Leeming, “Injunctions restraining enforcement of 'Muslim Ban' Executive Orders” (2017) 91 *ALJ* 443

INJUNCTIONS RESTRAINING ENFORCEMENT OF “MUSLIM BAN” EXECUTIVE ORDERS[*]

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[443] Much publicity has been given to President Trump’s Executive Orders suspending entry into the United States of persons from certain predominantly Muslin countries, and to the court decisions restraining enforcement of those orders. This note has two modest aims. The first is to summarise the steps taken in the litigation in January, February and March 2017. The second is to mention some of the legal issues which have arisen, and to compare aspects of the United States legal system with the Australian legal system.[1]

The sequence of events is as follows.

20 January President Trump takes oath of office.

27 January First Executive Order 13769 “Protecting the Nation From Foreign Terrorist Entry Into the United States”.[2] Section 3(c) suspended for 90 days entry of aliens from Iraq, Iran, Libya, Somalia, Sudan, Syria and Yemen. Section 5(a) suspended the United States Refugee Admissions Program for 120 days, s 5(c) suspended the entry of Syrian refugees indefinitely, and ss 5(b) and (e) appeared to relate to the prioritising of claims based on minority religious persecution, either when refugee intake was resumed or on a case-by-case basis.

30 January State of Washington commences proceedings in United States District Court for the Western District of Washington at Seattle, seeking declarations that ss 3(c), 5(a)-(c) and (e) are invalid (*Washington* proceedings).

1 February White House counsel memorandum providing “Authoritative Guidance” on First Executive Order: “to remove any confusion I now clarify that Sections 3(c) and 3(e) do not apply” to “lawful permanent residents”.[3]

3 February State of Hawaii commences proceedings in United States District Court for the District of Hawaii seeking declarations that parts of First Executive Order are invalid (*Hawaii* proceedings) and injunctions seeking to restrain their enforcement.

3 February In the *Washington* proceedings, District Court at Seattle issues temporary restraining order preventing enforcement of ss 3(c), 5(a)-(c), (e), refuses a temporary stay, and directs a timetable for hearing of preliminary injunction.[4]

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[1] I am grateful for the comments of Professor Samuel Bray, UCLA School of Law, on an earlier draft of this note. All errors are mine.

[2] 82 Fed Reg 8,977. See <https://www.whitehouse.gov/the-press-office/2017/01/27/executive-order-protecting-nation-foreign-terrorist-entry-united-states>.

[3] See <http://www.politico.com/f/?id=00000159-fb28-da98-a77d-fb7dba170001>.

[4] *State of Washington v Trump*, No C17-0141-JLR, 2017 WL 462040 (US District Court, Western District of Washington, Seattle. 3 February 2017). See <https://www.clearinghouse.net/chDocs/public/IM-WA-0029-0005.pdf>.

4 February	United States Government files notice of appeal and seeks a stay. United States Court of Appeals for Ninth Circuit refuses immediate stay following oral argument conducted by telephone.
7 February	Hearing of application of stay pending appeal in *Washington* proceedings.
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7 February	International Refugee Assistance Project commences proceedings in the Maryland District of the United States District Court (*Maryland* proceedings).
9 February	United States Court of Appeals for Ninth Circuit dismisses application for a stay in *Washington* proceedings.[5]
6 March	Second Executive Order 13769 "Protecting the Nation From Foreign Terrorist Entry Into the United States".[6] This order applied to nationals of Iran, Libya, Somalia, Sudan, Syria and Yemen, and made it clear that it did not apply to lawful permanent residents, dual citizens travelling on passports other than those issued by the six countries. It was scheduled to take effect on 16 March.
8 March	*Washington* appeal dismissed on Government's motion.
10 March	*Maryland* proceedings amended to challenge and seek an injunction against enforcing Second Executive Order.
15 March	District Court (District of Maryland) conducts hearing and issues preliminary injunction preventing enforcement of s 2(c) of the Second Executive Order in *Maryland* proceedings.[7]
15 March	District Court (District of Hawaii) issues temporary restraining order and refuses a temporary stay of ss 2 and 6 of the Second Executive Order in *Hawaii* proceedings.[8]

The foregoing is incomplete, and not only because there are other moving parties in each of the *Washington, Hawaii* and *Maryland* proceedings. There is also a great deal more litigation than is mentioned above. For one thing, there was a flurry of *habeas corpus* based litigation (the so-called "airport cases") immediately after the First Executive Order took effect.[9] For another, the Hawaii decision observes that the order "inspired several lawsuits across the nation in the days that followed", by reference to a formidable footnote which is worth reproducing in terms:

> See, eg, *Mohammed v United States*, No 2:17-cv-00786-AB-PLA (CD Cal Jan 31, 2017); *City & Cty of San Francisco v Trump*, No 3:17-cv-00485-WHO (ND Cal Jan 31, 2017); *Louhghalam v Trump*, Civil Action No 17-cv-10154, 2017 WL 386550 (D Mass Jan 29, 2017); *Int'l Refugee Assistance Project v Trump*, No 8:17-0361-TDC (D Md filed Feb 7, 2017); *Darweesh v Trump*, 17 Civ 480 (AMD), 2017 WL 388504 (ED NY Jan 28, 2017); *Aziz v Trump*, --- F Supp 3d ---, 2017 WL 580855 (ED Va Feb 13, 2017); *Washington v Trump*, Case No C17-0141JLR, 2017 WL 462040 (WD Wash Feb 3, 2017), emergency stay denied, 847 F 3d 1151 (9th Cir 2017). This list is not exhaustive.

[5] *State of Washington v Trump*, No 17-35105, DC No 2: 17-cv-00141 (US Court of Appeals, 9th Cir, Washington, 9 February 2017). See <https://cdn.ca9.uscourts.gov/datastore/opinions/2017/02/09/17-35105.pdf>.

[6] 82 Fed Reg 13,209. See <https://www.whitehouse.gov/the-press-office/2017/03/06/executive-order-protecting-nation-foreign-terrorist-entry-united-states>.

[7] *International Refugee Assistance Project v Trump*, Civil Action No TDC-17-0361 (US District Court, District of Maryland, 16 March 2017). See <http://www.mdd.uscourts.gov/sites/mdd/files/TDC-17-0361-Opinion-03162017.pdf> (document filed 16 March).

[8] *State of Hawaii v Trump*, CV No 17-00050 DKW-KSC (US District Court, District of Hawaii, 15 March 2017). See <http://www.hid.uscourts.gov/files/announcement142/CV17-50%20219%20doc.pdf>.

[9] See <http://joshblackman.com/blog/2017/01/29/the-procedural-aspects-of-the-airport-cases/>.

It is hard to conceive that this multiplicity of proceedings would occur in Australia. The High Court has original jurisdiction and, if challenges were commenced in other courts, they could be removed to the High Court by Commonwealth Attorney-General. Although the United States Supreme [445] Court has a narrow original jurisdiction, it would not permit these claims to be brought. It is easy to forget that "the single most important decision in American constitutional law",[10] *Marbury v Madison* 5 US (1 Cranch) 137 (1803), was a decision holding that the *Judiciary Act 1789* was invalid to confer original jurisdiction upon the United States Supreme Court. Part of the reasons for including s 75(v) in the Australian *Constitution* was to avoid the same result in Australia,[11] and its combination of prerogative remedies (writs of mandamus and prohibition) and equitable remedies (injunction) means that no law could deny the High Court the final and interlocutory remedies required to determine matters involving the exercise of federal executive power. The purpose of s 75(v), as Dixon J put it, was "to make it constitutionally certain that there would be a jurisdiction capable of restraining officers of the Commonwealth from exceeding Federal power".[12]

Recent examples of urgent claims seeking injunctions against the Commonwealth include challenges to the post-GFC "tax bonus" payments in *Pape v Federal Commissioner of Taxation* (2009) 238 CLR 1 and the plain-packaging of tobacco products in *JT International SA v Commonwealth* (2012) 250 CLR 1. Usually, by providing an urgent final hearing, with undertakings being proffered in the meantime, and assisted by a practice that requires exceptional circumstances before interlocutory relief is given in a constitutional challenge,[13] the litigants and court are spared the need to determine constitutional issues on an interlocutory basis.

In the United States, the litigation necessarily commenced in the lower federal courts. The District Courts are courts of limited geographical jurisdiction (rather like the original District and Country Courts in the Australian colonies).[14] However, it appears that federal courts, beginning in the late 20th century, claim the power in an appropriate case to issue so-called "national injunctions" preventing federal executive action across the country, directed not merely against the plaintiff, but against all persons.[15] Such a power has an obvious tendency to encourage forum shopping. Further, the government need only fail in one court, while the challengers have every incentive to make repeat applications throughout the country. There is also the possibility of divergent rulings. It may be seen, for example, that the injunction granted by the *Hawaii* court was broader than that granted in *Maryland* a few hours earlier on the same day.

The next thing to observe is terminology. In the United States, "temporary restraining orders" and "preliminary injunctions" are remedies regulated by r 65 of the Federal Rules of Civil Procedure.

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[10] E Chemerinsky, *Federal Jurisdiction* (5th ed, Wolters Kluwer, NY, 2007) 12.
[11] See M Leeming, *Authority to Decide – The Law of Jurisdiction in Australia* (Federation Press, 2012) 246-252.
[12] *Bank of New South Wales v Commonwealth* (1948) 76 CLR 1, 363.
[13] *Castlemaine Tooheys Ltd v South Australia* (1986) 161 CLR 148, 156; *Australian Capital Television Pty Ltd v Commonwealth* (1992) 66 ALJR 214; *Australian Broadcasting Corporation v O'Neill* (2006) 227 CLR 57, [66].
[14] See, eg *Country Courts Act 1852* (Vic) and *District Courts Act 1912* (NSW).
[15] See S Bray, "Multiple Chancellors: Reforming the National Injunction" (131 Harv LR (forthcoming); available on SSRN).

The rules state that a temporary restraining order may issue without notice to the adverse party, but will expire at a time stated on the order, which is not to exceed 14 days. In contrast, a preliminary injunction may only issue after notice has been given to the adverse party, but need not be limited in time.

Those orders broadly correspond with an interim injunction which may be obtained *ex parte*, and an interlocutory injunction. Interim injunctions issued by Australian courts rarely exceed three days. They commonly issue without reasons, and are also only rarely the subject of appeal, in part because of the timeframe, and in part because a respondent will ordinarily prefer to apply to the court which issued the injunction with a view to adducing evidence or complaining about a failure to disclose.

The order which issued in the *Washington* proceedings on 3 February 2017 was styled a "temporary restraining order", but departed from the ordinary course, in that (a) it issued following *inter partes* argument and (b) it was not in terms restricted in time. It included short reasons of seven [446] pages, but failed to identify the basis on which the order was made (the States had relied on a suite of constitutional rights, including due process and the "Establishment clause",[16] as well as statutory prohibitions upon discrimination on the basis of nationality).

The circuit court treated the order as a preliminary injunction, from which an appeal would lie. (Appeals do not generally lie from temporary restraining orders.) In Australia, the fact that an order obtained *ex parte* was stated to be "until further order" would not prevent it from being treated as an interim order, apt to be discharged unless the moving party could show cause for its continuance.[17]

The nature of the argument in the *Washington* proceedings reflected two key differences in the United States legal system.

First, the standard of judicial review applicable to the exercise of executive power turned upon the extent to which Congress had intervened. This reflects what had been said by Jackson J in *Youngstown Sheet & Tube Co v Sawyer* 343 US 579, 635 (1952): "Presidential powers are not fixed but fluctuate depending upon their disjunction or conjunction with those of Congress." Because the *Immigration and Nationality Act* had conferred a broad power upon the President to suspend the entry of aliens, conventional analysis would accord a great deal of deference to the validity of the exercise of power. This did not occur, and is perhaps one explanation for the President's tweet:

> Remarkable, in the entire opinion, the panel did not bother even to cite this (the) statute. A disgraceful decision.

Secondly, the United States system accords varying degrees of deference to the views of other branches of government on questions of law. Notions of deference in the United States to agencies'

[16] Contained in the First Amendment: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof"; cf Australian *Constitution*, s 116.

[17] See *Resort Hotels Management Pty Ltd v Resort Hotels of Australia Pty Ltd* (1991) 22 NSWLR 730, 731; *Ross v Internet Wines Pty Ltd* (2004) 60 NSWLR 436, [109]; *Lakis v Lardis* [2016] NSWSC 1459, [24]-[28].

interpretation of laws and regulations form no part of Australian law.[18] Yet in at least one respect, it appears to have been disregarded in the *Washington* case. The order was not clear on its face as to whether it applied to "lawful permanent residents" (broadly speaking, aliens with green cards). A memorandum from White House counsel contended that it did not. While by no means binding on the District and Circuit courts, conventionally a measure of deference to that construction should have been accorded to it. The issue appears to have evaporated for the time being, because of the more precise drafting in the Second Executive Order.

Although the Australian approach to construction is different, the phenomenon of opposing parties in constitutional litigation advancing self-servingly broad, or narrow, constructions is familiar in Australian litigation. Gageler J has said of it:

> The constructions advanced reflect forensic choices: one designed to maximise the prospect of constitutional invalidity; the other to sidestep, or at least minimise, the prospect of constitutional invalidity. A court should be wary.[19]

One final common theme may be noted. The early phases of much litigation in all common law systems tend to involve equitable remedies. In addition to injunctions, it may be recalled that discovery was until the middle of the nineteenth century exclusively available in chancery. That is as much true as litigation involving questions of public law as private law. Indeed, as Justice Gummow has observed:

> [T]he development of the interim injunction with the power to suspend or postpone injunctive relief and the efficiency of the procedures in Chancery after the reforms of the 1850s favoured equitable relief over that under the prerogative writs.[20]

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For very many years, lawyers practising in public law have needed familiarity with equitable principle.

Postscript

Since the foregoing was written, an appeal from the Maryland proceedings has been heard by the Court of Appeals for the Fourth Circuit (on 8 May 2017) and dismissed (on 25 May 2017): 2017 WL 2273306. On 1 June 2017 the United States Government filed a petition in the United States Supreme Court seeking a writ of certiorari reviewing the judgment of the Court of Appeals for the Fourth Circuit, as well as a stay pending the determination of that petition: see http://www.scotusblog.com/case-files/cases/trump-v-international-refugee-assistance-project/.

[18] *Corporation of the City of Enfield v Development Assessment Corporation* (2000) 199 CLR 135, [44]; *Obeid v The Queen* (2015) 91 NSWLR 226, [118].

[19] *North Australian Aboriginal Justice Agency Ltd v Northern Territory* (2015) 256 CLR 569, [75].

[20] W Gummow, "The Scope of Section 75(v) of the Constitution: Why Injunction but No Certiorari?" (2014) 42 Fed L Rev 241, 248.