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## The Fourth Circuit Travel Ban Argument: Framing the Challengers' Case for the Supreme Court

By Peter Margulies    Tuesday, December 12, 2017, 1:00 PM

The substance and tone of the Dec. 8 Fourth Circuit en banc argument in *International Refugee Assistance Project (IRAP) v. Trump* differed substantially from the Dec. 6 Ninth Circuit argument in Hawaii's challenge to the travel ban (EO-3). The Ninth Circuit panel in *Hawaii v. Trump* assessed the government's un-cabined claim of authority under 8 U.S.C. § 1182(f) against what Hawaii's lawyer, Neal Katyal, called the "finely reticulated" scheme of the Immigration and Nationality Act (INA). In contrast, the *IRAP* argument—by the ACLU's Cecilia Wang—acknowledged the INA argument against EO-3 but stressed the more difficult establishment clause claim. If the Hawaii and *IRAP* cases end up consolidated in the Supreme Court, EO-3's challengers will have to pivot away from the establishment clause and instead emphasize EO-3's conflict with the INA's anti-discrimination provision, 8 U.S.C. § 1152(a)(1)(A), and with the statute's overall plan, structure and purpose.

The government, represented in the Fourth Circuit by Deputy Assistant Attorney General Hashim Mooppan, again argued for an un-cabined reading of § 1182(f), which authorizes the president to limit the entry of foreign nationals "detrimental to the interests of the United States." Mooppan sought to cloak this reading in neutral terms, describing EO-3 as the result of a multi-agency process. However, Mooppan countenanced only frail checks on executive authority. Pushed by Judge Barbara Milano Keenan on whether the government's reading had a limiting principle, Mooppan offered two ethereal examples. First, the president can't announce, "I don't like immigrants," and then bar entry of *all* immigrants to the United States. Short of that absolute ban—and a second hypothetical ban on immigrant men that Mooppan conceded would trigger constitutional concerns—Mooppan rejected any limits on executive power.

The sweeping authority claimed by the government would empower the president to unilaterally reimpose the national origin quotas that Congress had decisively rejected in 1965. As I discussed in this post, Congress enacted the INA's anti-discrimination provision to preclude any attempt, including one resembling EO-3's indefinite bar on entry of immigrants, to restore the quota system through executive fiat. To shield the government from this criticism, Mooppan sought to, discount § 1152(a)(1)(A) as a mere technical measure barring discrimination in the physical issuance of a hard-copy immigrant visa, but not discrimination in the *entry* of visa-holders into the United States.

The government's marginalization of the INA's antidiscrimination mandate violates the "most basic" canon of statutory interpretation, which counsels against interpreting statutory language as superfluous (as was demonstrated in the 2009 case *Corley v. United States*, in which the court observed that a statute "should be construed so that ... no part will be inoperative or superfluous, void or insignificant"). Suppose a president could avoid the anti-discrimination mandate merely by styling indefinite restrictions on immigration as limits on entry. The mandate would dwindle into insignificance. The neutering of a statutory provision that Congress labored to pass in 1965 would clash with the "common sense" reading of statutes that the Supreme Court has repeatedly urged, as in *FDA v. Brown & Williamson*.

Moreover, § 1182(f)—the "entry" provision relied on by the government—actually has a far more tailored pedigree than the government acknowledged. The immigration scholars' amicus brief that Alan Schoenfeld and I filed in the Fourth Circuit and Ninth Circuit explains that in 1941, Congress enacted a precursor to § 1182(f) at President Franklin D. Roosevelt's request that authorized the president to exclude foreign nationals "prejudicial to the interests of the United States." Prior to the 1941 statute's passage, the conservative Republican Robert Taft of Ohio cautioned against the "extreme" power that the Roosevelt administration sought. Responding to Taft's warning, Roosevelt assured Congress that the proposed statute only authorized denial of entry to spies or other agents of hostile governments (amicus brief, pp. 21-23). Regulations implementing the statute observed these limits.

Section 1182(f), which Congress enacted in 1952, made this authority available even on those rare occasions when the world was entirely at peace. However, nothing in the new statute suggested that Congress wished to depart from the tailored reading of the 1941 statute and authorize the sweeping authority that the Trump administration has now claimed. Reinforcing this view, in 1978 Congress expressly made the 1941 statute applicable even when there was no state of war between two or more states (*see* current 8 U.S.C. § 1185(a)(1)). However, the 1978 legislation actually *constrained* executive authority in important ways, notably by barring the president from imposing categorical restrictions on citizens' travel abroad. Indeed, the Senate Foreign Relations Committee explained this curbing of executive discretion by noting the absence of any "sound reason ... for the re-establishment of a U.S. passport policy which identifies certain countries as being politically or ideologically taboo."

EO-3 seeks to return to the categorical restrictions that Congress has repeatedly condemned. That makes it an example of what the Supreme Court, in *Whitman v. American Trucking Association*, called "elephants in mouseholes"—sweeping claims of authority that the executive branch tries to shoehorn into a deliberately narrow statutory space.

While the government has also argued that the president has separate authority to exclude foreign nationals under Article II of the Constitution, its authority for that argument is suspect. The government relies on *United States ex rel. Knauff v. Shaughnessy*, in which the Supreme Court denied a habeas corpus petition brought by a foreign national whom the government had detained as a security risk when that person sought to enter the United States. However, the government's reliance is misplaced. In dicta, the *Knauff* court discussed executive power to exclude foreign nationals (pp. 541-42). That description was not necessary to the court's holding, which turned on the constitutionality of the predecessor to 8 U.S.C. § 1185(a)(1). In that provision, Congress delegated a limited power to the president to exclude foreign nationals; *Knauff* turned on the constitutionality of the statute. It did not address the legality of unilateral executive action, which in *Knauff* was limited to exclusion of one foreign national, not the tens of thousands affected by EO-3.

The Fourth Circuit judges seemed less interested than their Ninth Circuit counterparts in drilling down to the statutory details. In addition, longstanding organizational opposition to executive restrictions on entry blunted IRAP's efforts to challenge the government's statutory stance. Consider EO-3's consistency with past practice, including President Carter's suspension of visas during the Iranian hostage crisis, President Reagan's suspension of visas to Cuba to remediate the problems caused by the Mariel Boatlift, and Reagan's interdiction of foreign nationals without visas on the high seas (subsequently upheld by the Supreme Court in *Haitian Centers Council v. Sale*). Each of these actions was far more tethered than EO-3 to exigent foreign policy contexts, including responding to flagrant violations of international law or preventing mass migration by inadmissible foreign nationals. However, Wang argued that the actions not reviewed by the courts were illegal. While this view has some support, in the challenge to EO-3, such arguments reinforce the government's contention that past practice and EO-3 are on all fours.

However, past practice also creates problems for the government, which DOJ lawyer Mooppan tried unsuccessfully to finesse at the Fourth Circuit. For the government, past practice in this case is an interpretive tool that only the government can use. Mooppan invoked past practice to sanction EO-3 but asserted that the INA provided no basis for *distinguishing* EO-3 from the actions of past presidents such as Carter and Reagan. On this view, history is relevant only if it supports EO-3. However, Mooppan asserted that distinguishing EO-3 by highlighting the exigent circumstances in the Iranian hostage crisis or the mass migrations faced by President Reagan inserted a "made-up emergency exception" into the INA.

The Supreme Court's treatment of past practice has resisted such arbitrary limits, particularly when past practice sheds light on the relationship between the president and Congress. In *Dames & Moore v. Regan*, Chief Justice William Rehnquist acknowledged that courts should consider the character and duration of past executive branch practice when assessing the legality of a new presidential initiative. The court in *Dames & Moore* found that the longstanding practice of presidential claims settlement in foreign affairs supported President Carter's settlement of claims with Iran as part of the deal resolving the hostage crisis. However, the court subsequently found in *Medellin v. Texas* that President George W. Bush's attempt to force Texas to comply with decisions of the International Court of Justice regarding criminal procedure did not fit under the claims settlement rubric.

As cases like *Dames & Moore* and *Medellin* demonstrate, the turn to past practice inevitably requires the courts to address the fit between history and the present action. Analyzing that fit requires common sense criteria, including the exigency factor raised by EO-3's challengers. The government's real complaint isn't with the criteria for assessing the lessons of history, but with the particular criteria (suggested by the challengers) exposing EO-3's departure from past practice.

An argument exploring the INA and past practice in-depth would have aided the Fourth Circuit's deliberations; unfortunately, both *IRAP* and the Fourth Circuit elevated the establishment clause argument at the statutory claim's expense. This was a dubious choice. As Josh Blackman has demonstrated the establishment clause is a poor fit for complex issues of foreign policy. At the Fourth Circuit, the challengers may well persuade a majority of the judges, with only Judges Shedd, Agee, and Niemeyer vigorously dissenting. However, the stage will shift at the next level, if the Supreme Court grants *certiorari*. While it is premature to assert that the court's recent stay allowing EO-3 to go into effect telegraphed its view of the merits, challengers of EO-3 will almost certainly need either Chief Justice John Roberts or Justice Anthony Kennedy. Neither seems likely to embrace the establishment clause claim.

Reinforcing the problems with this part of the challenge, the Fourth Circuit spent several minutes grilling Mooppan about a classified report that the government had prepared regarding countries listed or considered for listing in EO-3. But the challenge to EO-3 will fail if it devolves into a dispute about the courts' access to classified information; that factor always bolsters the government's case for deference. Winning in court requires framing an argument effectively. The argument that EO-3 doesn't fit the INA—a common sense argument—may find an audience at the Supreme Court. However, that argument requires framing EO-3 as a departure from past practice. Stressing the establishment clause crowds out the nuance that the statutory claim requires. It follows that challengers should resist the siren song of the establishment clause and focus on the statutory claim.

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