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Immigration order is unconstitutional religious test

The executive order signed by President Donald Trump on Friday to restrict immigration from certain Muslim countries violates the due process and equal protection clauses of the U.S. Constitution.



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Attachments



The executive order signed by President Donald Trump on Friday to restrict immigration from certain Muslim countries violates existing statutory law. The Immigration and Nationality Act forbids discrimination in the issuance of visas based upon a person's race, nationality or place of origin. 8 U.S.C. Section 1152(a)(1)(A). The Jan. 27 order, titled "Protecting the Nation from Foreign Terrorist Entry into the United States," holds that "the immigrant and nonimmigrant entry into the United States of liens from countries referred to in section 217(a)(12) of the INA, 8 U.S.C. 1187(a)(12), would be detrimental to the interest of the United States." Seven countries are affected: Iraq, Iran, Libya, Somalia, Sudan, Syria and Yemen.

But the order affects those with existing legal rights. First, it affects those with Special Immigrant Visas. These unique programs were promulgated under the Refugee Crisis in Iraq Act of 2007, 8 U.S.C. Sections 1157, 1241-49 and the Afghan Allies Protection Act of 2008, 8 U.S.C. Sections 1101, 601-602. Only those who "provide faithful and valuable service" are eligible to apply. Moreover, the regulations require that the applicant "has experienced or is experiencing a serious threat" as a direct result of the "valuable service." The translators that assisted our troops during the war in Iraq - sometimes under penalty of death - fall under this category.

Second, the order affects those seeking to join a spouse or child already in the United States, the so-called "follow to join" visa category. 8 U.S.C. Section 1157(c)(2)(A); 8 C.F.R. Section 207.7(a) (spouse of child of refugee "shall be granted refugee status if accompanying or following-to-join the principal alien"). Visas grant legal permission to enter the United States. Thus, the order affects all individuals with refugee applications (which have previously been approved by U.S. Citizenship and Immigration Services), and valid immigrant and non-immigrant visa holders whose national origin is Iraq, Syria, Iran, Sudan, Libya, Somalia or Yemen.

The due process clause of the Fifth Amendment to the U.S. Constitution prohibits arbitrarily depriving individuals of liberty interests. *See Nicholas v. INS*, 590 F.2d 802, 809 (9th Cir. 1979) (an alien within the United States is entitled to the guaranty of procedural due process embodied in the Fifth Amendment). The order, on its face, discriminates on the basis of county of origin. These countries were picked because they are Muslim. The fact that other (more worthy) countries were not picked does not change the discrimination. Imperfect discrimination is still discrimination.

The equal protection clause of the Fifth Amendment is violated when the discriminatory impact is traced to a discriminatory purpose. *Personnel Adm'r of Massachusetts v. Feeney*, 442 U.S. 256, 279 (1979). Racial discrimination can emerge from the effect of the state action where it weighs more heavily on one race than another, *Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 266 (1979), and a discriminatory purpose may be inferred by the totality of the relevant facts. *Washington v. Davis*, 426 U.S. 229, 242 (1976). "If the impact of [the action] could not be plausibly explained on a neutral ground, impact itself would signal that the real classification made by the law was in fact not neutral." *Feeney*, 442 U.S. at 275.

Here, not only is it clear that the seven countries were selected because they are overwhelmingly Muslim, but Trump himself said that he intended to give priority to Christians. The government cannot put one religious group (Christians) above another (Muslims).

The order also prioritizes refugee claims provided "that the religion of the individual is a minority religion in the individual's country of nationality." The minority religion language (read: the "Christian exception") is a smoking gun that shows that the order is elevating one religion for another. That violates both the equal protection clause and the First Amendment.

Finally, class action treatment is warranted. A habeas corpus action that otherwise meets the requirements for class certification is both proper and necessary. *See Schall v. Martin*, 466 U.S. 253 (1984) (class of juveniles sought habeas corpus relief); *U.S. ex rel. Sero v. Preiser*, 506 F.2d 1115 (2nd Cir. 1974) (class of young adults sought habeas corpus relief from serving terms in state reformatories).

In the immigration context, determinations of whether indefinite or prolonged detentions generate serious constitutional concerns is a common question that can be decided by an "up or down vote." It is either right as to all or wrong as to all. There is no in-between. Moreover, answering comprehensively, in a class action setting, facilitates a uniform framework for the First and Fifth Amendment challenges. To the extent that differing immigration statutes (general visa holder, Special Immigrant Visa, follow-to-join category) render the claims impractical, the courts may form subclasses. *See Fed. R. Civ. P. 23(c)(5); Marisol A. v. Giuliani*, 126 F.3d 372, 378-79 (2nd Cir. 1997) (finding subclasses where each class members had "separate and discrete legal claims pursuant to particular federal and state constitutional, statutory, and regulatory obligations of the defendants").

Trump's order violates the due process and equal protection clauses of the U.S. Constitution. It bans entry from seven countries that have zero connection with the terroristic acts of 9/11, and ignores four others (Saudi Arabia, United Arab Emirates, Egypt and Lebanon) that do. It is a religious test and it is unconstitutional.

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