

Are Department of Justice Attorneys Losing on Purpose?

Two days ago, the San Francisco-based 9th Circuit Court of Appeals heard the greatest legal challenge yet to President Trump's temporary pause in immigration from seven terrorist hotspots. Government lawyers asked the court to restore President Trump's executive order, contending that the president alone has the power to decide who can enter or stay in the United States.

The Judges—two Democratic appointees and one Republican—repeatedly questioned career Department of Justice lawyer August E. Flentje on why the states should not be able to sue on behalf of their residents or on behalf of their universities, which have complained about students and faculty getting stranded overseas.

This should have been a no-brainer for Flentje to brief and answer.

Our friend Ken Klukoski, a research fellow with Liberty University School of Law who has written briefs on constitutional issues in federal courts across the country, including the U.S. Supreme Court, says the states unquestionably lack standing to bring some of the issues in the kitchen-sink lawsuit brought by the states of Washington and Minnesota.

Washington and Minnesota claim violations of the Establishment Clause and the Religious Freedom Restoration Act (RFRA), for example. Those rights can only be raised by natural persons or by corporate organizations. A state has no rights under that constitutional provision or federal statute, so cannot sue over alleged violations. And despite what Judge Robart said in issuing his temporary restraining order, a state cannot assert

the personal rights of its citizens concluded Klukowski.

But it gets worse says Ken Klukowski.

The Supreme Court has reiterated countless times that when a federal court lacks subject-matter jurisdiction in a lawsuit, the only power the court has is to explain why it cannot claim jurisdiction, then dismiss the case.

That's what should have happened for many of the claims in this lawsuit, said Klukowski.

However, reports in the U.K. Daily Mail and other publications covering the hearing suggest that Flentje, who appeared via telephone, floundered through the hearing on even those elementary motion to dismiss type of arguments.

Then again, maybe attorney Flentje was a little conflicted to begin with.

After President Trump fired the acting attorney general Sally Yates last week, Flentje was the top appeals lawyer available in the Justice Department.

Yates was fired after she said she would not instruct the Justice Department to defend the temporary pause in immigration from terrorist hotspots, and Flentje, a career lawyer with the Department of Justice, found himself handling the case through a series of defaults.

According to his hometown newspaper, the Wichita Star, Flentje's previous high-profile cases were the legalization of gay marriage and the detention center at Guantanamo Bay, so he's been steeped in the Obama Department of Justice's progressive philosophy and rose through the ranks in that environment.

Flentje also worked previously for establishment Republican Senators Bob Dole and Nancy Kassebaum, neither of whom were, to put it politely, immigration hawks.

His father, Edward Flentje, a professor at Wichita State University, said his son has argued appellate cases before but has never argued a case before the Supreme Court.

Flentje's father also said he puts his personal beliefs aside to fulfill the duties of his role. "He's a civil servant, and I think he's been very careful," his dad said. "We have family members protesting what's going on, but he plays it pretty close and I think has a deep sense of duty, representing to the best of his ability the president within the law and the Constitution."

Mr. Flentje, a Princeton man who took creative writing classes with Joyce Carol Oates, seems like the epitome of the civil servant lawyer, but representing President Trump "to the best of his ability" is a very modest test of success when the security of the United States and the safety of every American family is at risk.

To drain the swamp at the Department of Justice General Sessions must hire a team of topnotch litigators who will not just defend President Trump's agenda, but aggressively advance it.

We urge Attorney General Sessions to bench Department of Justice attorneys with August Flentje's civil servant mentality, especially in cases where rogue judges like District Judge James L. Robart put our national security at risk through ultra vires rulings, and replace them with experienced conservative litigators who will fight for President Trump's agenda. {eo}

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