

MarketWatch

Opinion: A libertarian explains why Trump's new travel ban is still legally suspect

President Trump's new travel ban undermines some of the old executive order's legal arguments

David Bier

March 8, 2017

President Trump issued a new executive order this week that revises, rescinds, and replaces his prior order banning immigration from several majority-Muslim countries. The new order, which is scheduled to take effect on March 16, is supposed to bolster the White House's case in court, resolving legal defects that prevented the ban from prevailing the first time around.

In some ways, it accomplishes its goal, but in other ways, the new order undermines several legal arguments that the administration has been making.

While defending the president against a lawsuit brought by the state of Washington, the administration's attorneys justified his list of seven majority-Muslim countries by stating that they were "previously identified as posing a heightened risk of terrorism by Congress or the Executive Branch." In fact, they said, "Congress itself identified Iraq and Syria as countries of concern."

This argument was always weak because, although Congress did single out these countries for additional vetting, it still specifically provided for the ability of Iraqi and Syrian nationals to come to America so long as they had a visa. But now the president has excluded Iraq from the list, which means its justification that this list was something Congress put together is gone.

The whole point of the ban, as the administration put it, was to establish "adequate standards... to prevent infiltration by foreign terrorists." In other words, because the vetting process is inadequate, and these nationalities are (in the eyes of the administration) inherently dangerous, people from the selected countries cannot be allowed in.

The new order exempts current visa holders from these countries. But this change totally undermines the argument that these nationals are dangerous even if they are screened. By fixing one problem, the administration creates another one for itself. If these nationals are dangerous, why would it concede to allow any of them in?

Here's a more immediate concern for the administration. When the original order was challenged, the administration argued in court that any delay in implementation "immediately harms the public by thwarting enforcement of an Executive Order issued by the President, based on his national security judgment." It is likely that they will argue the same when this one is challenged.

Yet the new order delays the effective date for more than a week. It does so to resolve a potential legal concern tied to banning people without notice. But the delay effectively eviscerates the argument from the president's legal team that a judge's decision to suspend enforcement of it would impose "irreparable harm." A judge could respond, "If that's true, did the president's delay also harm the United States?"

The administration also claimed that this was not a ban intended to reduce admissions of immigrants from these majority Muslim countries. Instead, it was just a temporary 90-day pause on entries from these places to allow the government to review vetting procedures. But now the new order restarts this timeline.

Why would the clock on reviewing procedures stop ticking just because the old order wasn't blocking entries? This provides evidence that these timelines were in fact arbitrary and that the goal wasn't about giving the administration time to review, but rather about cutting legal immigration of people—mainly Muslim immigrants—that the administration simply does not like.

Despite all of the changes, the fundamental problems persist. The order still references 1952 law providing that the president can exclude "any class of alien" if he finds them "detrimental." But this justification ignores a later-enacted 1965 law that bans discrimination against immigrant visa applicants based on nationality. While the 1965 law provides a list of exceptions, the 1952 law was specifically not included among them.

Congress did not want to allow the president this authority. In fact, it specifically debated the question of whether difficult-to-screen countries should be included under the 1965 non-discrimination rule and decided that they should be.

This means that the executive order re-boot is still legally suspect. Indeed, in some ways, because it undermines so many of the government's arguments, the order has become even more suspect than it was before, and the courts should tell the president to go back to the drawing board once again.

David J. Bier is an immigration policy analyst at the libertarian Cato Institute's Center for Global Liberty and Prosperity.