The Nondelegation Case Against Trump's New Travel Ban

The Way Forward for a Constitutional Challenge

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Last week, President Donald Trump imposed a massive travel ban, barring nearly all immigration and other entry into the United States by citizens of twelve nations, and imposing severe restrictions on seven more. The twelve nations subjected to near-total bans are Afghanistan, Burma, Chad, the Republic of Congo, Equatorial Guinea, Eritrea, Haiti, Iran, Libya, Somalia, Sudan, and Yemen. The other seven are Burundi, Cuba, Laos, Sierra Leone, Togo, Turkmenistan, and Venezuela.

As the American Immigration Council explains, barring nearly all migrants from these countries will significantly damage the US economy, and have negative humanitarian effects, as well. Migrants from many of these countries – including Afghanistan, Cuba, Iran, and Venezuela – are fleeing horrific poverty and oppression by communist, radical Islamist, and other authoritarian regimes. If Trump and the Republican Party truly cared about combating communism and radical Islamism, as they like to claim, they would not shut America's doors to their victims.

The security rationales for the travel ban – reducing crime and terrorism – are extremely flimsy. Immigrants from the countries in question have extremely low rates of terrorism and much lower crime rates than native-born Americans.

Despite the enormous harm likely to be caused by the travel ban, many assume there is no effective way to challenge it in court. The Supreme Court's badly flawed ruling in *Trump v. Hawaii* (2018) – addressing Trump's first-term "Muslim ban" – probably precludes challenges based on discriminatory intent. Other factors may block that sort of challenge, as well. Nonetheless, there is an alternative path to striking down the new travel ban: the nondelegation doctrine. That path remains open because *Trump v. Hawaii* did not consider nondelegation issues; indeed, the word "nondelegation" is not even mentioned in any of the five majority, concurring, and dissenting opinions in that ruling. So, while it may not be easy to mount a successful legal challenge to the ban, the combination of its enormous scope and the weaknesses of its ostensible rationales could open the door to a successful nondelegation claim.

Trump v. Hawaii and Constraints on Discrimination-Based Challenges to Travel Bans

Trump v. Hawaii, the Supreme Court's badly flawed 2018 ruling upholding an earlier Trump travel ban very likely precludes challenges to this new travel based on claims that it discriminates on the basis of race, ethnicity, or religion. In that earlier case, the Court upheld Trump's imposition of a travel ban on residents of several Muslim-majority nations. Although, on its face, the policy did not target any one religious group, Trump repeatedly said that the ban was intended to carry out his 2016 campaign promise to impose a "Muslim ban" and the overwhelming majority of those victimized by the ban were in fact Muslims. The security rationale for the Muslim Ban was extremely weak, and not even consistently applied. Nonetheless, a narrow 5-4 Supreme Court majority upheld the ban on the basis that the president's determinations on immigration policy deserved broad deference that would not apply in almost any other sphere. Thus, a challenge based on unconstitutional discrimination on the basis of religion could be rejected so long as the ban

was facially neutral and rested on a "bona fide" nondiscriminatory rationale – however weak.

This makes it unlikely that a discrimination-based challenge to the new travel ban can succeed. In addition, the inclusion of numerous countries inhabited by a wide range of racial, ethnic, and religious groups makes it hard to argue that it is intended to target members of any one in particular; though it is notable that all the covered nations are mostly non-white, as that category is usually understood in the US.

The Case for a Nondelegation Challenge

But the ban could be challenged on the basis of the principle of "nondelegation". The basic idea is very simple. The Supreme Court has recognized that there must be some limit to Congress's delegation of legislative authority to the executive, though judicial enforcement of that principle has been relatively permissive. Still, if any measure crosses that line, it is the unchecked delegation of a major power. That,is exactly what two federal courts recently held in striking down Trump's assertion of virtually unlimited power to impose tariffs.

Trump's sweeping new travel ban rests on a virtually unchecked grant of authority to impose immigration restrictions. But just as unlimited delegation of tariff powers is unconstitutional, so too is unfettered delegation over immigration – an equally broad power with even graver human consequences. Immigration restrictions affect millions and, for many fleeing violence and oppression, they are quite literally matters of life and death – including for some of those covered by this new travel ban.

The statute Trump cites to justify the new travel ban, 8 U.S.C. Section 1182(f), gives the president the authority to "bar the entry of any aliens or of any class of aliens into the United States" whose admission he finds "would be detrimental to the interests of the United States." That appears to grant virtually limitless authority to restrict migration and other entry into the United State – and the Supreme Court roughly interpreted it that way in *Trump v. Hawaii*. Chief Justice John Roberts' majority opinion describes Section 1182(f) as a "comprehensive delegation" that "exudes deference to the President in every clause."

The current travel ban is far more sweeping, forbidding nearly all or most immigration and other entry by citizens of nineteen nations. It would cause enormous economic and humanitarian harm. As my Cato Institute colleagues (and leading immigration policy experts) Alex Nowrasteh and David Bier explain in two excellent pieces (see here and here), the Administration's rationales for the ban are flimsy, at best. Despite claims that the ban will protect the US against crime and terrorism, migrants from the covered nations have extremely low rates of terrorism and much lower crime rates than native-born Americans. Bier and Nowrasteh also shred the administration's information-sharing and visa overstay theories. In addition, overstays by visitors on short-term temporary visas cannot possibly justify barring long-term migrants and refugees. The latter are entitled to permanent residency (or are on track for it) and therefore pose little or no risk of overstaying.

If such extremely weak arguments are enough to show that the banned migrants would be "detrimental to the interests of the United States", and that a gargantuan travel ban can be imposed, then virtually any immigration restrictions can be justified on the same basis.

In response, one might argue that keeping out even a very small number of criminals or terrorists serves the national interest. But virtually any immigration restriction can be justified that way. After all, any substantial number of immigrants is likely to include at least a few who go on to commit crimes, even if their aggregate crime rate is extremely low. The same goes for visa overstays or any other problem potentially caused by migration. Such "one criminal is one too many" rationales for immigration restriction inevitably devolve into rationalizations for unlimited power.

There may be ways to interpret Section 1182(f) more narrowly. For example, one can argue that it implicitly applies only to large-scale negative effects on US interests, or that its use is constrained by other statutes authorizing the issuance of immigrant visas,

work visas, and other modes of legal migration. If the discretion granted by the law is limited in any substantial way, much of Trump's travel ban becomes unlawful.

In sum, the new travel ban can only be upheld if Section 1182(f) gives the president virtually unlimited power to exclude migrants and other non-citizens from entering the United States. He must be able to declare pretty much any potential migrant's entry "detrimental to the interests of the United States" and thereby ban them. If anything is a nondelegation problem – this is.

Addressing Potential Objections to the Nondelegation Challenge

There is one important difference between tariffs and immigration that might make a nondelegation argument more difficult to raise in this case. Article I of the Constitution specifically gives Congress power over tariffs, while the Constitution does not clearly indicate which branch of government has the power to restrict immigration. This likely the case because the federal government was not supposed to have that power in the first place. Prominent Founding Fathers such as James Madison and Thomas Jefferson rejected the notion that the federal government possessed any general power to restrict immigration. The Supreme Court only held otherwise in the *Chinese Exclusion Case* in 1889 – a century after the ratification of the Constitution. But if this governmental power does indeed exist – as longstanding Supreme Court precedent holds – the most plausible place for it is Congress. In the 1889*Chinese Exclusion Case* – that upheld the deeply racist Chinese Exclusion Act of 1882 – the Supreme Court stated that the authority belongs to "the legislative department." The Chinese Exclusion Case famously did not ground immigration authority in any specific enumerated power, but held that it must exist *somewhere* as an "inherent incident of sovereignty." Some scholars have argued that the immigration power arises from the power to regulate foreign commerce or the Naturalization Clause, which gives Congress the power to grant citizenship. Both of these are enumerated congressional powers, much like the tariff power, and presumably subject to the same nondelegation constraints.

By contrast, a few academics have argued that immigration power is actually an inherent executive power. Supreme Court Justice Clarence Thomas has suggested the same in a solo opinion joined by any other justice. The Supreme Court's 1950 decision in *U.S. ex rel. Knauff v. Shaughnessy* nods in this direction, stating that "[t]he right to do so stems not alone from legislative power, but is inherent in the executive power to control the foreign affairs of the nation." But this executive power theory makes little sense. If the president possesses inherent, virtually unlimited power to exclude non-citizens, there would be no need for the many congressional statutes that grant him some degree of authority to do so, going all the way back to the Alien Enemies Act of 1798, a wartime authority that Trump has been (illegally) trying to use to facilitate peacetime deportations without due process.

Under the inherent executive power theory, all such laws would become superfluous. The president could just exclude any immigrants he wants without any need for legislative authority. Indeed, there would be no need for Section 1182(f), either. The president would then also be free of any obligation to obey any statutory restrictions on his authority in this sphere. Presumably, Congress cannot take away or constrain an inherent executive power. Such a broad interpretation of *Knauff* is therefore at odds with centuries of practice and precedent.

Moreover, there are ways to distinguish that case from a potential challenge to Trump's new travel ban. *Knauff* dealt with a limited statute that "authorizes.... special restrictions on the entry of aliens only when the United States is at war or during the existence of the national emergency proclaimed May 27, 1941 [a few months before the US entered World War II]" and does not apply "during normal times." The Court emphasized that a "state of war still exist[ed]" during the relevant time period. The President, as commander-in-chief of the armed forces, clearly possesses greater discretion in wartime.

Knauff also did not endorse unlimited delegation to the executive, noting that "[n]ormally, Congress supplies the conditions of the privilege of entry into the United States." The executive is only "entrusted with the duty of specifying the procedures for carrying out the congressional intent." This suggests there are limits to the extent of permissible delegation.

The Way Forward

Given all this, nondelegation theory offers the best chance for challenging Trump's massive new travel ban in court. At this time, it is hard to say whether that attempt will in fact be made. Perhaps would-be challengers are excessively deterred by the precedent of *Trump v. Hawaii*. Also, some more liberal organizations might be hesitant to mount a challenge based on nondelegation, an idea conventionally associated with conservatives.

Besides actual courtrooms, a legal challenge to the travel ban will also need to be fought in the court of public opinion. There must be an integration of legal and political strategy. In successful high-profile cases, the two are often mutually reinforcing. Opponents must emphasize the enormous harm the travel ban will do the US economy and to migrants fleeing oppression, violence, and tyranny.

Success is not guaranteed. But the attempt should be made. Defeat in court would not make the situation materially worse than it already is, in a world where most assume *Trump v. Hawaii* gives the president a blank check to impose travel bans. Victory, on the other hand, would both end the current cruel travel ban and set a valuable precedent for the future. Both important constitutional principles and the lives and freedom of many thousands of migrants fleeing oppression are at stake.

Ilya Somin is a co-counsel for the plaintiffs in one of tariff cases mentioned above, VOS Selections, Inc. v. Trump. His article is partly based on material adapted from the author's writings at the Volokh Conspiracy blog, hosted by Reason.

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