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Enjoining the Revised Refugee EO: The Hawaii District Court "Waters Down" the Separation of Powers

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

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On Wednesday, Hawaii U.S. District Judge Derrick K. Watson converted his March 15, 2017 temporary restraining order enjoining two sections of President Trump's Revised Refugee Executive Order into a preliminary injunction that halted President Trump's Revised Refugee Executive Order (EO) in its entirety. The Hawaii decision applies to the EO's worldwide pause in refugee admissions, its pause in admissions from six majority-Muslim countries, and its mandate that the executive branch review all visa- and refugee-processing procedures. The Hawaii district court decision exceeds the bounds of Establishment Clause case law by cherry-picking President Trump's recent remarks about the revised EO. Moreover, Judge Watson's overbroad order also halts future executive branch *deliberations* on procedures for refugee and visa-processing, thus clashing with both Congress's delegation of power and the President's Article II authority.

The Hawaii court's cherry-picking of President Trump's comments reinforces the folly of judicial over-reliance on the public utterances of both candidates and presidents. (*See* my earlier post here on Virginia decision U.S. District Judge Anthony Trenga's refusal to venture down this deep rabbit-hole). One problem with such undue reliance is the variability of such political pronouncements: in the volatile atmosphere of political discourse, participants frequently make inconsistent statements, even within the same speech (as my earlier post showed regarding a 1940 national security address by Franklin Roosevelt). In focusing on President Trump's statement earlier this month that the revised EO was a "watered-down version" of the original EO, the Hawaii court illustrated another problem with cherry-picking public officials' remarks: the likelihood that the court will misread those remarks based on the judge's own predilections.

Judge Watson interprets President Trump's use of the term "watered-down" as demonstrating that the revised EO is not materially different from the original EO, at least regarding the anti-Muslim bias that the court viewed as infecting the first order. On this view, a "watered-down version" is the same in all relevant respects and different only in minor details. This is the theory propounded by the state of Hawaii, despite the revised EO's express exemption of Iraqi visa applicants, U.S. lawful permanent residents and current visa-holders and its specific waiver provisions for family reunification, education, and business and professional interests. According to Judge Watson, President Trump's description of the revised EO as a "watered-down version" of the original EO proves Hawaii's theory of the case. There's only one problem with the Hawaii court's assertion: the Supreme Court has *repeatedly* used the term "watered-down" in the opposite sense, as demonstrating a material alteration.

The leading Supreme Court case is a very important decision, indeed: *Malloy v. Hogan* (1964) held that the Fifth Amendment's safeguard against compelled self-incrimination applied to the states. Justice Brennan's opinion for the Court roundly repudiated the state's assertion that the Fourteenth Amendment applied Bill of Rights guarantees in a materially altered, "watered-down" form. The Court rejected this vision of an altered, "watered-down" Bill of Rights, stressing that the privilege against self-incrimination applied just as vigorously to the states as it did to the federal government. This holding paved the way for the Court's 1966 landmark decision, *Miranda v. Arizona* (1966). Earlier, Justice William O. Douglas evinced the same material-alteration understanding of the phrase "watered down" in his concurrence in the 1963 landmark case, *Gideon v. Wainwright* (1963), noting that the Sixth Amendment right-to-counsel guarantee had not been fundamentally altered as the Fourteenth Amendment imposed it on states. In *McDonald v. City of Chicago* (2010), the Court again cautioned against the dangers of material, "watered-down" incorporation, this time in the Second Amendment context.

While President Trump has wisely refrained from billing himself as a constitutional scholar, his comments on the revised EO were *precisely* contoured to the Supreme Court's construction. In criticizing the Hawaii district court's earlier halt to the revised EO, Trump stressed that it had been "tailored" to the Ninth Circuit's initial ruling denying the government's request to stay a Seattle court's temporary restraining order (TRO) of the original EO. Lawyers and courts view "tailoring" as connoting *material* changes, not mere tinkering at the edges. Trump's use of the term "watered-down version" should be read in that same light, as the Supreme Court in *Malloy* and its progeny has consistently understood the phrase. *Material* changes place the President on the right side of Establishment Clause jurisprudence, which is skeptical only about minor revisions at the margin that leave discriminatory intent largely unchanged, not about substantial alterations. To be sure, President Trump shouldn't take greater liberties with language than the rest of us do. However, a lone district court judge should also not construe President Trump's language in a fashion that flouts the Supreme Court's long practice.

Along with misreading President Trump's language, the Hawaii court also imposed unprecedented restrictions on the executive branch's ability to internally deliberate about immigration policy— restrictions that were not even sought by the plaintiffs! Judge Watson enjoined portions of Sections 2 and 6 of the revised EO, which require executive branch officials to suggest improvements in visa- and refugee-processing procedures and seek necessary changes to the vetting done by foreign governments. Such internal deliberation, whether or not it leads to sound policy, is squarely contemplated by 8 U.S.C. § 1103(a)(3), which empowers the Secretary of Homeland Security and other officials to issue "regulations" and "instructions" and "perform such other acts" as needed to implement the Immigration and Nationality

Act (INA). This subsection does not preclude judicial review of the rules, procedures, and policies that federal officials promulgate, or suggest that such measures warrant absolute deference. However, it clearly tasks federal officials with both the authority and the responsibility to *consider* whether additional measures are necessary.

Furthermore, some measure of internal executive branch deliberation is protected by Article II of the Constitution itself. Some consultation with foreign governments is also subject to Article II protection, as the Supreme Court recognized in *Zivotofsky v. Kerry* (2015). The Hawaii court's overbroad injunction blinks at these building blocks in the separation of powers.

The Hawaii court's injunction is an illustration of the perils of overly intrusive judicial review in the complex realm of immigration. There is definitely room for the courts in this area, when the government disregards basic rights and makes arbitrary decisions that clash with Congress's plan. To the extent that the original EO embodied these flaws, judicial review played a vital remedial role. However, unduly intrusive judicial review runs the risk of enshrining the judge's own personal predilections as surrogates for legislative intent and the Framer's vision. Those dangers exist in overly intrusive judicial review of the actions of *any* president, including Donald Trump.

As a law professor, I'm entirely free to analyze the substantial policy concerns with both the original *and* revised EOs. Judges don't have that luxury. They look to policy only when it sheds light on law. The Hawaii court lost sight of that essential guidance.

Topics: Donald Trump, Executive Power

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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).