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The Extraordinary Judicial Rebukes of Trump's Travel Ban

John M. Greabe
University of New Hampshire School of Law, john.greabe@law.unh.edu

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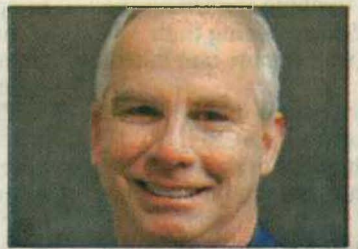

JOHN GREABE
Constitutional Connections

President Trump's two executive orders suspending travel to the United States by refugees and foreign nationals from several Muslim-majority countries have been put on hold by a number of lower court federal judges.

Whatever might be said about the merits of these rulings, and regardless of whether they will be upheld in future appeals, they are extraordinary judicial rebukes of a sitting president.

The president's first executive order, issued on Jan. 27, banned all refugees from entering the country for 120 days, barred Syrian refugees indefinitely and imposed a three-month moratorium on travel to the United States by the nationals of Iran, Iraq, Syria, Sudan, Libya, Yemen and Somalia.

The order also contained a provision privileging the claims of refugees who are religious minorities in their countries of origin – a provision that the president described in an interview as designed to benefit Christians.

A federal judge in Washington concluded that the order was likely unconstitutional and issued a national injunction that temporarily stopped it from going into effect.

A three-judge panel of the United States Court of Appeals for the Ninth Circuit upheld this ruling. And a federal district court judge in Virginia

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'We find ourselves in uncharted waters' on judges' travel ban rulings

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also found that the order was likely unconstitutional and issued injunctive relief.

Instead of appealing (or further appealing) these rulings, the president issued a second executive order to supersede the first.

The second order, issued on March 6, omitted Iraq from the list of countries from which travel would be temporarily banned, removed the indefinite ban on Syrian refugees and struck the provision benefiting religious-minority refugees.

Despite these changes, federal judges in Hawaii and Maryland concluded that the second order was still likely unconstitutional.

They again issued national injunctions stopping it from going into effect. These judges pointed to numerous public statements by the president and his advisers suggesting an intention to target Muslims – e.g., presidential adviser Rudy Giuliani told the press that he had been tasked with putting together a commission to "legally" implement a "Muslim ban" – and found that the new executive order was likely to be unconstitutionally discriminatory.

So what makes these rulings so extraordinary?

First, the president justified both executive orders on grounds of national security. It is exceedingly rare for a federal judge to grant relief on challenges to the president's exercise of policy discretion on matters of national security.

Judges recognize that, when it comes to national security, the executive branch has far greater expertise, and access to far more information, than they do. Indeed, judges frequently will not even rule at all on claims challenging executive decision-making in the national security realm. Often, they will invoke the political question doctrine and dismiss such claims as unsuitable for resolution in judicial proceedings.

Second, with respect to the president's more recent executive order, the judges found it likely that the national-security rationale that the president advanced was not the real reason that he took action. Rather, the judges found, the order was likely motivated by a bare desire to exclude Muslims from the country.

These findings are remarkable.

Measures that do not contain explicitly discriminatory language – and the second executive order does not – enjoy a strong presumption of constitutionality. To demonstrate the discriminatory nature of such a measure, the challengers must show that it was issued because of, and not merely in spite of, its burdensome effect on Muslims.

In ordinary circumstances, this would be a nearly impossible showing to make. As an initial matter, consider the inherent nature of a court ruling that accepts such an argument. The court is implicitly saying to a coequal branch of the federal government not only that it is lying, but that it is lying to conceal its bigotry. To say that such a statement is jarring to inter-branch harmony is to put it mildly.

Moreover, consider the difficulties inherent in attributing an unstated motive to actions taken by the politically accountable branches. Such actions –even executive orders issued in the name of the president – usually involve the input and coordination of a large number of advisers and policy experts.

How does one attribute a single, unstated motive to action jointly undertaken by, or at the behest of, many actors? Ordinarily, courts shy away from doing so. Government officials often come to the same conclusion, or vote in the same way, for very different reasons.

It does not overstate matters to say that we find ourselves in uncharted waters.

Several federal judges have taken a look at the extraordinary public record surrounding the president's travel ban and concluded that the ban is nothing more than a pretext masking unconstitutional discrimination against Muslims.

Such rulings do not reflect mere disagreement between the president and the courts about the constitutionality of controversial government policy. Rather, they suggest that the judges have doubts about whether the president took his oath to support and defend the Constitution in good faith.

(John Greabe teaches constitutional law and related subjects at the University of New Hampshire School of Law. He also serves on the board of trustees of the New Hampshire Institute for Civics Education.)