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The Supreme Court issued an Order yesterday, June 26, 2017, relating to the Executive Order imposing a 90-day ban on entries into the United States by certain nationals of Iran, Libya, Somalia, Sudan, Syria, and Yemen. This was a "per curiam" Order, meaning that all participating Justices signed on to it. In the Order the Court granted (1) the government's petitions for certiorari and consolidation of review and (2) partially granted its petitions to stay the injunctions issued by the Maryland and Hawaii district courts (which, as you will recall, the Fourth and Ninth Circuits had previously upheld).

The Order is here, but a brief summary follows.

The Court first described the Executive Order and its travel through the courts. One notable development at the Supreme Court level is that the plaintiffs had argued that the entry ban, which the Executive Order had specified to run for 90 days from the order's effective date in March, had expired on June 14, with the result that there was nothing for the Court to review and the cases were moot. In response, the Administration issued a memorandum purporting to revise the Executive Order so that the "effective date" of each of the Executive Order's provisions was "the date on which the injunctions in these cases 'are lifted or stayed with respect to that provision.'" The government cited this memorandum as curative of the mootness problem: an Executive Order issues from the Administration, which surely retains the authority to revise it, and that authority would extend to revision of EO's effective date. Of course, by October, when the Court will hear the case, 90 more days will have elapsed since today's decision to stay the injunctions.

The Court granted certiorari, consolidated the two appeals for hearing during the first session of its October Term. The Court did not decide in its Order whether the litigation was moot, and it instead instructed the parties to brief the question for argument in October.

Turning next to the government's motions to stay the injunctions, the Court reconsidered the "balancing of interests" that courts must perform when they frame court orders. The Court noted that both injunctions paid appropriate attention to the interests of the plaintiffs — here, states, state universities, close family members of affected aliens. However, the Court ruled that "the injunctions reach much further" than the interests of these plaintiffs: "They also bar enforcement of [the entry ban] against foreign nationals abroad who have no connection to the United States at all." As applied to these more removed foreign nationals, the required balancing would tip much more in the government's favor: "[T]he Government's interest in enforcing the [entry ban], and the Executive's authority to do so, are undoubtedly at their peak when there is no tie between the foreign national and the United States."

The Court therefore granted the government's motion to stay the injunction in part, holding that the entry ban "may not be enforced against foreign nationals who have a credible claim of a bona fide relationship with a person or entity in the United States." As of today, the government may reinstitute the ban against all other covered foreign nationals.

Toward elaborating what "credible claim of a bona fide relationship" means, the Court gave examples, including (1) "a close familial relationship" with an individual in the United States, (2) admission into an American college or university, and (3) a job offer from a U.S. employer. Examples (2) and (3) would support the continued review of applications for student visas and H-1B and other employer-sponsored visas. And once a Harvard student or employee arrives in the United States, Example (1) would support grant of a visa in the ordinary course to his or her spouse or dependent.[1]

We note that the Supreme Court here is only describing the circumstances under which the entry ban will not apply, with the result that the government must consider visa applications in the ordinary course. As was true as well of the stayed injunctions, the Court's ruling does not guarantee that any individual person will receive a visa. In any case, the Court's decision should not materially change the status quo for our community.

1 Justice Thomas, joined by Justices Alito and Gorsuch, wrote a further opinion explaining that he would have stayed the injunctions in their entirety, giving full effect to the entry ban regardless of a particular national's relationship with entities in the United States.