

President Trump's Executive action

By Justin Hewitt



On 20 January 2017, Donald Trump was sworn in as the 45th president of the United States. This followed an election campaign in which Mr Trump made many promises that were well outside the mainstream positions of both the Democratic and Republican Parties. To name a few, Mr Trump promised to ban Muslims from entering the United States, to build a wall along the border with Mexico, to deport undocumented immigrants, to get rid of the North American Free Trade Agreement and to 'drain the swamp' in Washington DC with restrictions on political lobbying. During the campaign, supporters of Donald Trump said they took many of the candidate's most far-reaching promises seriously but not literally. One of the questions in the early days of the Trump presidency was whether Mr Trump's promises should indeed be taken literally and, if so, how he might go about implementing them in the face of widespread opposition including the possibility of opposition from the Republican controlled Congress and the likelihood of legal challenges.

President Trump wasted no time answering some of those questions. He quickly set about issuing a series of executive orders and presidential memoranda designed to make good on his campaign promises including some of the most controversial parts of his agenda.

An executive order is a written order issued by the president to the federal government without congressional approval. Article II of the United States Constitution vests 'the executive power'

President Donald Trump signs his first executive order as president, ordering federal agencies to ease the burden of President Barack Obama's Affordable Care Act, in the Oval Office at the White House in Washington, DC on January 20, 2017. Photo by Kevin Dietsch/MediaPunch Inc/Alamy Live News.

in the president but does not define it. While there is no express reference in the Constitution to the power of the president to issue directions by executive order, every president since George Washington has used the power to issue executive orders. Franklin D Roosevelt issued 3,721 executive orders during his presidency. Most presidents since have issued a few hundred such orders. George W Bush issued 291 and Barack Obama 277. It is also not unprecedented for a president to issue a flurry of executive orders in the first days of a presidency. President Obama signed 19 executive actions in his first 12 days in office in 2009. President Trump signed 18 executive orders and memos in his first 12 days in office.

There are significant constraints on what can be done by a president by executive order. The orders can only exercise powers given to the president by the Constitution or laws passed by Congress. One significant consequence is that the orders cannot spend money that has not been appropriated by Congress. The order must comply with the Constitution. Congress can also override an executive order although the president can in turn veto any such law.

The preparation and presentation of executive orders is itself covered by an executive order. Once an executive order is proposed, it is required to be sent to the Office of Management

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and Budget, an executive branch agency, for review. The OMB sends it along to affected agencies for comments, which it usually compiles into a report and returns to the president. Those steps are designed to ensure that the agencies that will eventually carry out the order consider it to be effective and realistic to implement. It is also typical for the president's staff to reach out to their party's congressional leaders for feedback.

While executive orders frequently deal with mundane matters of government, they have been employed on occasion to address matters of great moment. In 1861 President Lincoln used an executive order to suspend the writ of habeas corpus during the Civil War. And in 1942, in the aftermath of the Japanese bombing of Pearl Harbor, President Franklin Roosevelt signed an executive order authorising the removal of people from military areas 'as deemed necessary or desirable'. The military in turn defined the entire West Coast of the United States, home to the majority of Americans of Japanese ancestry or citizenship, as a military area. By June 1942, more than 110,000 Japanese Americans were relocated to internment camps. That executive order was upheld by the Supreme Court in *Korematsu v United States* 323 US 214 (1944). It later emerged that the government had submitted incomplete and false evidence to the court in claiming military necessity for the internment program when in fact the allegations of Japanese-American espionage had been refuted by the FBI and military intelligence. The Supreme Court was also told that military authorities feared an invasion of the West Coast, which they did not. Justice Stephen Breyer recently described the decision as 'discredited'. Mr Korematsu's conviction for evading internment was eventually overturned in 1983 and in 1988 Congress passed legislation to pay reparations to detainees.

The first target of President Trump's executive orders was Obamacare. Within hours of taking the oath of office, President Trump issued an executive order titled 'Minimizing the Economic Burden of the Patient Protection and Affordable Care Act Pending Repeal'. This order effectively called on the secretary of Health and Human Services and other agencies to interpret regulations as loosely as possible to minimise the financial burden on individuals, insurers and health care providers of Obamacare pending the repeal of the legislation. The impact of this executive orders was likely to be mainly symbolic because the repeal of Obamacare requires legislation.

On 25 January 2017, President Trump issued an executive order directing the secretary of Homeland Security to 'take all appropriate steps to immediately plan, design, and construct a physical wall along the southern border, using appropriate materials and technology to most effectively achieve complete operational control of the southern border'. The practical effect of this order is unclear because the building of a wall along the



People with signs protesting President Trump's immigration ban at LAX Airport in Los Angeles, California, on 29 January 2017. Credit: Jim Newberry/Alamy Live News

border with Mexico would require substantial funding which rests in the hands of Congress. Another executive order issued on the same day directed increased enforcement of federal immigration law and appears designed to find, arrest and deport those in the United States illegally regardless of whether they had committed serious crimes.

President Trump's most controversial executive order to date was the travel ban, which was announced on the evening of Friday, 27 January 2017. Executive Order 13769, titled Protecting the Nation from Foreign Terrorist Entry into the United States, made several changes to the policies and procedures by which non-citizens could enter the United States including:

- suspending for 90 days the entry of persons from seven Muslim-majority countries: Iraq, Iran, Libya, Somalia, Sudan, Syria and Yemen;
- suspending for 120 days the refugee admissions program and capping the number of persons admitted under that program for 2017;
- an indefinite ban on the entry of Syrian refugees.

The impact of this order was immediate and widespread. It was reported that thousands of visas were immediately cancelled,

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hundreds of travelers with such visas were prevented from boarding planes bound for the United States or denied entry on arrival and some travellers were detained on arrival. During the weekend after its issuance, there was considerable confusion over the scope of the ban. Officials at the Department of Homeland Security initially interpreted the order to not apply to permanent residents (green-card holders). However, the White House initially overruled that reading meaning that some green-card holders were denied entry into the United States or not permitted to board planes because they were nationals of one of the seven nominated countries.

The travel ban was prepared in an unconventional manner. *Politico* reported that the draft order 'was so tightly held that White House aides, top Cabinet officials, Republican leaders on Capitol Hill and other Trump allies had no idea what was in it even when it was signed — and that was just how top advisers and aides wanted it'. That added to the chaos and confusion over the weekend as executive officials, travellers, airlines and others struggled to understand the scope of the ban. It also resulted in criticism from Republican Congressional leaders. Senate Foreign Relations Chairman Bob Corker said, 'We all share a desire to protect the American people, but this executive order has been poorly implemented, especially with respect to green card holders'.

The legal challenges to the travel ban commenced immediately. From January 28 to 31 many cases were filed in federal courts across the United States. A number of courts granted temporary restraining orders enjoining the enforcement of major parts of the executive order. The most comprehensive order was made by Judge James Robart of the United States District Court in Seattle in cases brought by the States of Washington and Minnesota. On 3 February 2017 Judge Robart effectively restrained the enforcement of the executive order. That prompted an early morning Twitter attack from President Trump who said the 'opinion of this so-called judge' was 'ridiculous and will be overturned'. In the ensuing appeal the Court of Appeals for the Ninth Circuit ruled against the president.

The legislative authority for the travel ban was section 212(f) of the Immigration and Nationality Act, which is entitled 'Suspension of Entry or Imposition of Restrictions by President'. The section reads:

Whenever the President finds that the entry of any aliens or of any class of aliens into the United States would be detrimental to the interests of the United States, he may by proclamation, and for such period as he shall deem necessary, suspend the entry of all aliens or any class of aliens as immigrants or nonimmigrants, or impose on the entry of aliens any restrictions he may deem to be appropriate.

These statutory words amount to a broad grant of power in the area of national security where courts typically give a great deal of deference to the president. The executive order recited President Trump's proclamation that the entry into the United States of the persons covered by the order 'would be detrimental to the interests of the United States'.

In the initial challenges to the travel ban, Justice Department lawyers appearing for the Administration were challenged to point to an evidentiary basis for the ban. At a hearing in Virginia, District Court Judge Leonie Brinkema said that 'the courts have been begging you to provide some evidence, and none has been forthcoming' and noted that the only evidence provided by the government in support of the ban was the order itself. Justice Department lawyers argued that the claimants had no standing to challenge the ban and that the president's authority to suspend the entry of any class of aliens was conferred by Congress and was unreviewable.

In the appeal from the decision of Judge Robart, the Ninth Circuit Court of Appeals focussed on the constitutional challenges to the president's executive action.

The Fifth Amendment prohibits the United States Government from depriving individuals of their liberty without due process of law. The Court of Appeals held that the executive order did not provide what due process requires 'such as notice and a hearing prior to restricting an individual's ability to travel'. The government's case on this issue was weakened by the order's apparent application to lawful permanent residents. The main target of the order was refugees, visa applicants and visa holders and they are unlikely to have the same due process rights as green-card holders. However, the Court of Appeals while acknowledging that the order made by Judge Robart 'might be overbroad in some respects' was not willing to try to rewrite the executive order.

The Constitution also prohibits the state establishment of religion or impermissible discrimination among persons based on religion. A 'Muslim ban' would most likely not pass muster. However, the travel ban did not in terms refer to Muslims. One of the issues that was raised by the court challenges was the extent to which the president's Twitter feed and public statements made by him and members of his team could be used as evidence to demonstrate the intent of the travel ban. In their court filings, the plaintiffs included statements Mr Trump made as a candidate in December 2015 calling for 'a total and complete shutdown of Muslims entering the United States until our country's representatives can figure out what is going on.' The plaintiffs argued that the executive order was intended to disfavor Muslims and pointed to numerous statements by the president about his

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intent to implement such a ban as well as evidence suggesting that the executive order was intended to be that ban. The Court of Appeals referred to that evidence and noted authority to the effect that evidence of intent including statements by decision makers may be considered in evaluating whether a governmental action was motivated by a discriminatory purpose. That was one of the reasons it left the stay on the ban in place.

After the order was issued by Judge Robart but before the appeal judgment, Rudolph Giuliani disclosed publicly that President Trump had initially asked for 'a Muslim ban'. 'I'll tell you the whole history of it,' Giuliani said in an interview on Fox News. 'So when [Trump] first announced it, he said, "Muslim ban". He called me up. He said, "Put a commission together. Show me the right way to do it legally".' Giuliani said he assembled a 'whole group of other very expert lawyers on this ... And what we did was, we focussed on, instead of religion, danger — the areas of the world that create danger for us ... Which is a factual basis, not a religious basis. Perfectly legal, perfectly sensible. And that's what the ban is based on. It's not based on religion. It's based on places where there are substantial evidence that people

are sending terrorists into our country.'

Following news of the Ninth Circuit ruling, President Trump had a range of legal options including appealing the Ninth Circuit ruling to the Supreme Court or returning to the District Court for a final hearing of the challenge to the travel ban. President Trump tweeted, 'SEE YOU IN COURT, THE SECURITY OF OUR NATION IS AT STAKE!' That appeared to foreshadow an appeal to the United States Supreme Court. However, it now seems that the president has decided against an appeal to the Supreme Court. The Justice Department has informed the Ninth Circuit Court of Appeals that the administration intends to rescind the order and replace it with a revised executive order 'to eliminate what the panel erroneously thought were constitutional concerns'.

There are likely to be many more legal challenges ahead as President Trump seeks to implement his agenda. The experience with the travel ban is an early lesson that unlike 'the court of public opinion', decisions in courts of law are based on facts, evidence and the law.

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