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NO MATTER HOW MANY NEW TRAVEL BANS TRUMP ISSUES, MAXIMUM POWER DOES NOT MEAN ABSOLUTE POWER

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We have numerous justifiable concerns with the immigration policies of the Trump Administration on behalf of our clients and all Americans who feel that our values are being undermined, especially the Executive Order entitled "Protecting the Nation from Foreign Terrorist Entry into the United States." Fortunately, courts across the country seem to agree except for one. Most notable were United States District Judge Robart's nation-wide temporary restraining order (TRO) of the EO in the Western District of Washington and United States District Judge Brinkema's Virginia-wide injunction against the EO in the Eastern District of Virginia. Due to these and many other orders, as well as heavy backlash, the Trump Administration has now stepped back and have stated that they will replace the January 27 EO with a new Executive Order sometime next week that will survive judicial scrutiny. It is our view, however, that even this new EO in whatever way repackaged will be unconstitutional under the Establishment Clause of the First Amendment to the U.S. Constitution.

As a reminder, the January 27 EO suspended for 90 days the entry of persons from Iraq, Iran, Libya, Somalia, Sudan, Syria, and Yemen, suspended the U.S. Refugee Admissions Program for 120 days, and banned Syrian refugees indefinitely, unless they received an exemption from DHS for being a "religious-minority." The EO immediately disrupted the lives of thousands of people, from non-immigrants, immigrants, LPRs, and even dual-citizen holders. The first suit against the EO came only a day after its enactment in the Eastern District of New York, which issued an emergency stay that temporarily blocked the

government from sending people out of the country after they have landed at a U.S. airport with valid visas, including green card holders. There were several other injunctions that followed. Then the States of Washington and Minnesota filed suit in the Western District of Washington, requesting, among other things, a restraining order on the ban. Judge Robart issued a nationwide temporary restraining order against the ban, which was affirmed by the Ninth Circuit. Judge Robart's ruling on the merits is still pending. Meanwhile, Judge Brinkema in the Eastern District of Virginia granted a Virginia-wide injunction against the EO, citing specifically to the Establishment Clause.

President Trump continues to argue that the President has extensive powers granted to him under the Immigration and Nationality Act (INA) § 212(f), 8 U.S.C. § 1182(f), and proffers that the judiciary cannot exercise jurisdiction over an EO due to the plenary powers doctrine. In relevant part, INA § 212(f) states that,

> *Whenever the President finds that the entry of any aliens or of any class of aliens into the United States would be detrimental to the interests of the United States, he may by proclamation, and for such period as he shall deem necessary, suspend the entry of all aliens or any class of aliens as immigrants or nonimmigrants, or impose on the entry of aliens any restrictions he may deem to be appropriate.*

However, as Judge Brinkema rightfully pointed out in her decision, "maximum power does not mean absolute power." *Aziz v. Trump*, 2017 U.S. Dist. LEXIS 20889, at *11 (E.D. Va. Feb. 13, 2017). In her analysis, Judge Brinkema reaffirms that the U.S. Constitution is the supreme law of the land, and that no one, not even the President, can violate its terms. Citing to landmark cases such as *Zadvdas v. Davis*, 533 U.S. 678 (2001) (finding that the power of the Executive is "subject to important constitutional limitations," holding that LPRs are entitled to due process rights, and that their indefinite detention is a violation of those rights), *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004) (noting that the President's Article II powers are subject to review, holding that citizens held as enemy combatants must be afforded due process rights, namely the meaningful opportunity to contest the factual basis for their detention), among others, she proves this point.

The Ninth Circuit that affirmed Judge Robart's TRO also provided precedent on the reviewability of the Executive, citing to *Boumediene v. Bush*, 553 U.S. 723,

765 (2008) (specifically noting that the political branches cannot "switch the Constitution on or off at will" and providing the right of habeas review to a non-citizen outside the US) and *INS v. Chadha*, 462 U.S. 919 (1983) (noting that Courts are empowered to review whether or not "Congress has chosen a constitutionally permissible means of implementing" the "regulation of aliens."). The Ninth Circuit goes so far to say that even under *Kleindienst v. Mandel*, 408 U.S. 753 (1972), the Court can review the actions of the Executive branch, noting that but for their ability to review, there would be no "facially legitimate and bona fide reason" test to measure executive exercises of immigration authority.

In short, there is no doubt that Trump's Executive Orders are subject to review when there is an alleged violation of the Constitution. But what specifically is unconstitutional about Trump's ban? Or a rewrite of the ban even if it does not apply to lawful permanent residents or non-immigrants who have already been in the United States? One indication of the new EO by DHS Secretary Kelly is that it would give time for people to come back in , and would presumably include the same 7 nations whose nationals would be barred from future entries.

The Establishment Clause

The Establishment Clause argument has great merit, and it is the opinion of these authors that this argument will likely prevent Trump from prevailing on even his latest Executive Order, where it is likely he will include even non-Muslim countries, so as to appear non-discriminatory. The Virginia Court, in relevant part, explains that,

> *"The clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another." The Supreme Court has articulated various tests for determining whether that command has been violated. The first such test is that the law "must have a secular…purpose." "In the past, test has not been fatal very often, presumably because government does not generally act unconstitutionally, with the predominant purpose of advancing" one religion over the other. The secular purpose requirement "'nevertheless serves an important function,'" because "y showing a purpose to favor religion, the government sends the…message to…nonadherents that they are outsiders, not full members of the political community, and an*

> *accompanying message to adherents that they are insiders, favored members." This message of exclusion from the political community is all the more conspicuous when the government acts with a specific purpose to disfavor a particular religion. (internal citations omitted).*

(*Aziz*, at *13-14).

In order to assess whether there was discriminatory intent in the January 27 EO, Judge Brinkema cites heavily to statements made by Trump during his campaign, especially noting that a "Muslim Ban" was a central feature of his platform. She also pointed to post-election and post-inaugural interviews where he speaks about the need to prioritize Christian refugees. She also cites to a particularly intriguing quote by Rudy Giuliani, who stated after the EO's enactment, that "when first announced it, he said 'Muslim ban.' He called me up. He said, 'Put a commission together. **Show me the right way to do it legally**.'...And what we did was, we focused on, instead of religion, danger—the areas of the word that create danger for us...Which is a factual basis, not a religious basis. Perfectly legal, perfectly sensible. And that's what the ban is based on. It's not based on religion. It's based on places where there are substantial evidence that people are sending terrorists into our country." Additionally, Judge Brinkema noted that post-hoc statements by DHS Secretary Kelly and White House Chief Counsel proclaiming that this is not a Muslim ban will be given little weight because we are looking to past intent in our analysis.

These statements taken together go to show that the ultimate aim of the Trump Administration is to ban Muslims. Even in light of the new EO, which may or may not include non-Muslim majority countries, these statements cannot be washed away. The intent to ban Muslims is there. The intent to violate the Establishment Clause, without outright saying it, is there. "'The world is not made brand new every morning,' a person is not made brand new simply by taking the oath of office." *Aziz*, at *15. Trump's new EO is only being reissued because he and his Administration know it is likely that his January 27 EO is unconstitutional. Essentially, the new EO will be a repackaging of the old. The intent, therefore, remains to ban Muslims. This is the case even if the new EO proposes to ban future entrants. While people with no ties to the US may not have the same constitutional rights as lawful permanent residents, such a person who wishes to visit a US citizen relative or attend a US educational institution could still likely be able to challenge an unconstitutional EO pursuant

to *Boumediene v. Bush* and *Hamdi v. Rumsfeld.*

Balancing the Government and State's Interests

Given that plaintiffs can likely prevail on the Establishment Clause argument, the government must prove that its national security concerns are bona fide. This means that the government must present evidence to support its assertions that these EOs are vital for the preservation of national security. Judge Brinkema again notes that in the Virginia case, the government failed to provide any evidence to support their claim. The Ninth Circuit also noted that no evidence had been proffered to point to terrorist threats of nationals from the original seven banned countries. In fact, Judge Brinkema states that the only evidence offered in this regard is the declaration of 10 national security experts who declared that **the January 27 EO only serves to make the country less safe**. It is possible, though, that a court may follow what the Massachusetts district court in *Louhghalam v. Trump* did, and grant the President this authority and not find discriminatory intent (although the court rendered this decision to justify not extending the injunction indefinitely, which it did initially, and did not analyze the discriminatory intent).

It is clear to us, and hopefully to a court that hears the new challenge, that the discriminatory intent will still exist in this new EO, thereby remaining in violation of the Establishment Clause. While it remains unclear if courts will find that this new EO puts forth facially legitimate national security concerns, it will still possess discriminatory intent, specifically banning Muslims, and will fail under the "bona fide" prong put forth in *Kleindienst*. *See also American Academy of Religions v. Napolitano,* 573 F.3d 115 (2009). If the EO is found to possess facially legitimate national security concerns, but also formed in bad faith, it will be up to the courts to decide if these national security concerns have enough muster to overcome constitutional constraints. But history has repeatedly shown that national security concerns have been conveniently and falsely invoked even to deprive US citizens of their rights as with the shameful internment of Japanese Americans.

These national security concerns, in our opinion, are invalid and cannot even pass the facially legitimate prong. Immigrants and refugees face numerous screenings before being granted admission into the United States. In addition, the immigration process can take years. The government in the January 27 EO proceedings failed to offer evidence that these processes were defective in

their ability to screen out security threats. Further, it is unlikely that a terrorist would go through the trouble of filing an nonimmigrant/immigrant petition, only to be vetted several times over, then be subjected to a consular interview, and then still have to make it through Customs and Border Protection. It is an inefficient means to their end. Even attempting to ban prospective entrants who have not had ties with the United States cannot be justified if the ban violates the Establishment Clause. Since *Marbury v. Madison,* 5 U.S. 137 (1803), the Supreme Court has recognized that when a government action is in conflict with the Constitution, it is for the judiciary to say what the law is. This is the wonderful balance that preserves American democracy. White House advisor Stephen Miller was wrong to assert that an unelected judge cannot check the President's power in the area of immigration. The will of the majority, even in a democracy, cannot trample upon the rights of others. If that happens, the judiciary applies the breaks on such abuse of power so as to protect those who are trampled upon by the majority.

But most importantly, the majority of people seeking to temporarily visit or immigrate to the United States are peaceful people. Just because they share a different religion, worldview, or skin tone than some Americans does not mean that they are somehow violent or a threat. In fact, the opposite is true. Immigrants have been critical in the continued advancement of our country. From science and technology, to social ingenuity and progress, immigrants have helped to continue moving our country forward. To equate immigrants or non-immigrants, especially those from Muslim-majority countries with terrorists is not only bigoted, but it is simply untrue. Profiling all people from a specific country cannot serve as a proxy for individualized suspicion and guilt. It is also a sloppy law enforcement technique as an individual who desires to harm the country can evade being part of the profile. There are other smart law enforcement techniques that have been successfully deployed to track and apprehend people who intend to do us harm than profiling all people of a country.

President Trump derives his authority to assert maximum power through the plenary power doctrine, which arose from a Supreme Court case in the late 1800s, *Ping v. United States*, 130 U.S. 581, that upheld the racist Chinese Exclusion Act. In the 21st century, after the United States has made such strides in civil rights, women's rights, and marriage equality, there is no longer place for plenary power as a justification to violate the Constitution. Allowing

President Trump to assert such maximum power, based on the plenary power doctrine, only takes America back more than a hundred years after all the progress that has been achieved. The plenary power, as asserted in the travel ban EO, also sends a wrong message to the world that America is no longer a welcoming place for people to travel, do business, temporarily work, or to make a permanent home. Being unwelcoming, arbitrary and intolerant is inconsistent with the notion of America as a great nation. On this President's Day, it is important to reflect whether now is the opportune moment to reassess the plenary power doctrine that was grounded in a racist law whose purpose was to exclude Chinese nationals just as the current or future EO is aimed against banning Muslims. It is high time for the courts to once and for all recognize the supremacy of the Constitution over the president's absolute power.