

## **Gaming the US System: Trump's Executive Orders on Immigration**

**By Michael Orlando Sharpe, Ph.D.**

US President Trump has attempted to game the system with two controversial executive orders that test the resilience of US democratic principles and institutions with far reaching internal and international consequences. These executive orders appear to establish a religious test for entry into the US and violate the bedrock US founding constitutional principles of religious liberty, equal protection, and due process of law. Executive orders allow US presidents to direct officers and agencies of the US federal government and have the full force of law as established by the US Constitution but are subject to judicial review and can be overturned if deemed unconstitutional or contrary to statutes. The two executive orders in question are purportedly Trump's plan of "extreme vetting" to keep "radical Islamic terrorists" out of the United States. The initial executive order signed by President Trump on January 27 blocked all refugees from entering the US for 120 days, Syrian refugees indefinitely, and banned citizens from seven majority Muslim majority countries from entering the US for some 90 days, namely, Iran, Somalia, Iraq, Libya, Sudan, Syria, and Yemen. Trump's executive order does not protect Muslims refugees fleeing persecution and war. Moreover, no immigrants or refugees from the seven targeted Muslim countries had committed fatal terrorist attacks on US soil. Although the Trump administration claimed it was not a "Muslim ban," it appeared to be so because it favored admission for minority religions in the region, specifically Christianity over Islam. It was rather unclear as to whether the ban applied to green card holders and then it was later clarified by the Secretary of the Department of Homeland Security that it would not unless there is information indicating that an individual is a threat to public safety. The rushed and bungled implementation of the travel ban resulted in immigrants being barred from entry into the US, detained at airports or even deported prompting nationwide demonstrations and actions in solidarity with the targeted migrants and refugees. Federal judges acted in several states including New York, Virginia, Washington, and Massachusetts addressing various issues as a result of the executive order including individuals detained in airports, allowing access to legal counsel, and detention and removal temporarily completely halting Trump's executive order and this was affirmed by the US 9<sup>th</sup> Circuit Court of Appeals.

Trump issued a second "watered down" executive order on March 6 that he hoped would address the initial legal concerns. The measure banned people from six predominantly Muslim countries namely, Iran, Somalia, Libya, Sudan, Syria, and Yemen for 90 days and all refugees for 120 days. Iraq was taken out with the rationale that it had updated its screening procedures to US standards but some speculate that this was done because of complaints that many Iraqis had risked their lives to help the US during its war effort in Iraq. Additionally, it removed the clause for persecuted religious minorities and does not apply to those with green cards and visas. This executive order was blocked by federal judges in Hawaii and Maryland arguing that the most recent ban discriminated against Muslims and hence the US constitutional provision of religious freedom. Trump argued that this is necessary for national security and to protect the United States from terrorist attacks. The US Justice Department will appeal to the more conservative US 4<sup>th</sup> District Court of Appeals. Trump has vowed to take this all the way to the US Supreme Court,

the highest court in the United States. As the nine person US Supreme Court remains with eight justices, evenly divided four conservatives and four liberals and Trump's nominee for the ninth justice Neil Gorsuch awaiting confirmation, the fate of the executive orders hang in the balance as an indicator of the embrace or disavowal of US principles and institutions.

### **How to Reconcile the US System with its Deeply Racist Past?**

The United States has a system of “separation of powers” and “checks and balances” between the executive, the legislature, and the judiciary that is designed to preserve liberty and prevent the “tyranny of the majority”. The US president has a great deal of leeway when it comes to immigration. He may deny entry to people or classes of people if he thinks their entry would be harmful to the U.S. The US system has prevailed so far in that the federal courts have managed to temporarily block President Trump's executive orders through the power of judicial review. Notwithstanding the strengths of US institutions, one cannot forget the United States has a deeply racist history that begins with the slaughter and appropriation of land of native Americans and continues with the enslavement, brutalization, and historic marginalization of African Americans who did much to build the United States. The US has a long history of racist and exclusionary immigration policy with preferences for white Western European and Protestant immigrants with the intent of maintaining a “homogenous society”. There are many examples of governmental action to enforce racial and ethnic preferences in immigration such as the Chinese Exclusion Act of 1882, the Gentleman's Agreement of 1907-1908 effectively restricting Japanese immigration to the United States, as well the National Origins Quota Act of 1924 which established a quota system of just 2% of each nationality already in the US according to the 1890 US Census and severely restricted immigration from Southern and Eastern Europe, (particularly Italians and Jews) and effectively excluded Asians, Arabs, and Africans. President Trump's executive orders harken back to President Truman's 1942 executive order during WWII that enabled the incarceration of US citizens of Japanese origin without due process.

Due to the civil rights movement and pressure from Southern European groups, racial and ethnic preferences in immigration policy changed with the 1965 Immigration and Nationality Act which replaced the discriminatory National Origins quota system. The 1965 Act prohibits preferences or discrimination based on race, sex, nationality, place of birth, or place of residence. One significant outcome of the 1965 Act, that draws the ire of some of the Alt-right and others, is “the browning of America” or the outcome of increased the immigrant populations and changed immigrant demographics from mostly European to countries in Africa, Asia, Southern and Eastern Europe, Latin America and around the world.

As for the US Congress, it could restrict funding for programs related to Trump's executive orders or pass a law that renders the executive order ineffectual. However, Congress is deeply divided along partisan lines with its republican majority and a republican president. Although some republicans have raised concerns, very little is likely to change unless some republican lawmakers depart from Trump and join with democrats with regard to these executive orders.

President Trump's executive orders violate the 1965 Immigration Act, as well as the US Constitution's 1<sup>st</sup> Amendment's Establishment Clause that forbids the government from favoring one religion over another as well as its Free Exercise Clause that guarantees religious liberty with no preference for a particular religion. Additionally, it breaches the US Constitution's 14<sup>th</sup> Amendment rights to "due process" and "equal protection". The US judiciary has resisted Trump's discriminatory executive orders thus far but US history informs us that at times racism and discrimination have prevailed. Civil society remains an important factor to remind the US of its founding principles and to push its institutions.

### **The Postwar Liberal Order, US Soft Power, and Message to the World**

The United States helped to establish the post war liberal democratic order with protections of human rights but this seems to be in jeopardy with Trump's actions and purported defense of illiberal Russia. Presidents Trump's executive orders are a departure from the US longstanding commitment to the post war international refugee regime and, as Angela Merkel pointed out in her strong condemnation of Trump's initial executive order, violates the Geneva Refugee Convention's requirement for states to take in refugees from war as a humanitarian obligation. Political scientist Joseph Nye has argued that "Trump has been a disaster for US soft power and a gift to ISIL". The Trump campaign and now presidency with its undisciplined use of Twitter and erratic and often erroneous statements has been damaging to US attractiveness and undermines its credibility. The "travel bans" send a terrible message to the world that US liberal democratic values are in in state of suspense, Muslim refugees and immigrants are not welcome in the United States, and/or there is a powerful anti-Islamic sentiment among policy makers that is impacting US law, policy, and democracy. This can be interpreted and used by ISIL and other groups as proof that the U.S. is at war with Islam. Despite the fact the administration is now saying that the executive orders are not a "Muslim ban", Trump specifically said during his campaign that he is calling for a "total and complete shutdown of Muslims entering the United States" until US representatives determine otherwise. The pervasive anti-Muslim sentiment and sometimes inflammatory rhetoric expressed by some of Trump's inner circle such as Michael Flynn, former National Security Advisor, and Steve Bannon, White House Chief Strategist can be manipulated as evidence of a US war with Islam and an international alliance of right wing populists.

Due to the Trump campaign and presidency thus far, US culture and political values likely appear to the rest of world as brutish, brash, bigoted, racist, misogynist, favoring bullies, materialistic, irreverent, unethical, and undemocratic with no foreign policy or one based only on faux intuitions and formulated by underinformed happenstance. This is certainly a gift to ISIL as it will try to position itself as a superior moral authority of the Islamic and developing worlds against a wealthy, corrupt, and declining United States. Hilary Clinton, former presidential candidate and Secretary of State, is correct when she says that this is not who we are. The US Constitution and the democratic values of life, liberty, equality, self-government as well as diversity, unity, compromise, and tolerance traditionally constitutes US self-perception. It is

important that steps are taken to reassure other countries that the US upholds its democratic and human rights commitments and that Muslims are included and respected with no differential treatment of their religion over others in the United States. The country and the world cannot afford for bravado, bigotry, and ill considered policy to define the United States. Just as the US helped to establish an acceptance of liberal democratic norms in the post war era, the model currently being presented will signal an acceptance of hyper-nationalism, hatred, and intolerance that will fuel the trend of nationalism and right wing populism that is sweeping the world.

### **Why do this?: Satisfying Constituents**

Although the Trump administration claims that refugees are “not properly vetted”, there is in fact a rigorous process in place that can take from 18-24 months including extensive review of applications by the US State Department and other federal agencies, interviews, health screening, as well as cultural orientations. As previously indicated, no immigrants or refugees from the targeted Muslim countries have committed fatal terrorist attacks on US soil. Why then do this? These executive orders, along with a flurry of others in the first weeks of the Trump presidency including building a wall on the US border with Mexico, limiting federal money to “sanctuary” cities, ending “catch and release” policies for undocumented immigrants, as well as hiring thousands more border control agents, are Trump’s attempts to appease and consolidate his base of supporters by showing that he is fulfilling his campaign promises. Some speculate that rise of right wing populism is the outcome of a white working class that feels squeezed as a result of globalization and neoliberal policies and a consequential embrace of a defacto white nationalism in reaction to the “browning” liberal democracies of the US and Europe. The disarray and distraction caused by these executive orders limiting Muslim immigration provides a viable smokescreen to game the system for Trump and his counterparts to pursue an agenda of deregulation that opens the door for large corporate and wealthy interests that will ultimately hurt his base of the “forgotten” white working class people he claims to represent. It is important that people of goodwill promote a credible press to combat “fake news” and join organizations that form the foundation of civil society so critical for democracy. These are some means among others to resist Trump and Trumpism and maintain the liberal democratic order and respect for human rights in the United States and worldwide.