clause where it threatens 13% of San Francisco's annual budget, 10% of Chelsea's annual budget, 15% of Lawrence's budget, and 15% of the County of Santa Clara's annual budget.[198] "The threat against such large percentages of Plaintiff Cities' annual budgets is an attempt to coerce the Cities into complying with the demands of the Executive Order."[199]

The Executive Order Must Be Struck Down for its Constitutional Vagueness

The Executive Order: Enhancing Public Safety in the Interior violates the Due Process Clause because it is ambiguous.[200] The Due Process Clause requires that a federal law "provide a person of ordinary intelligence fair notice of what is prohibited."[201] The Executive Order should be voided for its constitutional vagueness to avoid arbitrary enforcement of the laws.[202] The states have not received proper notice of what conduct is punishable and it is unclear how to comply with the order.[203]

The Executive Order affects all states because it does not define "sanctuary jurisdictions," and this term is not defined in the INA.[204] A "sanctuary jurisdiction" is not a legal term of art making it unclear which states are at risk for the loss of federal funding, punishment, or fines.[205] It is vague in its language in reference to federal funds, directing the Director of the Office of Management and Budget to obtain information of "all federal grant money that currently is received by any sanctuary jurisdictions."[206] Thus, current litigants have equated this language to imply "all federal funds."[207]

The Executive Order imposes "fines and penalties" on unlawful aliens present within the United States and "those who facilitate their presence in the United States."[208] It does not describe the meaning of "those who facilitate," which may subject a number of individuals to liability, such as county officials who provide medical services to undocumented immigrants, friends or family members, religious organizations who assist them, landlords, employers, or attorneys who represent them.[209] The Executive Order expands the nation's enforcement priorities to categories broader than any previous Administration.[210] This creates ambiguous categories of individuals and "may sweep in millions of individuals who have not been convicted of any criminal offense, let alone a serious or violent one."[211] These enforcement priorities are unconstitutionally vague because they allow the discretion of immigration officers to determine generally who is a "criminal" or a "risk to public safety or national security."[212]

It is unclear what states must do to comply with the Executive Order and it does not define the meaning of "comply with federal law," while only citing to one federal immigration statute.[213] The Executive Order suggests that compliance with § 1373 requires states to honor detainer requests, yet § 1373 makes no mention of detainers, referring solely to communications.[214] Since all states deal with

detainer requests, this may subject all states to punishment where compliance is unclear.[215] The Executive Order is unconstitutionally vague and reveals its broad scope indicating that it will be enforced "to the extent consistent with law" and such vague regulations may not be upheld by the Supreme Court.[216]

The States have Rights in Their Sovereign Capacity to Choose Whether to Administer Federal Immigration Law and the Executive Order Violates the Tenth Amendment.

The Federal Government Deputizes State Law Enforcement and the States Should Not Enter into a § 287(g) Agreement, as It is Detrimental to Law Enforcement

The states have the right to choose whether to enter into a § 287(g) agreement and should refuse to accommodate the Federal Government's effort to expand this program.[217] Entering into these agreements, which allows state law enforcement officers to act as ICE Officers, permits the Federal Government to hold the states accountable for enforcing federal immigration law.[218] Instead of enhancing the total workforce of ICE, the new Administration masked the Executive Order by relying on the states to expand § 287(g), and hiring only a minimal number of ICE officers to achieve his goal.[219]

The states should reject the Federal Government's attempt to "force-multiple" ICE officers through § 287(g) agreements because it distracts state officers from the local goal to keep the general public safe.[220] Expansion of this program will cause state officers to spend a significant amount of that time investigating peoples' immigration status, rather than focusing on keeping the streets safe.[221] State officials recognize the benefits of immigrants and the problems that anti-immigrant policies may have on society.[222] Specifically, some have expressed views like, "We've spent decades establishing trust . . . with our very diverse immigrant communities," and a such policies simply "prohibit [state] police from notifying [federal authorities] of undocumented persons" when they are material witnesses of crime, involved in minor traffic offenses, or minor misdemeanors.[223]

States that reject these agreements understand the concern of immigrants that are victims or witnesses of crimes, where they may hesitate to contact the police out of fear that they may be deported.[224] Agreements under § 287(g) directly contradict other statutes that ensure the safety of immigrants, regardless of lawful or unlawful status.[225] These congressional actions allow immigrants to aid law enforcement in the investigation and prosecution of criminal activity.[226] The aspect of state law enforcement being perceived as ICE officers provides a "dangerous chilling effect on trust and cooperation from the community."[227] It also "drives a wedge between local law enforcement officers and the communities they serve."[228] The County of Santa Clara prohibits its law enforcement from inquiring about a person's suspected immigration status solely on national origin, race or ethnicity, or English-speaking ability.[229]

The County understands this potential danger to the relationship between law enforcement and the public, as well as the concern of racial profiling.[230] Although criminal law allows an officer to use race as a factor in determining reasonable suspicion to stop an individual suspected of criminal activity, deputizing state law enforcement as ICE officers may submit the state authorities to racial profiling.[231] With differing standards of probable cause between the criminal and immigration systems, it is unclear how this will play out, but it will likely enhance racial profiling while having harmful impacts on communities.[232]

The Executive Order Subjects the States to Carry a Financial Burden

The states have the right to choose whether to enforce federal immigration law and the Federal Government may not force the states to carry out a program, where the states carry the financial burden.[233] The "[s]tates in their sovereign capacity" have the right to choose whether to participate in a federal program where conditional funds are attached.[234] "The Federal Government may neither issue directives requiring the States to address particular problems, nor command the States' officers, or those of their political subdivisions, to administer or enforce a federal regulatory program."[235]

The Federal Government may not require the states to honor ICE detainers and compliance with § 1373 does not require the states to honor detainers.[236] When ICE issues a detainer request for a noncitizen in criminal custody, the state has the discretion to decide whether to honor the ICE detainer.[237] If the state decides to honor the ICE detainer, the individual then remains in the state's custody for an additional forty-eight hours after his or her criminal sentence is completed.[238] During those forty-eight hours, the individual is in the criminal system, rather than the immigration system, meaning that the state bears the cost for the noncitizen to remain in custody.[239] An individual's liberty rights are at stake during the forty-eight hour detainer, and any additional detention—the forty-eight hours excludes holidays and weekends.[240] Additionally, the immigration detainer is flexible, which allows for any emergencies or extraordinary circumstances ICE may have throughout the process of issuing a Notice to Appear and picking up on the detainer.[241]

The choice to honor an ICE detainer does not simply place a significant financial burden on the states for the cost of detention, but it requests that the states do something that is unconstitutional—detain an individual without a warrant or probable cause.[242] Honoring an ICE detainer is voluntary because it subjects the states to liability and a places an additional financial burden on the states through settlement and court costs.[243] "Declining to honor ICE detainers does not prevent DHS from enforcing immigration law . . . if they so choose, without using [state] courts or law enforcement officers as tools of civil immigration enforcement."[244]

In addition to bearing the cost of detention, the Executive Order imposes a financial burden on the states' overall bud-

gets, where states admit to being extremely dependent on federal funds.[245] Furthermore, ensuing the limitations of the Spending Clause, conditional funding must also satisfy the concept of federalism—to preserve the states' autonomy.[246] The Supreme Court must find coercion where the state is so dependent on federal funds that the conditional spending "destroy[s] the possibility of effective choice."[247] The state has the right to consent or deny the Federal Government's conditional funding.[248] However, the Supreme Court must invalidate conditional funding where consent is based on federal duress or coercion.[249] Though it is risky for a state to admit to being so dependent on federal funds, it must do so to conclude that the Executive Order is a threat on a large portion of its annual budget.[250] Where the County of Santa Clara concedes that its annual budget relies heavily on federal funds, it has also acknowledges that majority of its annual budget is not used for law enforcement or immigration law purposes.[251]

The states have standing in federal court due to the financial burden of withholding extreme portions of funding from the states' budgets, and this particularized injury is traceable to the defendant because it is a direct cause of his Executive Order.[252] A state may also prove that it has third party standing on behalf of its educational and health care facilities, which rely heavily on federal funding.[253] The states complaints are not ripe due to the planning of annual budgets and the necessity to discern what federal funds are available—access to federal funding plays a significant role in budget planning.[254] The Supreme Court must find that the Executive Order is unconstitutional, and enjoin its implementation and enforcement.[255]

The States have the Tenth Amendment Right to Create Sanctuary City Policies

The Tenth Amendment states, "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."[256] The Federal Government cannot prohibit the states from adopting local ordinances, by requiring the states to enforce immigration law, because it may not compel a state to "enforce a federal regulatory program."[257] A state acts in its utmost sovereign capacity when acting under the Tenth Amendment to better the health, safety, and general welfare of its people.[258]

A large portion of a state's overall budget is used for essential services to the public, such as law enforcement, health care, and education.[259] By threatening federal funding generally, the Executive Order threatens education and Medicaid, which are necessary to the health, safety, and general welfare of the people.[260] The City of Chelsea and the City of Lawrence have local ordinances for the purpose of "further[ing] local law enforcement," and "protect[ing] all of their residents."[261] Sanctuary Cities recognize the need to keep its community healthy, especially where illnesses may spread if children are not be vaccinated or the sick are not be treated.[262]

The President likens Sanctuary Cities to be those that fail to comply with § 1373.[263] Very few sanctuary policies conflict with § 1373, and most Sanctuary Cities comply with the statute—being that the it refers solely to communications.[264] The Executive Order proposes to inform the public of "threats associated with sanctuary jurisdictions" through a weekly blotter of the Declined Detainer Outcome Report and a list of crimes committed by "aliens."[265] Compliance with § 1373 cannot be attributed to honoring detainer requests, especially where detainers are voluntary, even in the eyes of DHS.[266] In order to apply for two specific federal grants, the Criminal Alien Assistance Program and the Edward Byrne Memorial Justice Assistance Grant, a state must certify "compliance with all federal laws," which includes § 1373.[267]

Federalism indicates that some constitutional powers are shared by both the states and the Federal Government.[268] By upholding a state immigration law provision, the Supreme Court determined that immigration law enforcement is a shared power between the states and Federal Government.[269] The states have the right to create a Sanctuary City Policy so long as it does not conflict with a federal immigration law or preclude communications under § 1373.[270] San Francisco's policy does not limit "communications regarding citizenship or immigration status in any way."[271] The Secure Communities Initiative enables communication between the State of California and federal immigration law enforcement through a shared fingerprint database. [272] Thus, communication of an individual's immigration status is transferred from the State to DHS.[273] The City of Chelsea's police manual asserts that the department "shall not undertake immigration-related investigations and shall not routinely inquire into the specific immigration status of any person(s) encountered during normal police operations."[274]

The City of Chelsea's local ordinance states that law enforcement "shall not question any person about his or her specific citizenship or immigration status unless that person is reasonably believed to be involved in" conduct regarding felonies, terrorism, and human trafficking offenses.[275] It does not prohibit the State from assisting federal immigration officers in relation to serious threats of public safety or national security.[276] The City of Lawrence's policy states that the City will honor detainer requests if ICE "demonstrates a criminal warrant signed by a judge and based on probable cause."[277] The City of "Chelsea has complied with every ICE Detainer Request it has received."[278] A state has the right in its sovereign capacity to create Sanctuary City Policies and these policies do no conflict with federal immigration law nor do they prohibit communications under § 1373.[279]

Conclusion

President Donald Trump has exceeded his executive authority through his Executive Order and threatens the vital system of a federalist government. He exceeds his executive powers by using a power that is exclusively vested in Congress, the Spending Clause. Even if Congress has given the President authority to allocate funds to the states,

his Executive Order does not meet the limitations of the Spending Clause. It is not only ambiguous, but violates the notice requirement, and is overly coercive. The Executive Order does not meet the nexus limitation by threatening funds that have no relation to immigration. The Executive Order is so overly coercive that it leaves the states with no choice. The states are sovereign entities within the American Government and cannot be coerced to enforce federal laws. President Trump intends to reconfigure the entire federalist system and does not acknowledge the states' rights. The states have standing in federal court due to the financial burden this Executive Order imposes on the states. The Legislative and Judicial Branches of government must mitigate the damages of this Executive Order. Congress should not be silent and the Supreme Court must find that this Executive Order is unconstitutional. The order threatens the very concept that our nation was founded on—immigration; "[t]he alien was to be protected . . . because he was a human being."[280] ■

Ms. Musconi is a third-year student at the New England School of Law, Boston MA.

Endnotes

[1]Emma Lazarus, The New Colossus, reprinted in Emma Lazarus: Selected Poems 58, 58 (John Hollander ed., 2005) (quoting lines 10–14 of The New Colossus).

[2]See Dirk Hoerder, In the Shadow of the Statute of Liberty: Immigrants, Workers, and Citizens in the American Republic, 1880-1920 8 (Marianne Debouzy ed., 1992).

[3]See generally Danny Kravitz, In the Shadow of Lady Liberty: Immigrant Stories from Ellis Island (2016) (discussing stories of the great wave of immigration beginning in the 1800's).

[4]James F. Smith, A Nation that Welcomes Immigrants? An Historical Examination of United States Immigration Policy, 1 U.C. Davis J. Int'l L. & Pol'y 227, 228 (1995).

[5]Mae M. Ngai, Impossible Subjects: Illegal Aliens and the Making of Modern America 64 (2004).

[6]Ngai, supra note 5, at 70–71.

[7]For simplicity, this Note will refer to states and local governments as "states."

[8]Gerald L. Neuman, Strangers to the Constitution: Immigrants, Borders, and Fundamental Law 45–46 (1996).

[9]Corrie Bilke, Divided We Stand, United We Fall: A Public Policy Analysis of Sanctuary Cities' Role in the "Illegal Immigration" Debate, 42 Ind. L. Rev. 165, 192 (2009).

[10]See Bryan Griffith & Jessica Vaughan, Map: Sanctuary Cities, Counties, and States, Ctr. for Immigr. Stud (Jan. 2016), http://cis.org/Sanctuary-Cities-Map.

[11]Bilke, supra note 9, at 179.

[12]Bilke, supra note 9, at 192.

[13]See Jim Rossi, Institutional Design and the Lingering Legacy of Antifederalist Separation of Power Ideals in the States, 52 Vand. L. Rev. 1167, 1174–76 (1999).

[14]See generally William N. Eskridge, Jr., Relationships Between Formalism and Functionalism in Separation of Powers Cases, 22 Harv. J.L. & Pub. Pol'y 21 (1998) (discussing formalist and functionalist perceptions of the separation of powers).

[15]See Eskridge, supra note 15, at 22.

[16]U.S. Const. art. I, § 1.

[17]U.S. Const. art. II, § 3.

[18]U.S. Const. art. III, §§ 1–2.

[19]See Herrera-Inirio v. I.N.S., 208 F.3d 299, 307–08 (1st Cir. 2000) (noting that plenary power assumes one branch has total authority in a particular arena).

[20]Legomsky & Rodriguez, Immigration and Refugee Law and Policy 97 (Robert C. Clark et al. eds., 6th ed. 2015).

[21]Legomsky & Rodriguez, supra note 21.

[22]Chae Chan Ping v. U.S., 130 U.S. 581, 609 (1989) ("The Chinese Exclusion Case").

[23]See I.N.S. v. Chadha, 462 U.S. 919, 941, 954 (1983); U.S. v. Curtiss-Wright, 299 U.S. 304, 319 (1936).

[24]See Chadha, 462 U.S. at 941, 954; U.S. v. Curtiss-Wright, 299 U.S. 304, 319 (1936).

[25]See generally Immigration Nationality Act, 8 U.S.C. §§ 1101–1537 (1952) (laws that govern immigration).

[26]8 U.S.C. § 1373 (1996).

[27]Office of Justice Programs Guidance Regarding Compliance with 8 U.S.C. § 1373, Bureau of Justice Assistance, U.S. Dep't of Justice, https://www.bja.gov/funding/8uscsection1373.pdf (last visited Mar. 20, 2017).

[28]See 8 U.S.C. § 1373.

[29]Michael David, Jr. and Danny Oliver in Honor of State and Local Law Enforcement Act, S. 1640, 114th Cong. (2015).

[30]U.S. Const. art. I, § 8.

[31]South Dakota v. Dole, 483 U.S. 203, 210 (1987).

[32]Dole, 483 U.S. at 210.

[33]Id. at 207, 211.

[34]Lynn A. Baker, Conditional Federal Spending After Lopez, 95 Colum. L. Rev. 1911, 1919 (1995).

[35]Baker, supra note 35, at 1921.

[36]See Megan Davy, Deborah W. Meyers, & Jeanne Batalova, Who Does What in U.S. Immigration, Migration Pol'y Inst. (Dec. 1, 2005), http://www.migrationpolicy.org/article/who-does-what-us-immigration; see also I.N.S. v. Chadha, 462 U.S. 919, 958 (1983).

[37]See Davy, Meyers, & Batalova supra note 37 (pointing to a diagram that depicts the federal agencies responsible for enforcing immigration laws); see also Chadha, 462 U.S. at 958.

[38]See generally Immigration Nationality Act, 8 U.S.C. §§ 1101–1537 (1952) (laws that govern immigration).

[39]See Chadha, 462 U.S. at 928; The Executive Branch, The White House, https://www.whitehouse.gov/1600/executive-branch (last visited Feb. 5, 2017).

[40]Plyler v. Doe, 457 U.S. 202, 211 (1982).

[41]Id. at 212.

[42]See, e.g., Nishimura Ekiu v. United States, 142 U.S. 651, 660 (1892).

[43]See United States v. Curtiss-Wright, 299 U.S. 304, 319 (1936).

[44]Id. at 322.

[45]See, e.g., A Guide to the Immigration Accountability Executive Action, Am. Immigr. Council (Nov. 30, 2014), https://www.americanimmigrationcouncil.org/research/guide-immigration-accountability-executive-action (discussing President Obama's Executive Order: Deferred Action for Childhood Arrivals).

[46]See generally U.S. Const. art. II (containing no reference to executive orders).

[47]See U.S. Const. art. II, § 3.

[48]Executive Power: Executive Orders, Law Cornell, https://www.law.cornell.edu/wex/executive_power (last visited Feb. 3, 2017).

[49]Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 588, 637 (1952).

[50]See generally Chae Chan Ping v. U.S., 130 U.S. 581 (1989) (determining that an Act of Congress outweighed a treaty between the U.S. and China).

[51]See Robert N. Clinton, A Mandatory View of Federal Court Jurisdiction: Early Implementation of and Departures from the Constitutional Plan, 86 Colum. L. Rev. 1515, 1529 (1986).

[52]Gerald L. Neuman, Strangers to the Constitution: Immigrants, Borders, and Fundamental Law 118 (1996).

[53]See Zadvydas v. Davis, 533 U.S. 678, 689 (2001) ("'[I]t is a cardinal principle of statutory interpretation . . . . '") (quoting Crowell v. Benson, 285 U.S. 22, 62 (1932)); Carlos E. Gonzalez, Reinterpreting Statutory Interpretation, 74 N.C. L. Rev. 585, 595 (1996).

[54]See Lisa A. Kloppenberg, Avoiding Constitutional Questions, 35 B.C. L. Rev. 1003, 1015–16 (1994).

the Federal Government may not force the states to carry out a progam, where the states carry the financial burdne. es to protec

[55]See Zadvydas, 533 U.S. at 698. But see Shaughnessy v. United States ex rel. Mezei, 345 U.S. 206, 215 (1953) ("Thus we do not think that respondent's continued exclusion deprives him of any statutory or constitutional right.").

[56]Demore v. Kim, 538 U.S. 510, 429–30 (2003); see also Jennings v. Rodriguez, SCOTUS Blog, http://www.scotusblog.com/case-files/cases/jennings-v-rodriguez/ (last visited Mar. 21, 2017) (pointing to the docket of a pending case revisiting this issue).

[57]Elizabeth Hull, Without Justice for All: The Constitutional Rights of Aliens 54, 86 (1985).

[58]The terms "alien," "noncitizen," and "undocumented immigrant" are used interchangeably.

[59]Yick Wo v. Hopkins, 118 U.S. 356, 359 (1886); see also Hull, supra note 58, at 54, 86 (stating that noncitizens are within the territorial jurisdiction by overstaying a valid visa or "entering without inspection").

[60]Plyler v. Doe, 457 U.S. 202, 212 (1982).

[61]See Alia Al-Khatib, Putting A Hold on ICE: Why Law Enforcement Should Refuse to Honor Immigration Detainers, 64 Am. U. L. Rev. 109, 132 (2014).

[62]Al-Khatib, supra note 62, at 132. See generally U.S. Const. amend. XIV, § 1; U.S. Const. amend. IV, § 1 (discussing individuals' liberty rights).

[63]Darla Cameron, How sanctuary cities work, and how Trump's executive order might affect them, The Washington Post, https://www.washingtonpost.com/graphics/national/sanctuary-cities/ (last updated Jan. 25, 2017).

[64]Coined by legal scholar Juliet Stumpf in 2006.

[65]See Ingrid V. Eagly, Criminal Justice for Noncitizens: An Analysis of Variation in Local Enforcement, 88 N.Y.U. L. Rev. 1126, 1144 (2013).

[66]See Juliet Stumpf, The Crimmigration Crisis: Immigrants, Crime, and Sovereign Power, 56 Am. U. L. Rev. 367, 376 (2006).

[67]Clare M. Hanusz, Recent Changes in Immigration Policies and President Obama's November 20, 2014 Executive Actions, 19-May Haw. B.J. 4, 12 (2015); see also Eagly, supra note 66, at 1184.

[68]Hanusz, supra note 68, at 12; see also Eagly, supra note 66, at 1184.

[69]Michele Waslin, Ph.D., The Secure Communities Program: Unanswered Questions and Continuing Concerns, Immigr. Pol'y Ctr, https://www.americanimmigrationcouncil.org/sites/default/files/research/SComm_Exec_Summary_112911.pdf (last updated Nov. 2011).

[70]Understanding Immigration Detainers: An Overview for State Defense Counsel, Nat'l Immigr. Project (March 2011), https://nationalimmigrationproject.org/PDFs/practitioners/practice_advisories/crim/2011_May_understand-detainers.pdf.

[71]See Christopher N. Lasch, Enforcing the Limits of the Executive's Authority to Issue Immigration Detainers, 35 Wm. Mitchell L. Rev. 164, 180–81 (2008).

[72]Understanding Immigration Detainers, supra note 71.

[73]See Understanding Immigration Detainers: An Overview for State Defense Counsel, Nat'l Immigr. Project (March 2011), https://nationalimmigrationproject.org/PDFs/practitioners/practice_advisories/crim/2011_May_understand-detainers.pdf.

[74]Cameron, supra note 64.

[75]See Immigration Detainers, ACLU, https://www.aclu.org/issues/immigrants-rights/ice-and-border-patrol-abuses/immigration-detainers (last visited Mar. 22, 2017).

[76]Immigration Detainers, supra note 76.

[77]Cameron, supra note 64.

[78]Cameron, supra note 64; see also U.S. Const. amend. IV, § 1.

[79]Legomsky & Rodriguez, supra note 21, at 522.

[80]Edward P. Hutchinson, Legislative History of American Immigration Policy 1789-1965 384 (1981).

[81]Hutchinson, supra note, at 384.

[82]Neuman, supra note 8, 48–49 (discussing the states ability to exclude based on health, crime, and poverty grounds).

[83]Neuman, supra note 8, at 51.

[84]U.S. v. Arizona, 132 S.Ct. 2492, 2500 (2012). See generally Martin v. Hunter's Lessee, 14 U.S. 304 (1816) (discussing the Supreme Court decision that a federal treaty superseded a state law).

[85]Lucas Guttentag, Immigration Preemption and the Limits of State Power: Reflections on Arizona v. United States, 9 Stan. J. C.R. & C.L. 1, 1 (2013). See generally Arizona, 132 S.Ct. 2492 (noting the Supreme Court's review of Arizona's immigration law where three provisions were struck down due to preemption).

[86]8 U.S.C. § 1357(g) (1952).

[87]See 287(g) Program: A Law Enforcement Partnership (ICE), Homeland Sec'y, https://www.dhs.gov/external/287g-program-law-enforcement-partnership-ice (last visited Feb. 5, 2017).

[88]See Stumpf, supra note 67, at 376.

[89]Michael John Garcia, Legislative Attorney, "Sanctuary Cities": Legal Issues, Cong. Res. Serv. (July 15, 2009), https://www.ilw.com/immigrationdaily/news/2011,0106-crs.pdf.

[90]Bilke, supra note 9, at 179 (2009); see also Amanda Sakuma, No Safe Place, MSNBC, http://www.msnbc.com/specials/migrant-crisis/sanctuary-cities (last visited Feb. 4, 2017).

[91]Sakuma, supra note 91.

[92]Bilke, supra note 9, at 179 (discussing the sanctuary movement crossed into the public sector); see also Sakuma, supra note 91.

[93]Bilke, supra note 9, at 179.

[94]Lawrence Trust Ordinance, § 9.20.020; see also Complaint at 15, City of Chelsea, City of Lawrence v. Donald J. Trump, No. 1:17-cv-10214 (D. Mass. filed Feb. 8, 2017) [hereinafter City of Chelsea & Lawrence].

[95]Complaint at 15, County of Santa Clara v. Donald J. Trump, No. 5:17-cv-00574 (N.D. Cal. filed Feb. 3, 2017) [hereinafter County of Santa Clara].

[96]Adam Andrzejewski & Thomas W. Smith, Federal Funding of America's Sanctuary Cities, Open the Books (Feb. 2017), https://www.openthebooks.com/assets/1/7/Oversight_FederalFundingofAmericasSanctuaryCities.pdf.

[97]Andrzejewski & Smith, supra note 97.

[98]Andrzejewski & Smith, supra note 97.

[99]Andrzejewski & Smith, supra note 97.

[100]See generally Exec. Order No. 13769, 82 Fed. Reg. 8977 (Jan. 27, 2017); Exec. Order No. 13768, 82 Fed. Reg. 8799 (Jan. 25, 2017); Exec. Order No. 13767, 82 Fed. Reg. 8793 (Jan. 25, 2017) (discussing President Trump's immigration policies through three executive orders).

[101]See Exec. Order No. 13768, 82 Fed. Reg. at 8801.

[102]Exec. Order No. 13768, 82 Fed. Reg. at 8799.

[103]Exec. Order No. 13768, 82 Fed. Reg. at 8799.

[104]Exec. Order No. 13768, 82 Fed. Reg. at 8801.

[105]Exec. Order No. 13768, 82 Fed. Reg. at 8801.

[106]Exec. Order No. 13768, 82 Fed. Reg. at 8799; see County of Santa Clara, supra note 96, at 21 n.5.

[107]See Exex. Order No. 13768, 82 Fed. Reg. at 8801 ("The Director of the Office of Management and Budget is directed to obtain and provide relevant and responsive information on all federal grant money that currently is received by any sanctuary jurisdictions.").

[108]See generally County of Santa Clara, supra note 96; City of Chelsea & Lawrence, supra note 95; Complaint, City and County of San Francisco v. Donald J. Trump, No. 3:17-cv-00485 (N.D. Cal. filed Jan. 1, 2017) [hereinafter City of San Francisco] (arguing that the President threatens "all federal funds" generally).

[109]Exec. Order No. 13768, 82 Fed. Reg. at 8800.

[110]See Daniel Person, How the Trump Administration Plans to Shame Seattle for Its Immigration Policy, Seattle Wkly (Jan. 30, 2017, 11:00AM), http://www.seattleweekly.com/news/how-the-trump-administration-plans-to-shame-seattle-for-its-immigration-policy/.

[111]Memorandum from Secr'y John Kelly to Acting Comm'r, U.S. Customs and Border Patrol, Kevin McAleenan et al., Enforcement of the Immigration Laws to Serve the National Interest (Feb. 20, 2017), https://www.dhs.gov/publication/enforcement-immigration-laws-serve-national-interest [hereinafter Enforcement of National Interest].

[112]See Exec. Order No. 13768, 82 Fed. Reg. at 8799.

[113]Clare M. Hanusz, supra note 81, at 6; see Exec. Order No. 13768, 82 Fed. Reg. at 8799.

[114]See Arthur L. Rizer III, The National Security Implications of Immigration Law 51 (2012).

[115]Rizer III, supra note 115, at 52.

[116]Neuman, supra note 8, at 149.

[117]Id.

[118]Rizer III, supra note 115, at 64.

[119]See David Cole, Enemy Aliens 57 (2003).

[120]See 8 U.S.C. § 1226(c) (1952); Rizer III, supra note 115, at 64; see also Shaughnessy v. United States ex rel. Mezei, 345 U.S. 206, 208 (1953); Chae Chan Ping v. U.S., 130 U.S. 581, 605–06 (1889).

[121]See Chae Chan Ping, 130 U.S. at 604–605 (Chinese Exclusion Case). See generally Carlson v. Landon, 342 U.S. 524 (1952) (noting deportation of aliens based on participation in communist activities); Korematsu v. United States, 323 U.S. 214 (1944) (Japanese Concentration Camps); Shaughnessy v. United States ex rel. Mezei, 345 U.S. 206 (1953) ("exclusion proceeding grounded on danger to the national security").

[122]See Donald Trump on Immigration, On The Issues, http://www.ontheissues.org/2016/Donald_Trump_Immigration.htm (last updated Nov. 6, 2016).

[123]Sanctuary Cities: Top 3 Pros and Cons, ProCon.org (Dec. 8, 2016), http://www.procon.org/headline.php?headlineID = 005333.

[124]Thomas B. Edsall, What Does Immigration Actually Cost Us?, NY Times (Sept. 29, 2016), https://www.nytimes.com/2016/09/29/opinion/campaign-stops/what-does-immigration-actually-cost-us.html?_r = 0.

[125]Bilke, supra note 9, at 168 (stating undocumented

immigrants entered legally and "overstayed or otherwise violated the terms of their authorization").

[126]Id. at 170.

[127]Id.; see also Stephen Goss et al., Actuarial Note, Effects of Unauthorized Immigration on the Actuarial Status of the Social, Soc. Sec'y Admin. (April 2013), https://www.ssa.gov/oact/NOTES/pdf_notes/note151.pdf.

[128]Andrew Soergel, 'Undocumented' Immigrants Pay Billions in Taxes, U.S. News (March 1, 2016, 1:38PM), http://www.usnews.com/news/articles/2016-03-01/study-undocumented-immigrants-pay-billions-in-taxes.

[129]Bilke, supra note 9, at 173.

[130]See Id. ad 170–71; see also Michelle Lee, Fact Check: Trump Claim on Murders by Unauthorized Immigrants, The Wash. Post (Feb. 28, 2017, 9:57PM), https://www.washingtonpost.com/politics/2017/live-updates/trump-white-house/real-time-fact-checking-and-analysis-of-trumps-address-to-congress/fact-check-trump-claim-on-murders-by-unauthorized-immigrants/?utm_term=.64c46fb8861a.

[131]See Gary Sharpiro, American Brain Drain: Why We Need H1B Visa Immigration Reform, Huffington Post, http://www.huffingtonpost.com/gary-shapiro/american-brain-drain-why_b_195627.html (last updated May 25, 2011).

[132]See, e.g., Eric Goldschein and Richard Feloni, 12 Immigrants Who Came to America With Nothing And Made A Fortune, Bus. Insider (Feb. 25, 2014) http://www.businessinsider.com/american-dream-immigrants-made-a-fortune-in-the-us-2014-2#sergey-brin-co-founder-of-google-1.

[133]See Karen Strauss, The Top 10 Jobs Among New Immigrants (And What They Show Us), Forbes (Jan. 20, 2017, 4:40PM), http://www.forbes.com/sites/karstenstrauss/2017/01/20/the-top-10-jobs-among-new-immigrants-and-what-they-show-us/#2459f9e042b5.

[134]See Brief for State of Washington, et al. as Amici Curiae Supporting Petitioner-Appellee,

at 18, State of Washington, et al., v. Donald J. Trump, et al., No. 17-35105 (9th Cir. Feb. 5, 2017); see also Rich McCormick, Apple, Facebook, Google, and 94 other file opposition to Trump's immigration ban, The Verge (Feb. 6, 2017, 2:42AM), http://www.theverge.com/2017/2/6/14519450/trump-immigration-ban-apple-google-facebook-opposition.

[135]See Exec. Order No. 13769, 82 Fed. Reg. 8977, 8977 (Jan. 27, 2017); Exec. Order No. 13768, 82 Fed. Reg. 8799, 8799 (Jan. 25, 2017); Exec. Order No. 13767, 82 Fed. Reg. 8793, 8793 (Jan. 25, 2017); see also Daniel Denvir, The Road to Trump's Noxious Nativism on Immigration was Paved by Centrists, Huffington Post (Nov. 15, 2016), http://www.huffingtonpost.com/entry/immigration-centrists_us_582b7b8be4b0e39c1fa6c3d2.

[136]Denvir, supra note 136.

[137]Denvir, supra note 136.

[138]See, e.g., Exec. Order No. 13767, 82 Fed. Reg. at 8793; Exec. Order No. 13768, 82 Fed. Reg. at 8799; Exec. Order No. 13769, 82 Fed. Reg. at 8977.

[139]Stephen Collinson, How Donald Trump Changed the Presidency in 7 days, CNN, http://www.cnn.com/2017/01/27/politics/donald-trump-first-week/ (last updated Jan. 27, 2017, 2:27PM).

[140]Jonah Engel Bromwich, Lawyers Mobilize at Nation's Airports After Trump's Order, NY Times (Jan. 29, 2017), https://www.nytimes.com/2017/01/29/us/lawyers-trump-muslim-ban-immigration.html?_r=0.

[141]See, e.g., S.F., Cal., Admin. Code §§ 12H–I (1989); Bos., Mass., Ordinance Establishing a Boston Trust Act (June 27, 2014); see also Letter from Matthew J. Piers, et al., to Tom Cochran, The U.S. Conference of Mayors, Legal Issues Regarding Local Policies Limiting Local Enforcement of Immigration Laws and Potential Federal Responses (Jan. 13, 2017), https://www.nilc.org/wp-content/uploads/2017/02/HSPRD-Memo-on-Local-Enforcement-of-Immigration-Laws-and-Federal-Resp.pdf.

[142]See Exec. Order No. 13768, 82 Fed. Reg. at 8799 (Jan. 25, 2017); see also Dina Francesca Haynes et al., Sanctuary City Initiative, New Eng. L. Ctr. for L. & Soc. Pol'y (Mar. 8, 2017), https://www.nesl.edu/docs/default-source/default-document-library/sanctuarycityinitiative-v-3.pdf?sfvrsn=2.

[143]See Jim Rossi, supra note 14, at 1174–76.

[144]See, e.g., Hamilton v. Dillin, 88 U.S. 73, 88 (1874).

[145]Exec. Order No. 13768, 82 Fed. Reg. 8799, 8799 (Jan. 25, 2017).

[146]See Complaint at 18, County of Santa Clara v. Donald J. Trump, No. 5:17-cv-00574 (N.D. Cal. filed Feb. 3, 2017).

147 U.S. Const. art. I, § 8 (explaining that the Constitution empowers Congress to "lay and collect taxes, duties, imposts, and excises, to pay the debts and provide for the common defense and general welfare of the United States.")

[148]See U.S. Const. art. II.

[149]Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 588, 637 (1952) (J. Justice Jackson, concurring).

[150]See Texas v. United States, 809 F.3d 134, 192 (5th Cir. 2015) ("[t]here is no judicial review of agency action 'where statutes [granting agency discretion] are drawn in such broad terms that in a given case there is no law to apply,'" such as "[t]he allocation of funds from a lump-sum appropriation.").

[151]See Texas, 809 F.3d at 192.

[152]County of Santa Clara, supra note 96, at 18.

[153]See 8 U.S.C. § 1373 (1952); see also County of Santa Clara, supra note 96, at 24.

[154]County of Santa Clara, supra note 96, at 23–24. See generally 8 U.S.C. § 1101 (definitions within the INA).

[155]U.S. Const. art. II, § 3; County of Santa Clara, supra note 96, at 24.

[156]See 8 U.S.C. § 1373.

[157]County of Santa Clara, supra note 96, at 24.

[158]Michael David, Jr. and Danny Oliver in Honor of State and Local Law Enforcement Act, S. 1640, 114th Cong. (2015); see also County of Santa Clara, supra note 96, at 27.

[159]County of Santa Clara, supra note 96, at 30 n.8.

[160]See County of Santa Clara, supra note 96, at 23.

[161]See Erica Newland, Note, Executive Orders in Court, 124 Yale L.J. 2026, 2057 (2015).

[162]See Newland, supra note 162 at 2057.

[163]See id.

[164]See id.

[165]Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 588, 637 (1952) (J. Justice Jackson, concurring).

[166]See Newland, supra note 162 at 2057.

[167]South Dakota v. Dole, 483 U.S. 203, 207–08, 210–11 (1987).

[168]Dole, 483 U.S. at 207–08, 210–11; see also Andrew B. Coan, Commandeering, Coercion, and the Deep Structure of American Federalism, 95 B.U. L. Rev 1, 11 (2015).

[169]Marshall Coover, Put Me in the Game, Coach: Texas Should Accept the Invitations from Congress, the Federal Judiciary, and the U.S. Department of Justice for States to Join the Immigration Law Enforcement Team, 39 Tex. Tech L. Rev. 315, 331 (2007).

[170]Exec. Order No. 13768, 82 Fed. Reg. 8799, 8799 (Jan. 25, 2017); see Dole, 483 U.S. at 211; see also Coover, supra note 170, at 330.

[171]County of Santa Clara, supra note 96, at 18 n.4.

[172]Exec. Order No. 13768, 82 Fed. Reg. 8799, 8801 (Jan. 25, 2017); see Dole, 483 U.S. at 207–08, 210–11.

[173]See U.S. Const. art. I, § 8.

[174]Dole, 483 U.S. at 206.

[175]Exec. Order No. 13768, 82 Fed. Reg. 8799, 8801 (Jan. 25, 2017); Dole, 483 U.S. at 207; see also U.S. Const. art. I, § 8.

[176]Dole, 483 U.S. at 207.

[177]Exec. Order No. 13768, 82 Fed. Reg. 8799, 8801 (Jan. 25, 2017); Dole, 483 U.S. at 207 (discussing that conditions of receipt of federal funds must be clear and unambiguous to the state, enabling the states' to "exercise their choice knowingly, cognizant of the consequences of their participation). ,heelasdauthority through this unconstitutional order. s the very principles of our federalist system, as he has exceeded his ex

[178]Dole, 483 U.S. at 207–08.

[179]See Dole, 483 U.S. at 207–08 (stating the condition must be related "to the federal interest in particular national projects or programs").

[180]County of Santa Clara, supra note 96, at 22.

[181]County of Santa Clara, supra note 96, at 22.

[182]See Funding Potentially at Risk in Jurisdictions with Sanctuary Policies, http://interactives-stage.devprogress.org/projects/2017/SanctuaryFundingInteractive/ (last visited Mar. 19, 2017).

[183]See Funding Potentially at Risk in Jurisdictions with Sanctuary Policies, supra note 183.

[184]Dole, 483 U.S. at 208 (stating that "other constitutional provisions may provide an independent bar to the conditional grant of federal funds").

[185]Albert J. Rosenthal, Conditional Federal Spending and the Constitution, 39 Stan. L. Rev. 1103, 1129 (1987).

[186]Rosenthal, supra note 186, at 1129–31 (analyzing that the carrying out a policy must pass muster of a regulatory or enumerated constitutional power).

[187]Rosenthal, supra note 186, at 1136.

[188]See Rosenthal, supra note 186, at 1126.

[189]See generally City of San Francisco, supra note 109; City of Chelsea & Lawrence, supra note 95; County of Santa Clara, supra note 96 (arguing that the President threatens federal funds generally).

[190]County of Santa Clara, supra note 96, at 13.

[191]National Federation of Independent Business v. Sebelius, 132 S.Ct. 2566, 2604 (2012).

[192]See Sebelius, 132 S.Ct. at 2602; see also County of Santa Clara, supra note 96, at 22.

[193]Printz v. United States, 521 U.S. 898, 902–05, 935 (1997) (discussing the Supreme Court's consideration of a portion of the Brady Act "that made state and local law enforcement an integral part of the enforcement of a federal regulatory scheme"); see also Coover, supra note 170, at 329.

[194]Sebelius, 132 S.Ct. at 2603.

[195]South Dakota v. Dole, 791 F.2d 628, 630 (C.A.8 1986).

[196]Sebelius, 132 S.Ct. at 2604–05 (stating that Section 1396c of the Medicaid Act was determined to be overly coercive and unconstitutional where the state stood to lose all of Medicaid funding rather than a small percentage).

[197]See id.

[198]County of Santa Clara, supra note 96, at 9 (stating that the County receives $1 billion in federal funding); City of Chelsea & Lawrence supra note 95, at 9 (stating that Chelsea receives $13.9 million in federal funds and Lawrence receives $37.8 million); City of San Francisco supra note 109, at 17–18 (stating that the City receives $1.2 billion of federal funds with only a small portion correlating with law enforcement).

[199]City of Chelsea & Lawrence supra note 95, at 9.

[200]See Exec. Order No. 13768, 82 Fed. Reg. 8799, 8801 (Jan. 25, 2017).

[201]See United States v. Williams, 553 U.S. 285, 304 (2008)

[202]See Kolender v. Lawson, 461 U.S. 352, 357 (1983) (determining that due process requires a law explicitly define and give fair notice of what conduct is punishable and a law that is not clear is void for vagueness).

[203]See Complaint at 20, County of Santa Clara v. Donald J. Trump, No. 5:17-cv-00574 (N.D. Cal. filed Feb. 3, 2017).

[204]See Exec. Order No. 13768, 82 Fed. Reg. 8799, 8801 (Jan. 25, 2017).

[205]Haynes et al., supra note 206. But see Andrzejewski & Smith, supra note 97 (stating that the U.S. Department of Justice uses an operation Sanctuary City definition as "a local government entity not reporting to federal authorities: 'aliens in custody'").

[206]See Exec. Order No. 13768, 82 Fed. Reg. at 8801; see also City of San Francisco, supra note 109, at 21–22.

[207]County of Santa Clara, supra note 96, at 21 n.5.

[208]Exec. Order No. 13768, 82 Fed. Reg. at 8801.

[209]See County of Santa Clara, supra note 96, at 20.

[210]See Exec. Order No. 13768, 82 Fed. Reg. at 8801(stating the priorities for removal under President Trump); Memorandum from Secretary Charles Johnson to Thomas S. Winkowski, Acting Director, et. al, Policies for the Appre-

hension, Detention and Removal of Undocumented Immigrants, (Nov. 20, 2014), https://www.dhs.gov/sites/default/files/publications/14_1120_memo_prosecutorial_discretion.pdf (stating the priorities for removal prior to the Trump Administration).

[211]County of Santa Clara, supra note 96, at 19.

[212]Id.; see also Exec. Order No. 13768, 82 Fed. Reg. at 8801.

[213]See Exec. Order No. 13768, 82 Fed. Reg. at 8801 (stating that "the Secretary shall utilize the Declined Detainer Outcome Report" to make a list of jurisdictions that "failed to honor any detainers").

[214]8 U.S.C. § 1373 (1952); City of San Francisco, supra note 109, at 23.

[215]Exec. Order No. 13768, 82 Fed. Reg. at 8801. See generally 8 U.S.C. § 1101 (INA definitions).

[216]County of Santa Clara, supra note 96, at 24; see also Exec. Order No. 13768, 82 Fed. Reg. at 8801.

[217]See Enforcement of National Interest, supra note 112.

[218]See 8 U.S.C. § 1357.

[219]See Memorandum from Secretary John Kelly to Acting Commissioner, U.S. Customs and Border Patrol, Kevin McAleenan et al., Implementing the President's Border Security and Immigration Enforcement Improvements Policies (Feb. 20, 2017), https://www.dhs.gov/publication/implementing-presidents-border-security-and-immigration-enforcement-improvement-policies (stating that the Executive Branch will hire 5,000 Customs and Border Patrol ("CBP") Officers and his 10,000 ICE officers) see also U.S.C. § 1357(g).

[220]Haynes et al., supra note 206.

[221]See Bilke, supra note 9, at 182.

[222]See id. at 181.

[223]Id. at 182.

[224]See Immigration Options for Victims of Crimes, U.S. Citizenship & Immigr. Serv. (Feb. 2010), https://www.dhs.gov/xlibrary/assets/ht_uscis_immigration_options.pdf.

[225]See Trafficking Victims Protection Act, 22 U.S.C. 78 §§ 7101–7113 (2000) (discussing the "TVPA" and congressional protections to victims of human trafficking, such as filing civil tort claims against their traffickers); see also 8 U.S.C. § 1101(a)(15)(u) (1952) (stating victims of domestic violence, sexual assault, and human trafficking may obtain a valid visa regardless of lawful status).

[226]See Immigration Options for Victims of Crimes, supra note 225.

[227]County of Santa Clara, supra note 96, at 16.

[228]Id.

[229]Id. at 15.

[230]See Cole, supra note 120, at 55 (stating that if one group is treated as suspicious, then dangerous persons may be missed).

[231]Whren v. United States, 517 U.S. 806, 817 (1996) (determining that a person may not be stopped by the police based on race alone and the "'reasonableness' determination, involves a balancing of all relevant factors").

[232]Waslin, supra note 70 (discussing concerns of racial profiling with § 287(g) and policies like stopping those "driving while Latino"); see Cole, supra note 120, at 54–55 (2003) (discussing that race as a proxy for suspicion to further the government's interest most likely will not satisfy strict scrutiny).

[233]See Printz v. U.S., 521 U.S. 898, 962–63 (1997).

[234]Reno v. Condon, 528 U.S. 141, 151 (2000); see also City of San Francisco, supra note 109, at 16.

[235]Printz, 521 U.S. at 962–63.

[236]See 8 U.S.C. § 1373 (1952).

[237]Darla Cameron, supra note 64.

[238]Darla Cameron, supra note 64.

[239]See County of Santa Clara, supra note 96, at 12 ("[T]he County was holding on average 135 additional inmates at a time, at a daily cost of $159 per person.").

[240]See Al-Khatib, supra note 62, at 134.

[241]See id. at 135.

[242]Morales v. Chadbourne, 793 F.3d 208, 214–20 (1st Cir. 2015); Commonwealth v. Santos Moscoso, SJ-2016-0168, at 18 (Mass. 2017); see also Miranda-Olivares v. Clackamas County, 2014 WL 1414305 (U.S. D.C. D. Ore. 2014) (determining the state was held accountable for violating the defendant's Fourth Amendment rights by not releasing on bail).

[243]Haynes et al., supra note 206.

[244]Santos Moscoso, SJ-2016-0168, at 18.

[245]County of Santa Clara, supra note 96, at 9.

[246]Rosenthal, supra note 186, at 1132.

[247]See id. at 1135.

[248]Id.

[249]Id (discussing that the Supreme Court has recognized State governments are capable of being subjected to duress by the federal government).

[250]See County of Santa Clara, supra note 96, at 9.

[251]See County of Santa Clara, supra note 96, at 9–11 (stating that federal funds are used for its only safety-net healthcare provider, its public health department, and social services).

[252]See Washington v. Trump, 847 F.3d 1151, 1158 (9th Cir. 2017) (noting that a state must prove standing by showing "it has suffered a concrete and particularized injury that is either actual or imminent, that the injury is fairly traceable to the defendant, and that it is likely that a favorable decision will redress that injury").

[253]Washington, 847 F.3d at 1160 (noting that "third party standing" gives "the [s]tates standing to assert the rights of the students, scholars, and faculty affected by the Executive Order").

[254]See Texas v. U.S., 523 U.S. 296, 300 (1998) (discussing that a case is ripe if the harm is anticipated and may not occur in the future).

[255]See County of Santa Clara, supra note 96, at 32.

[256]U.S. Const. amend X.

[257]New York v. U.S., 505 U.S. 144, 161–62 (1992); see also City of Chelsea & Lawrence, supra note 95, at 27.

[258]See Gonzales v. Raich, 545 U.S. 1, 29 (2005).

[259]County of Santa Clara, supra note 96, at 8.
[260]City of Chelsea & Lawrence, supra note 95, at 24.
[261]City of Chelsea & Lawrence, supra note 95, at 12.
[262]New York City Privacy Policy, Exec. Order No. 41, (Sep. 17, 2003), http://www1.nyc.gov/assets/immigrants/downloads/pdf/eo-41.pdf.
[263]City of San Francisco, supra note 109, at 14.
[264]U.S. v. Arizona, 132 S.Ct. 2492, 2500–01 (2012) (noting that states are prohibited from making a law that conflicts with a federal law).
[265]Exec. Order No. 13768, 82 Fed. Reg. 8799, 8801 (Jan. 25, 2017).
[266]Cameron, supra note 64.
[267]County of Santa Clara, supra note 96, at 16 n.3.
[268]Coan, supra note 169, at 11.
[269]U.S. v. Arizona, 132 S.Ct. 2492, 2500–01 (2012).
[270]See U.S. Const. amend X; Arizona, 132 S.Ct. 2492, 2500–01 (2012).
[271]City of San Francisco, supra note 109, at 11.
[272]Id.; see also Arizona, 132 S.Ct. at 2500–01.
[273]City of San Francisco, supra note 109, at 11.
[274]City of Chelsea & Lawrence, supra note 95, at 14–15.
[275]Id. at 13.
[276]See id. at 15.
[277]Id. at 17.
[278]Id. at 15
[279]See id. at 17; see also 8 U.S.C. § 1373 (1952).
[280]Cole, supra note 120.

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– and also bars past ILS officers from becoming a voting ILS Board member. The policy is effective as of October 1, 2018 and we have until then to pass new bylaws that conform to the national policy. Although the National Board has sent the proposal back to the Sections and Divisions Council, to consider the various comments provided by the individual sections and report back to the Board, all indications point to it being unlikely that the one-time-on-the leadership-ladder provision will be reversed. Implementation may change, and the ability of former officers to be voting members of the Board may change. But nothing is set in stone as of yet.

The ILS Advisory Council will become a key player in ILS continuity – I intend to use this council of senior ILS members frequently, asking it to propose different solutions and ideas for Board consideration. I am asking the Advisory Council to select a member to attend the Board meetings, to provide valuable context, advice, and history for the Board.

Over this transition year, the ILS will work towards establishing a new system for choosing Board members, in hopes of ensuring both continuity and new faces. The 2017-2018 Board is drawn from all over the United States, from San Francisco to Boston, EOIR to ICE to State to private bar, and everyone is excited to meet the coming challenges. We'll work together to re-energize ILS committees and planning for our May 2018 conference in Memphis, seminars in DC and NY, webinars, the Green Card, and other publications and media. We'll continue the Immigration Leadership Luncheon program in DC, which is co-sponsored by the DC Chapter - and seek to expand that into new cities. We'll be reaching out to our colleagues in the veteran's arena to work together to set up training programs on naturalization for veterans. And we're trying a new 4-panel seminar on Federal Litigation in the immigration context on November 30 in D.C.

We're open to your ideas and suggestions for new programs, particularly if you want to work on implementing them. And we're always looking for additional committee members – you do not need to be on the Board to be on a committee!

Please do not hesitate to contact me with ideas for seminars or programs, to volunteer, or just to talk.

Elizabeth (Betty) Stevens

The Green Card

Immigration Law Section
Federal Bar Association
1220 North Fillmore Street, Suite 444
Arlington, VA 22201

2017-2018 Immigration Law Section Officers:

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