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Peter Margulies

Roger Williams University School of Law, pmargulies@rwu.edu

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The Revised Refugee Executive Order in the Courts: Detour or Speed-Bump?

By Peter Margulies Thursday, March 16, 2017, 7:43 AM

Wednesday was an active day in the courts for President Trump's Refugee Executive Order (EO). A U.S. district court in Hawaii issued a Temporary Restraining Order (TRO) blocking the revised EO issued less than two weeks ago. In addition, the Ninth Circuit, with five judges dissenting, declined to order an en banc rehearing on a Seattle district court's TRO against the *original* EO. Judge Jay Bybee's dissent (joined by judges Kozinski, Callahan, Bea, and Ikuta) comes closest to the deferential note that I believe the Supreme Court will ultimately strike when and if it considers the revised EO's legality. However, because of the substantial tailoring in the revised EO, the Supreme Court could uphold EO 2.0 without embracing the broad deference urged in Judge Bybee's dissent.

First, some background on the revised EO (see Josh Blackman's posts [here](#), [here](#), and [here](#)): The revised EO exempts lawful permanent residents (LPRs), current visa-holders (VHs), and noncitizens with approved refugee status—all of whom had reliance interests disrupted by the original EO. The revised EO only affects foreign nationals abroad who are seeking visas *ab initio*. The Supreme Court has *never* held that the Constitution protects noncitizens in this context. The revised EO excludes Iraqis, makes Syrian refugees subject to a 120-day bar (not the indefinite halt decreed by the initial EO), and deletes any mention of a priority for religious minorities.

In the Hawaii case, Judge Derrick K. Watson found the revised EO's careful tailoring insufficient to withstand the plaintiffs' Establishment Clause challenge. Unfortunately, Judge Watson paid no heed to the ill fit between the varied factors that drive immigration decisions and the Establishment Clause case law's search for an intent to harm or help religion.

That heedlessness swims against the tide of Supreme Court precedent. In *Kerry v. Din* (2015), Justice Kennedy's controlling opinion found that even the due process rights of U.S. citizen sponsors of visa applicants had to bow to the "facially legitimate and bona fide" interest of the U.S. government in countering terrorism. In endorsing this flexible standard, Justice Kennedy cited *Kleindienst v. Mandel* (1972), in which the Court first articulated the "facially legitimate and bona fide" test. *Mandel*, which Judge Bybee cited repeatedly in his Ninth Circuit dissent, rejected a First Amendment challenge to the denial of a visa to a Marxist scholar whom U.S. citizens wished to hear speak in person. *Mandel's* relaxed standard suggests that Judge Watson's opinion will be short-lived.

Rejecting *Mandel's* teaching, Judge Watson second-guessed the security emphasis of the revised EO. The revised EO cites the armed conflicts that have engulfed 5 of the 6 countries (Libya, Somalia, Sudan, Syria, and Yemen) subject to the country-wide pause in admissions. Because of those armed conflicts, the EO concludes, a review of U.S. visa procedures is appropriate. According to the revised EO, review is appropriate for the 6th country on the list—Iran—because that country has been a longtime sponsor of terrorism. In my opinion, these facts do not present a persuasive *policy* case for the EO's pause in admissions, for reasons that former senior Department of Homeland Security lawyer David Martin states [here](#). However, a given policy need not command a unanimous policy consensus to be "facially legitimate and bona fide." Indeed, the whole point of the "facially legitimate and bona fide" standard, as Justice Kennedy reiterated in *Kerry v. Din*, is to ensure that courts stay out of the policy debates that are the rightful province of the political branches.

The need for a measure of judicial restraint on immigration pertains to Establishment Clause challenges, as well as those like *Mandel's* based on free speech. Ferreting out discriminatory intent is relatively straightforward in traditional Establishment Clause cases such as *Larson v. Valente* (1982), in which the Court struck down a religious fundraising restriction obviously designed to placate state legislators who, in the words of one such lawmaker, were "hot to regulate the Moonies." In contrast, immigration rules can entail a plethora of secular, neutral justifications, including national security, trade, and foreign affairs. In the face of such neutral justifications, judicial efforts to find an intent to hurt or help a given religion are an ill-starred intrusion into the political branches' prerogatives.

In the Hawaii case, Judge Watson sought to ground his search for forbidden intent in then candidate Trump's repeated calls for a Muslim ban. However, the campaign speeches of any politician are a singularly weak reed for supporting the weight of Establishment Clause jurisprudence. Recall that Franklin D. Roosevelt, the patron saint of deficit spending, ran as a budget *hawk*, decrying then President Herbert Hoover's fiscal extravagance. (See Julian Zelizer's nuanced account, *The Forgotten Legacy of the New Deal* [abstract [here](#)]). Political candidates take a multitude of different and sometimes contradictory positions, depending on the audience they're addressing, the exigencies of the campaign, or sometimes, it seems, even the time of day. Citing evanescent campaign speeches as definitive proof of *governmental* intentions is a descent down a very deep rabbit-hole. The "facially legitimate and bona fide" test thankfully blocks that dangerous slide into incoherence.

However, the antidote to Judge Watson's finding the revised EO's tailoring insufficient is not Judge Bybee's view that no tailoring of the original EO was even *necessary*. Whether based on due process or on the Immigration and Nationality Act's own structure and purpose, the original EO's impact on LPRs and VHs was arbitrary and unlawful. Because the Trump administration wisely trimmed back the original EO,

when (as it likely will) litigation surrounding the EO reaches the Supreme Court, the Court will not have to address the excesses of that order or the chaos it caused. The Court can simply opt to respect the tailoring that the revised EO features. Unlike Judge Watson's holding, that result will not hamstring future presidents. Unlike Judge Bybee's untrammelled deference, such a result will also not license presidential unilateralism. As a balancing of competing constitutional values, that's not a bad place to stand.

Topics: Refugees, Immigration

Peter Margulies is a professor at Roger Williams University School of Law, where he teaches Immigration Law, National Security Law and Professional Responsibility. He is the author of *Law's Detour: Justice Displaced in the Bush Administration* (New York: NYU Press, 2010).