LAWFARE

The Refugee Executive Order, the Immigration Act, and the Government's Bottom Line

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In its reply brief urging the Ninth Circuit to stay Judge James Robart's temporary restraining order against President Trump's Refugee Executive Order (EO), the Justice Department has tried to move the court battle to more defensible ground. While the government's reply made no formal concessions on the merits, it suggested that as litigation progressed, the Ninth Circuit could tailor the TRO to "at most" include only "previously admitted aliens who are temporarily abroad now or who wish to travel and return to the United States in the future." The government's suggestion is a welcome clarification of the issues. To further that goal, this post will address how the litigation against the EO is really a tale of two subjects: the previously admitted visa-holders (VHs) described in the government's reply, and noncitizens abroad who have *never*been admitted to the United States and probably have few if any constitutional or statutory rights. The post will then explain that the best legal argument for previously admitted VHs is a *statutory* claim that major portions of the EO exceed the President's authority under the Immigration and Nationality Act (INA).

I. The Constitution and Never-Admitted Noncitizens Abroad: A Portrait in Desolation

Despite the overbroad TRO by Seattle district court judge James Robart enjoining the entire refugee EO, noncitizens abroad who are awaiting admission to the United States confront a bleak legal landscape. Outside the bounds of Guantanamo Bay, where the U.S. has detained individuals pre- and post-9/11, judicial solicitude for overseas noncitizens is virtually nonexistent. While an amicus brief in *Washington v. Trump* in which Steve Vladeck, Judith Resnik and other scholars serve as co-counsel provides a more optimistic view of the constitutional prospects for noncitizens abroad, the reality is more grim.

The Supreme Court's 2015 decision in *Kerry v. Din*, a case cited by Steve and his fellow co-counsel, exemplifies the gap between hope and experience. In *Din*, Justice Kennedy*assumed without deciding* that U.S. citizens sponsoring immediate relatives abroad had a due process right founded on privacy-related freedom of intimate association. However, as Marty Lederman indicated here, Justice Kennedy viewed the process due as modest. Din, an Afghan national who had once worked as a clerk in a town controlled by the Taliban, received a denial of the Immediate Relative petition for an immigrant visa sponsored by his U.S. citizen spouse. The denial cited an unspecified national security ground in the INA, which contains a plethora of

terrorism-related grounds for denying admission to the United States. Justice Kennedy assessed the government's refusal to cite a specific reason under the highly deferential "facially legitimate and bona fide" standard. Concerned about the risk to intelligence sources and methods, Justice Kennedy declined to require disclosure that would constitute minimal notice in the domestic setting: the specific INA subsection that figured in the denial. Moreover, nothing in Kennedy's opinion suggested any interest in rethinking the longstanding nonreviewability of most consular visa denials.

If you're thinking that noncitizens abroad who are awaiting admission to the United States will have a better shot under the Equal Protection Clause, think again. Despite the amicus brief's accurate assertion that the Chinese Exclusion Case (1889) belongs to a disturbingly racist and xenophobic era in U.S. history, the decision's holding that Congress has plenary power over admission of noncitizens is still good law. Congress, in part due to the efforts of the late Senator Ted Kennedy, moved decisively away from national origin quotas in 1965. However, the Supreme Court has never come close to holding that Equal Protection would preclude such restrictions if Congress chose to reenact them. Explaining this extreme form of deference, Justice Robert Jackson, author of the canonical *Youngstown* concurrence on separation of powers, observed in*Harisiades v. Shaughnessy* (1952) that policy toward noncitizens is "vitally and intricately interwoven with contemporaneous policies in regard to the conduct of foreign relations … [s]uch matters are so exclusively entrusted to the political branches of government as to be largely immune from judicial inquiry or interference."

There has been some movement on constitutional and statutory issues for noncitizens who have been admitted to the U.S., or even noncitizens who succeed or fail at entering without official admission. But the outlook is still austere for those noncitizens abroad awaiting admission to the U.S. or those noncitizens abroad*applying* for a visa. The Justice Department's reply brief in the Washington State challenge to the refugee EO merely acknowledges the obvious. It's puzzling that Washington State has yet to reciprocate on this invitation to narrow the issues in the lawsuit.

Indeed, the government's acknowledgment seems almost *too* generous, since the Due Process Clause only provides modest *substantive* protections, even for already-admitted VHs. While, returning VHs and those already here who need to travel abroad may have *statutory* protection (as I will describe below), the Due Process Clause on its own does not provide much help. Only returning lawful permanent residents at a port of entry, *not* returning nonimmigrant VHs, receive constitutional due process protection. Courts have regularly held that the government has discretionary authority to revoke individual visas after they have been issued, even for individuals already in the United States. *Knoetze v. Dep't of State* (5th Cir. 1981).

True, the government typically states an individualized *reason* for revocation. For example, in *Knoetze*, the government asserted that the VH had failed to disclose that he had committed a crime in his native South Africa that rendered him inadmissible. The government also revokes visas because a VH fails to comply with the visa's terms. For example, if a student VH works without authorization, the government can revoke the student's visa.

However, courts have never found that the Due Process Clause *required* such individualized grounds. Moreover, most federal circuits have held that the INA precludes judicial review of visa denials, since those denials are discretionary in nature. See Bernardo v. Johnson (1st Cir. 2016).

II. The Immigration Statute: A Safe Haven Against the EO

But while VHs may not have luck on constitutional grounds, they have stronger statutory claims. The good news here is that the INA *itself* protects VHs from the arbitrary disruption wrought by the EO. While no single provision of the INA dictates this result, the INA's overall structure and plan protects classes of VHs who are in the U.S. or returning from overseas from *blanket* visa revocations not linked to disputes with other states. The INA provision cited in the EO (and by Josh Blackman here)—8 U.S.C. 1182(f)—must be read in light of the INA's overall plan and structure.

Section 1182(f) appears on its face to grant the President sweeping power, by authorizing him or her to bar the entry of "any alien … or class of aliens" or attach any appropriate restrictions if the President finds that entry would be detrimental to U.S. interests. The legislative history of the provision, from the restrictive 1952 McCarran-Walter Act, reinforces Josh's assertion that 1182(f) delegates broad power to the President; the Judiciary Committee report states that the President can "suspend the entry of all aliens." However, this broad reading of 1182(f) unduly discounts the INA's structure and overall plan. (This is true even though an INA provision frequently cited by EO opponents—1251(a)(1)(A) (the nondiscrimination provision)—actually only applies to issuance of *immigrant* visas, not nonimmigrant VHs affected by the EO [see Josh's analysis here]).

Ironically, the clearest indication of the need for tailoring 1182(f) to avoid arbitrary results comes from the Fifth Circuit's decision ruling that President Obama's Deferred Action for Parents of Americans (DAPA) program was inconsistent with the INA. In*Texas v. United States* (2015), the Fifth Circuit noted that the INA today is a complex edifice made up of numerous "specific and detailed provisions." (Full disclosure: Josh and I, along with Leif Olson and the Cato Institute's Ilya Shapiro, were co-counsel on Cato's amicus brief to the Fifth Circuit.) Through these many statutory building blocks, the court explained, the INA "expressly and carefully provides legal designations allowing defined classes of aliens to be lawfully present." Those classes included both LPRs and nonimmigrants. Surveying this carefully wrought architecture, the court held that DAPA's blanket grant of lawful presence to 4.3 million undocumented persons would undermine the INA's foundation.

In defining the generic provisions of the INA that the Department of Homeland Security (DHS) cited as support for DAPA—such as provisions that simply empowered DHS to make rules under the statute—the Fifth Circuit also considered past practice. In this respect, the Fifth Circuit took its cue from the Supreme Court's separation of powers jurisprudence. The Supreme Court, in construing congressional silence under Justice Jackson's second *Youngstown* category of executive-legislative interaction, has long considered the existence of a pattern as evidence of Congress's acquiescence in executive practice. (The Supreme Court affirmed this method most recently in *NLRB v. Noel Canning* (2014), striking down the Obama administration's use of recess appointments and noting that, "the longstanding 'practice of the government' can inform our determination of 'what the law is.'") In the DAPA case, the Fifth Circuit found that prior executive exercises of discretion to grant lawful presence had been "interstitial"—filling gaps rather than providing sweeping new relief. DAPA was doomed because it failed to fit these past interstitial exercises of executive discretion.

This same analysis applies to portions of the Trump administration EO that purported in blanket fashion to bar the entry and revoke the visas of nonimmigrant VHs. The INA provides nonimmigrant visas because those visas benefit the United States and its people. Nonimmigrants such as students and medical doctors help our institutions function and flourish. Of course, nonimmigrants also gain from their stays in the United States. But the reciprocal benefits provided to the United States and nonimmigrants come with matching burdens. Noncitizens must comply with the terms of their visas. For its part, the United States must generally provide individualized reasons for visa revocation.

The INA provision authorizing visa revocation, § 1155, reinforces this individualizing turn. Under 1155, DHS can revoke the approval of "any [visa] petition" for "good and sufficient cause." Notably, 1155 does not include added authority to revoke "any class" of visas. Since 1155 deals specifically with visas, its failure to include the "any class" language found in 1182(f) suggests that visa revocation should be individualized, based on a VH's failure to comply with the visa's terms. The inclusion of language on "good and sufficient cause" echoes the theme of particularized bases for visa revocations. Congress could have readily provided that DHS can revoke a visa for "any reason" or on "any ground." Congress's mention of "good and sufficient cause" suggests that visa revocation should generally be retail, not wholesale. The blanket, arbitrary decrees in President Trump's EO would undermine this structure, not reinforce it.

In certain exigent situations, events will drive a broader approach to executive discretion. If the U.S. is at war with another nation, wholesale visa revocations are almost certainly part of the President's toolkit. Similarly, a bilateral dispute, such as the 1979-80 Iranian hostage crisis, may ramp up the President's power. In this vein, the D.C. Circuit upheld a 1979 rule requiring reporting by Iranian students in the United States. *See Narenji v. Civiletti* (1979). Absent such situations, however, the structure of the INA requires that visa revocations should proceed individually.

The Obama administration's designation of the seven countries in the EO (Iran, Iraq, Libya, Somalia, Sudan, Syria, and Yemen) as "areas of concern" does not alter this analysis. This designation served a limited purpose. Under 8 U.S.C. 1187(a)(12), nationals from countries otherwise eligible for the visa-waiver program would need the additional vetting that visa processing provides if those individuals had visited "areas of concern"—which the statute leaves it up to the Secretary of Homeland Security to designate In other words, this provision demonstrates legislative trust in the vetting that takes place during visa processing, not the disdain that the EO exemplifies.

Furthermore, past practice regarding 1182(f) buttresses this argument. Past presidents of both parties have used 1182(f) as a scalpel, not a shotgun. (*See* the excellent Congressional Research Service study here.) For example, in 1988, President Reagan suspended the entry of Panamanian nationals who "formulate[d] or implement[ed] the policies" of former Panamanian leader Manuel Noriega. In 1986, President Reagan suspended entry of some Cubans (but not immediate relatives of U.S. citizens) as a countermeasure when Cuba reneged on a 1984 immigration agreement with the U.S. and resumed "facilitating illicit migration" to this country. Subsequent presidents have taken the same tack. None of their proclamations under 1182(f) have the arbitrary character that marks President Trump's EO.

In sum, the INA itself cabins 1182(f) with respect to previously admitted VHs abroad and those currently here who plan to travel overseas. In contrast, despite Judge Robart's sweeping order, neither the Constitution nor the INA offers protection to noncitizens waiting overseas for admission to the United States. At least in the context of what constitutes appropriate preliminary relief, the Justice Department's acknowledgment of the possibility of such different levels of protection is an encouraging step. The Ninth Circuit should plumb the full ramifications of this acknowledgment, in the interest of easing the uncertainty that has prevailed since the EO's issuance.