AMERICAN CONSTITUTIONALISM

VOLUME II: RIGHTS AND LIBERTIES

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Supplementary Material

Chapter 12: The Contemporary Era – Individual Rights/Due Process

**State of Washington v. Trump, No. 17-35105** (9th Cir. 2017)

*Donald Trump as candidate and as president-elect repeatedly called for a ban on Muslim immigration into the United States. Shortly after taking office, Trump issued Executive Order No. 13769, which suspended foreign nations from Iran, Iraq, Libya, Somalia, Sudan, Syria, and Yemen from entering the United States. The administration was sued in federal district court by the state of Washington, which won a temporary injunction barring implementation of the executive order. The administration appealed to the 9th circuit, which affirmed the judgment of the lower court. Of particular interest was the court’s discussion of the judicial reviewability of executive decisions to exclude aliens at the border. This panel of judges concluded that such presidential directives were subject to judicial scrutiny.*

PER CURIAM.

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The Government contends that the district court lacked authority to enjoin enforcement of the Executive Order because the President has “unreviewable authority to suspend the admission of any class of aliens.” The Government does not merely argue that courts owe substantial deference to the immigration and national security policy determinations of the political branches—an uncontroversial principle that is well-grounded in our jurisprudence. *Cardenas v. United States* (9th Cir. 2016). . . . Instead, the Government has taken the position that the President’s decisions about immigration policy, particularly when motivated by national security concerns, are *unreviewable*, even if those actions potentially contravene constitutional rights and protections. . . .

There is no precedent to support this claimed unreviewability, which runs contrary to the fundamental structure of our constitutional democracy. B*oumediene v. Bush* (2008). Within our system, it is the role of the judiciary to interpret the law, a duty that will sometimes require the “[r]esolution of litigation challenging the constitutional authority of one of the three branches.” *Zivotofsky ex rel. Zivotofsky v. Clinton* (2012). We are called upon to perform that duty in this case.

Although our jurisprudence has long counseled deference to the political branches on matters of immigration and national security, neither the Supreme Court nor our court has ever held that courts lack the authority to review executive action in those arenas for compliance with the Constitution. To the contrary, the Supreme Court has repeatedly and explicitly rejected the notion that the political branches have unreviewable authority over immigration or are not subject to the Constitution when policymaking in that context. *Zadvydas v. Davis* (2001). . . .

*Kleindienst v. Mandel* (1972) does not compel a different conclusion. The Government cites *Mandel* for the proposition that “‘when the Executive exercises’ immigration authority ‘on the basis of a facially legitimate and bona fide reason, the courts will [not] look behind the exercise of that discretion.’” The Government omits portions of the quoted language to imply that this standard governs judicial review of *all* executive exercises of immigration authority. In fact, the *Mandel* standard applies to lawsuits challenging an executive branch official’s decision to issue or deny an individual visa based on the application of a congressionally enumerated standard to the particular facts presented by that visa application. The present case, by contrast, is not about the application of a specifically enumerated congressional policy to the particular facts presented in an individual visa application. Rather, the States are challenging the President’s *promulgation* of sweeping immigration policy. Such exercises of policymaking authority at the highest levels of the political branches are plainly not subject to the *Mandel* standard. . . .

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Indeed, federal courts routinely review the constitutionality of—and even invalidate—actions taken by the executive to promote national security, and have done so even in times of conflict. . . . As a plurality of the Supreme Court cautioned in *Hamdi v. Rumsfeld* (2004), “Whatever power the United States Constitution envisions for the Executive in its exchanges with other nations or with enemy organizations in times of conflict, it most assuredly envisions a role for all three branches when individual liberties are at stake.”

In short, although courts owe considerable deference to the President’s policy determinations with respect to immigration and national security, it is beyond question that the federal judiciary retains the authority to adjudicate constitutional challenges to executive action.

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The Fifth Amendment of the Constitution prohibits the Government from depriving individuals of their “life, liberty, or property, without due process of law.” The Government may not deprive a person of one of these protected interests without providing “notice and an opportunity to respond,” or, in other words, the opportunity to present reasons not to proceed with the deprivation and have them considered. . . .

The Government has not shown that the Executive Order provides what due process requires, such as notice and a hearing prior to restricting an individual’s ability to travel. Indeed, the Government does not contend that the Executive Order provides for such process. Rather, . . . the Government argues that most or all of the individuals affected by the Executive Order have no rights under the Due Process Clause.

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The procedural protections provided by the Fifth Amendment’s Due Process Clause are not limited to citizens. Rather, they “appl[y] to all ‘persons’ within the United States, including aliens,” regardless of “whether their presence here is lawful, unlawful, temporary, or permanent.” These rights also apply to certain aliens attempting to reenter the United States after travelling abroad. The Government has provided no affirmative argument showing that the States’ procedural due process claims fail as to these categories of aliens. For example, the Government has failed to establish that lawful permanent residents have no due process rights when seeking to re-enter the United States. Nor has the Government established that the Executive Order provides lawful permanent residents with constitutionally sufficient process to challenge their denial of re-entry.

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Even if the claims based on the due process rights of lawful permanent residents were no longer part of this case, the States would continue to have potential claims regarding possible due process rights of other persons who are in the United States, even if unlawfully, non-immigrant visa holders who have been in the United States but temporarily departed or wish to temporarily depart, and applicants who have a relationship with a U.S. resident or an institution that might have rights of its own to assert. . . .

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