

Emerging Constitutional Issues for the Trump Presidency

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Adam Samaha Transcript

I'm gonna talk a little bit about speech and religion, and, if compelled, the Foreign Emoluments Clause, but that's for later on. So, let's speak to religion. Let me speak first broadly. So, most or all of the issues that I will reference can be addressed using old constitutional logic—orthodox or conventional legal reasoning of which constitutional legal reasoning is a part. They can be addressed that way. Maybe all of them. So, Muslim registries and flag burning, for example. Those stand out. Or the ability of government to try to restrain leaks, and what happens when information leaks afterward. These are all familiar issues on which conventional, or what I'll call “old constitutional logic,” does not break down.

But, conventional logic—legal reasoning, including constitutional analysis—can break down, and it can break down for a number of reasons. So, I wanna highlight two types of breakdown. So, one is that the old logic just doesn't seem to work. It seems to fail in the sense that it doesn't seem to apply. You don't seem able to process an issue that seems new. And when that happens, then the people who are actually engaged in conventional legal reason in the old legal logic—there's often an internal pressure then. A felt need for something new in order to process these problems. Now, that doesn't mean that constitutional law will necessarily govern. It might be the best option to leave constitutional law out of it. But that's one kind of breakdown.

A second type of breakdown is when the old logic is able to give results. Nobody really denies that. But the logic and the results may be both: are under attack. So, they're under fundamental challenge. That often comes from outside the legal system per se, but it can come from within as well. So, when that happens, that kind of type two breakdown, that I think is often an opportunity, or at least optimistically it's an opportunity, to explain why the old logic and the old results should be preserved. That should be an opportunity. And I don't think it will be adequate under these conditions. It won't be adequate to say, “Well, it's old.” Or “very, very old.” Or “unbelievably old.” Because the challenge is to the logic and the results themselves.

Okay, so, to try to illustrate that larger framework and speak just a little bit about speech and religion, let's talk first about Muslim registries. Now, I read a report that Nikki Haley, during her confirmation hearings today, repudiated this idea of having people in the United States who admit to being Muslim be registered with the federal government. So, this might have been just a not very well-thought-out component of the early presidential campaign. And maybe it's not really a serious proposal. Well, let's just think about that for a moment. Under the old logic, this is flatly unconstitutional. I don't think it's really a closed question. As long as there's some sort of hassle, and not even a penalty, but just a hassle to register, based on religious belief—that's just unconstitutional.

Now, there isn't terrific originalist history to support that proposition, but over a long period of time, building up lessons we felt have been learned, that's just unconstitutional to single out religious belief. Now, if somehow the singling out is religiously motivated conduct, then, conventionally speaking, we apply strict scrutiny and the government better have a very persuasive reason for singling out religiously motivated conduct. As such, and it just seems impossible under orthodox old analysis that that position could be sustained. So, that's an old kind of logic and it makes you wonder why anyone would propose it if they thought about it very much. And one possibility is, of course, that it's a kind of stunt or a political gambit, and not really meant to be a serious proposal.

So, think just a minute, leaving aside legal logic—just thinking about policy and pragmatics and maybe evidence. So, what would happen if you asked Muslims to register? Well, religion happens to be opaque. It's something that people can express but they can also often keep hidden. And so, what the registry would do, I take it, would punish the conscientious. So, it would punish those who are willing to be honest. And those who are willing to hide, I guess, would escape. Unless you have some sort of supplemental program. So, you would disadvantage the conscientious. And then there were proposed a proposed form of protest by non-Muslims, who said, "We will register if you set up a registry." That creates real problems for administration. That's a bold and clever move.

So, then it makes you think that there are just—or ought to be—alternatives that are a little more serious. And these other alternatives, it turns out, under the old logic, I think, are not much of a constitutional problem. Take one pretty obvious one: surveillance. Okay? Surveillance. Just surveillance and not letting anybody know about it. Now, if you do that, then there are pretty obvious and established standing problems to getting into court, if that's what you want to do. To object. And, moreover, a secretive surveillance program is likely to be fairly effective. Now, you can't claim political credit if you do it that way. But, secretly targeting people based on the felt risk within an administration seems like a much more practical alternative and one that the old logic, actually, of constitutional law, doesn't provide much grounding for complaint. At least not effectual complaint.

Let me speak for just a few minutes then about speech. And I'll talk about flag burning first because that's one of these old issues. It's so old. It's so 1980s, this issue. That's how—I think much of what we will look forward to in the next administration is a return to the 1980s, which I remember all too well. So, let's think about that. Flag burning. So, old logic. This is easy. You can even cite cases that singling out flag burning, targeting flag burning, and punishing it because of the offensiveness of the message is just flatly unconstitutional and can cite cases for this. And I've seen news articles citing cases for that. Now, I don't think that people who want flag burning to be punished don't understand that the Supreme Court has made a ruling. They

either want a constitutional amendment or they want to discuss and talk about the issue or promote it regardless of what some judge has said. And I think that pushes us toward a less orthodox, maybe, less conventional form of reason that's maybe not a constitutional reason at all. And that's to think about why, if at all, flag burning should be protected under the Constitution.

So, one way of thinking about the problem is, well, this is a matter of self-expression, and when the government singles out messages based on those messages, we should be highly skeptical that government officials and regulators are gonna get this right. And no matter what, it's gonna suppress some people's ability to express themselves. But, if we open up the argument beyond conventional legal reason, and think about flag burning as a practice, just for a moment—I don't really have terrific evidence—but has flag burning ever actually accomplished anything? Other than, I guess, two things: One is demonstrating the intensity of someone's feelings. It definitely does that. And I think it indicates that the person cares not for other people's feelings, or at least a certain class of people's feelings. Now, I'm not sure how highly we want to value that sort of conduct. In fact, for many of you out there in the audience, you might think the combination of expressing yourself in very strong form and indicating you care not about other people's feelings might remind you of somebody. Okay. So, think about that.

The other interesting feature of flag burning is that it's very effective when it's under assault and probably is more potent if made illegal. So, there can actually be a real, practical function for protest when the protest is itself unlawful and the person is willing to take the legal consequences in order to show the intensity of their belief and also to confront standard operating procedure.

Okay, I just have a little bit more. I have a lot more I want to say but a little bit more that I will say to leave some time for discussion. Let me talk then about more novel issues in which orthodox legal reason might break down in maybe both ways. So, think about these issues that I see rising. Number one, the president calling people names or, more particularly, calling organizations names. CNN: "Fake news." *New York Times*: "Failing." Now, I think under the old logic, this is really not much of a problem unless there's some realistic threat of formal legal action against these entities. Moreover, those statements can be leveraged into increased audience shares. So, noting that the president has singled you out and said, "You're failing," can actually boost your readership in a demonstrable way. And having that kind of confrontation with the President of the United States can be useful.

So, it can actually be to the advantage of the targets. That's at least possible. So, maybe the organizations should just lump it, as they say. But, there is another effect of speech like this. It seems to contribute to the Balkanization of media sources, and more people have an option to decide what kind of reality that they live in without checking data evidence or the sensibilities of other people. That's not something... that kind of issue is not something that old-style legal reason or constitutional reason can handle very well. At least not yet.

I'll note two other emerging issues that may or may not be constitutional in our near future. The president withholding information, and not just on government operations, but on the operations of the Trump organization and the trust system that the president has said that he will set up. Now, he's made promises about how this organization will operate, and, ordinarily, there's really no good First Amendment claim—no good constitutional claim—to the disclosure of government information, let alone information about nominally private organizations. But when the president makes a promise in order to try to defend against problems of conflicts of interest, when that promise is made, I wonder if this will then be converted into a constitutional debate or discussion of constitutional dimension.

And then finally I'll just flag one more issue, and that is the president suing people. I found zero historical examples of the president suing somebody else. The president apparently does have a private capacity, at least the courts thought so in the Clintons against Jones litigation. So, the president probably does have a personal capacity and can sue. So, that's a hurdle that I think he could overcome. Whether the president has a cause of action is a more interesting question. Do note, though, that some untold number of people have signed non-disclosure agreements with Donald Trump and the Trump organization promising not to disclose confidential information. And under at least some of these agreements, confidential information is more or less defined as what Donald Trump would prefer not to be discussed. Or what the Trump organization prefers not to be discussed. So, if the president himself, or more likely the Trump organization, sues to enforce these non-disclosure agreements against people who now want to claim misconduct on behalf of the now-President of the United States, how do you analyze that as a constitutional question? Seems to me the resources of old constitutional thinking probably run out. And that, I think, is where our job begins. And when I say "our," I mean me and you out there too. Okay, thanks.