

DAILY NEWS

The discrimination dog that didn't bark: Trump's religious liberty executive order is much less threatening than critics feared

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Do you ever get the feeling that some commentaries are written a little too far in advance of events?

On Wednesday, social media was filled with outcry about the sweeping, “Handmaid’s Tale”-like provisions of the executive order on religious liberty President Trump was preparing to sign Thursday.

Churches and believers would be set up as above all law. #LicenseToDiscriminate trended all day on social media, reflecting predictions that the President would somehow (as if he could) use his pen to nullify a wide range of federal and even state anti-discrimination laws, on the supposed basis that they impair the rights of religious believers.

Most of the wild speculation played off a leaked draft back in January of an executive order that amounted to a wish list of what some organized religious conservatives were hoping Trump would do. Even then, there were indications that these were not the views of Trump himself and that they faced stiff opposition within the White House.

What the White House unveiled Wednesday night was far more modest. In fact, it dropped about 96% of the controversial stuff that had circulated in the January draft, including many provisions that in my view were misconceived and would quite rightly have come under withering criticism.

Gone were new rules making federal contracting even more of a complicated legal mess, gone was language proposing to protect conscience-based views on sexuality when they were theologically conservative but not otherwise, and so on.

Instead, the new order has three parts.

One, it prescribes that deference be observed to speech rights, consistent with law, in enforcing the law's 1950s-era prohibition on extensive campaign activity by churches.

Whatever one thinks of the Johnson Amendment, this change looks like small ball. Nothing in the law itself will change, and nothing will become lawful that is now unlawful. There is already little if any enforcement activity based on the amendment. Maybe the IRS will relax its vigilance further.

But tax law is ultimately backed by the Department of Justice: Did Jeff Sessions actually need a presidential go-ahead to spell out that he can assert a full range of discretion?

There is also a cryptic reference to having agencies defer more broadly to speech rights beyond the context of the IRS and campaigns, which lawyers are likely to look at closely in coming days just in case it proves to be something big.

Two, it directs that certain accommodations be made to some employers on Hobby Lobby-type issues of contraceptive benefit provision. Maybe this will consolidate ground already gained by the Supreme Court's ruling and Congressional sentiment, but pro-Hobby-Lobby groups are already saying they got much less than they hoped for on this front.

Three, it offers a general statement of policy support for religious liberty. This might help the pro-accommodation side prevail more often in future debates at the agencies. If so, the Trump White House will have joined all its predecessors in the practice of taking credit for fine-sounding, vague statements of principle while leaving to the agencies the messier and inevitably less popular responsibilities of implementation.

Significantly, according to advance reports, a White House official indicates that there are no plans for any additional executive order on LGBT discrimination issues.

Organized gay groups, committed to keeping their base in a constant state of alarm, will be reluctant to admit that this is a big win for their cause. Even so, it fits the theory I've argued for some time that lifelong New Yorker Trump doesn't want to go around picking fights with the gay community.

To sum up, then: There is every indication that President Trump does want to make a gesture toward one of his important electoral constituencies that they did not waste their time in voting for him (other than as a way to keep Hillary Clinton's Democrats out of office). But he does not see fighting this particular set of culture war issues as central to his goals as President. Hence this mostly symbolic announcement, timed for the National Prayer Breakfast. Maybe bigger victories for organized religious conservatives lie ahead — but if so, they are likely to come from the agencies, not from the Oval Office.

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