SCOTUSblog
SUPREME COURT OF THE UNITED STATES BLOG

# Symposium: Understanding the Supreme Court's equitable ruling in *Trump v. IRAP*

Josh Blackman

July 12, 2017

In *Trump v. International Refugee Assistance Project*, the Supreme Court stayed, in part, the judgments of the U.S. Courts of Appeals for the 4th and 9th Circuits. Though the per curiam decision quite deliberately avoided any discussion of the merits, a careful study of how its equitable analysis treated the lower-court decisions provides some hints to how the justices ultimately may rule (assuming the case is not mooted come October).

The Supreme Court announced that its equitable analysis was based on the four-factor test articulated in 2009 in *Nken v. Holder*: "(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies."

With respect to the third factor, the justices rejected the lower courts' balancing of the harm with respect to "foreign nationals abroad who have no connection to the United States at all." The burdens they suffer, the Supreme Court noted, "are, at a minimum, a good deal less concrete than the hardships identified by the courts below." For this latter group, the court disagreed with the 4th and 9th Circuits' balancing of the equities: "Denying entry to such a foreign national does not burden any American party by reason of that party's relationship with the foreign national." In short, the court noted, any burdens to such nationals "are, at a minimum, a good deal less concrete than the hardships identified by the courts below."

For the second factor, the justices rejected the lower courts' consideration of the government's irreparable injury, especially in light of the fact that the executive order provided "a case-by-case waiver system" for such unconnected aliens. "To prevent the Government from pursuing that objective by enforcing §2(c) against foreign nationals unconnected to the United States," the Supreme Court noted, "would appreciably injure its interests, without alleviating obvious hardship to anyone else." Finally, with respect to the fourth factor, the court cited its 2010 ruling in *Holder v. Humanitarian Law Project* for the proposition that "the interest in preserving national security is 'an urgent objective of the highest order.'" Likewise, the court relied on the

1981 ruling *Haig v. Agee*to conclude that "the balance tips in favor of the Government's compelling need to provide for the Nation's security."

The per curiam opinion assiduously avoided any discussion of the first factor. As I noted two weeks ago, I see this decision as something of a compromise that avoided the need for any member of the liberal bloc to record a dissent, but still gave the president more or less what he wanted. Because of this tightrope walk, it is difficult to predict how the majority would vote on the merits. Based on the practices of the Roberts court, however, the posture of this case would generally signal a reversal of the lower courts. Specifically, since Chief Justice John Roberts joined the Supreme Court in 2005, when the court grants a stay of a lower court decision and grants the petition for a writ of certiorari, in 22 out of 24 cases, the ultimate disposition is a reversal, at least in part. As a general rule, when Justice Anthony Kennedy does not dissent from the grant of a stay and certiorari is granted, the lower court will not stand.

Based on this practice, the Supreme Court's issuance of a partial stay in the travel ban litigation would, in the normal course, signal that a majority of the court intended to reverse (at least in part) the 4th and 9th Circuits. This case, however, is far from normal. I agree with most commentators that the case will likely become moot by the time argument is held in October, so the court may have no need to weigh in again on the second executive order. But we should not lose sight of the fact that the second executive order is merely a temporary policy. There very well may be a third, permanent executive order issued over the summer. So the per curiam decision may yield useful hints of how the justices will resolve the final policy.

Some have argued that the Supreme Court's bifurcation between those who do and do not have a bona fide connection to the United States merely reflected a judgment on standing. For example, David Cole told the *Financial Times* that the Supreme Court "allowed the government to bar from entry only people who were not part of the lawsuits at issue." This is not necessarily the case.

The district court in Maryland found that because Section 2(c) of the second executive order was infected by President Donald Trump's unconstitutional bias, "nationwide relief was appropriate." The 4th Circuit agreed that limiting relief to the named plaintiffs "would not cure the constitutional deficiency" because "[i]ts continued enforcement against similarly situated individuals would only serve to reinforce the 'message' that Plaintiffs 'are outsiders, not full members of the political community.'" Both courts agreed that the burdens suffered by all aliens – with or without connections to the United States – were of equal weight, in light of the president's unlawful animus.

The per curiam decision issued a subtle rejoinder to these conclusions. At the bottom of page 10, the Supreme Court cited *Kleindienst v. Mandel* in its discussion of the lower courts' finding of a hardship for "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." Those were precisely the facts of *Mandel*, in which Americans were burdened by the denial of entry of a Belgian Marxist scholar. On the next page, the justices noted that the lower courts "did not conclude that exclusion [for unconnected aliens] would impose any legally relevant hardship

on the foreign national himself." To support that observation, the per curiam decision cited *Mandel* for the proposition that "an unadmitted and nonresident alien … ha[s] no constitutional right of entry to this country."

Both of the appellate court rulings, however, were in no way dependent on whether aliens had a "constitutional right of entry." The crux of the 4th Circuit's decision was that Trump's statements – both before and after the inauguration – demonstrated that the executive order "drips with religious intolerance, animus, and discrimination." The en banc court added that "EO-2 cannot be divorced from the cohesive narrative linking it to the animus that inspired it." It was on this basis that the court of appeals affirmed the district court's nationwide injunction, as applied to unknown aliens who otherwise had "no constitutional right of entry."

Likewise, the 9th Circuit's decision was premised on the fact that the executive order failed to meet the requisite burden of proof under 8 U.S.C. § 1182(f) to exclude anyone, even unknown aliens who otherwise had "no constitutional right of entry." The panel reasoned that "narrowing the injunction to apply only to Plaintiffs would not cure the statutory violations identified, which in all applications would violate provisions of the INA." In both cases, the executive order was void "ab initio," or from the outset – on constitutional or statutory grounds – regardless of whom it affected.

The per curiam decision is in some tension with both of these findings. The Supreme Court observed that the "Government's interest in enforcing §2(c), and the Executive's authority to [deny entry to unconnected aliens], are undoubtedly at their peak when there is no tie between the foreign national and the United States." The lower courts, to the contrary, concluded that this "interest" was trivial, if not non-existent. For example, the 4th Circuit stated that the order's "asserted national security interest" to exclude all covered aliens, regardless of their bona fide connections, was a "post hoc, secondary justification for an executive action rooted in religious animus and intended to bar Muslims from this country." Reasoning that "[t]he public interest is served by 'curtailing unlawful executive action,'" the 9th Circuit discounted the government's interest in national security because "the President must nonetheless exercise his executive power under § 1182(f) lawfully."

If the 4th Circuit is correct that the entire executive order is tainted by unconstitutional animus, then the government's interest in enforcing it as to all aliens would indeed be nonexistent. The government has no interest in implementing an unconstitutional policy, even if certain parties lack standing to challenge it. Likewise, if the 9th Circuit was correct that the entire executive order was unlawful because the president lacked the statutory authority to promulgate it, then the government's interest in enforcing the order as to all aliens would also be nil. The government cannot act unlawfully, even if other parties lack standing to challenge the government's action. The Supreme Court's per curiam decision, which allows the order to be enforced against some aliens, does not support either conclusion.

***

I don't pretend that the Supreme Court's carefully drafted opinion was designed to opine on the merits of the case. Yet the balancing of the equities here is in tension with the core of the rulings

from the 4th and 9th Circuits, and with *Mandel* itself. And, in light of what I've dubbed the Kennedy rule, were the court to rule on the merits of this case after oral argument, a reversal would be more likely than not.

*Josh Blackman is a constitutional law professor at the South Texas College of Law Houston, an adjunct scholar at the Cato Institute, and the author of "Unraveled: Obamacare, Religious Liberty, and Executive Power."*