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White House Immigration Ban Promises Constitutional Showdown

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Did President Donald Trump's executive order on immigration ban Muslims from the country on the basis of their religion? That will be a central question when federal judges dig more deeply into the constitutionality of the order, signed on Jan. 27. If the answer is yes, it appears vulnerable to a First Amendment challenge.

So far, four U.S. district judges -- in Brooklyn, New York; Boston; Alexandria, Virginia; and Seattle -- have issued temporary rulings blocking aspects of the order. These provisional, hastily granted judicial rulings didn't delve into deep constitutional issues. Instead, they sought to prevent deportations or other government actions that would harm individuals affected by it.

Lawyers for those individuals will return to court in coming days to flesh out their arguments. The Trump administration presumably will send attorneys from the Justice Department to defend the executive order, and the respective judges will subsequently issue more-thorough rulings.

One or more of the pending cases is likely to evolve this week into unusual and fascinating debates over the meaning of soaring constitutional provisions such as "due process," "equal protection," and a part of the First Amendment that prohibits the government from enacting laws "respecting the establishment of religion."

The debate also promises to spill over into confirmation hearings for Trump's Supreme Court nominee, whom he is expected to make in coming days.

Muslim Ban?

The executive order indefinitely suspended resettlement of Syrian refugees and all other refugee resettlement for 120 days. It also banned entry for 90 days of nationals from seven predominantly Muslim countries: Syria, Iraq, Iran, Sudan, Libya, Somalia, and Yemen.

“This was a Muslim ban wrapped in a paper-thin national-security rationale,” said Anthony Romero, executive director of the American Civil Liberties Union, one of the organizations that went to court to challenge the order.

Several legal experts drew similar conclusions.

“It’s clearly a nationality ban and a de facto religion ban,” said Dan Siciliano, a law professor at Stanford University. “We have in place statutes that say the government should not set policy or take actions based on nationality.”

Laurence Tribe, a prominent liberal constitutional scholar at Harvard University, called the order “barely disguised religious discrimination against Muslims and religious preference for Christians.” The order by its own terms establishes preferential treatment for refugees identified with “minority religions” in their country of origin.

The Supreme Court, in a 1982 ruling, explained that “the clearest command of the Establishment Clause” of the First Amendment “is that one religious denomination cannot be officially preferred over another.”

‘Jihadist Sentiments’

Still, some observers said the courts ultimately might uphold Trump’s order. Its alleged anti-Muslim thrust “is not clear to me,” said Eugene Volokh, a professor at UCLA School of Law. Judges might interpret the order as targeting people from countries where “jihadist sentiments” are common, he said. The president generally has broad authority to exclude noncitizens from coming into the country, Volokh said.

Jonathan Turley, a law professor at George Washington University, predicted the courts wouldn’t interpret the order as a religious ban. “It is not on its face a Muslim ban,” he said. “That dog simply won’t hunt. No judge can look at the order and analyze it as a Muslim ban because the vast majority of Muslims around the world are not affected by the limitations placed on these seven countries.”

President Trump insisted that his purpose was to halt immigration from areas afflicted by terrorism. “This is not about religion,” he said in a statement Sunday evening. “This is about terror and keeping our country safe.”

In fact, airports in the U.S. and around the world were engulfed in confusion and, in some cases, protests related to the imposition of the order.

Trump appeared to ignore the high court’s 1982 pronouncement when he told Christian Broadcast News in an interview scheduled to air Sunday evening that he intended to give priority to Christians from the Middle East over Muslims. “It was almost impossible” for Syrian Christians to enter the U.S., he said in the interview. Separately, in a Tweet on Sunday, the

president said: “Christians in the Middle East have been executed in large numbers. We cannot allow this horror to continue!”

Trump’s Intentions

Strange as it may seem, Trump’s utterances on Twitter or elsewhere could become evidence in court of what he intended to accomplish with the executive order. Some possible examples include his original call during the presidential campaign for a “total and complete shutdown of Muslims entering the United States” and his modified demand for a ban targeting immigrants from majority-Muslim countries.

Even some conservative Republicans expressed unease about the constitutionality of the Trump order. Focusing on the First Amendment issue, Senate Majority Leader Mitch McConnell said on ABC’s “This Week” on Sunday: “It’s hopefully going to be decided in the courts as to whether or not this has gone too far.”

“I think we need to be careful,” McConnell added. “We don’t have religious tests in this country.”

Roger Pilon, founding director of the Cato Institute’s Center for Constitutional Studies, predicted the debate over Trump’s immigration order would ultimately end up with the Supreme Court.

“I don’t see President Trump backing down,” he said. “I do hope, however, that the stays the lower courts are issuing will allow for a measure of ‘business as usual,’ because the initial situation seems very chaotic.”