



## Trump's New Travel Ban Might Be Better Politically Than Legally

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President Trump on Monday signed a second executive order severely restricting immigration from several predominantly Muslim countries. This new order is somewhat more limited than Trump's first ban, announced in January, which sparked confusion and protests before being blocked by a federal judge. But while the narrower scope and slower rollout may help politically, it is less clear whether the new approach will be any more likely to survive inevitable legal challenges. Indeed, the order may have eroded some of the administration's own legal positions.

Trump's new order differs from the first in several significant ways. First, Iraq is no longer on the list of countries subjected to a 90-day travel ban. (The other six countries included in the original order — Iran, Somalia, Sudan, Libya, Syria and Yemen — remain unchanged.) Second, the ban no longer applies to people with valid U.S. visas. The order also makes clear that U.S. green card holders are allowed to travel into the country, which was ambiguous in Trump's original order. (The government eventually clarified that green card holders weren't included, but that wasn't explicit in the order itself.) Third, the new order no longer gives preference to refugees who are religious minorities in their home countries, a provision that in effect gave Christians an advantage.

The changes — particularly the exemption for green card and other visa holders — could help the new order gain more public support than the original one. The polling firm Morning Consult recently tested different ways of asking about the original executive order. Support for the ban was 4 percentage points lower in a version of the poll that said the policy could apply to holders of visa or green cards. That might seem like a small difference, but public opinion on the original ban was closely divided; even a small shift in opinion could make the difference between plurality support for and plurality opposition to the new executive order.

The new order could also deprive Trump's opponents of one of the most powerful emotional tools at their disposal: images and stories of people who had been granted visa to come to the U.S. being stopped at airports and prevented from traveling to or entering the U.S. Those stories drew widespread press coverage and led to protests at the airports. Now, these green card and

visa holders most likely won't be held up at airports. The new executive order also means that we probably won't be hearing stories of Iraqis who helped American soldiers during the Iraq War being denied entry into the United States.

But while the new order may address some of the original ban's political challenges, it doesn't necessarily resolve the legal ones. It may even make some of them worse, legal experts said.

One legal argument against the original ban was that it was, in effect if not in name, a religious test, which many legal experts argued would violate the Constitution's protection of religious freedom. The new ban removes the explicit priority granted to religious minorities in the predominantly Muslim countries, which could help it pass legal muster. But it doesn't address the history of comments from Trump and others with ties to him that he wanted to impose a "Muslim ban."

"I think this [revision] was clearly an effort to rescue the constitutionality of the order," said Elizabeth Goitein, co-director of the Brennan Center for Justice's Liberty and National Security Program.<sup>1</sup> "Essentially they removed the smoking gun — the express carve-out for certain religious minorities." Nevertheless, she added, "all the other evidence of religious animus is still there."

David Bier, an immigration policy analyst at the libertarian Cato Institute, argued the new order is also illegal because it violates the Immigration and Nationality Act of 1965, which he said outlawed discrimination in immigration based on nationality. He called the new order "overbroad and illegal."

The new executive order may also undermine the Trump administration's own legal arguments in a few different ways. The first is the exclusion of Iraq from the list of banned countries. One of the Trump administration's main arguments for the original ban was that its list of countries was based on the Obama administration's own, identical list of "countries of concern." "The countries that were chosen in the executive order to protect Americans from terrorists were the countries that have already been identified by Congress and the Obama administration," Reince Priebus, Trump's chief of staff, said on "Meet the Press" in January. But now that the list is being altered, that justification no longer works as well. "Iraq being excluded actually undermines the administration's argument that it was a list that came from Congress," Bier said.

Second, by narrowing the order so that current visa holders are not affected, the administration undermines its argument that the ban is needed because existing vetting procedures are insufficient to protect national security. Courts could interpret the decision to exempt current visa holders from the new restrictions as an admission that the status quo visa vetting procedures are adequate. "Leaving in current visa holders also undermines the argument that these nationals *per se* pose a unique threat, and that the current vetting process is inadequate to deal with this threat, which is their whole argument," Bier said.

Third, by deciding to delay enforcement of the new order until March 16 (presumably to avoid the confusion of the last time around), the administration could undermine its claim that it needs to act quickly. "If the ban were announced with a one-week notice, the 'bad' would rush into our country during that week," Trump tweeted in January. But that's a tough point to make now.

“This undermines the argument that the administration made in court that *any* delay would jeopardize national security,” Bier said.

The lawsuits against the original order will likely continue. For one thing, something called the voluntary cessation doctrine says that even if a defendant ceases some illegal behavior — Trump’s original executive order, in this case — lawsuits against it do not become moot. And even with the exclusion of current visa holders, there are still many others — universities, spouses — with a keen interest in immigration to the United States who could sue.

“I’m sure it will be challenged right away,” Goitein said.