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# Do Foreign Nationals Really Have Constitutional Rights?

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# Do foreign nationals have constitutional rights?



**JOHN GREABE**

Constitutional Connections

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 be-

cause 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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# High court has weighed in on foreign nationals and constitutional rights

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erty 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 consti-

tutional 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 evi-

dence 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 govern-

ment 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, Jus-

tice 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 State necessarily translate to government action overseas. He instead 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 unascertainable 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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