CYRUS D. MEHTA & PARTNERS PLLC
US IMMIGRATION & NATIONALITY LAW

THREADING THE NEEDLE: CHALLENGING TRUMP'S TRAVEL BAN DESPITE TRUMP V. HAWAII

Posted on July 2, 2018 by Cyrus Mehta & Sophia Genovese

On June 26, 2018, the US Supreme Court in a 5-4 decision in *Trump v. Hawaii* upheld President Trump's travel ban against seven countries, the majority of which are predominantly Muslim. Chief Justice John Roberts, in writing the majority opinion, found that Section 212(f) of the Immigration and Nationality (INA) "exudes deference to the President" and thus empowers him to deny entry of noncitizens if he determines that allowing entry "would be detrimental to the interests of the United States."

There has already been much criticism of this decision. Although Trump made various utterances regarding his animus towards Muslims during his campaign and even after he became president, the majority found the third version of the Executive Order to be neutral on its face and that it did not violate the Establishment Clause of the First Amendment of Constitution. Still, ironically, the majority made reference to *Korematsu v. United States*, 323 U.S. 214 (1944) as a result of Justice Sonia Sotomayor referencing this decision in her powerful dissent. She found striking parallels between *Korematsu* and Trump's travel ban. For example, they were both based on dangerous stereotypes about particular groups' inability to assimilate and their intent to harm the United States. In both cases, there were scant national security justifications. In both cases, there was strong evidence that there was impermissible animus and hostility that motivated the government's policy.

The majority rejected the dissent's comparison of Trump's supposedly facially neutral travel ban to *Korematsu*, but still took this opportunity to overrule *Korematsu*. Yet, when one carefully reviews Trump's motivations behind the travel ban, it is not too different from the motivations that resulted in the forced internment of Japanese Americans. Indeed, Justice Sotomayor astutely

reaffirmed that "he United States of America is a Nation built upon the promise of religious liberty." In her rejection of the legality of the travel ban, she observed that "he Court's decision today fails to safeguard that fundamental principle. It leaves undisturbed a policy first advertised openly and unequivocally as a 'total and complete shutdown of Muslims entering the United States' because the policy now masquerades behind a façade of national-security concerns."

The irony here is that although the majority found that the motivation behind the executive order that resulted in the internment of Japanese-Americans was gravely wrong and has no place in law under our Constitution while Trump's travel ban is facially neutral, the ban has resulted in the tragic and forced separation of families from the banned countries. It has also prevented the future entry of skilled people from these countries. For instance, if a US citizen sponsors a parent of Iranian nationality, that parent can never immigrate to the United States under the travel ban. The same prohibition would be applicable to a spouse who is an Iranian national who is the beneficiary of an approved I-130 petition filed by her US citizen spouse. While there are supposedly waivers for entry, as Justice Breyer in his separate dissent observed, the Government "is not applying the Proclamation as written," where the Secretaries of State and Homeland Security have failed to issue guidance to consular officials on the issuance of waivers, and where only 430 waivers have been issued in total, representing "a miniscule percentage of those likely eligible for visas." Justice Breyer points to a particularly egregious example of a travel ban waiver denial of a child with cerebral palsy from Yemen to demonstrate his point. Due to the war in Yemen, he explained, the young child could no longer access her medication for her disease, and was thus no longer able to move or speak and was going to die if she did not receive treatment soon. Despite this predicament and the young child's clear eligibility for a waiver according to Presidential Proclamation 9645 (explaining that case-by-case waivers may be granted in circumstances involving, for example, "the foreign national is an infant, a young child or adoptee, an individual needing urgent medical care, or someone whose entry is otherwise justified by the special circumstances of the case"), the consular official denied her waiver. After this story had been highlighted in an *amicus* brief before the Supreme Court, the family received an update from the consulate that they were eligible for waivers; however, instead of receiving visas, the case was put into

administrative processing. It took several more months and international attention to get this child a waiver, indicating that these waivers are not being granted despite an individual's clear eligibility for them, as outlined in the EO.

If waivers of those who are clearly eligible do not get approved, and one can find a pattern of wholesale denials that are consistent with Trump's animus and hostility towards people from these banned nations, then it may be possible to assert that the motivations behind the denial of the waivers are based on improper stereotyping of certain nationalities that have no place under our Constitution, like the majority in *Trump v. Hawaii* found in *Korematsu*. Finding parallels behind the motivations that resulted in the forced internment of Japanese Americans to the wholesale denial of entry to people eligible for visas just because they happen to be nationals of predominantly Muslim countries could potentially result in further litigation that can overrule the ban, or at least force the Administration to actually implement its waiver process as outlined in the Proclamation. This will no longer be the facially neutral policy that the majority gave a pass to, rather the application of that policy through a sham waiver process will put more focus on the animus displayed by Trump towards Muslims. In other words, the failure to issue waivers, if shown to be a result of Trump's animus towards Muslims, could be used as evidence to show that not only is the waiver process a sham, but could invalidate the entire EO in a future challenge.

It is at this juncture that Justice Kennedy's tepid concurrence can provide the ammunition for future plaintiffs who challenge the waivers, and thus Trump's travel ban. The following extract from Justice Kennedy's concurrence is worth quoting in verbatim:

There may be some common ground between the opinions in this case, in that the Court does acknowledge that in some instances, governmental action may be subject to judicial review to determine whether or not it is "inexplicable by anything but animus," Romer v. Evans, 517 U. S. 620, 632 (1996), which in this case would be animosity to a religion. Whether judicial proceedings may properly continue in this case, in light of the substantial deference that is and must be accorded to the Executive in the conduct of foreign affairs, and in light of today's decision, is a matter to be addressed in the first instance on remand. And even if further proceedings are permitted, it would be necessary to determine that any discovery and other preliminary matters would not themselves intrude on the foreign affairs power of the Executive…

There are numerous instances in which the statements and actions of Government officials are not subject to judicial scrutiny or intervention. That does not mean those officials are free to disregard the Constitution and the rights it proclaims and protects. The oath that all officials take to adhere to the Constitution is not confined to those spheres in which the Judiciary can correct or even comment upon what those officials say or do. Indeed, the very fact that an official may have broad discretion, discretion free from judicial scrutiny, makes it all the more imperative for him or her to adhere to the Constitution and to its meaning and its promise.

The First Amendment prohibits the establishment of religion and promises the free exercise of religion. From these safeguards, and from the guarantee of freedom of speech, it follows there is freedom of belief and expression. It is an urgent necessity that officials adhere to these constitutional guarantees and mandates in all their actions, even in the sphere of foreign affairs. An anxious world must know that our Government remains committed always to the liberties the Constitution seeks to preserve and protect, so that freedom extends outward, and lasts.

Thus, all hope is not lost for future plaintiffs adversely impacted by the travel ban. There might be a way to thread the needle by demonstrating that the actual application of the Executive Order, which the majority found facially neutral, is no longer so neutral if waivers are denied wholesale by government officials that are motivated by Trump's original animus towards Muslims. It was this animus that resulted in the first two versions of the travel ban that were struck down by the lower courts of appeals, and which resulted in the third ban that was the subject of the Supreme Court's decision in *Trump v. Hawaii*. It was also the same majority in *Trump v. Hawaii* that found *Korematsu* abhorrent but distinguished it from the supposedly facially neutral Executive Order of Trump. But plaintiffs can show that this very same EO is no longer neutral because the waivers are not accessible as misrepresented by the Government in *Trump v. Hawaii*. As explained above, there have been no official guidelines issued by the Secretaries of State and Homeland Security regarding how consular officials will adjudicate waivers, and whether those denied can seek further redress or review within the administrative system. Such a failing to issue waivers or at least issue guidance to obtain these waivers again calls into question the 'neutrality' of the ban. Once the improper motivation can be shown, especially through the application of the waivers, litigants can again potentially challenge the ban.

As we've previously explained, while INA § 212(f) grants wide discretion to the

President, "maximum power does not mean absolute power." *Aziz v. Trump*, 2017 U.S. Dist. LEXIS 20889, at *11 (E.D. Va. Feb. 13, 2017). Once plaintiffs find an opening by challenging the ban through the sham waiver process, other authorities that limit the power of the President can spring to life. For example, in *Zadvydas v. Davis*, 533 U.S. 678 (2001), the Court found that the power of the Executive is "subject to important constitutional limitations." In *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004), the Court stated that the President's Article II powers are subject to review, and ruled that citizens held as enemy combatants must be afforded due process rights, namely the meaningful opportunity to contest the factual basis for their detention. In *Boumediene v. Bush*, 553 U.S. 723, 765 (2008), the Supreme Court declared that the political branches cannot "switch the Constitution on or off at will" and extended the right of habeas review to a non-citizen outside the US. Moreover, in *INS v. Chadha*, 462 U.S. 919 (1983), the Supreme Court reaffirmed that Courts were empowered to review whether or not "Congress has chosen a constitutionally permissible means of implementing" the "regulation of aliens." And as was argued in the Ninth Circuit, even under *Kleindienst v. Mandel*, 408 U.S. 753 (1972), the Court can review the actions of the Executive branch, noting that but for their ability to review, there would be no "facially legitimate and bona fide reason" test to measure executive exercises of immigration authority.

Finally, until Trump became President, no one realized that INA § 212(f) could be applied so broadly so as to eviscerate visa classifications created by Congress. *Trump v. Hawaii* will embolden Trump even further to restrict legal immigration without going through Congress. For instance, he may apply 212(f) to certain family preference categories and restrict the entry of foreign nationals who are the beneficiaries of approved I-130 petitions, by declaring that their entry will be detrimental to the interest of the United States. The same would be true if Trump hypothetically decided to restrict H-1B beneficiaries, say from India, because he believed that their entry into the US would be inconsistent with his Buy American Hire American Executive Order, and thus detrimental to the interest of the United States. It is at this point that a less pliant Congress may have to step up and limit the broad language under 212(f) so that a president like Trump with authoritarian impulses will not be able to trample upon the separation of powers doctrine.

As *Trump v. Hawaii* passes through the ages, the dissents of Justice Sotomayor and Justice Breyer will have more force than the majority opinion. A powerful

dissent signals to another court that the majority got it wrong, similar to Justice Murphy's dissent in *Korematsu.* A dissent also sends a signal to Congress that it can overrule a Supreme Court decision by changing the law. This is how Justice Ginsburg's powerful dissent in *Ledbetter v. Goodyear Tire & Rubber Company*, 550 U.S. 618 (2007), resulted in Congress enacting the Ledbetter Equal Pay Act. There is thus hope for the nation to redeem itself if a future Congress modifies INA § 212(f) thus effectively overruling *Trump v. Hawaii*.