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IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

CITY AND COUNTY OF SAN FRANCISCO, Plaintiffs, v. DONALD J. TRUMP, President of the United States, UNITED STATES OF AMERICA, JOHN F. KELLY, Secretary of United States Department of Homeland Security, JEFFERSON B. SESSIONS, Attorney General of the United States, Defendants.	Civil Case No. 3:17-cv-00485-WHO
COUNTY OF SANTA CLARA, Plaintiff, v. DONALD J. TRUMP, President of the United States of America, JOHN F. KELLY, in his official capacity as Secretary of the United States Department of Homeland Security, JEFFERSON B. SESSIONS, in his official capacity as Attorney General of the United States, JOHN MICHAEL "MICK" MULVANEY, in his official capacity as Director of the Office of Management and Budget, and DOES 1-50, Defendants.	Civil Case No. 3:17-cv-00574-WHO ***AMICI CURIAE* BRIEF OF POLITICAL SCIENCE SCHOLARS IN SUPPORT OF PLAINTIFFS' MOTIONS FOR SUMMARY JUDGMENT**

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

EXECUTIVE ORDERS

POLITICAL SCIENCE PUBLICATIONS

OTHER AUTHORITIES

I. INTEREST OF *AMICI CURIAE*

Amici curiae are four leading political science scholars who have done substantial research on the presidency and the historical use of executive orders. *Amici* submit this brief to provide what they hope to be useful background about the executive branch's longstanding process for formulating and vetting executive orders and the implications of the failure to employ that process for the executive order at issue in this case.

Amici include the following:

- **Kenneth R. Mayer** is professor of political science at the University of Wisconsin, Madison. His teaching and research interests focus on American political institutions, especially Congress and the presidency. He is the author of *With the Stroke of a Pen: Executive Orders and Presidential Power*, which won the American Political Science Association's 2002 Richard E. Neustadt Award "for the best book published that contributed to research and scholarship in the field of the American presidency."

- **Andrew Rudalevige** is Thomas Brackett Reed Professor of Government at Bowdoin College. Prior to 2012, he was Walter E. Beach '56 Chair in Political Science at Dickinson College. He is a co-author of *The Politics of the Presidency*, the author of *The New Imperial Presidency: Renewing Presidential Power after Watergate*, and coeditor of *The Obama Presidency*. His book *Managing the President's Program: Presidential Leadership and Legislative Policy Formation* won the 2003 Richard E. Neustadt Award.

- **Adam L. Warber** is professor of political science at Clemson University. He is the author of the 2006 book *Executive Orders and the Modern Presidency: Legislating from the Oval Office* and numerous articles on the strategic use of executive orders.

- **Keith E. Whittington** is William Nelson Cromwell Professor of Politics at Princeton University. He has published widely on American constitutional theory and development, federalism, judicial politics, and the presidency. His published books include *Constitutional Construction: Divided Powers and Constitutional Meaning*; *Constitutional Interpretation: Textual Meaning, Original Intent, and Judicial Review*; and *Political Foundations of Judicial Supremacy: The Presidency, the Supreme Court, and Constitutional Leadership in U.S. History* (which won the 2008 C. Herman Pritchett Award for best book in law and courts and the 2008 J. David Greenstone Prize for best book in politics and history).

II. INTRODUCTION

For the better part of a century, the executive branch has had in place, and for the most part has followed, a process for formulating and vetting proposed executive orders that subjects a proposed order to a great deal of scrutiny. The process includes soliciting input from the affected departments and agencies, which can advise not just on internal implementation details but also on how an order may affect the public, along with conducting a legal review of the proposed order. The purpose of this deliberative process has been to ensure informed consideration of potential issues and consequences of an order—in other words, to foster responsible governance. The process acts as an internal set of checks and balances within the executive branch to discourage reckless action and to reinforce the rule of law.

That process did not occur for Executive Order 13768, 82 Fed. Reg. 8799 (Jan. 30, 2017) (the "Order"). In the professional opinion of *amici curiae*, that makes this Order an outlier against the historical norm of utilizing the long-standing process to vet executive orders, especially when they are of substantial consequence, as this one certainly is. Our governmental system relies on checks and balances present not only between branches, but also within individual branches. *Amici curiae* respectfully submit that, when the executive branch circumvents its internal checks and balances, there is a greater need for judicial vigilance protecting constitutional and other rights.

III. ARGUMENT

A. Executive orders normally are subjected to a vetting process that includes the participation of affected departments and agencies to ensure informed consideration of any issues with a proposed order.

Franklin Roosevelt created a standard process for the preparation of executive orders. Exec. Order No. 6247 (Aug. 10, 1933). His executive order decreed that "[t]he draft of an Executive order or proclamation shall first be submitted to the Director of the Bureau of the

Budget." *Id.* ¶ 2. If approved at the Bureau of the Budget (BoB), "the draft shall be transmitted to the Attorney General for his consideration." *Id.* ¶ 3. A follow-up order several years later strengthened these veto points, stating: "If [the proposed order] is disapproved by the Director of the Bureau of the Budget or the Attorney General, it shall not thereafter be presented to the President unless it is accompanied by the statement of the reasons for such disapproval." Exec. Order No. 7298 (Feb. 18, 1936). It also required the Attorney General's review "as to both form and legality." *Id.* ¶ 2. The Attorney General normally delegates the review to the Department of Justice's Office of Legal Counsel (OLC). The review is not just to rubber stamp the order; rather, the OLC is expected to conduct a rigorous legal review and to provide advice that is "accurate, thoroughly researched, and soundly reasoned."[1]

From the beginning, the BoB's review of executive orders included soliciting input from the relevant departments and agencies. As *amicus curiae* Prof. Rudalevige explains:

> The standard process for receiving BoB approval mirrored the system already in place for Roosevelt's legislative program, and for many of the same reasons. A letter went to any executive agencies that the BoB thought might be affected by the issuance of a given order, asking for their comments. BoB staff assessed the feedback returned—ranging from strong opposition or support to baffled apathy—and, as appropriate, edited the order or asked the originating agency to defend the extant draft or produce a revised one.

Andrew Rudalevige, *Executive Orders and Presidential Unilateralism*, 42 PRESIDENTIAL STUD. Q. 138, 149 (2012) [hereinafter *EOPU*] (citation omitted).

In 1962, several changes were made to reflect administrative experience with this process and improve the vetting of proposed orders. John F. Kennedy's Executive Order 11030, entitled "Preparation, Presentation, Filing and Publication of Executive Orders and Proclamations,"

[1] David J. Barron, *Memorandum re: Best Practices for OLC Legal Advice and Written Opinions*, U.S. Dep't of Justice, Office of Legal Counsel (July 16, 2010) (available at https://www.justice.gov/sites/default/files/olc/legacy/2010/08/26/olc-legal-advice-opinions.pdf).

required departments and agencies seeking issuance of an order to include documentation "explaining the nature, purpose, background, and effect of the proposed Executive order or proclamation and its relationship, if any, to pertinent laws and other Executive orders or proclamations." 27 Fed. Reg. 5847 (June 21, 1962). As BoB general counsel Arthur Focke explained in 1962, the reason for this requirement was that BoB staff (and through them, the president) frequently did not have "from the agencies adequate information in support of the proposed order. . . . Such information has frequently been meager and has necessitated requests for additional material." *EOPU* at 149.

Executive Order 11030 still governs the process for creating and vetting executive orders, although there have been subsequent orders relating to the formatting of orders or recognizing the reorganization of the BoB and its renaming as the Office of Management and Budget (OMB). The only changes in the formulation procedure came with Jimmy Carter's Executive Order 12080, 43 Fed. Reg. 42235 (Sept. 20, 1978), which allowed the OMB to send nonsubstantive, commemorative proclamations directly to the president without Attorney General review, and Barack Obama's Executive Order 13683, 79 Fed. Reg. 75041 (Dec. 11, 2014), which assigned the responsibility for preparing trade proclamations under the Trade Act of 1974 to the Office of the U.S. Trade Representative.

Prof. Rudalevige's examination of the historical records relating to hundreds of executive orders over the last four decades and other presidential materials reveals that this process of subjecting proposed executive orders to substantial vetting within the executive branch is normally followed. *See EOPU* at 147–51. The notion that executive orders are just a mechanism for top-down control of the executive branch is too simplistic. As Rudalevige notes, "[w]e tend to take it as given that an executive order, which, after all, is a command to some part of the executive branch, shapes the actions of that branch to conform to the president's will." *Id.* at 140.

In most cases, however, "the issuance of executive orders seems to involve as much . . . consultation as command." *Id.* at 145.

Although most executive orders originate from agencies or actors outside the Executive Office of the President, even White House-driven orders usually are subjected to the same clearance and consultation process: agencies are given notice of the proposed order and are invited to comment, and their comments sometimes are heeded. *EOPU* at 150. The OMB's normal approach has sought to gain consensus and to ensure that the wider executive branch agrees, to the extent possible, on the text of an order moving forward, even if that involves multiple rounds of revision, negotiation, or appeasement. *Id.* The process can take several months, the better part of a year, or longer. For example, the vetting of Bill Clinton's Executive Order 13045, 62 Fed. Reg. 19885 (Apr. 21, 1997), which called on agencies to assess and address the impact of their policies on risks to children's health, involved seventeen executive agencies and offices over the course of eight months. *EOPU* at 142–44. Jimmy Carter's Executive Order 12044, 43 Fed. Reg. 12661 (Mar. 24, 1978), which reformed the regulation-development process and called for a review of existing regulations, was vetted through most executive branch agencies and took over a year to formulate.[2] According to research by *amicus curiae* Prof. Warber, Harry Truman's Executive Order 9981 (July 26, 1948), which desegregated the military, was under consideration for over a year before it issued. Based on the research of *amici curiae*, such timelines are the norm for formulating executive orders of substantial consequence.

[2] Andrew Rudalevige, *Beyond Structure and Process: The Early Institutionalization of Regulatory Review* 13–17 (Midwest Pol. Sci. Ass'n, Conf. Paper, 2017).

The reason for this approach is to ensure an orderly process that allows all aspects of an order to be considered before an order is presented for a president's signature. As BoB general counsel Focke explained to the incoming administration of Richard Nixon, clearing orders through BoB would help the president learn of budgetary, management, and organization implications raised by a draft order, and provide "the best judgment of the Administration as a whole." *EOPU* at 150. It would also avoid "the confusion and embarrassment" that could result from endorsing a request without wider coordination and consultation. *Id.* The process also results in many proposed executive orders—including White House-driven proposals—not issuing at all, such as when critiques from affected departments and agencies reveal problems with the underlying policy.[3]

To be sure, the process outlined above for creating executive orders is not always followed. Because the process is itself a creation of an executive order, a president could ignore or override the requirements. But the process is normally followed because it represents responsible governance. Such a process is of ever-increasing importance as the proportion of executive orders relating to matters of substantial consequence has increased over the last century. *EOPU* at 145 ("[S]tudies have found an upswing in the number of 'significant' executive orders issued by presidents over time.") (citing, *inter alia*, Kenneth R. Mayer, *Executive Orders and Presidential Power*, 61 J. POL. 445–66 (1999)[4]); Adam L. Warber, EXECUTIVE ORDERS AND THE MODERN PRESIDENCY: LEGISLATING FROM THE OVAL OFFICE 39–40, 143–44 (2006) (finding,

[3] Andrew Rudalevige, *Agencies and Agency in Presidential Management of Executive Orders* 14–19 (Am. Pol. Sci. Ass'n, Conf. Paper, 2016).

[4] Prof. Mayer treated executive orders as "significant" if they were discussed in the press, legal scholarship, Congress, or the President's public statements, were the subject of federal litigation, or created a new institution with substantive policy responsibility. Kenneth R. Mayer, WITH THE STROKE OF A PEN: EXECUTIVE ORDERS AND PRESIDENTIAL POWER 83–85 (2002).

based on a review of thousands of executive orders, that the proportion of executive orders addressing a "major policy initiative" was less than half before Carter, increased to 62% during the Carter, Reagan, and George H.W. Bush administrations, and was 74% under Clinton).

B. Executive Order 13768 was not formulated and vetted in the manner normally expected for such a consequential order.

Executive Order 13768 lacks the hallmarks of vetting by the affected departments and agencies, leading *amici curiae* to conclude that the Order was not formulated or vetted in accordance with the normal process described above.

One of those hallmarks would be clarity about how to implement the Order. That is lacking. As this Court has recognized, key operative terms in the Order—such as "sanctuary jurisdiction"—are not even defined. *See* SF Dkt. No. 82, at 5. This is problematic in an Order intended to have sweeping effect. The Order does not merely change how the government functions internally; it seeks to affect the behavior of others, and in particular to force local jurisdictions—on threat of defunding and other measures—to participate in the enforcement of federal laws or policy. At a minimum, one would expect a properly vetted order to clearly define what conduct would warrant the "sanctuary jurisdiction" designation. If the normal process had been followed, the affected departments and agencies would have reviewed and commented on the proposed order, and any resulting order would have provided such clarity. Instead, the meaning of "sanctuary jurisdiction" is unknown even to those responsible for implementing the Order. As this Court has noted, after the Order issued, then-Secretary of Homeland Security John Kelly admitted that he "do[esn't] have a clue" how to define "sanctuary city." *Id.* at 42.

Furthermore, if the vetting process had been followed, the Order would have clearly stated what funding is at risk for such sanctuary jurisdictions. Instead, the Order refers at times to all "Federal grants" but at other times to all "Federal funds"; it is also unclear whether it purports to

affect funding that was previously awarded or only new funds. The Order is not only unclear about what funding could be affected, but also, according to this Court, unconstitutionally attempts to impose new conditions on funding. SF Dkt. No. 82, at 37. It is telling that the Attorney General issued a memorandum that, in essence, reimagines the Order as putting at risk only those federal grants that are already conditioned on compliance with 8 U.S.C. § 1373. *See* SF Dkt. No. 107, Attach. 1. If the Order had been properly vetted, there would not have been any need for such a memorandum, much less one putting forth an interpretation that this Court found to be "not legally plausible." SF Dkt. No. 82, at 3.

Another hallmark of proper vetting would be evidence of consideration of the consequences and practicalities in implementing the Order. That is lacking as well. For example, Section 7 of the Order directs U.S. Immigration and Customs Enforcement (ICE) "to hire 10,000 additional immigration officers." That directive ignores the impracticalities of such a massive hiring surge; ICE already had thousands of jobs to backfill before the Order, experiences substantial turnover, and faces "a dearth of applicants for frontline border patrol positions."[5] The directive also ignores that billions of dollars would have to be (and have not been) appropriated for such positions. Under the usual formulation process for executive orders, this hiring directive—if it survived at all—would have been more practical and tempered. Instead, the Order directs an arbitrary and fanciful level of hiring.

It is not just the substance of the Order that reveals a lack of vetting. It is also the circumstances surrounding its issuance. The timing of the Order alone calls into question whether any vetting occurred. The Order was signed January 25, 2017—a mere five days after Donald

[5] Julia Horowitz, *Trump's tall order: Hiring 15,000 ICE and border patrol agents*, CNN (Mar. 3, 2017) (available at http://money.cnn.com/2017/03/03/news/economy/hiring-immigration-agents-ice/index.html).

Trump took office on January 20. No process of review, vetting, and discussion by the departments and agencies affected by the Order could have occurred during that time. Indeed, the incoming administration had not even filled most of leadership posts in the affected departments and agencies before issuing the executive order. For example, the Attorney General (Jeff Sessions) did not take office until February 9, 2017; the Director of the Office of Management and Budget (Mick Mulvaney) did not take office until February 16, 2017; and the Office of Personnel Management remains without a director. To be sure, it is not unprecedented for executive orders (usually of more modest consequence) to be signed in the early days of an administration. A well-organized transition team can arrange to commence the vetting process for proposed orders before a President takes office. As has been widely reported, however, Mr. Trump's transition was anything but organized.[6] And even with a well-organized transition, the normal vetting process would have taken more than a few months for this Order, which embodies complicated new policy initiatives and is aimed at having enormous public impact.

Moreover, the Order was part of a flurry of executive orders hastily issued during the first ten days of the administration. Another order relating to immigration, the now-rescinded Executive Order 13769, 82 Fed. Reg. 8977 (Feb. 1, 2017) ("Travel Ban Order"), which issued on January 27, 2017, similarly lacked the hallmarks of vetting. That order, titled "Protecting the

[6] *See, e.g.*, Julie Hirschfeld Davis & Sharon LaFraniere, *Trump Lets Key Offices Gather Dust Amid "Slowest Transition in Decades,"* NY TIMES (Mar. 12, 2017) (available at https://www.nytimes.com/2017/03/12/us/politics/trump-administration.html) ("From the moment he was sworn in, President Trump faced a personnel crisis, starting virtually from scratch in lining up senior leaders for his administration. Seven weeks into the job, he is still hobbled by the slow start, months behind where experts in both parties, even some inside his administration, say he should be."); Jessica Taylor, *Reports Of Turmoil Color Trump's Transition*, NATIONAL PUBLIC RADIO (Nov. 16, 2016) (reporting on the "rocky start to [Mr. Trump's] transition planning," including the departure of "several very experienced members of the transition team" and replacement of the transition chief) (available at http://www.npr.org/2016/11/16/502301828/reports-of-turmoil-color-trumps-transition).

Nation from Foreign Terrorist Entry into the United States," barred entry into the United States by immigrants and refugees from seven countries. The Travel Ban Order immediately resulted in confusion and chaos at ports of entry and disrupted the lives and plans of thousands of people around the world. Setting aside the many legal issues that have been raised with the order (which resulted in its withdrawal after the Ninth Circuit upheld a temporary injunction against its enforcement, *see Washington v. Trump*, — F.3d —, 2017 WL 526497 (9th Cir. Feb. 9, 2017)), the original Travel Ban Order was drafted in apparent ignorance of the fact that many foreign nationals have preexisting authority to enter the country, such as pre-approved refugees, students and workers holding visas for entry, and people holding permanent residency status in this country. The failure of the Travel Ban Order to even acknowledge the existence of such persons, let alone to address how they should be treated under that order, reflects the absence of any effort by the White House to get input from the State Department or Homeland Security before issuing it.[7] The administration's failure to utilize the normal vetting process for the nearly contemporaneous Travel Ban Order reinforces the conclusion that it similarly failed to utilize that process for the Order at issue here.

In addition to getting input from the affected departments and agencies, the normal vetting process for an executive order includes review by the Office of Legal Counsel for "form and legality." It is unclear whether even that limited review of the Order occurred. On January 30, 2017, members of the Senate Judiciary Committee, concerned about the "rash and illegal

[7] News reports cited senior sources at those departments confirming that there was no consultation about the Travel Ban Order. *E.g.*, Jonathan Allen & Brendan O'Brien, *How Trump's abrupt immigration ban sowed confusion at airports, agencies*, Reuters (Jan. 28, 2017) (available at http://www.reuters.com/article/us-usa-trump-immigration-confusion/how-trumps-abrupt-immigration-ban-sowed-confusion-at-airports-agencies-idUSKBN15D07S).

executive actions" taken immediately after Mr. Trump took office, demanded a straight answer in an open letter to the Acting Attorney General. Their letter noted:

> As members of the Senate Judiciary Committee, we write to express concern about the Department of Justice's ambiguous response to inquiries about the Department's role in reviewing the legality of President Trump's recent executive orders and memoranda. On Friday, the press reported that **the Department had "no comment" when asked whether its Office of Legal Counsel (OLC) had reviewed any of the executive orders issued by the new Administration** to date. In the vast majority of cases, the answer to this question should be a straightforward "yes."[8]

In light of the Justice Department's failure to confirm the OLC's review, this Court's findings about the illegality of the Order, and the Department's memorandum attempting to walk back the Order to make it legally meaningless, there is no reason to believe that OLC review (or at least a review of any rigor) occurred.

In short, it is clear that the administration rushed the Order to issuance in the first week of the presidency without going through the usual process for formulating an executive order.

IV. CONCLUSION

Executive orders normally are developed responsibly and with extensive consultation. The point of doing so, even if a president is not strictly obligated to, is to ensure that an executive order is legal, that its consequences are understood and intended, and that its directives can be implemented in a fair and orderly way. The slapdash enactment of Executive Order 13768 was, in the professional experience of *amici curiae*, well outside the historical norm for an executive order of such consequence. When the executive branch so circumvents its normal internal checks and balances, there is a heightened need for our judiciary to serve, in the words of James

[8] Press Release, Sen. Dianne Feinstein, *Senate Judiciary Members: Is the Justice Department Doing Its Job to Review Trump's Executive Orders?* (Jan. 30, 2017) (available at https://www.feinstein.senate.gov/public/index.cfm/press-releases?ID=534C9526-C15C-48DB-958A-9BD7A84A65D9) (emphasis added).

Madison, as "an impenetrable bulwark against every assumption of power in the . . . executive" and "to resist every encroachment upon [constitutional] rights." 1 ANNALS OF CONG. 439 (1789).

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Respectfully submitted,

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