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Do Foreign Nationals Really Have Constitutional Rights?

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Additional Information
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Do foreign nationals have constitutional rights?

Last month, President Trump issued an executive order that has become known as the “travel ban.” Among other things, the ban sought to temporarily exclude from the United States foreign nationals from seven predominately Muslim countries.

Almost immediately, a number of plaintiffs sued and succeeded in obtaining “stays” preventing the ban from going into effect until the cases can be tried. Courts granted these stays because they found that the ban was likely to violate, among other things, anti-discrimination principles embedded within the First and Fifth Amendments to the United States Constitution.

Many of my constitutional law students have wondered how these rulings can be correct. They ask how foreign nationals who reside overseas can plausibly claim protection under a Constitution that gives them no right to travel to the United States. It is a very good question.

For more than a century, the Supreme Court has recognized that foreign nationals are entitled to many constitutional rights when they are present in the United States. For example, a foreign national prosecuted here for committing a serious crime is entitled to the assistance of counsel and other constitutional trial guarantees. Moreover, overseas foreign nationals enjoy constitutional protections with respect to their legal rights.

SEE CONSTITUTION D3
High court has weighed in on foreign nationals and constitutional rights

**CONSTITUTION FROM D1**

The United States is a country of migration, and its Constitution reflects a commitment to protecting the rights of its residents and those who seek asylum. The high court has weighed in on foreign nationals and constitutional rights, suggesting that the government's actions must be balanced with respect to the rights of those affected.

In the case of Verdugo-Urquidez v. United States, a 1990 Supreme Court decision that may prove quite relevant to the travel-ban cases, the Court ruled that the Fourth Amendment protects citizens of foreign countries from unreasonable searches and seizures within the territorial limits of the United States. The decision was based on the principle that the Fourth Amendment's protections are applicable to all persons within the United States, regardless of their citizenship status.

The dissent argued that, because the Fourth Amendment is a bill of rights, it protects only those persons who are part of a national community or have otherwise developed sufficient connection with this country to be considered part of that community.

A crucial reason why the plurality reached this conclusion was the absence of historical evidence suggesting that the Framers intended the Fourth Amendment to apply to government searches conducted outside the territorial limits of the United States. The dissent argued that this evidence should be excluded because the searches were conducted without a warrant, in violation of the Fourth Amendment.

The Court dismissed the dissent's argument that, because the Constitution is the source of any authority the government holds to take action abroad, constitutional limits on the exercise of that authority must also be observed.

In terms of the facts of Verdugo-Urquidez, if the Constitution sometimes authorizes United States law enforcement officials to conduct searches abroad, the Fourth Amendment's requirements must be followed in connection with those searches. The dissent would have ruled in favor of the defendant, as the lower courts had done.

In a concurring opinion, Justice Anthony Kennedy took the third approach. He rejected both the plurality's view that constitutional rights belong to a specified group of people and the dissent's view that limitations on government action within the United States necessarily translate to government action overseas. Instead he asked a context-specific question: Is it practical to require law enforcement agents to obtain a warrant for searches conducted outside the United States?

Justice Kennedy thought not: "The absence of local judges or magistrates available to issue warrants, the differing and perhaps uncertain conceptions of reasonableness and privacy that prevail abroad, and the need to cooperate with foreign officials all indicate that the Fourth Amendment's warrant requirement should not apply in Mexico as it does in this country."

He therefore joined the plurality in ruling for the government.

If the travel ban case reaches the Supreme Court, it might become yet another precedent about the nature and purpose of constitutional rights and how they apply abroad. Should foreign nationals have the right to challenge (allegedly) discriminatory government decision-making in connection with the discretionary issuance of travel visas to which they have no right? If history is any guide, the court will not speak with a single voice on this important question.

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What do Trump’s food preferences tell us about the man?

**BURNS FROM D1**

They got together at the Famous Famiglia Pizzeria in Times Square, and — in a now notorious photo op — decorously ate their pie with knives and forks.

Hilarity ensued, particularly on the part of late night comics and millions of other native (and adopted) New Yorkers. There were endless discussions of how to fold the slice to make it easier to grasp and bite. Now, when Donald Trump does eat pizza, he has a new and novel approach to it. He carefully screeches off the cheese and other toppings and eats them, leaving the naked and exposed crust to be dumped in the trash.

For generations, the eating habits of American politicians — especially presidents and those aspiring to the presidency — have been regularly scrutinized and often held up for ridicule. Barack Obama, of course, was widely seen as a fastidious eater of all healthy food, even if he did periodically sneak away with Joe Biden to indulge his passion for cheeseburgers and fries. Other than that, he stuck to healthy meals like salmon laden with veggies from Michelle's garden, and his between-meal snacks — kept in bowls in the Oval Office — included lots of vegetables and trail mix. He'd take a break on his Hawaiian vacations, when he and the family would treat themselves to traditional shave ice, flavored with syrup fruits.

Trump, though? Not so healthy, but by a long shot. Melanie may have ordered that Michelle's vegetable garden is to be preserved, but little of its bounty is likely to end up on her husband's plate. He is said to be nuts about Lay's Potato Chips and Oreo cookies, washed down with Diet Coke and followed by cherry vanilla ice cream.

The portly and exercise-averse septuagenarian is also a devotee of McDonald's, KFC and Wendy's when traveling, proclaiming often that their products are unlikely to contain contaminants. Really? And his idea of a great breakfast is bacon and "over-well" cooked eggs. For dinner, he's a steak and potato man, which is to say several helpings of potatoes, maybe a bit of meat and baked with cream and cheese, and steak cooked so thoroughly "it would rock on the plate," his long-time Mar-a-Lago butler told the New York Times.

And his premiere meal, his all-time favorite? Meatloaf, especially when made according to a family recipe. It's on the menu at the Mar-a-Lago Club as well as the White House. (Just a week ago Trump insisted that Chris Christie order it. Apparently, the New Jersey governor is still lining up for Trumpian abuse.) It is said that Trump's sister, a respected federal judge, makes it for him on his birthday.

It appears that in his food preferences, as in so much else in life, Trump yearns for those halcyon days of the 1950s and 60s. That's amazing when you consider that, in the last 50 or so years, American cooking, spurred on by James Beard, Julia Child, Alice Waters and their devoted disciples, has undergone a genuine revolution in ingredients, cooking styles and recipes. But that cornucopia of truly spectacular foodstuffs has yet to make it to Trump World.

Pineapple pizza, often dubbed Hawaiian pizza, is not from the Aloha State at all. It was invented — according the know-it-all Atlas Obscura — in a small city on Ontario, Canada, by a bored Greek immigrant back in 1962. And that's in Trump's golden age for food.

Given Donald's apparent lack of interest in pizzas, I doubt that the White House chefs will have to hang up their whisks and stow their souffle dishes and start rolling out pineapple pizzas.

But — you knew there was a "but" here — pineapples, the chosen fruit of the 1960s, is not found in the fruits, it's the first in the list of apples, pears, pomegranates and figs that are given as food gifts. How long will it be before a once-wholesome ham saddled with sweet pineapple rings and maraschino cherries shows up on the menu for an official State Dinner?

(“Monitor” columnist Kat Burns lives in Bow.)

These are the characters of town meeting season