

Emerging Constitutional Issues for the Trump Presidency

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Adam Cox Transcript

Hi, I'm Adam Cox. I teach immigration and constitutional law here and I'm gonna talk a little bit about the constitutional issues that might emerge from Trump's immigration policies. Can the folks in the back hear me? Great. So, the first thing I guess I'd like to note is that the idea that presidential immigration policies might raise serious constitutional issues is obviously not new. President Obama's signature immigration initiatives prompted constitutional litigation brought by a couple dozen states that wound its way all the way to the Supreme Court. And, ultimately, his signature initiative was enjoined by the court system. So, the intersection between immigration policy and constitutional law is very real right now, but the way in which President-elect Trump's proposed policies are likely to raise constitutional questions is quite different than the way in which President Obama's were likely. And in particular, President Obama's policies regarding deportation were the ones that raised constitutional litigation that made its way to the Court. Whereas it's more likely to be the admissions policies—the entrance policies of the Trump administration—that'll raise those constitutional questions.

So, let me explain a little bit why that is. So, under the Obama administration in 2012, President Obama announced a policy initiative to protect roughly a million undocumented immigrants who'd come to the country when they were children. And then in 2014, expanded on that policy, announcing a new initiative that would have protected roughly 4 million other immigrants living in the country without legal authorization from deportation. Now, those policies, in particular the second one, which protected the parents of US citizen children and green card holders, prompted constitutional litigation challenging the president's authority to decide not to enforce immigration laws against some formally deportable non-citizens. And the pool of formally deportable non-citizens is obviously very, very large.

So, the most striking fact about American immigration policy today is that of the roughly 22 million non-citizens who live in the United States, half are formally deportable. So, obviously, in that world, what matters most for immigration policy is not the rules that Congress makes so much as the choices that presidents and their administrations make about whom, from among that very large pool of deportable people, to pick and choose for purposes of deportation. Now, the choices that the Obama administration made were challenged in court in part on the ground that the president had effectively conferred a benefit on unauthorized immigrants by promising that they would not be deported. The Trump administration obviously is likely to rescind those policies and the efforts that have been announced by President-elect Trump go in the opposite direction, right? They are policies that will likely increase enforcement levels overall and also expand the group of potentially deportable immigrants who are subject to the enforcement machinery of the immigration bureaucracy. Because 11 million immigrants are living in the

country without legal authorization, the president's decision to change those choices, even though it's a fundamental policy change, is very unlikely to raise significant constitutional questions, because from within that large pool, the president just has significant power to pick those priorities. So, the announcements by President-elect Trump to target, in an even increased fashion, the deportation of a group of immigrants labeled by the President-elect as criminal aliens, that might be a very significant policy change, but one that's unlikely to raise constitutional questions.

And so instead, I think what's likely to happen is that the aggressive policy agenda on the admissions side of immigration policy is the one that's most likely to raise constitutional issues in maybe two different ways. So, one set of policies that have been suggested—at least were suggested during the campaign by the President-elect and various advisors and supporters—are policies that seek to depress levels of lawful immigration to the United States on the theory that our current immigration policies are simply too generous and don't work or serve the interests of the American people. Now, because so much of immigration policy is made by the administrative state and not by Congress itself, decisions to try to depress the level of lawful immigration will require that the immigration service, the Department of Homeland Security, and others make administrative changes to the way that visas are processed and applications are evaluated. And those decisions might themselves raise the same kind of constitutional challenge that Republican governors leveled against President Obama's deportation relief initiatives. And that is there might be challenges that those policy changes cannot be made without more significant administrative process than the President-elect is likely to want to use to make those policy changes. Right? So, we're likely to see basically like the opposite political valence on the same kind of constitutional litigation that tries to force the administration to use more cumbersome procedures to change policy and therefore delay the policy change that the administration can accomplish.

Okay, the second area of admissions policy that I guess has been more widely discussed—that's likely to raise constitutional issues—are proposals by President-elect Trump and candidate Trump to ban certain kinds of immigrants from coming to the United States. Obviously, this originated, I guess, a little more than a year ago in November of 2015 when then-candidate Donald Trump proposed banning all Muslim immigrants from the country. That policy proposal has evolved like a number of times over the last year. Ryan [Goodman] and Adam [Samaha] kind of both mentioned it as a possible... there's a possible registry component in it today. But it remains a question whether the president has the authority to decide that some particular group of immigrants—whether identified on the basis of race or religion or ideology, or perhaps on the basis of other things like whether they come from countries that the administration believes have connections to terrorism—whether those kinds of immigrants can be, at the wish of the president, excluded from the country.

Now, there's obviously a statutory question underneath that whether Congress has given the president that power, but there's also a constitutional question. And the constitutional question is alive in part because an odd aspect of immigration law is that many, many foundational questions about how the Constitution applies to immigration policy have just never been answered by the courts. And the foundational cases that gave us immigration policy today, cases that arose in the late 19th century when Congress first enacted restrictive immigration laws that in openly racial fashion prohibited the entry of Chinese immigrants to the United States. Those policies were sustained by a Supreme Court and gave rise to something known as the plenary power doctrine of immigration.

Now, what that doctrine is and what it stands for has been long-debated and never resolved by our federal courts or certainly the Supreme Court. And that's what creates the possibility that policies that in ordinary domestic contexts would be considered obviously unconstitutional—like a policy that discriminates openly on the basis of race—creates the possibility that a court would sustain such a policy when the decision is whether or not to admit an immigrant on the basis of race or religion or ideology. Now, I think the fact that the Supreme Court in particular has been reluctant ever to formally resolve the question whether the Constitution applies in admissions contexts for immigrants in the same way that it applies in ordinary domestic contexts makes me think that it's gonna continue to try to avoid that issue. And its avoidance might be facilitated by the administration itself.

So, while I guess I doubt that the current Supreme Court would actually sustain an immigration policy that openly excluded immigrants on the basis of race or religion—or what we're more likely to see, of course, what the more recent policy proposals reflect—are policies that, say, use proxies. Like picking a list of countries, in the way that the Bush administration did, for either exclusion or special registration, where it happens to be the case that the list of countries chosen is highly correlated with nations that have significant Muslim populations or significant Arab populations or the like. And, so, policies that are correlated strongly with race or religion, those, I think, might be sustained by courts.

But the reason that they might be sustained by courts actually doesn't have a whole lot to do with the way in which immigration constitutionalism is exceptional and has a lot more to do with what Kim [Taylor-Thomson] mentioned, which is the way in which ordinary domestic constitutional law actually does very little to regulate policies that are neutral on their face but that are correlated with things like race and religion. The tests that litigants must overcome to demonstrate that those policies constitute unconstitutional discrimination are extremely demanding. And as a result, it's very difficult for profiling litigation in any context to succeed.

So, there's much more I could say. Sanctuary city policy is another area where I think there'll be a lot of constitutional struggle between state and local governments and the federal government

over immigration policy. But maybe I'll turn it over to [Roderick Hills] because he can probably talk about that when he talks about localism.