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Towards a "Democratic Dictatorship"? Constitutional Crisis Deepens as Trump Fights "Checks and Balances"

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SEE YOU IN COURT, THE SECURITY OF OUR NATION IS AT STAKE!

– Tweet from Donald J. Trump, February 9, 2017

Trump's screaming tweet, complete with all caps in the original, captures the essence of this president's bold move to take total power over the United States.

When he says "the security of our nation is at stake," he refers demagogically to the imaginary threat of terrorists from seven countries. He is right to say "the security of our nation is at stake," but not at all in the way he means – the security of our nation is profoundly at stake in this case because, if he wins, then presidential orders will become dictatorial decrees beyond the reach of the courts. Our constitutional crisis continues.

At issue is Executive Order 13769, issued January 27, 2017, establishing the so-called Muslim ban on immigrants from seven countries (Iran, Iraq, Yemen, Syria, Somalia, Sudan, and Libya). The order was prepared with limited vetting and implemented with no advance planning, creating immediate, global chaos that led to numerous court challenges and partial stays of the order. The case brought January 30 by the states of Washington and Minnesota together persuaded a Washington State judge (appointed by President Bush) to issue a nationwide temporary restraining order (TRO), enjoining the U.S. government from enforcing key provisions of the Executive Order (which the government apparently took its time to obey). The government's motion for an emergency stay of the TRO was heard February 7 by a three-judge federal district Appeals Court (one step below the U.S. Supreme Court). On February 9, the Appeals Court unanimously affirmed the lower court's ruling and left the TRO in place, unmodified, until the lower court holds a duly-scheduled hearing of the government's appeal of the TRO before deciding whether to make the TRO permanent.

Trump's Executive Order has created a watershed crisis in U.S. constitutional government. Trump fired an acting attorney general for questioning his order's constitutionality and legality. Several lower federal courts have found the order, in the words of the Appeals Court, "unconstitutional and violative of federal law." The issue is likely to reach the Supreme Court before long. If the Supreme Court rules for the president, then he will be able to rule by decree. If the Supreme Court upholds the lower courts, that will check the president's power to rule by decree, but only until the next challenge to the U.S. Constitution's traditional balance of powers.

9th Circuit Appeals Court rejects attack on Constitution

What follows is a brief summary of the Appeals Court's 29-page order, including the constitutional issues that court identified. The language of the Appeals Court order is as restrained and dignified as the president's tweets are hysterical and outrageous. The court begins (p. 3) by stating the basis for deciding the issue:

> To rule on the Government's motion, we must consider several factors, including whether the Government has shown that it is likely to succeed on the merits of its appeal, the degree of hardship caused by a stay or its denial, and the public interest in granting or denying a stay.

In sketching the background for the Executive Order, the court notes (p. 3) that the only specific attack or threat cited to justify the danger to national security is 9/11. The court described elements of the Executive Order and their impact as they were implemented.

In a February 10 tweet, President Trump asserted:

LAWFARE: "Remarkably, in the entire opinion, the panel did not bother even to cite this (the) statute." A disgraceful decision!

Since the court cites the Immigration and Nationality Act, codified at 8 U.S.C. (p. 4), it's not clear what statute Trump had in mind. The court also wrote (p. 6) that in issuing its initial restraining order:

> The district court preliminarily concluded that significant and ongoing harm was being inflicted on substantial numbers of people, to the detriment of the States, by means of an Executive Order that the States were likely to be able to prove was unlawful.

The U.S. government claimed that the states had no standing to sue, no right to sue, because the states had not suffered sufficient injury from the Executive Order. The government did not dispute that the state universities "are branches of the States under state law" (p.8). After reviewing the impact of the Executive Order on members of the state universities, the court held (p.12):

> We therefore conclude that the States have alleged harms to their proprietary interests traceable to the Executive Order. The necessary connection can be drawn in at most two logical steps: (1) the Executive Order prevents nationals of seven countries from entering Washington and Minnesota; (2) as a result, some of these people will not enter state universities, some will not join those universities as faculty, some will be prevented from performing research, and some will not be permitted to return if they leave. And we have no difficulty concluding that the States' injuries would be redressed if they could obtain the relief they ask for: a declaration that the Executive Order violates the Constitution and an injunction barring its enforcement. The Government does not argue otherwise.

According to government lawyers, the federal courts have no legitimate authority to review any presidential orders "to suspend the admission of any class of aliens: (p. 13). The government argues that such orders are even more unreviewable when the president is

motivated by national security claims, even if the orders violate constitutional rights and protections. The government claims that court review of unconstitutional orders violates the principle of separation of powers in government. The court rejects these arguments (p. 14):

> There is no precedent to support this claimed unreviewability, which runs contrary to the fundamental structure of our constitutional democracy.... Within our system, it is the role of the judiciary to interpret the law, a duty that will sometimes require the "[r]esolution of litigation challenging the constitutional authority of one of the three branches...." We are called upon to perform that duty in this case.

The court notes (p.15) that the government is so desperate to find support for its claims that it misquotes from a case (Kleindienst v. Mandel) to reach a false conclusion. Even in national security cases, the courts have a legitimate role, contrary to the government argument. The court points out that, while the Supreme Court counsels deference to national security decisions of the White House or Congress, the Supreme Court also made clear that (pp. 17-18):

> ... the Government's "authority and expertise in [such] matters do not automatically trump the Court's own obligation to secure the protection that the Constitution grants to individuals," even in times of war.... it is beyond question that the federal judiciary retains the authority to adjudicate constitutional challenges to executive action.

Addressing the government's motion to stay the lower court order, the Appeals Court points out that a stay is not a matter of right, but a matter of court discretion based on the particular circumstances of the case. The government, by requesting the stay, bears the burden of showing that those circumstances support the request:

> Our decision is guided by four questions: "(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies." [citation omitted]

The court concludes that the government fails to satisfy any of the four criteria. The court cites the Constitution's Fifth Amendment requirement that "No person ... be deprived of life, liberty, or property without due process of law ..." and describes the government position in quietly scathing terms (pp. 19-20):

> The Government has not shown that the Executive Order provides what due process requires, such as notice and a hearing prior to restricting an individual's ability to travel. Indeed, the Government does not contend that the Executive Order provides for such process. Rather, in addition to the arguments addressed in other parts of this opinion, the Government argues that most or all of the individuals affected by the Executive Order have no rights under the Due Process Clause. [emphasis added]

To make this argument, the government lawyers must ignore the plain language of the Constitution referring to "No person" and hope that no one notices that the individuals

affected by the Executive Order are, in fact, living, breathing persons. People noticed, and people noticed that this attitude is authoritarian and in antithesis to American democratic standards.

The government tries to mitigate the Executive Order by referring to an "Authoritative Guidance" issued by White House Counsel Donald F. McGahn addressing and seeking to remedy certain portions of the order relating to lawful permanent residents. The court rejects this government argument with withering dry scorn (pp. 21-22):

> The Government has offered no authority establishing that the White House counsel is empowered to issue an amended order superseding the Executive Order signed by the President and now challenged by the States, and that proposition seems unlikely. Nor has the Government established that the White House counsel's interpretation of the Executive Order is binding on all executive branch officials responsible for enforcing the Executive Order. The White House counsel is not the President, and he is not known to be in the chain of command for any of the Executive Departments.

In analyzing this and other poorly thought out, incomplete, and incompetent aspects of the government's case, the court points out (p. 24) that "it is not our role to try, in effect, to rewrite the Executive Order." What the court says, with somewhat sly due deference, is that it's up to the White House to do its job correctly.

The court turns to the states' argument that the Executive Order violates both the Constitution's First Amendment's command that "Congress shall make no law respecting an establishment of religion," as well as the Equal Protection Clause of the Constitution. White citing Supreme Court holdings supporting the states' argument, the Appeals Court chooses not to address it in the context of the government's emergency motion. The court reserves the right to address the issues when the appeal of the TRO is heard.

Although the court does not address it directly, the underlying absurdity of the Executive Order is that it is based on fear-mongering over imaginary threats. If the "terrorist threats" endlessly uttered by the Chicken Littles of government and media had any basis in reality, then suspending the Executive Order might actually be dangerous and might even lead to "irreparable injury." The court rejects that government argument, too (p.26):

> The Government has not shown that a stay is necessary to avoid irreparable injury.... Despite the district court's and our own repeated invitations to explain the urgent need for the Executive Order to be placed immediately into effect, the Government submitted no evidence to rebut the States' argument that the district court's order merely returned the nation temporarily to the position it has occupied for many previous years. The Government has pointed to no evidence that any alien from any of the countries named in the Order has perpetrated a terrorist attack in the United States. Rather than present evidence to explain the need for the Executive Order, the Government has taken the position that we must not review its decision at all. [emphasis added]

In contrast, the court found that the states had provided ample evidence that the Executive Order had already caused irreparable damage to some people and that, if reinstated, it would cause irreparable damage to many more.

Assessing the general public interest, the court saw favorable arguments on both sides. The

public has a “powerful interest in national security,” but the public also has an interest in “free flow of travel, in avoiding separation of families, and in freedom from discrimination.” At this point, the court denies the government’s motion for an emergency stay, in effect because there is no perceptible emergency. Or rather there is no emergency as the government defines it. Taken as a whole, the court’s order illustrates a serious constitutional emergency perpetrated by the president against his own government and people. While the court doesn’t list other public interests, the public also surely has a substantial interest in a government that follows the constitutional due process of law, that acts in good faith, that supports its arguments with facts based in reality, and that does not claim the right to act dictatorially with no checks and balances.

White House acts as if it is not only ABOVE the law, it IS the law

Late on February 10, Trump administration sources said there would be no appeal of this decision to the Supreme Court. That leaves the future district court decision as a possible vehicle for a Supreme Court ruling. But late on February 10, the president hinted at just issuing a brand new Executive Order (adding “I like to surprise you.”). This might be good for the White House, avoiding a possible Supreme Court decision requiring them to act within the constitutional framework of the law. That might also be better than a Supreme Court decision that reinforced the president’s power to rule by decree. We don’t know how far the Supreme Court will go either for ideology or to protect judicial authority. We can be pretty sure that our constitutional crisis will not be over any time soon, and may not turn out well for the Constitution.

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