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Do Foreign Nationals Really Have Constitutional Rights?

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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 prop-

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ety that is located within the United States. But things are far less clear when persons outside the territory of the United States invoke the Constitution to challenge governmental action with effects felt overseas.

In part, this lack of clarity reflects fundamental disagreements among Supreme Court justices about the fundamental nature and purpose of our constitutional rights. The justices have tended to fall into three basic camps with respect to this issue.

The first camp says that constitutional rights are best understood as freedoms guaranteed to a specific group of people: at most, United States citizens and persons within the territorial limits of the United States. The second camp argues that constitutional rights are better seen as limitations on American governmental power whenever and wherever it is exercised. The third camp rejects these categorical understandings in favor of a context-specific approach that yields different answers depending on the rights involved and the underlying facts.

All three approaches are on display in United States v. Verdugo-Urquidez, a 1990 Supreme Court decision that may prove quite relevant to the travel-ban cases.

In Verdugo-Urquidez, United States law enforcement agents conducted searches of Mexican properties owned by a foreign national criminal defendant who was on trial in the United States for a number of serious criminal offenses. The searches yielded evidence that the government wished to introduce at trial. The defendant argued that this evidence should be excluded because the searches were conducted without a warrant, in violation of the Fourth Amendment. The defendant won this argument in the lower courts, and the government appealed to the Supreme Court.

In an opinion written by Chief Justice William Rehnquist, a plurality of the court applied the first approach and ruled in favor of the government. In the plurality's view, the Framers of the Fourth Amendment intended it to protect only those persons "who are part of a national community or who 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 governmental searches conducted outside the territorial limits of the United States. A dissenting opinion written by Justice William Brennan and joined by Justice Thurgood Marshall took the second approach.

The dissent argued 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.

Put 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. He instead asked a context-specific question: Is it practical to require law enforcement officials 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 unascertainable understandings 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.

(John Greabe teaches constitutional law and related subjects at the University of New Hampshire School of Law. He also serves on the board of trustees of the New Hampshire Institute for Civics Education.)

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

BURNS FROM D1

and festooned with rings of pineapples and maraschino cherries fastened to the sad roast with toothpicks.

I'll concede that Johannes­

sen's culinary taste isn't per­
fect. He would replace pineap­
les on pizzas not with saus­age and peppers and mush­rooms — as God decreed — but with seafood. I suppose that's not surprising, though, when we consider that fish make up more than 40 percent of the tiny island nation's ex­ports.

I suspect that the current occupant of our White House wouldn't like either pineapple or seafood on his pizza. In fact, pizza is not listed among his favorite foods. Perhaps that's because he's still smarter from the mockery he endured in 2011 when he, a native New Yorker met Sarah Palin in the city during her overhyped "One Nation" bus tour. (Remember that? Fun times!)

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 comedians 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 scrapes 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 to ridicule. Barack Obama, of course, was widely seen as a fastidious eater of overall 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—were full of nuts, 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 fruit syrups.

Trump, though? Not so healthy, not by a long shot. Melania 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 exercise­averse septuagenarian is also a devotee of McDonald's, KFC and Wendy's when traveling, proclaiming often that their products are unlikely to contain bacteria. 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 there are countless helpings of potatoes, rice, and bread and basted with cream and cheddar, and steak cooked so thoroughly "that it would rock on the plate," as he 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.

And that he'd like before a meal — potato chips and Oreo cookies, washed down with Diet Coke and followed by cherry vanilla ice cream.

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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 whisk 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 1950s and '60s, is still a hit. How long will it be before a once-wholesome ham sadly stuffed with sweet pineapple rings and maraschino cherries shows up on the menu for an official State Dinner?

("Monitor" columnist Katy Burns lives in Bow.)