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DONALD TRUMP

The Fourth Circuit Argument on the Refugee EO: Second-Guessing the President or Safeguarding Individual Rights?

By Peter Margulies Tuesday, May 9, 2017, 9:20 AM

Reading the tea-leaves of appellate argument can be tricky, but skepticism about the legality of President Trump's revised Executive Order (EO) was a prominent strand in Monday's Fourth Circuit en banc argument on whether to affirm a Maryland district court's injunction halting the EO. Of the thirteen judges at the hearing in *International Refugee Assistance Project v. Trump*, Chief Judge Gregory and Judges King, Wynn, Keenan, Motz, Thacker, Floyd, and Harris all voiced concerns about the revised EO's legality under the Establishment Clause, while Judges Niemeyer and Shedd seemed to view the order as legal. Judges Traxler, Diaz, and Agee were tougher to read (Judges Wilkinson and Duncan did not participate).

However the court rules, the argument placed the opposing options in this case in stark relief: (1) narrowly construe the President's authority and read both President and candidate Trump's comments in the worst possible light, or (2) cultivate a measure of deference and a reluctance to view pre- and post-inauguration statements by Trump and his advisors as dispositive evidence of an intent to condemn Muslims as a group.

By way of review, recall that the revised EO was, in President Trump's words, "tailored" to the judicial and political pushback triggered by the original EO. The revised EO suspended all immigration admissions for 90 days from six countries (Iran, Libya, Somalia, Sudan, Syria, and Yemen). Iraq was included in the original EO but dropped from EO 2.0 for foreign policy reasons. The revised EO also suspended all refugee admissions for 120 days, removing Syrians from the indefinite bar they had been subject to under the original EO. In addition, the revised EO expressly exempted lawful permanent residents, whom courts believed were covered by the original EO. It also exempted other groups whose exclusion, detention, and removal had caused the chaos that attended issuance of the original EO: current visa-holders and noncitizens with approved refugee status. The remaining group covered by the revised EO—noncitizens who have not been previously admitted to the United States—has far more attenuated legal claims. The Constitution generally does not protect noncitizens abroad who have no previous ties to the United States. Moreover, the EO only requires a *pause* in admissions, not a permanent bar.

Monday's Fourth Circuit argument dealt mainly with the plaintiffs' Establishment Clause claim. The Establishment Clause prohibits government actions intended to and likely to produce injury or aid to religion. Most of the judges at Monday's argument seemed to view the case as turning on two distinct but overlapping legal tests. One test, taken directly from the Supreme Court's Establishment Clause jurisprudence, is whether the revised EO had a "secular purpose." The other test is whether the action was "facially legitimate and bona fide" under the Supreme Court's decision in *Kleindienst v. Mandel* (1972) and Justice Kennedy's concurrence in 2015's *Kerry v. Din*.

The "secular purpose" factor is one of three prongs in the best known approach to adjudication of Establishment Clause challenges, set out in the Supreme Court's 1971 decision in *Lemon v. Kurtzman* (1971). Under that approach, for the state to prevail, a court must also find a "primary effect [of the challenged action] that neither advances nor inhibits religion" and the absence of a tendency to "foster excessive state entanglement with religion."

While this venerable test is serviceable when applied to the state or local government displays of religion-related themes that comprise the bread and butter of Establishment Clause dockets, courts have rarely applied the test to actions of the *federal* government. That reticence is particularly noticeable in the realm of national security and foreign relations. As Josh Blackman noted here, the myriad variables at work in those cases customarily require greater flexibility for the political branches. In a case on religious displays demonstrating the judicial deference that characterizes Establishment Clause challenges to federal action, the Supreme Court in *Salazar v. Buono* (2010) found that a blatantly religious symbol—a cross—was almost certainly intended by Congress not as a promotion of religion but as a commemoration of Americans killed in World War I. In reaching this conclusion, the Court saw no need to refer to each of *Lemon's* three prongs. Focusing on the first prong, secular purpose, was sufficient.

Perhaps because the *Lemon* test was not designed for the complex realm of foreign relations, the litigants and judges at Monday's argument generally stuck with the second test, which the Court designed for immigration, *not* the Establishment Clause: whether the action was "facially legitimate and bona fide" under the Supreme Court's decision in *Kleindienst v. Mandel* and Justice Kennedy's concurrence in 2015's *Kerry v. Din*. The government's reading of the test differed from the construction offered by the ACLU's Omar Jadwat.

The government, ably represented by Acting Solicitor General Jeffrey Wall, read the adverb "facially" as modifying both "legitimate" and "bona fide." On this reading, if the EO is neutral on its face, it is inherently both "legitimate" and "bona fide." To prove a neutral basis for the revised EO, Wall highlighted the factors cited both in the EO and in related pronouncements by the Attorney General and the Secretary of

Homeland Security, including the existence of armed conflicts in five of the six countries covered by the pause in admissions and the state sponsorship of terrorism by the sixth country, Iran. In the government's view, if the measure is neutral on its face, a court cannot "look behind" its four corners to comments, such as Trump's campaign statements, that allegedly show an anti-Muslim animus.

The ACLU reads the *Mandel* test differently, as requiring proof that a challenged government action is both, (1) "facially legitimate," and (2) "bona fide." On this more stringent reading, which seemed to elicit support from several of the Fourth Circuit judges, the government won't prevail *merely* by showing that an action is neutral on its face. Instead, the government *also* has to show that, regardless of the measure's facial neutrality, invidious animus did not motivate officials to act.

The back-and-forth of the Fourth Circuit hearing demonstrated that *neither* argument is persuasive. As Wall, the government's lawyer, appeared to concede at one point, a sliding scale may best regulate the relationship between a measure's putative neutral objectives and the statements that illuminate the motives behind the measure. To illustrate this sliding scale, consider rhetoric that is redolent with animus from a measure's proposal to its implementation. Here, the hypothetical posed by ACLU lawyer Omar Jadwat is instructive. Suppose that a President had publicly and explicitly observed during the campaign and as President that he hated Jews. Suppose further that the President had upon assuming office issued an executive order temporarily halting immigration from Israel. A court would be justified, given this stark rhetoric, in performing a more searching review of the posited neutral justifications for the temporary halt. Ignoring the President's pre- and post-Inauguration animus would be an act of willful blindness inconsistent with the Establishment Clause and American constitutionalism.

This sliding scale approach fleshes out Justice Kennedy's reference in *Kerry v. Din* to the effect of plaintiff's "affirmative showing of bad faith." Justice Kennedy suggested that once a plaintiff made such a showing, the court could "look behind" the neutral reasons for the measure. If Justice Kennedy meant that once a plaintiff demonstrated the government's bad faith, the court could question whether the government had acted in good faith, the Justice's recommendation seems redundant. The plaintiff has already proven bad faith; what more needs to be shown on this score? However, Justice Kennedy's approach gains cogency if, upon a showing of bad faith, the court can take a harder look at whether the government's action matches its stated goals.

To check undue judicial intrusion on the prerogatives of the executive branch, a sliding scale in the complex realm of foreign relations should acknowledge a ground truth about political rhetoric: change comes with the territory. In negotiating this shifting terrain, finding a single motive or meaning is a quixotic endeavor. In previous posts, I have cited the example of Franklin Roosevelt's deft maneuvers (see here and here): FDR ran against Herbert Hoover as a budget hawk, and then embraced deficit spending to revive America's economy. In 1940, Roosevelt pledged never to permit American soldiers to fight in European wars, even as he prepared for the United States' inevitable entrance into World War II. We now can surmise more about what Roosevelt intended. But Roosevelt's success depended largely on his ability to keep people guessing.

President Trump is no FDR. However, ascribing an unchanging anti-Muslim intent to him founders on the ebb and flow of his volatile discursive style. Trump has been a public figure for well over thirty years.

As a fixture in 1980s New York media, Trump's preoccupations appeared to be fame, romance, and high-end real estate. Anti-Muslim animus would not have placed in his top thousand priorities. It's true that candidate Trump at times talked about a "Muslim ban." However, even as a candidate, Trump then pivoted to his next talking point, recommending "extreme vetting" of Muslim immigrants. In all of these remarks, which I regarded during the campaign as thoroughly misguided (a view I continue to hold today), Trump also focused on the threat of terrorism from groups such as ISIS and Al Qaeda—a genuine priority shared by every administration since September 11.

Consider also the explanation of the first refugee EO by Trump advisor Rudy Giuliani. According to Giuliani, Trump tasked him as follows: "[p]ut a commission together ... [and] show me the right way to do it legally." Trump's critics, including the Maryland district court whose order was the subject of Monday's hearing, have focused on this explanation as a "smoking gun" demonstrating Trump's effort to launder his animus into acceptable public policy. For the critics, Trump slyly shifted his stated concern from a "religious basis" (Giuliani's terms) to the "factual basis" of "areas of the world that create danger for us." However, classifying Giuliani's explanation as a smoking gun hinges on an inference that is eminently debatable. Trump's critics are convinced that the "it" in "the right way to do it legally" refers to banning Muslims *qua* Muslims. This is surely one inference, but it's not the only one.

The "it" in Giuliani's explanation could also refer to assessing whether the United States' current criteria for screening immigrants work as promised. Pending an answer to this vital question, it's not inherently unreasonable to temporarily suspend immigration from countries riven by terrorism and armed conflict. That is what the revised EO seeks to do. The revised EO's method is unwise as a policy matter, in my view, but second-guessing executive policy choices is not a judicial function. Moreover, as Judge Shedd observed at the Fourth Circuit argument, the revised EO restricts the immigration to the U.S. of less than 15 percent of the world's Muslim population. If the revised EO is a "Muslim ban," it is markedly ineffective on its face. A President who sought to prohibit all Muslims could surely do better. That manifest lack of fit should indicate that other scenarios besides a deliberate Muslim ban best fit the facts.

There's a second constraint needed on Establishment Clause adjudication addressing foreign policy. As Judges Niemeyer and Shedd noted at Monday's Fourth Circuit argument, courts should acknowledge the nature of the overseas risks that the EO seeks to address, the information deficit that courts confront in evaluating those risks, and the accountability deficit between courts and the President. Some of the Fourth Circuit judges Monday suggested that there is only modest evidence of a correlation between terrorist violence in the U.S. and immigration from the affected countries. However, as I have noted previously, this asks the wrong question, for two reasons.

First, there is more evidence of immigrants from the six countries—particularly Somalia—*funding* terrorism abroad. From a national security and foreign relations standpoint, such assistance to terrorism overseas is just as harmful as violence within the United States, and just as legitimate a subject for government regulation. Second, the focus should be on *situations on the ground* in the six affected countries and the ability and willingness of the governments in those countries to assist U.S. immigration screening. The armed conflicts in five of the six countries and the state sponsorship of terror in Iran at least create room for doubt on this score. Indeed, as Judge Diaz noted in Monday's argument, the Obama administration recognized the volatility in the six affected countries, finding that nationals of other states who merely *visited* the six countries were ineligible for waivers of visa requirements.

At the end of the day, I'm not sure that an impartial review of U.S. consular procedures should result in the recommendation of major changes. However, courts intrude unduly on the prerogatives of the political branches if they use the anvil of Establishment Clause jurisprudence. Statutory remedies under the Immigration and Nationality Act are available if the Trump administration seeks expressly or impliedly to make its temporary suspension permanent. Today, invocation of those remedies is premature.

The case against judicial intrusion is reinforced by the plaintiffs' lack of standing. Under Article III of the Constitution, a plaintiff must show "injury in fact," defined as a harm that is both concrete and particularized. According to the government, only one individual plaintiff, John Doe No. 1, even has a live claim against the revised EO. Moreover, since John Doe No. 1's claim hinges on his petition for his noncitizen spouse, his claim fits neatly within a family reunification waiver expressly provided for in the revised EO. In other words, John Doe No. 1 is a successful waiver petition away from realizing his goal. That's a job for a good lawyer, but it's a slender reed to support intervention by the federal courts.

The Establishment Clause is also a slim reed for judicial intervention, given the rife situation abroad that the revised EO cites, the judiciary's lack of ability to independently assess the course of overseas conflicts, and the contrast between judges' life tenure and the President's periodic subjection to the voters' will. Regardless of how the Fourth Circuit rules (along with a Ninth Circuit panel that hears a similar case next week), the revised refugee EO is likely heading to the Supreme Court. The Fourth Circuit argument has at least served to clarify the stakes in that final showdown.

Topics: Donald Trump, Refugees, Executive Power, Immigration

Tags: IRAP v. Trump, Fourth Circuit

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