Lower Court Confusion Over Impact Of Trump V. Hawaii

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A number of the legal challenges to President Donald Trump's various immigration initiatives contend that those executive actions are based on religious or racial animus. Litigants have cited various statements made by the president, before and after his election, in support of their claims. To what extent should courts take into account the alleged motives behind an executive order or an agency action in considering challenges to them? The U.S. Supreme Court addressed this issue in its recent decision in Trump v. Hawaii, which upheld Trump's so-called travel ban against the contention that the ban is anti-Muslim and violates the establishment clause.[1] However, it appears that some lower federal courts have not understood the court's message.

Background

The motive behind agency actions is not an issue in judicial review under the Administrative Procedure Act because such review is based on the administrative record created before the agency and it is "not the function of the court to probe the mental processes" of agency decision-makers.[2] "[C]ourts are to decide, on the basis of the record the agency provides, whether the action passes muster under the appropriate APA standard of review."[3] If the reviewing court cannot evaluate the challenged agency action on the basis of the record before it, the matter is remanded to the agency for additional investigation or explanation.[4] Executive agency regulations are subject to review under the APA, but executive orders issued by the president are not subject to review because the president is not an "agency" within the meaning of the act.[5]

Executive orders and agency actions can be challenged on the ground that they conflict with the U.S. Constitution.[6] But the motive behind the challenged action is not an issue in most cases because the constitutionality of an action is seldom dependent on the motive behind it. Indeed, the Supreme Court has said that "[i]t is a familiar principle of constitutional law that this court will not strike down an otherwise constitutional statute on the basis of an alleged illicit legislative motive."[7]

There are multiple reasons for this judicial reluctance to examine the motives behind challenged laws or executive actions. One is the difficulty of reliably ascertaining what the motive actually was. The Supreme Court has cautioned that, "[w]hat motivates one legislator to make a speech about a statute is not necessarily what motivates scores of others to enact it, and the stakes are sufficiently high for us to eschew guesswork."[8] Similarly, agency actions and executive orders may be the handiwork of multiple authors with differing motives. Moreover, because individuals commonly have multiple motives for their actions, "[t]o look for *the sole purpose* of even a single legislator is probably to look for something that does not exist."[9]

Furthermore, the court has noted that judicial inquiry into the motives of the legislative or executive branches "could be highly intrusive."[10] Such inquiries put courts in the awkward position of deciding whether co-equal branches engaged in pretext and dishonesty, which can create friction between the branches. And, if a court strikes down an otherwise valid statute or executive action because it was the product of an impermissible motive, Congress or the president could simply reenact it after disclaiming the bad motive.

Nonetheless, certain constitutional claims may permit some inquiry into whether the executive order or agency action at issue was based on an impermissible motive. The Supreme Court has been willing to accept direct proof of impermissible motive in two doctrinal areas: equal protection claims under the 14th and Fifth Amendments, and establishment clause claims under the First Amendment.[11]

At the same time, the Supreme Court has "long recognized the power to expel or exclude aliens as a fundamental sovereign attribute exercised by the government's political departments largely immune from judicial control."[12] The general rule is that "when the executive exercises this power negatively on the basis of a facially legitimate and bona fide reason, the courts will neither look behind the exercise of that discretion, nor test its justification."[13]

The Supreme Court's Decision in Trump v. Hawaii

These competing considerations regarding the scope of judicial review were addressed by the Supreme Court in Trump v. Hawaii. The court observed that normally, its deferential review of actions relating to immigration policies would begin and end by confirming that the travel ban was religiously neutral on its face. But, in response to the establishment clause challenge, the court assumed (without deciding) that it could look behind the face of the order and apply rational basis review, considering whether the policy is plausibly related to the stated objective to protect the country and improve vetting processes. In doing so, the court could consider extrinsic evidence about motive but would uphold the policy so long as it could reasonably be understood to have a legitimate grounding apart from any religious hostility. The court concluded that this test was satisfied; it noted that "the policy covers just 8 percent of the world's Muslim population and is limited to countries that were previously designated by Congress or prior administrations as posing national security risks."[14]

The court acknowledged that it hardly ever strikes down a policy as illegitimate under rational basis scrutiny and that, on the few occasions where it has done so, the laws at issue have lacked any purpose other than a bare desire to harm a politically unpopular group.[15] By applying this form of review to the travel ban, the court majority demonstrated its unwillingness to invalidate an executive action based on alleged presidential bias short of the extreme situation where the only explanation for the action is unlawful bias. In contrast, the dissent would have applied a less deferential test: whether a reasonable observer, presented with all the evidence, would conclude that the "primary purpose" of the ban is to disfavor Muslims.[16]

Lower Court Decisions After Trump v. Hawaii

In the wake of Trump v. Hawaii, two federal district courts have so far addressed the issue of how to weigh evidence of alleged presidential bias in cases challenging the

administration's immigration policies. These courts have understood the impact of the Supreme Court's decision quite differently.

In Gutierrez-Soto v. Sessions, a federal court in Texas ruled on a challenge to the decision of the attorney general (through his designees) to revoke the humanitarian parole of two Mexicans facing deportation. Among other claims, the petitioners alleged that they were discriminated against on the basis of their national origin in violation of the equal protection clause. They asked the court to consider Trump's statements about Mexicans as evidence of his administration's discriminatory animus toward them. Following the approach taken in Trump v. Hawaii, the court considered this extrinsic evidence but upheld the revocation of parole because it could be reasonably understood to result from an independent justification. The court found that Trump's statements lacked anything more than a tenuous connection to the revocation of the petitioners' parole, and that there was a rational basis to revoke their parole because federal officials considered the petitioners a flight risk as they had a final order of removal.[17]

In Presente v. U.S. Department of Homeland Security, a federal court in Massachusetts took a very different view of the law in considering the sufficiency of a complaint challenging the administration's decision to terminate the designation of Haiti, El Salvador and Honduras for temporary protected status, or TPS. These designations, which date from 1999, 2001 and 2010, have enabled some 400,000 nationals from those countries to reside temporarily in the U.S. without being subject to removal. The plaintiffs asserted a claim of unlawful discrimination by race, ethnicity and/or national origin. They alleged that Trump has personally made "numerous statements reflecting bias and prejudice against immigrants of color, particularly Latino and Haitian immigrants."

The government moved to dismiss the complaint and argued that, under Trump v. Hawaii, the court should apply rational basis review. The plaintiffs argued that the decision to terminate the TPS designations was motivated by racial animus and so is subject to heightened judicial scrutiny. The court sided with plaintiffs. It construed Trump v. Hawaii as applying only to "decisions by the government regarding admission of aliens, particularly in the context of the executive's authority to make national security judgments."[18] Instead, the court relied on a 1977 case, involving an allegedly discriminatory zoning decision, in which the Supreme Court stated that "[d]etermining whether invidious [racial] discriminatory purpose was a motivating factor demands a sensitive inquiry into such circumstantial and direct evidence of intent as may be available."[19]

The Massachusetts court rejected the government's argument that conducting such an inquiry in immigration cases would enable litigants to avoid deferential rational basis review by recasting distinctions drawn on the basis of alienage as being drawn along racial lines. The court concluded that the plaintiffs plausibly alleged that a discriminatory purpose was a motivating factor in the TPS decision based on "the combination of a disparate impact on particular racial groups, statements of animus by people plausibly alleged to be involved in the decision-making process, and an allegedly unreasoned shift in policy."[20] Therefore, it allowed the case to go forward.

Analysis

While the full ramifications of Trump v. Hawaii remain to be played out, there is strong reason to believe it establishes a broader rule than what the Massachusetts court discerned. Although the claim in Trump v. Hawaii involved religious bias and the First Amendment, the court framed its ruling in broader terms that apply equally to other forms of discrimination: "we may consider plaintiffs' extrinsic evidence [of motive], but will uphold the policy so long as it can reasonably be understood to result from a justification independent of unconstitutional grounds."[21] Notably, the court majority explained that it saw no basis for engaging in a more "free-ranging inquiry" in the context of "national security and foreign affairs" including "immigration policies, diplomatic sanctions and military actions."[22] Thus, the rational basis review articulated in Trump v. Hawaii should apply to all challenges to executive branch decisions regarding the admission or removal of unauthorized immigrants. While extrinsic evidence of improper motive may be offered in support of challenges asserting equal protection or establishment clause claims, an executive action in the realms of immigration, diplomatic sanctions and military actions can be invalidated only when there is no explanation for the action other than an unconstitutional one.

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[1] 138 S.Ct. 2392 (June 26, 2018).

[2] Morgan v. United States, 304 U.S. 1, 18 (1938) (per curiam); see also Citizens to Preserve Overton Park Inc. v. Volpe, 401 U.S. 402, 420 (1971).

[3] Florida Power & Light Co. v. Lorion, 470 U.S. 729, 744 (1985).

[4] Id.

[5] Dalton v. Specter, 511 U.S. 462, 469 (1994); Franklin v. Massachusetts, 505 U.S. 788, 800-01 (1992).

[6] Chamber of Commerce of U.S. v. Reich, 74 F.3d 1322 (D.C. Cir. 1996).

[7] U. S. v. O'Brien, 391 U.S. 367, 383 (1968).

[8] Id. at 384.

[9] Edwards v. Aquillard, 482 U.S. 578, 637 (1987) (Scalia, J., dissenting) (emphasis in the original).

[10] Nixon v. Fitzgerald, 457 U.S. 731, 756 (1982).

[11] Vikram David Amar and Alan E. Brownstein, The Complexities of a "Motive" Analysis in Challenging President Trump's Executive Order Regarding Entry to the United States (March 24, 2017), available at https://verdict.justia.com/2017/03/24/complexities-motive-analysis-challenging-president-trumps-executive-order-regarding-entry-united-states.

[12] Fiallo v. Bell, 430 U.S. 787, 792 (1977).

[13] Kleindienst v. Mandel, 408 U.S. 753, 770 (1972).

[14] 138 S.Ct. at 2421.

[15] Id. at 2420.

[16] Id. at 2438 (Sotomayor, J., dissenting).

[17] Gutierrez-Soto v. Sessions, --- F.Supp.3d ----, 2018 WL 3384317, at *8 (W.D.Tex. 2018).

[18] Presente v. U.S. Dep't of Homeland Security, 2018 WL 3543535, at *12 (D.Mass. 2018).

[19] Village of Arlington Heights v. Metro. Hous. Dev. Corp.,429 U.S. 252, 266 (1977).

[20] Presente v. U.S. Dep't of Homeland Security, 2018 WL 3543535, at *15.

[21] 138 S.Ct. at 2420.

[22] Id. at n. 5.