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The newsletter of the Illinois State Bar Association's Section on International & Immigration Law

Editor's Comments

BY LEWIS F. MATUSZEWICH

In the first issue of *The Globe* of this year Patrick Kinnally, former chair of International and Immigration Law Section Council article, "Free Speech and Soliciting Aliens to Violate Immigration Law" appeared. In this issue Patrick Kinnally has provided an update on the same topic: "Free Speech and Soliciting Aliens to Violate Immigration Law."

Patrick Kinnally has also provided us, "Temporary Protected Status: It's Time to Get It Right."

Hannah Kreinik is a law student at UIC John Marshall Law School, completing studies to obtain her juris doctor degree and a LLM in international business and trade. Hannah submitted the case note titled, "Administrative Agencies Must Disclose Ex Parte Communication Used in the Decision-Making Process."

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Free Speech and Soliciting Aliens to Violate Immigration Law: *United States v. Sineneng Smith*

BY PATRICK M. KINNALLY

Provisions of the Immigration and Nationality Act allow a felony prosecution where any person "encourages or induces an alien to come to, enter, or reside in the United States" if the encourager "knew or recklessly disregarded the fact that such coming to, entry, or residence is or will be in violation of the law". 8 USC 1324(a)(1)(A)(iv), 8 USC 1324 (a)(1)(B)(i) ("the statute"). The United States Supreme Court heard argument on the validity of this statute at the end of February 2020. Its task, it was thought, would be to determine whether the statute is constitutional because it is overbroad and violates the First Amendment. *United States v. Sineneng-Smith*, 910 F.3d 461 (9th Cir. 2018) ("Smith").

Editor's Comments

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As always, thank you to our authors and we encourage members of the International Law and Immigration Section to submit articles for future issues of *The Globe*.■

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Free Speech and Soliciting Aliens to Violate Immigration Law: *United States v. Sineneng Smith*

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The table was set to do so. Correctly, the Supreme Court never reached that issue. *United States v. Sineneng-Smith*, No. 19-67, May 2020. In a unanimous opinion, the Supreme Court determined the ninth circuit had hijacked the case when it invited three organizations – non-parties to the case already briefed – to submit *amici* briefs on three issues the ninth circuit created. The one it decided the case on was: "Whether the statute of conviction is overbroad or likely overbroad under the First Amendment, and if so, whether any permissible limiting construction would cure the First Amendment problem?" (Sl.Op. at p. 7) The ninth circuit's invitation occurred after the parties' presentation at oral argument. In other words, the ninth circuit created the overbreadth issue it would later decide. Instead of acting as an arbiter, it sought to be an advocate. Why?

The facts of *Smith* possess little allure. Evelyn Sineneng-Smith ("Evelyn") operated an immigration consulting business. It does not appear she was a lawyer. The focus of Evelyn's business was to assist individuals to obtain lawful permanent resident status or work authorization from federal immigration authorities. Purportedly, she did this by obtaining labor certifications for her clients as a predicate to obtaining lawful permanent resident status. The problem with Evelyn's representations were, in a word, a canard. The program she told her clients was the basis to help them no longer existed, and had not existed for over a decade. She knew that. But she still signed financial representation agreements with her clients based on the expired program. Essentially, she lied to her clients for personal gain.

In July 2010, a grand jury indicted Evelyn in a ten-count filing. Among other things, she was charged with violating the statute in three counts. Prior to trial, she moved to dismiss the immigration counts since her conduct was "not within the scope" of the statute; that the statute was impermissibly vague under the 5th Amendment; and the statute violated the First Amendment because it was allegedly content-based restriction on her speech. The motion was denied.

After a 12-day trial, a jury found Evelyn guilty on all three of the immigration counts, as well as three counts of mail fraud. Later, the District Court affirmed her convictions on two of the immigration counts and two of the mail fraud counts. Evelyn appealed, arguing her pretrial motion should have been granted. The ninth circuit court of appeals agreed, based on its view that no reasonable reading of the statute could not include speech. At the very least, it said the statute potentially criminalizes the simple words spoken to a wife, a parent, friend, a neighbor or co-worker ... "I encourage you to stay here."

Under the ninth circuit's analysis of the statute, it opined the following might be construed as criminal conduct under the statute:

- A loving grandparent who encourages her grandson to overstay his Visa by telling him, "I encourage you to stay."

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- A speech directed to undocumented individuals or perhaps on social media which states something like, "I encourage all of you folks out there without legal status to stay in the United States. We are in the process of trying to change the immigration laws and the more we can show the potential hardship on people who have been in the country a long time, the better we can convince American citizens to fight for us and grant you a path to legalization.
- Or, an attorney tells her client that she should remain in the country while contesting removal because non-citizens within the Unites States have greater due process rights than those outside the United States, and as a practical matter, the government may not physically deport her until removal proceedings have been completed.

The United States argued the statute should be read narrowly; that its targets, like Evelyn, were unethical and unauthorized practitioners who prey on unknowing potential immigrants to stay unlawfully in the United States. And, in Evelyn's case, she did so for her own financial profit, without legal basis for her supposed representation. Furthermore, it argued that a solicitation exception exists as to the First Amendment, where speech is a centerpiece to the criminal conduct charged. *United States v. Williams*, 553 US 285 (2008) ("*Williams*"); *United States v. White*, 610 F.3d 956 (7th Cir. 2010) ("*White*"). And it indicated, in the scenarios listed by the ninth circuit, that no enforcement actions would occur. Unpersuaded by that concession, the ninth circuit found the statute unconstitutional.

Finally, it proffered that speech, which is integral to criminal conduct, such as fighting words, threats and solicitations, remain categorically outside First Amendment protection. *Williams, White*. In its argument, the United States argued that Evelyn's criminal conduct based on her solicitations to her clients was not only untrue, but had no legal foundation and resulted in her financial gain: it was sufficient for the solicitation count verdicts.

As the *Williams* Court noted, offers to engage in illegal activity do not acquire 1st Amendment protection when the offeror is mistaken about the factual predicate of the offer. 553 U.S. at 302. And under the void for vagueness doctrine, *Williams* observes that a conviction fails to equate with due process if it does not provide a person of ordinary intelligence fair notice of what is proscribed, or lacks any standards so it authorizes discriminatory enforcement.

Finally, *Williams* said that a statute is vague not due to the difficulty of determining whether the incriminating fact has been proved, but the indeterminacy of what exactly that fact is. Put another way, if criminal culpability is based on the statute's subjective text without any precise definition or settled legal denotations, it fails. *Williams, 553 U.S. at 305*, citing, *Coates v. Cincinnati*, 402 U.S. 611 (1971).

William White created a website. A frequent topic on his website was Matthew Hale, the leader of a white supremacist organization known as the World Church of the Creator. Hale was charged in 2003 and later convicted of solicitation and two counts of obstruction of justice in connection with the alleged murder of a Federal court judge. He received a 40-year term of incarceration. *United States v. Hale*, 448 F.3d 971 (7th Cir. 2006)

In 2008, White posted on his website the following information about Juror A who was on the panel in Hale's criminal case. It read:

> Gay anti-racist (Juror A) was a juror who played a key role in convicting Matt Hale. Born [date] [he/she] lives at [address] with [his/her] gay black lover and [his/her] cat [name]. [His/her] phone number is [phone number], cell phone [phone number] and [his/her] office is [phone number].

Previously, White had posted personal information about the foreperson or Juror A at Hale's trial. On that website, White posted calls for violence against "anti-racists". Based on this information, a grand jury returned an indictment charging White with soliciting a crime of violence against Juror A.

Prior to trial, White moved to dismiss the indictment since his internet posting was speech protected by the First Amendment. Basically, his argument was the posting was not a solicitation, and because it was not, it is speech deserving of First Amendment protection. The trial court granted the motion. The seventh circuit court of appeals reversed. It held that the indictment alleged a solicitation offense, even if the solicitation was not explicit. Furthermore, it found that whether the First Amendment protected White's right to post the personal information of Juror A is based on his intent in posting Juror A's personal information. If White's intent in posting that information was to request one of his readers harm Juror A, then the crime of solicitation is complete, regardless if no act occurred or whether Juror A was harmed. *Williams.*

For many, this may seem too broad a proscription. But let's not forget this case came to the court on the pleadings, not like a jury's verdict, as was the situation in *Smith*. Contrariwise, if White's posting was to make a political statement about sexual orientation, then no solicitation would occur, since the requisite intent required for the crime is absent. The court left the question up to the jury to decide, and the court to fathom what instructions should be given either under the First Amendment or not. *United States v. Freeman*, 761 F.2d 549 (9th Cir. 1985) ("*Freeman*").

In *Freeman*, the issue was whether jury instructions should have been given since much of the speech concerned abstract advocacy, which is protected under the First Amendment. On the other hand, solicitation turns on purposefully encouraging another to commit a particular crime. It may be that if the statute is read as being confined to the solicitation of specific criminal conduct it should pass muster under the First Amendment.

The concerns raised by the ninth circuit revolved around abstract advocacy. Lawyers, as have I, advocate for their clients not to leave the United States because they have better access to courts and for the very reason that immigration authorities have a hard time of removing individuals (*i.e.*, lack of passport from native country). There is nothing criminal about that. It is true: and pure advocacy. On the other hand, what was

the precise solicitation made by Evelyn to her clients? Residing in the United States when she objectively knew that was an impossibility under the supposed law she claimed still existed? A jury of her peers said it was. Actual conduct should be the focus of whether First Amendment protection adheres.

The facts in *Smith* are not sympathetic. A jury's verdict, and largely a judge's confirmation of those findings, should not be disregarded lightly. Although in today's world it may seem otherwise, opinions matter. And, because they may be different does not denote they are unprincipled. There is no doubt the statute the ninth circuit invalidated casts a wide net. So does the ninth circuit's view. It seems to me that what is lacking is what the contours of a solicitation embrace in a criminal trial. In this context, what amounts to a solicitation requires some specific delineation. If that is a matter of law, then the Supreme Court needs to explain what that is. Its guidance as to what the First Amendment proscribes in a criminal solicitation case is important to all our citizenry. Regardless of personal perspectives, I think we can all agree on that proposition.

The Supreme Court invalidated the ninth circuit opinion since it is the parties to the case, not a court hearing it, that frame the issues the court decides. (Sl.Op. at p. 3) In short, courts, "do not, or should not, sally forth each day looking for wrongs to right". *United States v. Samuels*, 808 F.2d 1298 (8th Cir. 1987) It sent the case back to the ninth circuit to consider the issues raised by the parties, not the overbreadth inquiry interjected into the appeal by the ninth circuit.

A great deal of effort went into the Sineneng-Smith appeal. The overbreadth issue,as Justice Thomas suggests in his concurring opinion, needs re-examination. It casts a wide net and is not found in the text of the First Amendment. It is "strong medicine" as the majority states. Regrettably, we will have to wait to another day for a current constitutional analysis of it.

On remand, I guess we will see how the ninth circuit sees it based on the record made by the parties, not the court.■

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Temporary Protected Status: It's Time to Get It Right

BY PATRICK M. KINNALLY

Seven years ago, I argued in this newsletter that temporary protected status (TPS) should be an agreeable exercise, not its antithesis. ''Temporary Protected Status Should be a Welcome Rule of Law", Kinnally, Illinois State Bar Association, *The Globe*, Oct. 2013. My premise was the Immigration and Nationality Act, 8 USC §1101, failed to address, or did so ineffectively, for those persons who did not fit into one of its sundry categories designed for immigrants and non-immigrants. And, historically executive actors seeking to fill this void by enacting programs such as extended voluntary departure and deferred enforced departure did so haphazardly.

Many persons got lost in the wake of the demise of such executive actions. I thought

TPS, enacted by Congress thirty years ago, would be the channel through which approximately 400,000 TPS migrants living in the United States would arrange their status in our country and become lawful permanent residents. It seems such an impression was mistaken. *Ramos v. Wolf,* 19-16981, 9th Cir. 9-14-20) (*Ramos*). And as we will see, executive administrative decisionmakers (*Matter of HGG*, 27 I&N Dec. 617, AAO, 2019); as well as judicial actors, (*Ramirez v. Brown*, 852 3d 954 (9th Cir. 2017); *Flores v. USCIS*, 718 F.3d 548 (6th Cir. 2013); *Serrano vs. Attorney General*, 655 F.3d 1260 (11th Cir., 2011); and most recently *Velasquez v. Barr*, 19-1148 (8th Cir., 10-27-20), seem to have varying interpretations and opinions as to what Congress meant in creating temporary protected status three decades past. Why?

Some context. The TPS status states:

A country may be identified for TPS for one or more of the following reasons:

- An ongoing armed conflict, such as a civil war, that poses a serious threat to the personal safety of returning nationals;
- An environmental disaster, such as an earthquake, hurricane, or epidemic, that results in a substantial but temporary disruption of living conditions, and because of which the foreign state is temporarily unable to adequately handle the return of its nationals; or
- Extraordinary and temporal conditions in the foreign state that impede its nationals from returning to the state in safety (unless the U.S. government finds that permitting these nationals to remain temporarily in the United

States is contrary to the U.S. national interest).

The Secretary of Homeland Security has discretion to decide whether a country qualifies for the TPS stamp. The secretary is to seek advice with other government agencies prior to deciding to nominate a country for TPS. The secretary's decision as to whether or not to classify a country for TPS is not subject to judicial review.

A TPS denomination can be made for six to 18 months at a time. At least 60 days prior to the expiration of TPS, the secretary must decide whether to extend or discontinue a designation based on the conditions in the foreign country.

In order to qualify for TPS, an individual must:

- Be a national of the foreign country with a TPS designation;
- Be continuously physically present in the United States since the effective date of designation;
- Reside continuously in the United States since a date specified by the Secretary of Homeland Security; and
- Not be inadmissible to the United States or be barred from asylum for certain criminal or national security-related reasons, such as individuals who have been convicted of a felony or two or more misdemeanors.

Individuals from a designated country must subscribe during a specific registration period and pay fees. In addition, an individual's immigration status at the time of application for TPS has no effect on one's eligibility, nor does the previous issuance of an order of removal. See Temporary Protected Status: Overview and Current Issues, Congressional Research Service (April 2020) https://www.everycrsreport.com/reports/RS20844.html.

These TPS groups have as much currency today as they did in 1990. Civil wars are occurring. Natural disasters have not ceased but some might argue have increased. And, failed governments teem. Of course, it is one political position not to have a TPS program at all. But should this happen through judicial or administrative scrutiny which is breathtakingly incongruent? Or, should Congress act, instead of sitting in the bleachers not paying attention. We need leaders.

The initial problem for TPS registrants, then, is how that person adjusts status to lawful permanent resident status (LPR). 8 USC 1255(a). Many TPS aliens entered the United States without inspection by an immigration officer. See *Matter of Quinlantan* (BIA 2010) 25 l&N Dec. 285. The adjustment of status (AOS) rule, with some exceptions, requires that persons who seek to change their status to LPR must have presented themselves for inspection when applying for admission into the United States. Additionally, 8 USC 1255(a) bars several classes of persons from adjustment including those whom are in unlawful immigration status on the date of filing the application for AOS and those who have failed to maintain continuously a lawful status since entry into the United States. 8 USC 1255(c)(2).

But under the TPS statute, Congress provided:

***

> During a period in which an alien is granted temporary protected status-for purposes of adjustment of status under Section 1255 of this title and change of status under section 1258 of this title the alien shall be considered as being, in, and maintaining lawful immigrant status.

***

8 USC 1254a(f)(4)

It seems this text is wracked with ambiguity since USCIS (*HGG*) and two Circuit of Appeals (*Serrano*; *Sanchez v. Dept. of Homeland Security*, 967 F.3d 242 (3rd Cir. 2020)

(Sanchez)) have concluded adjustment of status is not permitted for those who entered the United States without inspection. On the other hand, three Federal Circuit Court of appeals have concluded the language is apparent and permits adjustment of status. (e.g., *Velazquez*)

Valezquez is the third court of appeals to conclude that 1254a(f)(4) means what it says, and that the TPS statute provision which considers the TPS registrant, "to be in, and maintaining lawful nonimmigrant status" is without uncertainty. These courts have concluded there is no separate requirement that such person be "inspected and admitted" under the AOS regime. 8 USC §1255a. The court of appeals in concluding so, have reasoned that since TPS beneficiaries are "considered to have nonimmigrant status for purposes of AOS they must also be considered "inspected and admitted" under 1255a. *Velazquez*, Sl.op. at 8.

Diversely, the executive branch of the government (*HGG*) and recently, the third ~~circuit court of appe~~als (*Sanchez*), maintain that the two terms "admission" and "lawful status" have distinct denotations. In this viewpoint, the argument posited is that TPS beneficiaries who entered the country without inspection are not admitted because they did not lawfully enter the United States. According to *HGG, Sanchez* and *Serrano*, this makes the TPS registrant ineligible to adjust his/her status to LPR.

Of course, this establishes the following hydra-headed policy dilemma. In the 6th, 8th and

9th Circuits, TPS registrants can adjust status even if they entered without inspection. In the 3rd and 11th Circuits, as well as elsewhere, they cannot. See USCIS PM - 602-0172 July 31, 2019; PM-602-0179, August 20, 2020. The result is a scheme which is inconsistent and unfair to those depending on the accident of their residence. I do not know which interpretation is correct, but it seems to me the existing protocol is aberrant.

Yet, this issue may be dwarfed by the holding in *Ramos*. *Ramos* lifted a preliminary injunction which blocked the government from terminating the TPS designations for Sudan, Nicaragua, Haiti and El Salvador. In the majority opinion, the ourt held that the DHS Secretary had vast and distinct discretion over designating a country under TPS. The Court looked at 8 USC §1255a(b)(5)(A), which states:

> * * * There is no judicial review of any determination of the Secretary of Homeland Security with respect to the designation or termination or extension of a designation of a foreign state under this subsection. * * *

The Court held that the Administrative Procedure Act claim was not reviewable since the claim did not challenge any agency

procedure or regulation. It observed that the challenge really was to the substantive decision of the Director's reasons to terminate the designation. That analysis was not subject to judicial review.

Of course, the implications for TPS applicants after *Ramos* are evident. (Congressional

Research Service, Smith, Ninth Circuit Decision allows Termination of Temporary Protected

Status for Sudan, Nicaragua and El Salvador, Oct. 16, 2020). Once the temporary designations for those countries expire, those TPS registrants will have no status. And, at the end of the day, that makes the importance of AOS to LPR for TPS registrants whether "inspected or admitted" much more significant, since they cannot adjust their status to LPR. Their TPS status will terminate. Removal from the United States will ensue.

Courts and executive actors in the sphere of statutory interpretation—based on the text of a Congressional statute—should not be making law. Congress needs to do what we all elected them to do—make laws that are plain and discharge the duty they have to define for those migrants whom need to know whether there is a clear path to becoming a part of our American polity. Congress' collective failure to do so is an abdication of their role as our representatives.

We need to get it right. ■

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Administrative Agencies Must Disclose Ex Parte Communications Used in the Decision-Making Process: *JSW Steel (USA), Inc. v. United States*

BY HANNAH KREINIK

Ex parte communications regarding an administrative agency's decision process will need to be identified and disclosed as part of the certification of the record for decisions, according to a recent decision from Judge Claire R. Kelly of the U.S. Court of International Trade. In *JSW Steel (USA) Inc., v. United States*, 466 F. Supp. 3d 1320 (Ct. Int'l Trade 2020), the Court of International Trade held that any necessary *ex parte* communications must be compiled to create a complete record in order to explain the government's actions and decisions. The CIT ruled against the U.S. Department of Commerce and remanded the case for it to explain its decision against JSW Steel (USA), Inc., a U.S. company that manufactures steel plates made from steel slabs imported from India.

After an investigation by the Bureau of Industry and Security (BIS) found that steel imports threatened national security, President Trump issued an Executive Order raising tariffs on steel products. Under Proclamation 9705, President Trump raised the tariffs on certain steel imports by 25% *ad valorem* (based on the value of the good). An exception to Proclamation 9705 allowed the Secretary of Commerce to exempt certain steel goods from the tariff increase if those goods were not manufactured in the United States in a satisfactory quality. The criterion "not produced in the United States in a satisfactory quality" requires that the steel be equivalent as a "substitute product," as in steel produced by a domestic producer that can "immediately" meet "the quality (e.g., industry specs or internal company quality controls or standards), regulatory, or testing standards, in order for the U.S. produced steel to be used in that business activity in the United States by that end user."

After Proclamation 9705 took effect, JSW Steel (USA) requested 12 exceptions to the increased tariffs on products from India and other countries that it used to manufacture steel plates. Three domestic steel producers objected to JSW Steel's requests to escape the higher tariffs. A year later, Commerce denied all of JSW Steel's requests for exemptions from the higher tariffs.

JSW Steel uncovered emails between the three objectors and Commerce officials hinting at *ex parte* contacts with Commerce. JSW Steel requested additional discovery to complete the administrative record, but Commerce responded that the record was not missing any materials.

When the case was brought to the U.S. Court of International Trade, Commerce admitted that the record was incomplete, but insisted that additional discovery was not necessary. The CIT ruled that Commerce needed to provide further explanation for the record that was used to deny the requests and to supplement the record with any additional communications. Finally, the CIT also denied JSW Steel's argument for continued discovery. The CIT interpreted this issue under the Administrative Procedures Act (APA) Section 706, Proclamation 9705, and applicable caselaw.

The CIT began its analysis under the APA Section 706, which requires a court to review administrative agency decisions based on the whole record or the portions cited by the parties. 5 U.S.C. § 706. The CIT explained that administrative agencies enjoy a presumption that the materials used to create their record is the whole record used in their deliberations. Commerce insisted that the communications with the three objectors was not part of the evidence it considered when making its decision. JSW Steel argued that the meetings were an essential element considered by Commerce. Because Commerce had already asserted that those particular meetings with the objectors were not used to formulate its decision, the CIT ruled that it could not justify additional discovery to uncover *ex parte* communications that Commerce did not consider.

The CIT stated that Commerce could re-certify that the record was indeed complete by taking the necessary steps to show the record did not have any defects indirectly or directly considered by the agency. The court stated that an explanation is required to justify that the record includes what was indirectly or directly used by the agency. The court decided that the record required an explanation based on the fact that neither the BIS or ITA recommendations and memoranda included what evidence was considered by the sub-agencies or why the specific evidence was used for the memorandum. BIS did not refer to any specific evidence and only stated that JSW Steel used the incorrect harmonized tariff number on its paperwork without any explanation as to why that was important for its consideration. The CIT also determined that the reasoning provided by the ITA was equally as disappointing. The CIT remanded the case to Commerce for it to explain the whole record.

Due to the discrepancies, the CIT concluded that a remand of the case was necessary in order to determine the evidence used indirectly or directly by Commerce in its decision to deny all twelve of JSW Steel's exclusion requests. The CIT remanded the case for Commerce to confirm its administrative record and supplement any additional material required. Finally, the court decided that if Commerce does not supplement any new material to the record, then it will be necessary for Commerce to explain specifically its reasoning for the request denials.

It will be interesting to see what comes from remanding the case for Commerce's additional investigation and potential supplementation of the record. The CIT emphasized that it would entertain extended discovery if Commerce's evidentiary record shows bad faith or impropriety on part of the agency after the case has been remanded.

This case informs us that the court will not be too quick to dismiss an agency's claim of a clean and complete record. At the same time, it is clear that the court will not allow an agency to get away with brief conclusory statements. The CIT insisted that the agency uphold its standards as an administrative body and to submit the necessary materials for a direct and well-reasoned decision. Currently, the court seems to allow for some flexibility during these complicated times, but seeks to remain strong on important matters of agency discretion and reliability.■

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