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From Parties to Presidents: Dealing with Decision-Maker Commentary

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I. INTRODUCTION

Decision-makers and their comments. Employment law has long wrestled with the weight to give to comments made by decision-makers, particularly when those comments are disconnected from any particular employment decision but nevertheless suggest the decision-maker may harbor an unlawful animus toward a particular group or activity. Tests examining the timing, nature, and context of the comment have emerged, evolved, and in some instances fallen away. At the same time, the law's understanding of what it means to discriminate or retaliate "because of" something has changed over time, raising abstract philosophical questions about causation and how a plaintiff might go about proving it, with or without resort to remarks made by the person who took the adverse employment action at issue.

Against this (seemingly unrelated) legal backdrop, Donald J. Trump ran for President of the United States and on January 20, 2017, was sworn in as the 45th President of the United States. In the first 100 days of his Presidency, President Trump signed 32 executive orders.¹ Of President Trump's initial 32 executive orders, five dealt directly with immigration:

- EO13767 "Border Security and Immigration Enforcement Improvements" (01/25/2017)
- EO13768 "Enhancing Public Safety in the Interior of the United States" (01/25/2017)
- EO13769 "Protecting the Nation from Foreign Terrorist Entry Into the US" (01/27/2017)
- EO13780 "Protecting the Nation from Foreign Terrorist Entry Into the US" (03/06/2017)
- EO13788 "Buy American and Hire American" (04/18/2017)

This paper focuses on two of these orders—EO13769 and EO13780—which have been embroiled in litigation from the moment of their signing through the date of this paper. While the legal theories vary, the thrust of the argument against the two orders is that they are impermissibly motivated by religious considerations in violation of the Establishment Clause, the Equal Protection Clause, and the statutory terms of the Immigration and Nationality Act, as evidenced by comments by citizen Trump, candidate Trump, President-Elect Trump, President Trump, and his top advisors.

Setting aside the question of whether a court should examine the motives of the President in exercising his lawful authority, the comments themselves have been uniformly viewed by the courts as providing at least some evidence of President Trump's motivation in signing the two executive orders banning travel from seven and then six Muslim-majority countries. While not exhaustive, the following represent those comments deemed significant enough to be included in the Fourth Circuit decision upholding the order enjoining enforcement of the second travel ban:

- 12/07/2015 – Trump publishes a "Statement on Preventing Muslim Immigration" on his campaign website, which proposed "a total and complete shutdown of Muslims entering the United States until our country's representatives can figure out what is going on." That same day, Trump tweets, "Just put out a very important policy statement on the

¹ http://www.presidency.ucsb.edu/executive_orders.php?year=2017 (last visited May 11, 2017). Looking strictly at raw numbers, President Trump has signed more executive orders in the first 100 days than any other U.S. President, other than Franklin D. Roosevelt, who holds the record with 99. <https://fivethirtyeight.com/features/a-presidents-first-100-days-really-do-matter/> (last visited May 11, 2017). President Truman, formerly second-place, is now in third place, with 25 executive orders in his first 100 days.

extraordinary influx of hatred & danger coming into our country. We must be vigilant!” That night, Trump reads from the published statement at a campaign rally in Mount Pleasant, South Carolina, commenting, “I have friends that are Muslims. They are great people—but they know we have a problem.”

- 03/09/2016 – Trump gives an interview to CNN in which he states, “I think Islam hates us,” and opined that “we can’t allow people coming into the country who have this hatred.” Likewise, Katrina Pierson, a Trump spokeswoman, tells CNN, “We’ve allowed this propaganda to spread all through the country that [Islam] is a religion of peace.”
- 03/22/2016 – Trump gives an interview to Fox Business television, in which he again urges a ban on Muslim immigration and explains “[W]e’re having problems with the Muslims, and we’re having problems with Muslims coming into the country.” During the same interview, Trump offers, “[Y]ou have to deal with the mosques whether you like it or not.”
- 07/17/2016 – Candidate Trump is asked about a tweet stating, “Calls to ban Muslims from entering the U.S. are offensive and unconstitutional,” and responds, “So you call it territories. OK? We’re gonna do territories.” J.A. 798.
- 07/24/2016 – Candidate Trump gives an interview to NBC’s Meet the Press and when asked if he has pulled back on his “Muslim ban,” Candidate Trump provides a more nuanced response, having likely received feedback regarding the potential dangers associated with focusing on “Muslims” when discussing his proposed travel ban, “We must immediately suspend immigration from any nation that has been compromised by terrorism until such time as proven vetting mechanisms have been put in place.” Attempting to stay on message, but muddying the water in the process, Trump continues, “I actually don’t think it’s a rollback. In fact, you could say it’s an expansion. I’m looking now at territories. People were so upset when I used the word Muslim. Oh, you can’t use the word Muslim. Remember this. And I’m okay with that, because I’m talking territory instead of Muslim.” Trump then offers, “Our Constitution is great.... Now, we have a religious, you know, everybody wants to be protected. And that’s great. And that’s the wonderful part of our Constitution. I view it differently.”
- 12/19/2016 – Commenting on the terrorist attack in Germany, President-Elect Trump describes the victims as people who were “prepared to celebrate the Christmas holiday” and the attackers as “ISIS and other Islamic terrorists [who] continually slaughter Christians in their communities and places of worship as part of their global jihad.”
- 12/21/2016 – When asked if recent violence in Europe had affected his plans to bar Muslims from immigrating to the United States, President-Elect Trump responds, “You know my plans. All along, I’ve been proven to be right. 100% correct. What’s happening is disgraceful.”
- 01/27/2017 – President Trump gives an interview to the Christian Broadcasting News, in which he explains that Executive Order 13769 (his first travel ban, which he signed the day of the interview) gives preference to Christian refugees: “They’ve been horribly treated. Do you know if you were a Christian in Syria it was impossible, at least very tough to get

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