

The legality and morality of Trump's #MuslimBan

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The Executive Order has been temporarily blocked, a Supreme Court decision is pending [AFP]

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Comment: Omar Mohammedi - President of the Association of Muslim American lawyers - unpicks the challenges to Trump's travel ban, and demonstrates its legal as well as moral flaws.

As early as 7 December 2015, in the midst of the Republican primaries, Donald Trump [proposed](#) a systemic policy of religious discrimination against Muslims with regards to immigration into the United States.

The trump campaign issued a [press release](#) setting forth his [ideas](#) to prevent Muslim immigration, and calling for a total "shutdown" of Muslims entering the United States until the government could understand the dangerous threat of "Islamic terrorism", where it comes from and why.

True to his promise, President Trump issued an [Executive Order](#) on 27 January 2017 entitled "Protecting the Nation from Foreign Terrorist Entry into the United States".

Though the Trump Administration has adamantly claimed in the past week that the Order is a "travel ban" and not a "Muslim ban," there is extensive extrinsic evidence that the intent and effect of the Order is in fact to preclude the

immigration of Muslims into the United States.

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One such example is the historical overview of the Order that Rudy Giuliani gave to a Fox News anchor on 29 January 2017 when questioned about the ban. He stated that President Trump told him that he wanted a Muslim ban and requested Giuliani to assemble a commission to show Trump the "right way to do it legally".

What does the ban entail?

The crux of the Order places an immediate 90 day ban on immigrants from Iran, Iraq, Libya, Somalia, Sudan, Syria, and Yemen entering the US. The Order states that "they are deemed detrimental to the interests of the United States".

Based on the language of the Order, the entry ban is applicable to not only nationals of the seven countries listed, but also dual nationals, where a person is a citizen of one restricted country and another non-restricted country.

There are literally hundreds of thousands of citizens of the United Kingdom and Canada who fall into this category and would be banned from entering the United States.

Syrians and refugees

Section 5 of the Order states that:

- (a) *All refugee admissions are suspended for 120 days.*
- (b) *At the expiration of the 120 days, the Order directs the Department of Homeland Security to prioritize refugee claims by individuals who are members of the religious minority in their affected home countries.*
- (c) *The Order states that the entry of Syrian nationals is detrimental to the U.S. and as a result, entry of all Syrians has been banned indefinitely.*

Most noteworthy in this section is the fact that Trump, while he hopes to exclude Syrian Muslim refugees indefinitely, has specifically outlined an exception for the immigration of Christian refugees after the expiration of the 120 day period. The Order excludes only Muslim-majority nations.

By including a provision that prioritises the immigration of "religious minorities" in these countries, the Order is very unambiguously stating that it will accept Syrian refugees who are Christian but not Muslim Syrian refugees.

Additionally, when Mr. Trump was interviewed by the Christian Broadcasting Network, he [stated that](#) he would prioritise the immigration of Christian refugees over those of other religions.

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President Trump intends to bar Muslims from entering the US which constitutes discrimination based on religion. 1.3 billion Muslims are not dangerous to the United States. Such an assumption may not only violate the constitution of the United States but it is morally probelamtic.

Constitutional challenges

There exist several arguments suggesting the Order is unconstitutional under the First Amendment's Establishment Clause which prohibits the government from undertaking actions that unduly favour one religion over another. One of the critical questions with respect to the validity of executive action challenged under the Establishment Clause is its intent and effect. If an action is intended to disfavor a particular religion, it violates the Establishment Clause.

“ The Order does not appear to be a reasonable security measure that is narrowly tailored to achieve the purpose it espouses ”

In addition, the order contradicts the Equal Protection Clause of the Fifth Amendment, and the Fourteenth Amendment. The Supreme Court long has recognised that the government violates these fundamental constitutional requirements when it discriminates on the basis of religion.

Though the Trump Administration has been denying that the intent of the Order is to disfavour Islam, there can be no sustainable argument against the fact that the intent and effect of the Order is to discriminate against Muslim immigrants.

It is clear from Trump's campaign promises regarding a Muslim ban, Giuliani's statements following the execution of the Order, and the language of the Order itself, that the purpose and effect of the order is to prevent the entry of Muslim immigrants.

The Constitution's requirement for equal protection of the law under the Fifth Amendment is offended if the government discriminates on the basis of religion in deciding who to allow entry to the United States.

“ If an action is intended to disfavor a particular religion, it violates the Establishment Clause ”

Typically, laws that discriminate are declared unconstitutional if they are too "over-inclusive," regulating many more people than necessary to achieve the government's goal. The Order does not appear to be a reasonable security measure that is narrowly tailored to achieve the purpose it espouses.

The Fourteenth Amendment to the Constitution specifically sets forth that these Constitutional protections are not confined to the protection of citizens alone. Rather, it extends the universal protections, without regard to race, colour, nationality, or religion, to any person within the territorial jurisdiction.

Statutory challenges

President Trump couches his authority for the Order upon a [statute of the US Code](#), stating the president has the authority to use a proclamation to suspend entry of "any alien or class of aliens into the United States" that would be detrimental to its interests.

History is in the making as we witness a showdown between the Executive Branch and the Judicial Branch



However, the 1952 law does not allow a president to *remove* those who are already lawfully present in the country (such as visa holders at airports).

In addition, the 1952 law upon which Trump relies was superseded by another – the Immigration and Nationality Act of 1965. Congress repealed national origin quotas in this later law and inserted a clause on nondiscrimination in immigration decisions. The relevant portion of the law states that "no person shall receive any preference or priority or **be discriminated against**

in the issuance of an immigrant visa because of the person's race, sex, nationality, place of birth, or place of residence."

The judicial challenge to the Order: What next?

Within a day of the Order going into effect, the Eastern District of New York Court held that the petitioners and all others in their position would have a strong likelihood of proving that their removal from the United States would violate their rights to Due Process and Equal Protection as guaranteed by the US Constitution.

On 10 February 2017, the Western District of Washington at Seattle granted a Temporarily Restraining Order by uniformly halting the Executive Order Ban.

As discussed, the judges have found - at least temporarily - that the Order violates the Equal Protection Clause, the First Amendment Clause and the Due Process Clause under the Constitution.

History is in the making as we witness a showdown between the Executive Branch and the Judicial Branch. A Supreme Court decision on National security of the Executive Order v. preserving the Bill of Rights under the Constitution is imminent.

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