North Carolina Central Law Review

Volume 40 | Number 1 Article 6

2017

A Wolf in Sheep's Clothing: Executive Order No. 13,780 as a Disguise For a Muslim Ban: The Implications of International Refugee Assistance Project V. Trump

Latoya Tyson

A WOLF IN SHEEP'S CLOTHING: EXECUTIVE ORDER NO. 13,780 AS A DISGUISE FOR A MUSLIM BAN: THE IMPLICATIONS OF *INTERNATIONAL REFUGEE ASSISTANCE PROJECT V. TRUMP*

LATOYA TYSON*

I. INTRODUCTION

A wolf dressed in a sheep's clothing is still a wolf. Should the United States' Court of Appeals ignore watching the proverbial wolf put on the sheep's wool right before their eyes, and then believe the wolf when he attempts to persuade the courts that he is not a wolf? I conclude that the court should not turn a blind eye. The proverbial sheep, President Trump's Executive Order No. 12780 ("EO-2"), unconstitutionally banned thousands of people from entering the United States based on the Islamic religion; yet, he disguised the order as an illusory national security measure. EO-2 placed a ninety-day suspension of entry of nationals from six, predominately Muslim countries.[1] National Immigration Policy has been a topic of great debate recently, and America is divided on this issue.

Recently, the United States Court of Appeals for the Fourth Circuit decided *International Refugee Assistance Project v. Trump*.[2] In *International Refugee Assistance Project*, the Court upheld a federal district court's preliminary injunction to enjoin the United States' government from the temporary suspension of entry for nationals from six predominately Muslim countries.[3] The Court concluded the *Lemon* test was appropriate for an Establishment Clause violation.[4] Also, plaintiffs were likely to succeed on the merits of their Establishment Clause claim as required for issuance for a preliminary injunction.[5] The Court also found that a nationwide preliminary injunction

*J.D. Candidate, North Carolina Central University, 2018, B.A. University of North Carolina at Greensboro, History, 2009. I dedicate this case note to my parents, who taught me the importance of hard work, dedication, and to always put God first in everything that I do. To my partner, Nekeyeta Newkirk, thank you for your unconditional love and always supporting my dreams.

1.Executive Order No. 13,780, § 2(c), 82 Fed. Reg. 13,209 (Mar. 6, 2017).

2. Int'l Refugee Assistance Project v. Trump, 857 F.3d 544 (4th Cir. 2017).

3. *Id.* at 572.

4. *Id.* at 592.

5. *Id.* at 601

was warranted.[6] However, the District Court abused its discretion by including the President in the injunction.[7]

The *International Refugee Assistance Project* decision raises the issue of whether the Constitution binds the American people and the rulers of the United States without exception of the President's actions.[8] This decision also contains an in-depth analysis of the Establishment Clause of the First Amendment of the United States Constitution.[9] This case note will focus on the legal and policy implications of the *International Refugee Assistance Project* decision and its long-term consequences. This note will begin with a background discussion of the case and the status of the law before the *International Refugee Assistance Project* decision. Finally, the note will examine the Court's decision to consider President Trump's campaign statements in its determination of whether EO-2 contained a religious motivation to ban Muslims from entry into the United States.

II. THE CASE

On January 27, 2017, President Trump signed Executive Order 13769[10], "Protecting the Nation From Foreign Terrorist Entry Into the United States" (EO-1").[11] The President invoked his authority to issue the Executive Order under 8 U.S.C. § 1182(f).[12] EO-1 immediately suspended the entry of immigrants and nonimmigrants from seven predominately Muslim countries for ninety days.[13] The stated purpose of the ninety-day suspension was to determine the information needed from any country to access whether an individual seeking entry is a threat to national security.[14] Additionally, the EO-1 reduced the number of refugees admitted in 2017 by more than half, as well as barred Syrian refugees from obtaining entry into the United States indefinitely.[15] Both, individuals and organizations challenged EO-1 in federal court.[16] A judge in the Western District of Washington granted a Temporary

6. *Id.* at 605.
7. *Id.*
8. *Id.* at 572.
9. *Id.*
10. Executive Order No. 13,769, 82 Fed. Reg. 8977 (Jan. 27, 2017).
11. *Id.*
12. 8 U.S.C. § 1182(f) (2012) states in pertinent part, "Whenever the President finds that the entry of any aliens or of any class of aliens into the United States would be detrimental to the interests of the United States, he may by proclamation, and for such period as he shall deem necessary, suspend the entry of all aliens or any class of aliens as immigrants or nonimmigrants, or impose on the entry of aliens any restrictions he may deem to be appropriate."
13. *Int'l Refugee Assistance Project,* 857 F.3d at 572. The designated countries included in the order were: Iran, Iraq, Libya, Somalia, Sudan, Syria, and Yemen.
14. *Id.*
15. *Id.* at 572-73.
16. *Id.* at 573.

Restraining Order ("TRO") enjoining nationwide enforcement of Section 3(c).[17] The Ninth Circuit denied the Government's request to stay the TRO pending appeal.[18] The Ninth Circuit declined to rewrite EO-1 and noted that political branches were better equipped for that task.[19] To avoid further litigation of EO-1, President Trump enacted a second Executive Order, EO-2, which revoked and replaced EO-1.[20]

The President invoked his authority to restrict aliens from entry under 8 U.S.C. § 1182(f) and enacted the Second Executive Order, EO-2, which "reinstated the ninety-day suspensions for six of the seven countries, eliminating Iraq, from the initial list."[21] The enactment of EO-2 prompted six individual plaintiffs and two organizational plaintiffs to seek a preliminary injunction to enjoin the enforcement of EO-2 alleging that EO-2 violated the Establishment Clause of the First Amendment of the United States Constitution.[22] The district court applied a hybrid analysis consisting of the *Mandel* and *Lemon tests*, in which the court considered campaign statements and post-inaugural statements of President Trump to determine whether EO-2's contained religious animus.[23]

Some of the campaign statements in the record included President Trump's Statement on Preventing Muslim Immigration on his campaign website, "in which he 'call[ed] for a total and complete shutdown of Muslims entering the United States until our representatives can figure out what is going on.'"[24] "In a March 9, 2016 interview, Trump stated that 'Islam hates us,' [ ] and that '[w]e can't allow people coming into this country who have this hatred[.]'"[25] Some of the post-inaugural statements on the record included President Trump's statement in response to the Ninth Circuit's decision not to stay the enforcement of the nationwide injunction.[26] The President stated, "I keep my campaign promises, and our citizens will be very happy when they see the result."[27] His campaign promises included a statement preventing Muslim immigration listed on his campaign website.[28] A few days after the Ninth Circuit decision, President Trump, "in a speech at a rally in Nashville, Tennessee, described EO-2 as 'a watered-down version of the first order.'"[29]

17. *Id.*
18. *Id.*
19. *Id.*
20. *Id.*
21. *Id.*
22. *Id.* at 577-78.
23. *Id.* at 588-93.
24. *Id.* at 594.
25. *Id.*
26. *Id.* at 577.
27. *Id.*
28. *Id.* at 575.
29. *Id.* at 577.

The government argued that the campaign statements were not probative of proving a discriminatory purpose of EO-2. However, the Court cited *Washington v. Seattle Sch. Dist. No. 1*[30] and *Village of Arlington Heights*[31] as authority to consider campaign statements. The district court ruled for the plaintiffs and determined they would likely satisfy all four requirements as to their Establishment Clause claim and issued a nationwide injunction to enjoin enforcement of Section 2(c) of EO-2.[32] The district court reasoned that notwithstanding the few provisional changes in EO-2, the history of President Trump's campaign and post-inaugural statements provide a convincing case that EO-2 contained a religious motivation to ban Muslims.[33] The Court noted, "We cannot shut our eyes to such evidence when it stares us in the face, for 'there's none so blind as they that won't see.'"[34] The government appealed to the United States Court of Appeals for the Fourth Circuit.[35] The Court upheld the nationwide injunction but lifted the injunction against the President.[36]

III. BACKGROUND

Prior to *International Refugee Assistance Project*, *Kleindienst v. Mandel* provided the standard test of "facially legitimate and bona fide" for analyzing government actions involving national security.[37] In *International Refugee Assistance Project*, the Court addressed the issue of whether Section 2(c) of EO-2's purpose was to improve national security, or religiously motivated in violation of the Establishment Clause of the United States' Constitution.[38]

Additionally, the Court stated that no court since *Kerry v. Din* had encountered, "a scenario where, as here, plaintiffs have plausibly alleged with particularity that an immigration action was taken in bad faith."[39] Therefore, in addressing this issue of first impression, we, "have minimal guidance on

30. *Id.* at 599. Washington v. Seattle *Sch. Dist. No. 1*, 458 U.S. 457, 463 (1982) (considering facially neutral campaign statements related to bussing in an equal protection challenge).

31. *Int'l Refugee Assistance Project,* 857 F.3d at 599. Village of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 266–68, 97 S.Ct. 555, 50 L.Ed.2d 450 (1977) (explaining that in the equal protection context, "[w]hen there is [ ] proof that a discriminatory purpose has been a motivating factor in the decision," a court may consider "contemporary statements by members of the decision making body").

32. *Id.* At 579.

33. *Id.* at 595.

34. *Id.* at 599.

35. *Id.* at 579.

36. *Id.* at 605.

37. Kleindienst v. Mandel, 408 U.S. 753, 770 (1972).

38. Int'l Refugee Assistance Project v. Trump, 857 F.3d 544, 572 (4th Cir. 2017).

39. *Id.* at 592.

what 'look[ing] behind' a challenged immigration action entails."[40] In *Din*, Plaintiff petitioned to have her husband, a resident of Afghanistan, approved for a visa to enter the United States.[41] Plaintiff's husband's visa application was denied pursuant to 8 U.S.C. § 1182(a)(3)(B), "which excludes aliens who have engaged in '[t]errorist activities,' however, the consular officer provided no further information."[42] The United States Supreme Court vacated the lower court's decision; the Court applied the test from *Mandel* noting, "[*Mandel's]* reasoning has particular force in the area of national security[.]"[43] The Court stated that the consular officers' citation to 8 U.S.C. § 1182(a)(3)(B), satisfies *Mandel's* facially legitimate and bona fide standard because the decision to deny entry based on an unmet statutory requirement is facially legitimate.[44] Moreover, the Court concluded the government's denial was bona fide because, by Plaintiff's admission, her husband worked for the Taliban government, which 8 U.S.C. § 1182(a)(3)(B), describes as terrorist activities.[45]

The government asserted in *International Refugee Assistance Project* that similar to *Din*, the present case dealt with national security and therefore, should apply the *Mandel* framework to analyze the four corners of EO-2, a facially neutral Executive Order.[46] In *Mandel*, American university professors invited Mandel, a Belgian citizen and revolutionary Marxist, to speak at several conferences in the United States.[47] Mandel's application for a nonimmigrant visa was denied under an INA provision[48] that, barred the entry of aliens who, "advocate[ ] the economic, governmental, and international doctrines of world communism."[49] The Attorney General may waive a bar under § 1182(a)(28)(D) and grant an exception, but declined to do because Mandel had previously violated the terms of his visas during prior visits.[50]

The American professors sued the government alleging that Mandel's visa denial violated their First Amendment right to engage in a free and open academic exchange.[51] The Supreme Court stated that Congress has, "plenary power to make rules for the admission of aliens and to exclude those who

40. *Id.*
41. Kerry v. Din, 135 S. Ct. 2128, 2132 (2015).
42. *Id.*
43. *Id.* At 2140.
44. *Id.*
45. *Id.*
46. Int'l Refugee Assistance Project v. Trump, 857 F.3d 544, 592 (4th Cir. 2017).
47. Kleindienst v. Mandel, 408 U.S. 753, 756 (1972).
48. *Id.*
49. *Id.*
50. *Id.* at 759.
51. *Id.* at 760.

possess those characteristics which Congress has forbidden."[52] The Court, "found that the longstanding principle of deference to the political branches in the immigration context limited its review of plaintiffs' challenge."[53] The Court applied a two-prong test and held that, "when the Executive exercises this power [to exclude an alien] negatively on the basis of a facially legitimate and bona fide reason, the courts will neither look behind the exercise of that discretion, nor test it by balancing its justification against the [plaintiffs'] First Amendment interests."[54] The Court concluded that the Attorney General's reason for denying Mandel's visa request satisfied the *Mandel* Test.[55]

The government asserts that because EO-2 states that it is motivated by national security interests, it therefore satisfies the *Mandel* 's test.[56] However, "this only responds *Mandel*'s 'facially legitimate' requirement."[57] The government's approach abandons *Mandel*'s "bona fide" test altogether.[58] Plaintiffs assert, in the Establishment Clause context, the Court should apply the test in *Lemon v. Kurtzman when* reviewing facially neutral government actions.[59] In *Lemon v. Kurtzman*, the United States' Supreme Court analyzed two state statutes that provided monetary reimbursements to church-related elementary and secondary schools.[60] Plaintiffs alleged that both statutes violated the Establishment Clause of the First Amendment of the United States Constitution.[61]

The Court stated in order to pass constitutional muster under the *Lemon* test, the Government must show that the challenged action (1) has a "secular legislative purpose;" (2) that "its principal or primary effect neither advances nor inhibits religion;" and (3) that it does not foster "an excessive government entanglement with religion."[62] The Court made clear that to prevail on an Establishment Clause claim, the government must satisfy all three prongs.[63] In the Establishment Clause context, "purpose matters."[64] Therefore, when a court considers whether a challenged government action's primary purpose is secular, the government must show that the challenged action has a secular

52. *Id.* at 766 (quoting *Boutilier v. INS*, 387 U.S. 118, 123 (1967)).
53. Int'l Refugee Assistance Project v. Trump, 857 F.3d 544, 589 (4th Cir. 2017).
54. *Id.* at 770.
55. *Id.*
56. *Int'l Refugee Assistance Project,* 857 F. 3d at 592.
57. *Id.*
58. *Id.*
59. *Id.*
60. Lemon v. Kurtzman, 403 U.S. 602, 606 (1970).
61. *Id.*
62. *Id.* at 612–13.
63. *Id.*
64. McCreary Cty., Ky. v. Am. Civil Liberties Union of Ky, 545 U.S. 844, 866 n.14 (2005) (holding whether a statement continues to taint a government action is a fact-specific inquiry for the court evaluating the statement).

purpose that is "genuine, not a sham, and not merely secondary to a religious objective."[65] The Court agreed with Plaintiffs and determined that both statutes violated the Establishment Clause.[66] The Court reasoned that providing direct aid for textbooks, salaries, and instructional material to teachers in private, religious schools violated the Establishment Clause because of the excessive government entanglement.[67] The most salient tool from *Lemon* is the three prong test that is the most used constitutional tool to evaluate Establishment Clause challenges.[68]

Lastly, in the context of this case, there is a nexus between *Mandel* 's "bona fide" prong and the constitutional inquiry established in *Lemon*. Both tests ask courts to evaluate the government's purpose for acting. However, when each of these tests was applied exclusively, they produced different results. The United States Court of Appeals for the Fourth Circuit opted for a middle ground. The Court agreed with the government that *Mandel* was the "starting point" for its analysis, but it also found the application of the *Lemon* test was a necessary tool.

IV. ANALYSIS

The Court in *International Refugee Assistance Project* correctly decided to see the proverbial wolf, EO-2, for its true purpose of banning Muslims from entering the United States. The Court refused to turn a blind eye to the abundant evidence of religious animus, notwithstanding the facial neutrality of EO-2. "The government contends that *Mandel* sets forth the appropriate test because it recognizes the limited scope of judicial review of the executive action in the immigration context."[69]

The Court stated that *Mandel* is the starting point for the analysis, but expanded their analysis and applied *Lemon* as well.[70] The entire premise of the review under *Lemon* is that even facially neutral government actions can violate the Establishment Clause.[71] Under Mandel, the first prong of facial legitimacy was satisfied; however, the second prong, "bona fide" or good faith, was not.[72] In *Din*, Justice Kennedy explained, when a plaintiff makes "an affirmative showing of bad faith" that is "plausibly alleged with sufficient

65. *Id.* at 864.
66. *Lemon*, 403 U.S. at 661.
67. *Id.* at 615-22.
68. *Int'l Refugee Assistance Project*, 857 F. 3d at 592.
69. *Id.* at 588.
70. *Id.*
71. *Id.*
72. *Id.* at 591-92.

particularity", courts may inquire into the purpose of the challenged action.[73] The Court correctly applied *Lemon* to inquire into the purpose of EO-2.

At issue in the current case is the first prong of *Lemon*, that states the challenged action must have a secular purpose. The Court's decision to include President Trump's campaign and post-inauguration in the EO-2, Establishment Clause inquiry was proper because the statements were relevant, closely related in time, attributable President Trump, and easily connected to proving EO-2's purpose. The *McCreary* court stated that reviewing a government's challenged actions for the primary purpose attempts to discern the official objective from a readily discoverable fact.[74] Here, the readily discovered facts before the court are the numerous statements made by President Trump that drip with religious intolerance and discrimination. For instance, President Trump's campaign statements, including his Statement on Preventing Muslim Immigration on his campaign website, in which he "call[ed] for a total and complete shutdown of Muslims entering the United States" are all prime examples of readily discoverable facts. [75]

The Court continued to analyze each public statement made both pre-inauguration and post-inauguration and concluded that all of the statements together provide direct evidence of the motivation of both EO-1 and EO-2.[76] President Trump's statements were "readily discoverable facts," that could be used to determine the government's "primary purpose."[77] The Court did not have to conduct an additional psychoanalysis to discover the purpose because President Trump willingly explained his purpose on numerous occasions.[78] The Court correctly concluded that EO-2 cannot be read in isolation when evaluating the order for an Establishment Clause violation.

The Court's decision in *International Refugee Assistance Project* does not narrow or expand *McCreary*, nor does it have a sweeping effect on future cases. However, this case clarifies the court's analysis after an affirmative showing of bad faith. This decision stands for the proposition that if there is a substantial, specific connection between the statement and the challenged government action, then the statement may be considered on a case-by-case basis. This case sends a clear message that the United States Constitution remains the law of the land for rulers and people.[79]

---

73. *Din*, 135 S. Ct. at 2141.
74. *McCreary*, 545 U.S. at 862.
75. *Int'l Refugee Assistance Project*, 857 F. 3d at 594.
76. *Id.* at 595.
77. *Id.*
78. *Id.*
79. Id. at 572 (*see Ex parte Milligan*, 71 U.S. (4 Wall.) 2 (1866)).

V. CONCLUSION

As stated earlier, in the Establishment Clause context, purpose matters. This is a long-standing legal principle that cannot be swept aside because it is inconvenient for President Trump's political agenda. Therefore, the Court's decision, in *International Refugee Assistance Project,* was proper in considering President Trump's statements as evidence that EO-2 contained a religious motivation.