SHORT ARTICLES

"PROTECTING THE NATION FROM FOREIGN TERRORIST ENTRY INTO THE UNITED STATES". A CONSTITUTIONAL ANALYSIS OF PRESIDENT TRUMP'S EXECUTIVE ORDERS*

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Abstract

Through the implementation of two Executives Orders, the recently instated US President Donald Trump has temporarily suspended the admission onto US soil of aliens from seven Muslim-majority countries, as well as refugees across the board.

The backlash across both the national and international public debate has been severe, as the resulting political struggle instantly translated into a legal dispute.

Several issues arose within the legal debate regarding the Executive Orders. First and foremost, attention has been called to equality and non-discrimination concerns; secondly, yet not less importantly, the interactions between the executive, legislative and judicial branches of the US Government have come to be challenged, potentially leading to a sort of "constitutional showdown".

This paper aims to appraise the consistency of President Trump's Executive Orders with existing legislation on immigration; their compliance with the First Amendment (with regards to the Establishment Clause), and Fifth Amendment (with regards to both the Equal Protection Clause and Due Process Clause); and how the Executive Orders fit within the habitual functioning of the US Federal system.

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Within the intricate panorama of the law, it is rather difficult to predict the outcome of the decision of the Supreme Court on President Trump's Executive Orders. A decisive role will certainly be played by the political cleavage

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1. Introduction

On the 27th of January 2017, a few days after being sworn in, the 45th President of the United States, Donald Trump, signed an Executive Order entitled "Protecting the Nation from foreign terrorist entry into the United States". This Order enforced some of the most significant measures promised during the electoral campaign: on the one hand, it suspended for 90 days the entry of foreign nationals born in or holding a passport from Iran, Iraq, Libya, Somalia, Sudan, Syria and Yemen; on the other, it halted the entry of refugees of any nationality for 120 days, and indefinitely for Syrian refugees.

The backlash across both the national and international public debate has been severe, as the resulting political struggle instantly translated into a legal dispute. The case was brought before the Courts – such as the Federal Court of Seattle and the US 9th Circuit Court of Appeals –, that temporarily suspended the ban nationwide, albeit having yet to examine its apparent unconstitutionality in depth. At long last, on the 26th of June, the Supreme Court decreed, on a provisional basis before the matter would be discussed in the coming fall, that the 90-day ban on visitors from Iran, Libya, Somalia, Sudan, Syria and Yemen, along

with the 120-day suspension of the US refugee resettlement program, could be enforced against those who lack a "credible claim of a bona fide relationship with a person or entity in the United States". Thus, the ruling now paves the way for parts of the ban to come into effect.

In order to bypass the Courts' suspension of the first Executive Order – before the Supreme Court announced its provisional decree – on the 6th of March 2017, the President adopted a new Executive Order, to take effect as of the 16th of March 2017. The new Executive Order retains key elements of the previous one, including its title. However, a number of adjustments were introduced to attempt to evade the issues on which the Courts based their suspension. Namely: Iraq no longer features on the list of banned nationalities, though still being subjected to strict controls; Syrian nationals have been included in the 120-day ban on refugees; and, allowance has been made to waive the ban for certain individuals based on a case-to-case evaluation. Moreover, the new Executive Order provides a detailed justification for each provision, predominantly in relation to the threat of terror attacks. It is evident that the Executive Order was revised to withstand any further judicial review, its main concern being to demonstrate beyond rebuttal that the provisions are reasonable and justified by a compelling logic of public interest.

Several issues arose within the legal debate regarding the Executive Orders. First and foremost, attention has been called to equality and non-discrimination concerns; secondly, yet not less importantly, the interactions between the executive, legislative and judicial branches of the US Government have come to be challenged, potentially leading to a sort of "constitutional showdown".

The controversial issues which have arisen within the US national debate regarding these provisions may be categorised as follows: the Executive Orders' consistency with existing legislation on immigration; their compliance with the First Amendment (with regards to the Establishment Clause), and Fifth Amendment (with regards to both the Equal Protection Clause and Due Process Clause); and how the Executive Orders fit within the habitual functioning of the US Federal system.

Consequently, the constitutionality, or lack thereof, of these two Presidential Executive Orders is now open to debate. In view of the similarity of their contents, they may be analysed in conjunction.

2. The legal and constitutional basis of the Executive Orders

To begin with, the Executive Orders need to be evaluated in terms of their consistency with the Immigration and National Act (INA), which was adopted by Congress in 1952 (and later amended) in order to regulate immigration.

As stated in their preamble, these Presidential orders have been expressly adopted on the basis of the powers granted to the White House by the INA. Therefore, first and foremost it should be verified whether the aforementioned Presidential power has been exercised in compliance with the law, in itself a challenging endevour.

In fact, the 8 U.S. Code § 1152 establishes that: "no person shall receive any preference or priority or be discriminated against in the issuance of an immigrant visa because of the person's race, sex, nationality, place of birth, or place of residence" – with the exception of certain cases such as family reunification, special qualifications or merit. Nevertheless, § 1182 states that: "whenever the President finds that the entry of any aliens or of any class of aliens into the United States would be detrimental to the interests of the United States, he may by proclamation, and for such period as he shall deem necessary, suspend the entry of all aliens or any class of aliens as immigrants or non immigrants, or impose on the entry of aliens any restrictions he may deem to be appropriate".

Therefore, the general principle of non-discrimination contained in §1152 is waived in § 1182, by the Presidential power to reduce or prevent the entry of all aliens or classes of aliens when the interests of the United States are considered to be at stake.

Furthermore, a directive of §§ 1182, 1226A and 1227 qualifies as "inadmissible aliens" or "deportable aliens" those suspected of terrorism[1].

In conclusion, the INA entitles the President to intervene at his own discretion, allowing for – albeit in exceptional scenarios – with special measures, especially in the case of a potential terrorist threat. Consequently, it appears that it would be complicated to revoke President Trump's Orders based on the INA.

A similar conclusion is reached when taking into account that the INA, despite its relevance in relation to this issue, is not the only legal basis for defining Presidential power over immigration. In fact, the US Constitution – rooted in a rigid principle of separation of powers – bestows the President with executive power (art.2, Sec I), with the responsibility to ensure that laws be faithfully executed, to govern all public officials and the

[1] A broad jurisprudential and doctrinal consultation has emerged with regards to "enemy aliens", elucidating many of the issues brought to light by President Trump's Executive Orders. Among the most recent contributions – also with reference to the pertinent literature – see D. Cole, *Enemy Aliens*, in 54 Stan. L. Rev. 953 (2002), 983-984: "the Court has always treated the rights of "enemy aliens" as categorically different from the rights of citizens, and indeed of all other aliens. The Court has upheld the constitutionality of the Enemy Alien Act, which authorizes the President in a declared war to detain, deport, or otherwise restrict the freedom of any citizen 14 years of age or older of the country with which we are at war. And in Johnson v. Eisentrager, the Court held that enemy aliens captured on the battlefield abroad had no right to seek habeas corpus in a United States court to challenge their subjection to military trial. The Court noted that at common law, an enemy alien had no rights during a time of war, and that the United States "regards him as part of the enemy resources." But these principles apply only in a time of declared war to citizens of the country with which we are at war. Thus, they should not be generalized to justify treatment of aliens when, as now, no war has been declared, and there is no identifiable enemy nation. The Supreme Court was careful to note in Eisentrager that the power to treat enemy aliens is "an incident of war and not ... an incident of alienage." It is critical to honor that distinction, the Court warned, because '"[m]uch of the obscurity which surrounds the rights of aliens has its origin in this confusion of diverse subjects". In case law, in addition to Johnson v. Eisentrager, 339 U.S. 763 (1950), see also Zadvydas v. Davis, 533 U.S. 678 (2001); Foucha v. Louisiana, 504 U.S. 71, 80 (1992); Ludecke v. Watkins, 335 U.S. 160 (1948).

administrative system (art 2, Sec III), as well attributing to him the role of Commander in Chief of the Armed Forces (art. 2, Sec. II)[2].

Thus, Executive Orders are a tool used by US Presidents to exercise their authority: the power to adopt them comes directly from the Constitution. Although they cannot contradict the law, they provide the White House with significant room for political manoeuvre to enforce the law, or intervene on issues which are yet to be regulated by Congress[3].

In light of this, it is by no coincidence that the preamble of the Executive Orders – particularly the second one – makes reference to the INA, as well as calling upon the powers that the Constitution bestows upon the President: this is to underline that the provisions are based on, not only existing legislation on immigration, but also – in addition to and notwithstanding – on Presidential prerogatives related to the handling of public administration, security and defence.

3. Executive Orders, Equal Protection Clause and Establishment Clause.

The following issue to be taken into account is the content of the Executive Orders under scrutiny. Within the public debate, as well as throughout scientific deliberations, the question has been outlined as follows: is it legitimate to ban the entry of immigrants and refugees based on their originating from Muslim-majority countries? Nonetheless, such an approach could be considered as incorrect, when shifting away from a political

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[2] With regards to Presidential power and the Executive branch see: A. Hamilton, J. Madison & J. Jay, *The Federalist Papers*, Essays 69-74; C. Rossiter, *The American Presidency* (1956); H. Finer, *The Presidency. Crisis and Regeneration. An Essay in Possibilities* (1960); R.E. Neustad, *Presidential Power and The Modern President: The Politics of Leadership from Roosevelt to Reagan* (1960); T. Lowi, *The Personal President. Power Invested, Promise Unfulfilled* (1985); S. Fabbrini, *Il presidenzialismo degli Stati Uniti* (1993); S.G. Calabresi, K.H. Rhodes, *The Structural Constitution: Unitary Executive, Plural Judiciary*, 105 Harv. L. Rev. 1153 (1992); R.A. Dahl, *Toward Democracy: A Journey* (1997); L. Tribe, *American Constitutional Law* (2000).

[3] Among the most recent studies on the topic see: P.J. Cooper, *By Order of the President: The Use and Abuse of Executive Direct Action* (2002); K.R. Mayer, *With the Stroke of a Pen: Executive Orders and Presidential Power* (2002); A.L. Warber, *Executive Orders and the Modern Presidency: Legislating from the Oval Office* (2006).

perspective and towards an analysis of the literal contents of the Executive Orders. Although President Trump promoted a so-called "Muslim-ban" during his electoral campaign, the Executive Orders make no reference to any religious criteria, but rather to the nation of origin and its suspected links to terrorism. The aforementioned distinction, although seemingly minor, is far from being irrelevant and needs to be addressed. Furthermore, although the first Presidential Order made an explicit reference only to Syria, which was later removed from the second Order, the other affected countries – in both Executive Orders – were indirectly identified by stating "countries referred to in section 217(a)(12) of the INA, 8 U.S.C. 1187(a)(12)". It should be noted that the latter was introduced in 2015, under the Obama administration, through the "Visa Waiver Program Improvement and Terrorist Travel Prevention Act of 2015". This section excludes from the Visa Waiver Program (which allows foreigners to sojourn in the United States without a visa up to a maximum of 90 days) those coming from, for transit or nationality, Syria, Iraq and other countries which – on the basis of relevant legislation or according to the directives of the Secretary of State – have repeatedly supported international acts of terrorism, a criterion applicable to Iran, Sudan, Libya, Somalia and Yemen.

Consequently, we are left with the following conundrum: President Trump's Executive Orders affect those countries previously listed in former President Obama's 2015 law, which are in turn extracted from security directives related to alleged threats of terrorism. Therefore, the supposed discrimination on travel to the US should be reflected in both Obama's law and Trump's Executive Orders. Nonetheless, the issues at hand are far from being equivalent. In fact, whilst the former exempts these nationalities from the stay without visa, the latter bans their entry altogether. Thus, a significant difference emerges in terms of discrimination towards foreigners' entry into the US based on their country of origin.

At this point, attention must be drawn to the US Constitution's and Supreme Court's positions on discriminatory treatment. Indeed, it should be appraised whether, from a jurisprudential standpoint, constitutional principles allow for legal differentiations such as those in question.

With regards to the Federal Government, the Fifth Amendment provides that: "no person shall be […] deprived of life, liberty, or property, without due process of law". Furthermore, within the Due Process Clause, the Supreme Court included the Equal Protection Clause – which prohibits to "deny to any person […] the equal protection of the laws" -, although the Constitution raises it, in its Ninth Amendment, only in reference to Member States. However, regardless of the aforementioned codes of the Constitution, discriminatory treatment, as explicitly prohibited by the Equal Protection Clause, should be considered as conflicting in its very nature with the Due Process Clause[4]. The Supreme Court has thus underlined how the provision – which also concerns non-citizens[5] - prevents discrimination on the basis of parameters such as race, religion, or nationality: in other words, "suspect classifications"[6] directed at "discrete and insular minorities"[7].

[4] The application of the Equal Protection Clause towards the Federal Government - the so-called "reverse incorporation" - is rooted in Bolling v. Sharpe, 347 U.S. 497 (1954): "the Fifth Amendment, which is applicable in the District of Columbia, does not contain an equal protection clause, as does the Fourteenth Amendment, which applies only to the States. But the concepts of equal protection and due process, both stemming from our American ideal of fairness, are not mutually exclusive. The "equal protection of the laws" is a more explicit safeguard of prohibited unfairness than "due process of law," and therefore we do not imply that the two are always interchangeable phrases. But, as this Court has recognized, discrimination may be so unjustifiable as to be violative of due process". See A.R. Amar, *Bill of Rights* (1998), 163; M.K. Curtis, *No State Shall Abridge. The Fourteenth Amendment and The Bill of Rights* (1986), 154.

[5] Graham v. Richardson, 403 U.S. 365 (1971).

[6] The first reference to "suspect classifications" is found in Hirabayashi v. United States, 320 U.S. 81 and Korematsu v. United States, 323 U.S. 214.

[7] See United States v. Carolene Products Company, 304 U.S. 144 (1938): "there may be narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten amendments, which are deemed equally specific when held to be embraced within the Fourteenth […] It is unnecessary to consider now whether legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation, is to be subjected to more exacting judicial scrutiny under the general prohibitions of the Fourteenth Amendment than are most other types of legislation […] Nor need we inquire whether similar considerations enter into the review of statutes directed at particular religious […] or national […] or racial minorities […] : whether prejudice against discrete and insular minorities

Thus, the criteria to evaluate the legitimacy of the Executive Orders differ whether more relevance is attributed to their literal wording – whereby there is no explicit reference to religious background, but only to the country of origin –, or to President Trump's campaign promises to introduce a "Muslim-ban".

Starting with the first hypothesis, the Supreme Court applies two different standards of scrutiny, with regards to treatments that take citizenship as a differentiating factor, depending on whether the rules are enacted by Member States or by the Federal Government.

When Member States attempt to enforce these rules, the different treatment of aliens is considered unconstitutional, unless strict scrutiny[8] is able to prove that: a) the discrimination is narrowly tailored to achieve a compelling governmental interest; b) there is no less restrictive way to effectively achieve the interest[9].

On the contrary, in the case of differentiated treatments enforced by the Federal Government, a more deferential "rational basis review" is applied: in order to abide by the Constitution, it is sufficient for the Government's measures to be ""rationally

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may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry".

[8] The levels of scrutiny under the three-tiered approach to Equal Protection analysis are: the strict scrutiny (the government must show that the challenged classification serves a compelling State interest and that the classification is necessary to serve that interest); the middle-tier scrutiny (the government must show that the challenged classification serves an important State interest and that the classification is at least substantially related to serving that interest); rational basis scrutiny (the government needs only to show that the challenged classification is rationally related to serving a legitimate State interest). See: Lochner v. New York, 198 US 45 (1905); United States v. Carolene Products Company, 304 U.S. 144 (1938); Korematsu v. United States, 323 U.S. 214; Kotch v. Board of River Port Pilot Commissioners 330 U.S. 552 (1947); Railway Express Agency, Inc. v. New York, 336 U.S. 106 (1949); Brown v. Board of Education, 347 U.S. 483 (1954); Craig v. Boren, 429 U.S. 190 (1976); E. B. v. Alabama ex rel. T. B., 511 U.S. 127 (1994); United States v. Virginia, 518 U.S. 515 (1996). Among the most recent studies on the subject see A. Bhagwat, *Purpose Scrutiny in Constitutional Analysis*, 85 Cal. L. Rev. 299 (1997); A. Winkler, *Fatal in Theory and Strict in Fact: An Empirical Analysis of Strict Scrutiny in the Federal Courts*, 59 Vand. L. Rev. 793 (2006); T.L. Grove, *Tiers of Scrutiny in a Hierarchical Judiciary*, in William & Mary Law School Scholarship Repository (2016), 475.

[9] For specific reference to aliens, see Graham v. Richardson, 403 U.S. 365 (1971).

related" to a "legitimate" government interest"[10]. The less demanding scrutiny on Federal rules is due to the fact that the Constitution delegates to the Federal Government a plenary power to deal with aliens and naturalization (art. 1, Sec. 8 and Sec. 9).

It is also necessary to take into consideration two further judicial elements that significantly strengthen the discretionary power conferred to the Federal Government. Firstly, it is professed that "there is a distinction between the constitutional rights enjoyed by aliens who have entered the United States and those who are outside of it"[11]: the effective difference between aliens already sojourning within the US territory and those still outside of it justifies the differing and less protective treatment of the latter. Secondly, "the statutory discrimination within the class of aliens – allowing benefits to some aliens but not to others – is permissible"[12]: since decisions in these matters may implicate relations with foreign powers, and since a wide variety of classifications must be defined in the light of changing political and economic circumstances, such decisions are of a character more appropriate to either the Legislative and Executive bodies than to the Judiciary[13].

In conclusion, the decision by the Federal Government to prevent aliens, or some categories of aliens, from entering the country is a "fundamental sovereign attribute" fulfilled through the legislative and executive branches, that is "largely immune from judicial control"[14].

Conversely, parameters of judicial review would be much more restrictive if the anti-Islamic aim pursued by President Trump were considered to be more relevant. According to the First Amendment, "Congress shall make no law respecting an establishment of religion". In fact, in line with the so-called "Establishment Clause", any religious discrimination is forbidden,

[10] See Mathews v. Diaz, 426 U.S. 67, 83 (1976); Ruiz-Diaz v. U.S., 703 F. 3d 483, 486-487 (9th Cir. 2012); Narenji v. Civiletti, 617, F.2d 745, 748 (D.C. Cir. 1979).
[11] See Zadvydas v. Davis, 533 U.S. 678, 693 (2001).
[12] See Mathews v. Diaz, 426 U.S. 67, 83 (1976).
[13] See Mathews v. Diaz, 426 U.S. 67, 83 (1976).
[14] See Shaughnessy v. U.S. ex rel. Mezei, 345 U.S. 206, 210 (1953); Fiallo v. Bell, 430 U.S. 787, 792, (1977); Holder v. Humanitarian Law Project, 561, U.S. 1, 33-34 (2010).

with the exception of those that satisfy the stringent conditions of strict scrutiny.

The Courts have established that, in assessing whether a measure is discriminatory or not, it must not necessarily express distinctions on a religious basis[15]: even if the measure is "facially neutral", strict scrutiny must be applied if the measure has been adopted on the basis of a "discriminatory purpose"[16]; in other words, a measure can be considered discriminatory, even if "substantially motivated by improper animus"[17]. Therefore, in light of the declarations made by President Trump during his campaign and at the moment of the adoption of the first Order – in spite of the *excusatio* included in the second Executive Order [18] - the discriminatory aim appears to be undeniable.

Within this extremely complex framework, it would be challenging to conceive accurate forecasts regarding the potential outcomes of the verdict on the constitutional legitimacy of the

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[15] Since Washington v. Davis, 426 U.S. 229, 242 (1976): "Government discrimination can be found also when a law or policy has a discriminatory purpose rather than just a disproportionate effect on a protected group". For a more recent view on "improper animus", from a jurisprudential standpoint, see also McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973); Price Waterhouse v. Hopkins, 490 U.S. 228 (1989); Desert Palace Inc. v. Costa, 539 US 90 (2003).

[16] "The Free Exercise Clause, like the Establishment Clause, extends beyond facial discrimination […] Official action that targets religious conduct for distinctive treatment cannot be shielded by mere compliance with the requirement of facial neutrality": see Church of the Lukumi Babalu Aye, Inc. v. Hialeah, 508 U.S. 520 (1993). "'Discriminatory purpose' [...] implies more than intent as volition or intent as awareness of consequences [...] It implies that the decision-maker [...] selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group": see Massachusetts Personnel Adm'r v. Feeney, 442 U.S. 256, 279 (1979).

[17] See Hunter v. Underwood, 471, U.S. 222, 233 (1985). Also see C. M. Corbin, *Intentional Discrimination in Establishment Clause Jurisprudence*, in University of Miami Law School - Institutional Repository, 300 (2015).

[18] See Sec. I, b), IV: "Executive Order 13769 did not provide a basis for discriminating for or against members of any particular religion. While that order allowed for prioritization of refugee claims from members of persecuted religious minority groups, that priority applied to refugees from every nation, including those in which Islam is a minority religion, and it applied to minority sects within a religion. That order was not motivated by animus toward any religion, but was instead intended to protect the ability of religious minorities -- whoever they are and wherever they reside -- to avail themselves of the USRAP in light of their particular challenges and circumstances".

Executive Orders. In fact, regardless of the different directions the judges may take, one should take into account the existing discrepancies between the numerous judicial precedents that have dealt with distinctions formulated on the basis of citizenship, origin and religion.

Some of the most representative cases that present the greatest similarities with this case are: the *Chae Chan Ping* case (1889)[19], in which the Supreme Court upheld the Federal law forbidding the immigration from China to the United States; the *Hyrabayashi* (1943)[20] and *Korematsu* (1944)[21] cases, in which the Court held that the application of curfews and detention against American Japanese citizens was constitutional, to protect the country from espionage in wartime; the *Graham* case (1971)[22], in which a State law was declared unconstitutional because it denied some kind of assistance to aliens; the *Doe* case (1982)[23], in which the Court struck down a Texan law forbidding the access to public schools for foreign children who entered illegally into the US; the *Church of the Lukumi Babalu Aye* case (1993)[24], in which the Supreme Court held that an ordinance forbidding the unnecessary killing of an animal, during a public or private ritual or ceremony, not for the primary purpose of food consumption, was unconstitutional, especially because the ordinance was intended against a religious minority residing in the area.

4. Executive Orders and Due Process Clause

Another controversial aspect of Trump's Executive Orders is related to their compliance with the Due Process Clause established by the Fifth Amendment, which provides that "no

[19] Chae Chan Ping v. United States, 130 U.S. 581 (9 S.Ct. 623, 32 L.Ed. 1068).
[20] Hirabayashi v. United States, 320 U.S. 81
[21] Korematsu v. United States, 323 U.S. 214. With an abounding literature on the "defense" from foreigners during times of war and terrorism, see, among the most recent texts, B.A. Ackerman, *Before the Next Attack: Preserving Civil Liberties in an Age of Terrorism* (2007); I.F.H. Lopez, *A nation of minorities: race, ethnicity, and reactionary colorblindness*, in Stanford Law Review, Vol. 59, 4, 985-1063 (2007).
[22] Graham v. Richardson, 403 U.S. 365 (1971).
[23] Plyler v. Doe, 457 U.S. 202 (1982).
[24] Church of the Lukumi Babalu Aye, Inc. v. Hialeah, 508 U.S. 520 (1993).

person shall be […] deprived of life, liberty, or property, without due process of law". The Due Process Clause – in its procedural meaning – guarantees that the limitation of fundamental rights be implemented through fair and impartial rules, such as the right to sufficient notice, the right to an impartial arbiter, and the right to give testimony and present relevant evidence at hearings[25].

In light of this, it is necessary to distinguish, according to legal precedents, between those aliens who are yet to enter US soil, and those who, despite also being affected by the Executive Orders, have already entered. In fact, aliens who are still outside of the US territory do not have any constitutional right to entry: the power to admit or exclude aliens is a sovereign prerogative and aliens seeking admission to the US request merely a privilege[26]. Likewise, there is no constitutionally protected interest in either obtaining or continuing to possess a visa card. Therefore, since the due process guaranteed by the Fifth Amendment only applies when the Federal Government seeks to deny a liberty or property interest, aliens outside of the US would not be entitled to put forward any claim in this regard[27].

Conversely, because all alien "persons" already within the US, even if affected by the Executive Orders, are safeguarded by the Due Process Clause, they would be entitled to Fifth

[25] On procedural due process see H. J. Friendly, *Some Kind of Hearing*, 123 U. Pa. L. Rev. 1267 (1975); R.L. Glicksman & E.R. Levy, *Administrative Law: Agency Action in Legal Context* (2010). For an illustration of case law see E. Chemerinsky, *Procedural due process claim,* 16 Touro L. Rev. 871 (1999). See also*:* Wisconsin v. Constantineau, 400 U.S. 433 (1971); Board of Regents of State Colleges v. Roth, 408 U.S. 564 (1972); Mackey v. Montrym, 443 U.S. 1 (1979); Cleveland Board of Education v. Loudermill, 470 U.S. 532 (1985). Conversely, as it is renowned, the due process clause, in its most concrete sense, is a principle allowing courts to protect certain rights deemed fundamental from government interference, even where procedural protections are present or where those rights are not specifically mentioned elsewhere in the Constitution. The most recent work on this topic is D. Bernstein, *The History Of 'Substantive' Due Process: It's Complicated*, 95 Tex. L. Rev. 1 (2016), to be consulted regarding the necessary jurisprudential and doctrinal references.

[26] See Landon v. Plasencia, 459 U.S. 21, 32 (1982).

[27] See Knoetze v. U.S., Dep't of State, 634 F.2d 207, 211 (5th Cir. 1981); Azizi v. Thornburgh, 908, F.2d 1130, 1134 (2d Cir. 1990); Legal Assistance for Vietnamese Asylum Seekers v. Dep't of State, Bureau of Consular Affairs, 104, F.3d, 1349, 1354 (D.C. Cir. 1997); De Avilia v. Civiletti, 643 F.2d 471, 477 (7th Cir. 1981).

Amendment protection, regardless of whether their "presence here is lawful, unlawful, temporary or permanent"[28]. Specifically, it has been acknowledged that aliens have significant due process interests that must be protected in deportation hearings. Thus, at the very least, before deportation aliens are entitled to prior notice of the nature of their charges, and a meaningful opportunity to be heard[29].

Subsequently, although the Executive Orders do not address deportation measures in case of their violation, it must be recognized that said measures will have to abide by the above mentioned minimum procedural guarantees. Nonetheless, some provisions applicable to visa holders coming from the banned countries have already appeared to be problematic. Namely: section 2(c) seems to deny re-entry to lawfully permanent residents and non-immigrant visa holders without constitutionally sufficient notice and opportunity to respond; the same section 2(c) prohibits lawfully permanent residents and non-immigrant visa holders from exercising their separate and independent constitutionally protected liberty of travelling abroad and thereafter re-entering the US; finally, section 4 contravenes the procedures provided by Federal statute for refugees seeking asylum and related relief within the US[30].

5. Executive Orders and the Federal system of the United States

The last consideration to be made is with regards to the compatibility of the Executive Orders with the Federal structure of the US. This issue, which might seem secondary at a glance, and has not predominantly featured in the heated public debates, has actually proved crucial for the decision that has led to the suspension of the first Executive Order.

In the case *State of Washington v. Donald Trump*, both the Court of Seattle in the first instance, and the US 9th Circuit Court of Appeals in the second (and in much less concrete terms), stated

[28] See Zadvydas v. Davis, 533 U.S. 678, 693 (2001).
[29] Reno v. Flores, 507 U.S. 292, 306 (1993); Choeum v. I.N.S., 129 F.3d 29, 38 (1st Cir. 1997); Demore v. Kim, 538 U.S. 510, 523 (2003).
[30] See U.S. Court of appeals for the 9th Cir., No. 17-35105, D.C. No. 2:17-cv-00141., 20.

that the first Executive Order, even if enacted while fulfilling an exclusive competence of the Federal Government (immigration and entry), excessively restricted certain responsibilities of Member States, which are unavoidably interconnected to those of the Federal Government. Specifically, the first-instance judgment reads: "the Executive Order adversely affects the States' residents in areas of employment, education, business, family relations, and freedom to travel. These harms extend to the States by virtue of their roles as *parens patriae* of the residents living within their borders. In addition, the States themselves are harmed by virtue of the damage that implementation of the Executive Order has inflicted upon the operations and missions of their public universities and other institutions of the higher learning, as well as injury of the States' operations, tax bases and public funds"[31].

In order to address these critical points, the second Executive Order allows for two hypotheses, whereby the ban may be waived according to a case-by-case assessment: if a) the foreign national has previously been admitted to the United States for a continuous period of work, study, or other long-term activity, is outside the United States on the effective date of this order, seeks to re-enter the United States to resume that activity, and the denial of re-entry during the suspension period would impair that activity (Sec. 3, c, I); and, if b) the foreign national has previously established significant contacts with the United States but is outside the United States on the effective date of this order for work, study, or other lawful activity (Sec. 3, c, II).

The enhancement of the thesis carried forward by the two Federal judges is primarily a consequence of the need to evaluate the existence of an "irreparable harm", that is a necessary element in order to accord a temporary restraining order[32]. However, based on the ruling of the substance of the case, this argument seems likely to remain a background noise, especially thanks to the amendments presented in the second Executive Order.

[31] See U.S. District Court, Western District Court of Washington at Seattle, case no. C17-0141JLR.

[32] See Granny Goose Foods Inc. v. Bhd. Of Teamsters & Auto Truck Drivers Local No. 70 of Alameda City, 415 U.S. 423, 439 (1974); Winter v. Nat. Res. Def. Council Inc., 555 U.S. 7, 24 (2008).

6. Conclusion

In conclusion, within the intricate panorama of the law, it is rather difficult to predict the outcome of the decision of the Supreme Court on President Trump's Executive Orders. A decisive role will certainly be played by the political cleavage: this was clearly demonstrated by the Supreme Court deadlock in 2016 (*U.S. vs. Texas*)[33], when justices exactly split between republicans and democrats (4-4), with regards to former President Obama's Executive Order, allowing irregular immigrants to sojourn temporarily on US soil.

Nonetheless, this future verdict – as shown in the above mentioned cases – will unquestionably influence the interactions between the jurisdiction, Presidency, and Congress, partly contributing to the redefinition of powers within a constitutional system, such as that of the US, divided among "separated institutions competing for shared power"[34].

[33] United States v. Texas, 579 U.S. (2016).

[34] C. Jones, *The Separated Presidency*, in A. King (ed.), *The New American Political System* (1990), 3.