NATIONAL REVIEW

Trump's Exclusion of Aliens from Specific Countries Is Legal

Arguments to the contrary ignore the Constitution and misstate federal law.

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On Friday, President Donald Trump issued an executive order calling for heightened vetting of certain foreign nationals seeking entry into the United States. The order temporarily suspends entry by the nationals of seven Muslim-majority countries: Syria, Iraq, Iran, Sudan, Libya, Somalia, and Yemen. It is to last for 90 days, while heightened vetting procedures are developed.

The order has predictably prompted intense protest from critics of immigration restrictions (most of whom are also critics of Trump). At the *New York Times*, the Cato Institute's David J. Bier claims the temporary suspension is illegal because, in his view, it flouts the Immigration and Nationality Act of 1965. This contention is meritless, both constitutionally and as a matter of statutory law.

Let's start with the Constitution, which vests all executive power in the president. Under the Constitution, as Thomas Jefferson wrote shortly after its adoption, "the transaction of business with foreign nations is Executive altogether. It belongs then to the head of that department, *except* as to such portions of it as are specifically submitted to the Senate. Exceptions are to be construed strictly."

The rare exceptions Jefferson had in mind, obviously, were such matters as the approval of treaties, which Article II expressly vests in the Senate. There are also other textual bases for a congressional role in foreign affairs, such as Congress's power over international commerce, to declare war, and to establish the qualifications for the naturalization of citizens. That said, when Congress legislates in this realm, it must do so mindful of what the Supreme Court, in *United States v. Curtiss-Wright* (1936), famously described as "the very delicate, plenary and exclusive power of the President as the sole organ of the federal government in the field of international relations – a power which does not require as a basis for its exercise an act of Congress."

In the international arena, then, if there is arguable conflict between a presidential policy and a congressional statute, the president's policy will take precedence in the absence of some clear constitutional commitment of the subject matter to legislative resolution. And quite apart from the president's presumptive supremacy in foreign affairs, we must also adhere to a settled doctrine of constitutional law: Where it is possible, congressional statutes should be construed in a manner that avoids constitutional conflicts.

With that as background, let's consider the claimed conflict between the president's executive order and Congress's statute. Mr. Bier asserts that Trump may not suspend the issuance of visas to nationals of specific countries because the 1965 immigration act "banned all discrimination against immigrants on the basis of national origin." And, indeed, a section of that act, now codified inSection 1152(a) of Title 8, U.S. Code, states that (with exceptions not here relevant) "no person shall receive any preference or priority or be discriminated against in the issuance of an immigrant visa because of the person's race, sex, *nationality*, place of birth, or *place of residence*" (emphasis added).

Even on its face, this provision is not as clearly in conflict with Trump's executive order as Bier suggests. As he correctly points out, the purpose of the anti-discrimination provision (signed by President Lyndon Johnson in 1965) was to end the racially and ethnically discriminatory "national origins" immigration practice that was skewed in favor of Western Europe. Trump's executive order, to the contrary, is in no way an effort to affect the racial or ethnic composition of the nation or its incoming immigrants. The directive is an effort to protect national security from a terrorist threat, which, as we shall see, Congress itself has found to have roots in specified Muslim-majority countries.

Because of the national-security distinction between Trump's 2017 order and Congress's 1965 objective, it is not necessary to construe them as contradictory, and principles of constitutional interpretation counsel against doing so.

Nevertheless, let's concede for argument's sake that there is conflict. At issue is a matter related to the conduct of foreign affairs – a matter of the highest order of importance since it involves foreign threats to national security. If there were a conflict here, the president's clear constitutional authority to protect the United States would take precedence over Congress's dubious authority to limit the president's denial of entry to foreign nationals.

But there is no conflict.

Federal immigration law also includes Section 1182(f), which states: "Whenever the President finds that the entry of any aliens or of any class of aliens into the United States would be *detrimental to the interests of the United States*, he may by proclamation, and for such period as he shall deem necessary, *suspend the entry of all aliens or any class of aliens* as immigrants or nonimmigrants, or*impose on the entry of aliens any restrictions he may deem to be appropriate*" (emphasis added).

Section 1182(f) plainly and sweepingly authorizes the president to issue temporary bans on the entry of classes of aliens for national-security purposes. This is precisely what President Trump has done. In fact, in doing so, he expressly cites Section 1182(f), and his executive order tracks the language of the statute (finding the entry of aliens from these countries at this time "would be detrimental to the interests of the United States").

While Bier ignores the president's constitutional foreign-affairs authority (although Trump expressly relies on it in the first line of his executive order), he concedes that Trump is relying on a statute. He theorizes, nevertheless, that because Section 1182(f) was enacted in 1952, whereas

the non-discrimination provision (Section 1152(a)) was enacted years afterward, the latter must be deemed to have amended the former – thus removing the president's authority to impose class restrictions based on the aliens' country of origin.

Nice try.

Put aside that Trump is principally relying on his inherent constitutional authority, and that the class restriction he has directed is based on national-security, not racial or ethnic considerations. Trump's executive order also expressly relies on an Obama-era provision of the immigration law, Section 1187(a)(12), which governs the Visa Waiver Program. This statute empowers the executive branch to waive the documentation requirements for certain aliens. In it, *Congress itself expressly discriminates based on country of origin.*

Under this provision, Congress provides that an alien is eligible for the waiver only if he or she has not been present (a) in Iraq or Syria any time after March 1, 2011; (b) in any country whose government is designated by the State Department as "repeatedly provid[ing] support for acts of international terrorism"; or (c) in any country that has been designated by the Department of Homeland Security as a country "of concern."

So, not only has Congress never repealed the president's sweeping statutory power to exclude classes of aliens from entry on national-security grounds; decades after the 1965 anti-discrimination provision touted by Bier, Congress expressly authorized discrimination on the basis of national origin when concerns over international terrorism are involved. Consequently, by Bier's own logic, the 1965 statute must be deemed amended by the much more recent statute.

Bier concedes that, despite the 1965 anti-discrimination statute, President Jimmy Carter barred entry by Iranian nationals in 1980, after the Khomeini revolution led to the U.S.-hostage crisis. But he treats Carter's restriction based on national origin as an aberration. Instead, he insists, we should place more stock in the federal courts' affirmation of the 1965 anti-discrimination provision during the 1990s — specifically, in a litigation involving an alien from Vietnam who had fled to Hong Kong and objected to being required to return to Vietnam to apply for a visa when applicants from other countries faced no such requirement.

But there is no inconsistency here. Bier perceives one only by overlooking the salient national-security distinction. The discriminatory treatment of Iranians was rationally rooted in anti-terrorism concerns, and was clearly proper. The discriminatory treatment of the Vietnamese alien was unrelated to national security or terrorism, and thus problematic. Trump, like Carter, is quite properly acting on national-security concerns.

One can debate the policy wisdom of the executive order, which is plainly a temporary measure while a more comprehensive and thoughtfully tailored policy is developed. The seven countries the president has singled out are surely hotbeds of radical Islam; but he has omitted other countries – e.g., Saudi Arabia, home to 15 of the 19 suicide-hijackers who attacked our country on 9/11 – that are also cauldrons of jihadism.

Furthermore, as I have argued, the real threat to be targeted is sharia-supremacist ideology, which is inherently hostile to the Constitution. Were we to focus our vetting, unapologetically, on that ideology (also known as "radical" or "political" Islam), it would be unnecessary to implement a categorical ban on Muslims or immigrants from majority-Muslim countries. That is critical because non-Islamist Muslims who can demonstrate loyalty to our constitutional principles should not be barred from admission; while Islamists, on the other hand, are not found only in Muslim-majority countries – other things being equal, a sharia supremacist from the banlieues of Paris poses as much of a threat as a sharia supremacist from Raqqa.

Yet, all that can be debated as we go forward. For now, there is no doubt that the executive order temporarily banning entry from specified Muslim-majority countries is both well within President Trump's constitutional authority and consistent with statutory law.