

Removal of Trump's Muslim Comments Raise Travel Ban Questions

Cogan Schneier

May 11, 2017

The removal of a webpage has put President Donald Trump in a lose-lose situation as appeals courts weigh whether to use his campaign statements in deciding if opponents are likely to show his second travel ban executive order illegally targets Muslims.

An online statement outlining then-candidate Trump's pledge to halt Muslim immigration, which had remained on his continually updated campaign website since Dec. 7, 2015, disappeared just before the U.S. Court of Appeals for the Fourth Circuit's hearing Monday on Trump's revised travel ban. The removal could come up during a Ninth Circuit hearing set for next week.

The question of why the webpage came down gets at the heart of the travel ban litigation, which has played out in courts across the country: whether judges can consider what Trump said or did on the campaign trail when evaluating his presidential actions. And if they can, is the president always tainted by those statements, even if he removes them from websites or rescinds them?

Opponents of Trump's revised travel ban have cited that 2015 press release, still visible in the president's tweet from the day it was issued, as evidence of his discriminatory intentions. For the campaign to take it down just before a court hearing appeared conspicuous to some attorneys following the cases, but keeping it up undercut the government's arguments that the travel ban is not based on religion.

"Damned if you do, damned if you don't," said South Texas College of Law professor Josh Blackman of the statement's removal.

In the Ninth Circuit case, Hawaii District Judge Derrick K. Watson referenced Trump's statement when writing that "there is nothing 'veiled' about this press release: 'Donald J. Trump is calling for a total and complete shutdown of Muslims entering the United States.'"

Walter Olson, a senior fellow at the libertarian Cato Institute for Constitutional Studies, said the Ninth Circuit panel could ask about the removal during its May 15 hearing.

"It is the kind of issue that judges poke at, realizing that it may not have any direct legal bearing on [their] states of mind then or now," Olson said. "They may be interested in hearing a reason [why the page was removed], in case it reveals more."

Olson added that judges often ask questions "without exactly knowing whether the answers will affect what they rule."

During Monday's Fourth Circuit hearing in Richmond, Virginia, the judges and lawyers appeared unaware that the page was gone as they discussed the president's statement. Judge Robert King pointed out that Trump "never repudiated" what he said about banning Muslims. "It's still on his website," King said.

White House Press Secretary Sean Spicer was asked during a press briefing Monday to explain why the executive order is not a "Muslim ban" even though the president's own website still called for "a total and complete shutdown of Muslims entering the United States." Spicer referred questions to the campaign, and a short time later the webpage was taken down.

"Taking down the statement on the same day as the argument seems mighty convenient," said Lee Gelernt, a lawyer at the American Civil Liberties Union, which is challenging Trump's revised travel ban in the Fourth Circuit. The Justice Department declined to comment.

Blackman said he hopes the question of what happened to the statement does come up in the Ninth Circuit arguments, if only to point out what he believes is unfounded outrage over its removal.

"This entire line of cases is insane," Blackman said. "The entire nature of the question answers itself: this is not something courts should be doing."