

The legal arguments for and against Trump's immigration ban

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Lawsuits have challenged President Donald Trump's executive order that temporarily prohibits immigrants and visitors from seven countries. Jonathan Turley, a law professor at George Washington University and Neal Katyal, former acting solicitor general under President Obama, join Miles O'Brien to discuss whether Trump's policy violates the law or Constitution.

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- **MILES O'BRIEN:**

Aside from the national security concerns, the president's executive order has ignited a fierce debate on its legality and constitutionality.

We get two views, from Neal Katyal, a former acting solicitor general under President Obama, and Jonathan Turley, a law professor at George Washington University.

Jonathan, let's begin with you.

Let's talk about the law, 1965 Immigration and Nationality Act. What does it say, and how might it impact this executive order?

- **JONATHAN TURLEY, Constitutional Attorney, George Washington University:**

Well, I think it can have an impact. There's no question that the law says that you cannot discriminate on the basis of nationality or place of origin.

And that certainly helps the challengers. But like much else in this debate, much of that law has been distorted. It only takes you so far. First of all, the law doesn't apply to refugees. It applies to immigrants. It's used when you have visa issues. Also, it doesn't cover religious discrimination.

Also, in 1990, the act was amended to exclude procedural changes as a form of discrimination. And that reduces the use of the 1965 law, I think, as a serious challenge. And also it means that much of that order, as they challenge, doesn't fall under the law.

So even if one aspect might be challenged successfully, the other aspects of the order would remain. Federal courts have a longstanding policy to minimize the degree to which they strike down a piece of legislation or executive authority.

- **MILES O'BRIEN:**

Neal, the way the Immigration and Nationality Act is written, it mentioned an individual's place of birth or place of residence. It doesn't mention religion specifically. The executive order seemed to be narrowly tailored, trying to avoid the use of the word religion.

So, in effect, did they write an executive order which would run afoul of this law?

- **NEAL KATYAL, Former Acting U.S. Solicitor General:**

Oh, they did. And don't be distracted by what you just heard from my friend Jonathan.

So – but let me read the law, first of all – quote – "No person shall receive any preference or priority or be discriminated against in the issuance of an immigrant visa because of nationality."

Now, this is most of what the executive order does, discriminates on the basis of nationality. Forget about the refugee provision. It's about green card holders. It's about anyone who is applying for a visa, a student, an employee of a company. You know, it applies broadly.

Now, of course, it doesn't reach religious discrimination. That's reached by the Constitution, a separate problem with the act. So you have got two different things. We have got, it violates the statute and it violates the Constitution.

And President Trump's advisers are pretending that this is 1952, in which this 1965 law didn't exist. But, unfortunately, it does. This is landmark legislation passed contemporaneously with the Voting Rights Act. And it is just blatantly illegal under that law.

- **MILES O'BRIEN:**

All right, I feel like I need a gavel and a black robe here, gentlemen.

Let's talk about the Constitution for just a moment, if we could. First Amendment, very important amendment, as we all know, the Establishment Clause.

Jonathan, it seems on the face of it that you could make a pretty good argument that this runs afoul of the Establishment Clause, which basically says the United States doesn't get in the business of choosing religions.

- **JONATHAN TURLEY:**

Well, I think the most vulnerable aspect of the order is the one that gives preference to minority religions, and those people that were persecuted under them.

That certainly is the weakest spot. But I'm still skeptical about whether you could make a successful establishment claim. There's a lot of cases that have to be moved aside to get from here to there if you want to strike down this law.

It is true there's establishment issues, but there's also plenary power in the hands of a president.

- **MILES O'BRIEN:**

All right, so the administration is trying to be very clear about saying this is not a Muslim ban.

But let's listen to candidate Trump December a year ago, when he first rolled out this idea.

- **PRESIDENT DONALD TRUMP:**

Donald J. Trump is calling for a total and complete shutdown of Muslims entering the United States until our country's representatives can figure out what the hell is going on.

(CHEERING AND APPLAUSE)

- **MILES O'BRIEN:**

OK.

And then, last Sunday, Rudy Giuliani, close adviser to President Trump in the campaign and through the transition, said this:

RUDY GIULIANI (R), Former Mayor of New York: We focused on, instead religion, danger. It's not based on religion. It's based on places where there are substantial evidence that people are sending terrorists into our country.

- **MILES O'BRIEN:**

OK, counselor, so you're arguing this case. Are those comments admissible?

- **NEAL KATYAL:**

Absolutely. And here's the thing.

When I was — my last job was the chief litigation officer for the federal government. And I made — I made — took use of all the precedents that Jonathan was talking about broad power in immigration.

Nothing extends as far as what the president has done. This is religious discrimination. And here's what the Supreme Court has said about that — quote — "The clearest command of the First Amendment is that one religious denomination can't be officially

preferred to another."

This executive order prefers Christians to Muslims. You have got it. The president himself said so contemporaneously when he issued the executive order to the Christian Broadcast Network. This is just un-American and unconstitutional.

- **MILES O'BRIEN:**

Jonathan, then-candidate Trump and his adviser, Rudy Giuliani, more recently, did they undermine their own case?

- **JONATHAN TURLEY:**

Well, they certainly undermined their case.

I mean, the Justice Department attorneys are in fetal positions every time someone like this speaks about the purpose of a law. But the longstanding view of the Justice Department has been what legislators say about a law as to the motivation of the law is not controlling.

I have been in cases where the Justice Department has maintained that position, that you have to look at the law as to whether it's lawful or constitutional. The court doesn't make assumptions about – or speculation about the motivations behind the law. If the law has an otherwise bona fide purpose, the courts tend to go with that.

I don't see a court, any court saying that what a candidate said on the trail is going to be material in terms of whether this law is struck down. And I'm surprised that Neal even suggests that.

I have been in cases where those types of arguments have been raised, and courts have shot it down. For example, what if – I mean, Trump clearly said that. But he then gave this law to someone to draft, and they came back with a law that is not a Muslim ban.

Now, I don't like the law, but I don't think any court is going to look at this law and say it's a Muslim ban, because it's not. There's plenty to object about this law without making it something it's not. It doesn't ban all Muslims.

Now, I know people don't like to say that because they – sort of like Richard III, you want to think of your enemies as worse than they are. You don't have to think about this law as worse than it is. It is not a Muslim ban on a legal basis.

- **MILES O'BRIEN:**

But, if it walks like a duck, talks like a duck, et cetera, isn't this legal parsing that they have come to this executive order? And when you look at the context and the comments, you have to come to the conclusion that at least religion was on their minds in some fashion.

- **NEAL KATYAL:**

Oh, religion was more than on their minds. I think Jonathan is just wrong.

This is a First Amendment religion challenge in which the motivations of the law will be looked to, and courts do so. And that's particularly underscored here, because what has the new defense of this law been by the White House? It's, oh, we're not focused on religion. We're focused on security.

- **MILES O'BRIEN:**

All right, much to discuss here.

Just in a word, going to the Supreme Court? Will this end up at the Supreme Court?

- **NEAL KATYAL:**

No, I think this is indefensible, and I think that the Justice Department, after they lose in district court after district court, won't bring this even to the Court of Appeals. I certainly wouldn't have if I were in the government.

- **MILES O'BRIEN:**

Jonathan, Supreme Court case?

- **JONATHAN TURLEY:**

It could go to the Supreme Court, but you have to be careful what you ask for.

We're going to get a new nominee to that court, and might not be the type of court you want to appeal this case, if you're with the ACLU.

- **MILES O'BRIEN:**

Neal Katyal, Jonathan Turley, thank you both very much.

- **NEAL KATYAL:**

Thank you.