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Supplementary Material

Chapter 11: The Contemporary Era—Individual Rights/Religion

Trump v. International Refugee Assistance Project, __ U.S. __ (2017)

Shortly after his inauguration as president, Donald Trump signed Executive Order No. 13769, which suspended entry of foreign nationals from seven named, majority-Muslim countries for 90 days so that executive officials could review adequacy of existing procedures for determining whether such individuals posed a risk to national security (the so-called travel ban). The order was controversial, and its implementation was extremely chaotic. Within days, a federal district court issued a nationwide injunction precluding implementation of the order. The administration withdrew the order and issued a new one (EO No. 13780) providing somewhat greater justification for the administration's actions and more limited application to refugees.

The second order was again challenged in court, and new injunctions were issued by district courts and upheld by the Ninth and Fourth Circuit Courts of Appeals. Those courts concluded that the executive order was not motivated by concerns of national security but rather by animus toward Muslims. The government appealed to the U.S. Supreme Court, which granted the cert petition to hear the case and modified the injunctions. Two of the justices would have lifted the injunctions entirely, but seven of the justices limited them to apply only to those without a "bona fide relationship with a person or entity in the United States."

PER CURIAM.

. . .

We now turn to the preliminary injunctions barring enforcement of the §2(c) entry suspension. We grant the Government's applications to stay the injunctions, to the extent the injunctions prevent enforcement of §2(c) with respect to foreign nationals who lack any bona fide relationship with a person or entity in the United States. We leave the injunctions entered by the lower courts in place with respect to respondents and those similarly situated, as specified in this opinion.

Crafting a preliminary injunction is an exercise of discretion and judgment, often dependent as much on the equities of a given case as the substance of the legal issues it presents. The purpose of such interim equitable relief is not to conclusively determine the rights of the parties, but to balance the equities as the litigation moves forward. In awarding a preliminary injunction a court must also "conside[r] . . . the overall public interest." . . .

. . . The Ninth Circuit concluded that §2(c) would harm the State by preventing students from the designated nations who had been admitted to the University of Hawaii from entering this country. These hardships, the courts reasoned, were sufficiently weighty and immediate to outweigh the Government's interest in enforcing §2(c).Having adopted this view of the equities, the courts approved injunctions that covered not just respondents, but parties similarly situated to them—that is, people or entities in the United States who have relationships with foreign nationals abroad, and whose rights might be affected if those foreign nationals were excluded. . . .

But the injunctions reach much further than that: They also bar enforcement of §2(c) against foreign nationals abroad who have no connection to the United States at all. The equities relied on by the

lower courts do not balance the same way in that context. Denying entry to such a foreign national does not burden any American party by reason of that party's relationship with the foreign national. And the courts below did not conclude that exclusion in such circumstances would impose any legally relevant hardship on the foreign national himself. . . .

At the same time, the Government's interest in enforcing §2(c), and the Executive's authority to do so, are undoubtedly at their peak when there is no tie between the foreign national and the United States. . . .

We accordingly grant the Government's stay applications in part and narrow the scope of the injunctions as to §2(c). . . . In practical terms, this means that §2(c) may not be enforced against foreign nationals who have a credible claim of a bona fide relationship with a person or entity in the United States. All other foreign nationals are subject to the provisions of EO–2.

The facts of these cases illustrate the sort of relationship that qualifies. For individuals, a close familial relationship is required. A foreign national who wishes to enter the United States to live with or visit a family member, like Doe's wife or Dr. Elshikh's mother-in-law, clearly has such a relationship. As for entities, the relationship must be formal, documented, and formed in the ordinary course, rather than for the purpose of evading EO–2. The students from the designated countries who have been admitted to the University of Hawaii have such a relationship with an American entity. So too would a worker who accepted an offer of employment from an American company or a lecturer invited to address an American audience. Not so someone who enters into a relationship simply to avoid §2(c): For example, a nonprofit group devoted to immigration issues may not contact foreign nationals from the designated countries, add them to client lists, and then secure their entry by claiming injury from their exclusion.

. . . Given the Government's representations in this litigation concerning the resources required to complete the 20-day review, we fully expect that the relief we grant today will permit the Executive to conclude its internal work and provide adequate notice to foreign governments within the 90-day life of §2(c).

. . .

JUSTICE THOMAS, with whom JUSTICE ALITO and JUSTICE GORSUCH join, dissenting in part.

I agree with the Court that the preliminary injunctions entered in these cases should be stayed, although I would stay them in full. The decision whether to stay the injunctions is committed to our discretion, but our discretion must be "guided by sound legal principles." The two "most critical" factors we must consider in deciding whether to grant a stay are "(1) whether the stay applicant has made a strong showing that [it] is likely to succeed on the merits" and "(2) whether the applicant will be irreparably injured absent a stay." . . .

The Government has satisfied the standard for issuing a stay pending certiorari. We have, of course, decided to grant certiorari. And I agree with the Court's implicit conclusion that the Government has made a strong showing that it is likely to succeed on the merits—that is, that the judgments below will be reversed. The Government has also established that failure to stay the injunctions will cause irreparable harm by interfering with its "compelling need to provide for the Nation's security." Finally, weighing the Government's interest in preserving national security against the hardships caused to respondents by temporary denials of entry into the country, the balance of the equities favors the Government. I would thus grant the Government's applications for a stay in their entirety.

Reasonable minds may disagree on where the balance of equities lies as between the Government and respondents in these cases. It would have been reasonable, perhaps, for the Court to have left the injunctions in place only as to respondents themselves. But the Court takes the additional step of keeping the injunctions in place with regard to an unidentified, unnamed group of foreign nationals abroad. No class has been certified, and neither party asks for the scope of relief that the Court today provides. . . .

Moreover, I fear that the Court's remedy will prove unworkable. Today's compromise will burden executive officials with the task of deciding—on peril of contempt—whether individuals from the six affected nations who wish to enter the United States have a sufficient connection to a person or entity in this country. The compromise also will invite a flood of litigation until this case is finally resolved on the merits, as parties and courts struggle to determine what exactly constitutes a "bona fide relationship," who precisely has a "credible claim" to that relationship, and whether the claimed relationship was formed "simply to avoid §2(c)" of Executive Order No. 13780. And litigation of the factual and legal issues that are likely to arise will presumably be directed to the two District Courts whose initial orders in these cases this Court has now—unanimously—found sufficiently questionable to be stayed as to the vast majority of the people potentially affected.