

Some Context For Trump's New Immigration Executive Order

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President Donald Trump's issuance of an executive order on Jan. 27, banning travel to the U.S. for 90 days by nationals of seven predominantly Muslim countries, and putting a halt to the U.S. refugee assistance program for 120 days, has sown confusion and spurred anger in the few days it has been in effect. In addition to the controversy over its substance, arguments are raging over the White House's claims of precedent for the executive order, and the implications of implementing "extreme vetting."

A Short Overview

First, let's go over what the new executive order requires. Under its provisions:

- Individuals holding nationality from Iran, Iraq, Syria, Sudan, Somalia, Libya and Yemen (the seven countries) may not travel to the U.S. for at least 90 days unless they are also dual U.S. citizens or U.S. lawful permanent residents.
- The U.S. refugee assistance program is suspended for 120 days; no refugees will be processed or permitted to enter the country during that period.
- The purpose of both actions is to allow the U.S. State Department and the [U.S. Department of Homeland Security](#) to develop an "extreme vetting procedure" above and beyond the checks currently conducted by the agencies.

Precedent for the List of Countries

[The White House](#) has claimed that the list of seven countries is the same as a list created by the Obama administration. While the list is the same, understanding its origin and use requires context.

The VWP Amendment and the Seven Countries

In December 2015, the Republican Congress passed the Visa Waiver Program Improvement and Terrorist Travel Prevention Act (VWP amendment), which restricted the ability of certain foreigners to enter the United States without a visa. That bill was strongly resisted behind the scenes by the Obama administration in negotiations with the Hill, and some modifications were made at the administration's request. Other changes were rejected by Republican negotiators, and ultimately the bill was enacted as part of the large, year-end, must-pass appropriations bill. Faced with the imperative of funding the government, President Barack Obama signed the appropriations bill and thereby enacted the VWP amendment.

The VWP amendment prohibited visa-free travel to the U.S. by anyone who had traveled to, or was a dual national of Iraq, Syria, or any country on a U.S. government list of state sponsors of terrorism. That list consists of Iran and Sudan. The VWP amendment also gave

the secretary of homeland security 60 days to determine, pursuant to listed criteria, whether other countries should be included on the list. In compliance with the law, after consulting with the director of national intelligence and the secretary of state, in February 2016 the homeland security secretary added Libya, Somalia and Yemen to the list, bringing the number of affected countries to seven.

Key Distinctions

While the new executive order utilizes the same list the Obama administration used with regard to the visa waiver program, there are some crucial distinctions:

- The statute did not ban travel. To the contrary, it merely denied certain people connected to these countries the privilege of visa-free entry, requiring instead that they obtain a visa. This is no different than what is required of nationals from more than 80 percent of the countries in the world who do not qualify for the visa waiver program (including Israel, Brazil, Mexico and South Africa, and all other nationals of the seven countries). Think of it as revocation of your access to the pre-check line at the airport, not being barred from all flights.
- As discussed above, the list was primarily created by Congress, over objections from the Obama administration, though three countries were added by the DHS pursuant to the statute.
- Congress created, and the Obama administration executed, exceptions and waiver authority, permitting even certain individuals who would otherwise lose their VWP privileges under the VWP amendment to receive visa-free travel to the U.S. These included individuals who had traveled to one of the seven countries as part of a VWP country's military, for legitimate business purposes, for nongovernmental organizations, as journalists, as well as members of [U.S. Customs and Border Protection's](#) "Global Entry" program.
- Unlike the executive order, the VWP amendment created no exemption for religious minorities. Indeed, religion played no role in the adjudication of the VWP amendment's provisions.

Suspension of the Refugee Program

With regard to suspension of the refugee program, the White House has cited a 2011 six-month ban on refugees from Iraq, following the arrest in Kentucky of two Iraqi nationals on federal terrorism charges. As the [Washington Post](#) and others have reported, the U.S. government did at the time reexamine the records of 58,000 Iraqi refugees already in the U.S., leading to a slow-down in processing of Iraqi visa applications, but Iraqi resettlement was never actually stopped or banned.

“Extreme Vetting”

As noted, the executive order calls a halt to any admission of these individuals into the U.S.

for several months. It does so in order to implement what the president has termed “extreme vetting.” Again, some context is useful. Currently Syrian refugees undergo the most thorough vetting of anyone entering the U.S. As the [New York Times](#) has reported, Syrian refugees must pass through as many as 20 different stages of vetting, including three personal interviews, three background checks and three fingerprint screens, to be allowed to enter the U.S. On average, it takes 18 to 24 months for a Syrian refugee to complete this vetting process, with approximately half failing the vet. If all refugees seeking to come to the U.S. and all immigrants (refugee or not) from the seven countries were to submit to such a vet, let alone something more “extreme,” they would have to wait at least this long (probably longer) and face odds of failing the vet that are at least as daunting.

Perhaps more to the point, the DHS and State would have to multiply many times over the resources currently devoted to Syrian refugee vetting. It is unclear how the U.S. government will find the personnel for such an effort, particularly in light of the fact that it has just imposed a hiring freeze. The demand for resources will skyrocket while no additional resources will be available. Something will have to give.

Finally, as some observers have noted, the major terrorist incidents that have hit the United States in recent years — including 9/11, Fort Hood, the Boston bombing, San Bernardino and Orlando — were perpetrated either by U.S. citizens or nationals of countries other than the list of seven. This means that either we have gotten lucky regarding the seven countries, these countries are not the main concern or the existing vetting process for these countries is working.

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