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OP-ED CONTRIBUTOR

Should the President's Words Matter in Court?

By Kate Shaw

May 31, 2017

The most striking aspect of last Thursday's opinion by the United States Court of Appeals for the Fourth Circuit, which rejected the Trump administration's latest effort to revive its travel ban for individuals from six predominantly Muslim countries, was its reliance on Donald Trump's own words as candidate, president-elect and president. The court leaned particularly heavily on his now-famous campaign statement that he was "calling for a total and complete shutdown of Muslims entering the United States."

The government's lawyers argued that those words had no bearing on the order's lawfulness, but the court disagreed. The president's words, the court found, led to only one conclusion: The order was driven by "religious intolerance, animus, and discrimination," not a genuine national-security need (as the order claimed), and was thus most likely unconstitutional.

What weight, if any, should the words of a United States president have in court? It's not a question the Supreme Court has ever answered. But if the Trump administration asks the court to hear this case, and the court agrees to do so, the outcome will almost certainly turn on this issue.



As a presidential candidate, Donald Trump called for a "total and complete shutdown of Muslims entering the United States" at a campaign rally in South Carolina in 2015. Sean Rayford/Getty Images

I believe the correct view is that the speech of a candidate or even a president should not ordinarily be relevant to a court's determination of the meaning or lawfulness of government action. This is especially true when the words of the president conflict with executive-branch positions offered in other, more authoritative settings and documents.

But there is an exception to this rule: namely, when presidential speech supplies evidence of intent or purpose of established legal relevance — for example, when assessing a claim of religious discrimination. Thus the Fourth Circuit was right to rely on Mr. Trump's words in rejecting the administration's effort to revive its travel ban, and the Supreme Court should follow suit.

It is generally a mistake for a court to give legal force to statements whose goals are those of political mobilization or persuasion — or anything other than the articulation of considered legal positions. In most cases, the authoritative statements of the legal positions of the United States are contained in official settings and documents like the arguments and briefs presented to courts by the Department of Justice. Privileging such documents ensures that the careful processes and expertise they reflect are not overshadowed by casual presidential utterances or ill-considered tweets.

The judges who have objected to using Mr. Trump's words against him in the travel ban litigation have been motivated by such concerns. Alex Kozinski, a judge on the United States Court of Appeals for the Ninth Circuit, which in February affirmed an order halting the initial travel ban, took particular issue with his colleagues' use of campaign speech, noting that "the panel has approved open season on anything

a politician or his staff may have said.” Judge Paul V. Niemeyer of the Fourth Circuit, dissenting from last week’s opinion, agreed, expressing alarm that in the future a court could “have free rein to select whichever expression of a candidate’s developing ideas best supports its desired conclusion.”

These judges are right to be cautious: We don’t want to give every tweet on every topic the color of law. And to a point they’re correct on the merits: The speech of a president should not usually be relevant to a court’s determination of the meaning or lawfulness of government action.

The Supreme Court, for example, acted properly in disregarding President Barack Obama’s statement that the Affordable Care Act’s individual mandate was “absolutely not a tax increase.” When the case came before the Supreme Court, Justice Antonin Scalia did press the federal government’s lawyer to explain the president’s remarks. But in the end, none of the opinions in the case even mentioned the remarks, presumably because the court concluded they were irrelevant to the constitutional question of Congress’s power to regulate health care. Most presidential speech isn’t legally significant.

Again, there are important exceptions. The Supreme Court has long held that in the context of religious discrimination claims, proof of government purpose is required to establish a constitutional violation. And countless courts have relied on statements by government officials in such cases. In 1993, in a case concerning whether a city ordinance in Florida impeded the free exercise of religion, the Supreme Court held that government purpose could be gleaned from “contemporaneous statements made by members of the decision-making body.”

Giving decisive weight to all presidential statements would be a bad idea. It would unduly empower the president, allowing him to circumvent internal executive-branch processes, and it would also unduly disempower him, preventing him from speaking freely about topics that might have litigation consequences. Each effect would be problematic, whether we’re talking about President Trump or any other president.

In the case of the travel ban, however, given the relevance of Mr. Trump’s words to determining its purpose, the courts can rule that the president’s speech is germane in this particular instance — without opening Pandora’s box.