Summer 2019

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Recommended Citation

Jeffrey F. Addicott, The Trump Travel Ban: Rhetoric vs Reality, 44 U. Dayton L. Rev. 491 (2019).

THE TRUMP TRAVEL BAN: RHETORIC VS REALITY

Jeffrey F. Addicott[*]

"SUPREME COURT UPHOLDS TRUMP TRAVEL BAN. Wow!"[1]
– President Donald J. Trump

ABSTRACT

President Trump's "Muslim ban" set the nation afire with debate. Opponents to the ban were motivated by the President's underlying motivations. Three iterations of the travel ban were struck down by lower courts. Before the Supreme Court, however, the travel ban was upheld. First, the plain language of § 1182(f) granted broad discretion to the President. Second, it did not violate the prohibition of discrimination against selected categories in § 1152(a)(1)(A). Finally, it failed to violate the Establishment

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[1] Donald J. Trump (@realDonaldTrump), TWITTER (June 26, 2018, 7:40 AM), https://twitter.com/realdonaldtrump/status/1011620271327989760?lang=en. *See also* Josh Gerstein & Ted Hesson, *Supreme Court Upholds Trump's Travel Ban*, POLITICO (June 26, 2018, 2:33 PM), https://www.politico.com/story/2018/06/26/supreme-court-upholds-trumps-travel-ban-673181. In a written statement, the White House noted: "Today's Supreme Court ruling is a tremendous victory for the American People and the Constitution. In this era of worldwide terrorism and extremist movements bent on harming innocent civilians, we must properly vet those coming into our country[.]" *Id.*

Clause because it is facially legitimate, satisfying rational basis review. The Court found no facial evidence demonstrating discriminatory bias.

I. INTRODUCTION

On January 20, 2017, Donald J. Trump was sworn into office as the 45th President of the United States of America.[2] In a surprise early move that turned out to be perhaps the most controversial issue in the first half of the Trump presidency, President Trump ordered a limited travel ban targeting travelers to the United States from six Muslim-majority countries.[3] Given then-candidate Trump's occasional lapses into bombastic rhetoric about "banning Muslims" from entering the United States, his action to implement a tailored travel ban for a handful of Muslim- majority nations set off a firestorm of debate. The expressed consternation was not so much centered on the black letter legality of the executive order, but more so on questioning the underlying motivations of President Trump. In the minds of some, President Trump's decision to implement a travel ban was wholly "unconstitutional" in violation of the Constitution's Establishment Clause. For certain, the travel ban galvanized both those who maintained a trigger-happy reaction to any unorthodox speech by President Trump and were outraged at a Commander-in-Chief who seemingly embraced religious intolerance.[4] The question was thus set: was Trump's move a necessary action to keep the nation safe from the threat of radical Islamic terrorism in the ongoing "War on Terror," or a reflection of a deep-seated hostility and animus towards Muslims, which might render the travel ban unconstitutional?[5]

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[2] Trump won forty-six percent—versus Hillary Clinton's forty-eight percent—of the popular vote. Gregory Krieg, *It's Official: Clinton Swamps Trump in Popular Vote*, CNN (Dec. 22, 2016, 5:34 AM), http://www.cnn.com/2016/12/21/politics/donald-trump-hillary-clinton-popular-vote-final-count/index.html. Nevertheless, Donald Trump won the Electoral College by a very comfortable margin—306 electoral votes versus Hillary Clinton's 232. *Presidential Results*, CNN, http://www.cnn.com/election/results/president (last visited Mar. 18, 2019); *see generally* WILLIAM C. KIMBERLING, THE ELECTORAL COLLEGE (1992), *available at* https://babel.hathitrust.org/cgi/pt?id=pur1.32754076105075;view=1up;seq=1. Trump won thirty states, while Clinton won twenty plus the Federal District of Columbia. *See Presidential Results, supra.*

[3] Although the Trump Travel Ban was particularly galling for those dissatisfied with the results of the 2016 election, other groups were equally disturbed. *See* Andrew Buncombe, *Donald Trump's Muslim Ban Inspires Mass Protests Across the United States Involving Millions of Americans*, INDEP. (Jan. 30, 2017, 3:42 PM), https://www.independent.co.uk/news/world/americas/donald-trump-muslim-ban-protests-us-refugee-immigration-policy-syria-iran-iraq-demonstrations-a7553476.html (demonstrating the widespread dissatisfaction with the Trump travel ban); JTA & TOI Staff, *Jewish Groups Decry Supreme Court Upholding of Trump Travel Ban*, TIMES OF ISRAEL (June 26, 2018, 8:40 PM), https://www.timesofisrael.com/jewish-groups-decry-supreme-court-upholding-of-trump-travel-ban/ (discussing different Jewish organizations and their response to the travel ban).

[4] *See* Andrew Buncombe, *Donald Trump's Muslim Ban Inspires Mass Protests Across the United States Involving Millions of Americans*, INDEP. (Jan. 30, 2017, 3:42 PM), https://www.independent.co.uk/news/world/americas/donald-trump-muslim-ban-protests-us-refugee-immigration-policy-syria-iran-iraq-demonstrations-a7553476.html.

[5] *See* President George W. Bush, *Address to the Joint Session of the 107th Congress*, SELECTED SPEECHES OF PRESIDENT GEORGE W. BUSH 2001–2008 (Sept. 20, 2001), *available at* https://georgewbush-whitehouse.archives.gov/infocus/bushrecord/documents/Selected_Speeches_George_W_Bush.pdf

Over the course of the next seventeen months, the attention—both political and legal—that was devoted to the original travel ban and its subsequent iterations was second only to the media's never-ending fixation on the so-called "Trump/Russia" collusion allegations.[6] After a series of lower court rulings that struck down each of the three versions of the President's travel ban, the United States Supreme Court finally settled the matter on June 26, 2018.[7] In a 5-4 opinion written by Chief Justice John Roberts, the majority rejected the challengers' claims of illegality.[8] While fully acknowledging that President Trump had made a series of derogatory and confusing statements about Muslims and a Muslim ban, the Chief Justice ruled that the Court "must consider not only the statements of a particular President, but also the authority of the Presidency itself."[9] In other words, for the Court, the question revolved around "the significance of those statements in reviewing a Presidential directive, neutral on its face, addressing a matter within the core of executive responsibility."[10] According to the Court, the sole prerequisite behind the Government's action is that the Executive present an explanation for the travel ban that is "plausibly related" to a legitimate national security objective.[11] Thus, since the text of the travel ban said nothing about religion, the Court ruled that the travel ban order was "expressly premised on legitimate purposes: preventing entry of nationals who cannot be adequately vetted and inducing other nations to improve their practices."[12] In short, the President of the United States has the absolute constitutional authority to restrict the entry of aliens whenever he finds that their entry "would be detrimental to the interests of the United States," in accordance with the applicable Congressional statute.[13]

(stating that: "Our war on terror begins with al Qaeda, but it does not end there. It will not end until every terrorist group of global reach has been found, stopped and defeated."). *See* Richard W. Stevenson, *President Makes It Clear: Phrase is "War on Terror"*, N.Y. TIMES (Aug. 4, 2005), https://www.nytimes.com/2005/08/04/politics/president-makes-it-clear-phrase-is-war-on-terror.html (quoting George W. Bush's Address at the American Legislative Exchange Council (Aug. 3, 2001)).

[6] *See* Jennifer Harper, *Media obsession: 55 Percent of Broadcast News Coverage of Trump Centered on Russia Probe*, WASH. TIMES (June 27, 2017), https://www.washingtontimes.com/news/2017/jun/27/media-obsession-55-percent-of-broadcast-news-cover/ (noting the amount of time spent on the Russia matter compared with other important policy topics); *See also* Ed Rogers, *The Media's Mass Hysteria Over 'Collusion' is Out of Control*, WASH. POST (July 11, 2017), https://www.washingtonpost.com/blogs/post-partisan/wp/2017/07/11/the-medias-mass-hysteria-over-collusion-is-out-of-control/?noredirect=on&utm_term=.c3a32fa5ed8a (pointing to different news stations like *New York Times* and *Politico* to demonstrate the "breathless coverage."); *The Media's Unhealthy Trump-Russia Obsession...By the Numbers*, INVESTOR'S BUS. DAILY (June 29, 2017), https://www.investors.com/politics/editorials/the-medias-unhealthy-trump-russia-obsession-by-the-numbers/ (noting an analysis which found, "from May 17 through June 20, the big three networks devoted 353 minutes of their precious airtime to the Russia story—equal to more than half the networks' total Trump coverage over those weeks.").

[7] Trump v. Hawaii, 138 S. Ct. 2392 (2018).

[8] *Id.* at 2402.

[9] *Id.* at 2418.

[10] *Id.* at 2401.

[11] *Id.* at 2420.

[12] *Id.* at 2421.

[13] 8 U.S.C. § 1182(f) (2012).

II. OVERVIEW

The purpose of this article is to trace the litigious journey of the Trump travel ban with attention to the efficacy of judicial review over issues related to matters that are outside of the "four corners" of an Executive Branch action related to national security and foreign relations. In this context, the trip is not solely about assessing the jurisprudence, particularly when opponents of the Trump travel ban relied heavily on then-presidential candidate Donald Trump's own inflammatory rhetoric about "banning Muslims," when arguing for relief from the executive order. As plainly cited by the plaintiffs in *Trump v. Hawaii*, there is no question that President Trump's untoward and outrageous pronouncements, which smack of religious discrimination, saddled the Trump presidency with a whole host of negative connotations, causing ample ground for concern.[14] While President Trump's personal oratory often runs counter to the otherwise laudable core meaning of his signature phrase, "Make America Great Again," religious bias is absolutely *anathema* to the American ethos.[15]

Apart from President Trump's well-established penchant for hyperbolic monologue, evaluating the Trump travel ban in an objective manner is fraught with other built-in difficulties.[16] Specifically, the American public is exposed to a relentless drumbeat of anti-Trump vitriol, both from his political opponents and from a very vocal and partisan mainstream media,[17] where almost every action or pronouncement by President Trump is treated with open suspicion and vituperous contempt.[18] Both realities, Trump's

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[14] *Trump*, 138 S. Ct. at 2417.

[15] Pamela Engel, *How Trump Came up with his Slogan 'Make America Great Again'*, BUS. INSIDER, (Jan. 18, 2017, 10:15 AM), http://www.businessinsider.com/trump-make-america-great-again-slogan-history-2017-1.

[16] *See* Jeffrey F. Addicott, *Prosecuting the War on Terror in the Trump Administration: The Trump Doctrine—Is There Really a New Sheriff in Town?*, 11 ALB. GOV'T L. REV. 209, 211–13 (2018).

[17] *See* Charles M. Blow, *Soul Survival in Trump's Hell*, N.Y. TIMES (Sept. 11, 2017), https://www.nytimes.com/2017/09/11/opinion/soul-survival-in-trumps-hell.html (arguing that living in the Trump Administration is the equivalent of existing in a living hell); *see also* Howard Kurtz, *Behind the Vitriol: Are Trump's Critics Mimicking his Tactics?*, FOX NEWS (April 26, 2018), http://www.foxnews.com/politics/2018/04/26/behind-vitriol-are-trumps-critics-mimicking-his-tactics.html (examining the media's coverage of the Trump Administration); Jeremy W. Peters, *As Critics Assail Trump, his Supporters Dig in Deeper*, N.Y. TIMES (June 23, 2018), https://www.nytimes.com/2018/06/23/us/politics/republican-voters-trump.html (discussing the harsh responses to President Trump's decisions).

[18] *See* Stephen Dinan, *Networks' Coverage of Trump Immigration Policy 92 Percent Negative*, WASH. TIMES (July 24, 2018), https://www.washingtontimes.com/news/2018/jul/24/networks-coverage-trump-immigration-policy-92-perc/ (demonstrating staggering negativity across ABC, CBS, and NBC towards Trump's immigration policy); Tom Engelhardt, *The Media Have a Trump Addiction*, THE NATION (Mar. 27, 2018), https://www.thenation.com/article/the-media-has-a-trump-addiction/ (exhibiting the historic amount of media coverage of President Trump: "no human being in history has ever been covered in this fashion[.]"). Jennifer Harper, *Numbers Don't Lie: Media Coverage Against Trump is Entrenched, Vicious, Persistent*, WASH. TIMES (June 29, 2017), https://www.washingtontimes.com/news/2017/jun/29/inside-the-beltway-media-bias-against-trump-is-ent/; *see also* Jennifer Harper, *Unprecedented Hostility: Broadcast Coverage of President Trump Still 90% Negative, Says Study*, WASH. TIMES (Mar. 6, 2018), https://www.washingtontimes.com/news/2018/mar/6/trump-coverage-still-90-negative-says-new-study/ ("Out of a total of 712 evaluative comments made on the air, only 65 were positive, or 9 percent. The

penchant for offensive phrases and the media's bias, play loudly in entertaining open and rational discussions on even the most basic of issues.

III. LOWER FEDERAL COURT LEGAL CHALLENGES TO THE TRUMP TRAVEL BAN

As the Republican Party's chosen candidate during the 2016 presidential contest, Donald Trump expressed pointed dissatisfaction with a number of policies, practices, and people in a manner that left many observers highly unsettled—both in terms of Trump's occasional lack of common civility and unconventional content.[19] To be sure, commentators still argue if the communication style, tone, and overall methodology employed by President Trump is political genius or political suicide.[20] However unartfully articulated on the long campaign trail, candidate Trump was especially keen on speaking out about securing and controlling America's borders.[21] Some of his justifications centered on the inherent right of any sovereign nation to ensure border integrity by requiring foreigners seeking admission to follow lawful immigration laws, but Trump also cited national security threats as a reason for restricting those seeking entrance into the country.[22] Thus, he touted building a more robust physical wall along the Mexico border, as well as targeting other types of immigrants to include those allowed into the nation under temporary protected status[23] and the Obama-created Deferred Action

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rest—647 comments—were negative, amounting to 91 percent."). *See also* Deborah Howell, *An Obama Tilt in Campaign Coverage*, WASH. POST (Nov. 9, 2008), http://www.washingtonpost.com/wp-dyn/content/article/2008/11/07/AR2008110702895.html (admitting that there was a distinct media slant towards Obama during the then presidential campaign and citing the number of positive stories about Obama versus the number of positive stories about McCain); Thomas E. Patterson, *News Coverage of Donald Trump's First 100 Days* (HKS Faculty Research Working Paper, Series 10, RWP17-040, Sept. 2017) ("Trump's coverage during his first 100 days was not merely negative in overall terms. It was unfavorable on every dimension. There was not a single major topic where Trump's coverage was more positive than negative.").

[19] Sarah McCammon, *Donald Trump has Brought on Countless Controversies in an Unlikely Campaign*, NPR (Nov. 5, 2016), https://www.npr.org/2016/11/05/500782887/donald-trumps-road-to-election-day.

[20] *See generally* Kent Wainscott, *'He's a Genius,' Says PR Executive on President Trump's Communication Style*, WISN-TV (Feb. 2, 2017, 7:04 PM), https://www.wisn.com/article/hes-a-genius-says-pr-executive-on-president-trumps-communication-style/8669332 (demonstrating one commentator's view on Trump's "genius."); Tara Golshan, *Donald Trump's Unique Speaking Style, Explained by Linguists*, VOX (Jan. 11, 2017, 12:50 PM), https://www.vox.com/policy-and-politics/2017/1/11/14238274/trumps-speaking-style-press-conference-linguists-explain (discussing Trump's linguistic styles and how this affects different types of people).

[21] *A History of Trump's Border Wall*, COUNTABLE (Apr. 25, 2017), https://www.countable.us/articles/418-history-trump-s-border-wall.

[22] *See* Donald J. Trump, Donald Trump's Immigration Speech in Phx., Ariz. (Aug. 31, 2016) (transcript available at https://www.nytimes.com/2016/09/02/us/politics/transcript-trump-immigration-speech.html); Ron Nixon & Linda Qiu, *Trump's Evolving Words on the Wall*, N.Y. TIMES (Jan. 18, 2018), https://www.nytimes.com/2018/01/18/us/politics/trump-border-wall-immigration.html.

[23] *See* Maya Rhodan, *Trump Looks to End Temporary Status for Some Immigrants*, TIMES (Nov. 20, 2017), https://www.scribd.com/article/364096365/Trump-Looks-To-End-Temporary-Status-For-Some-Immigrants (reporting on the Department of Homeland Security's intention to end temporary protected status in early 2019 for 2,500 immigrants who came to the U.S. from Nicaragua in 1998 after Hurricane Mitch).

for Childhood Arrivals ("DACA").[24] In terms of national security threats to the nation, President Trump's greatest concern was centered on protecting the United States from the very real threat of radical Islamic terrorism, particularly given the backdrop of horrendous ISIS-inspired terror attacks in the West during the 2014-2016 timeframe.[25]

Indeed, on January 27, 2017, one week after taking the oath of office, President Trump issued Executive Order No. 13769 ("Travel Ban EO-1")—a temporary travel ban[26] for individuals seeking entrance into the United States from seven Muslim-majority countries that "had been previously identified by Congress or prior administrations as posing heightened terrorism risks."[27] The order was directly focused on longstanding hotbeds of terrorism—Iran, Libya, Somalia, Syria, Sudan, Yemen, and Iraq.[28] Travel Ban EO-1, entitled "Protecting the Nation from Foreign Terrorist Entry into the United States[,]" also halted the United States refugee program for 120 days and suspended all admittance of Syrian refugees indefinitely.[29] As the title suggested, Travel Ban EO-1 also directed the Secretary of Homeland Security to conduct a thorough review regarding the adequacy of information provided by foreign governments about their nationals seeking entry into the United States.[30]

President Trump's reasoning in selecting the seven nations for a temporary immigration suspension was because each "is a state sponsor of terrorism, has been significantly compromised by terrorist organizations, or contains active conflict zones."[31] Further, not only were all the listed countries rife with radical Islamic extremists, but many of them also possessed a governmental bureaucracy that had little or no credibility in terms

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[24] The Trump Administration rescinded DACA in September 2017. *See* DEP'T OF HOMELAND SEC., MEMORANDUM ON RESCISSION OF DEFERRED ACTION FOR CHILDHOOD ARRIVALS ("DACA") (Sept. 5, 2017), ("This memorandum rescinds the June 15, 2012 memorandum entitled 'Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children,' which established the program known as Deferred Action for Childhood Arrivals.").

[25] Masood Farivar, *Trump Pledges War on Radical Islamic Terrorism*, VOA NEWS (Jan. 18, 2017, 8:27 AM), https://www.voanews.com/a/donald-trump-pledges-war-radical-islamic-terrorism/3676303.html. *See also ISIS Fast Facts*, CNN, https://www.cnn.com/2014/08/08/world/isis-fast-facts/index.html (last updated Sept. 3, 2018); John Haltiwanger, *ISIS in America: How Many Times Has the Islamic State Attacked the U.S.?*, NEWSWEEK (Dec. 11, 2017), https://www.newsweek.com/islamic-state-america-attacks-744497 (giving a general background of terrorist attacks linked to ISIS in the U.S.).

[26] Exec. Order No. 13,769, 82 Fed. Reg. 8,977 (Jan. 27, 2017); HILLER R. SMITH & BEN HARRINGTON, CONG. RESEARCH SERV., LSB10017, LEGAL SIDEBAR: OVERVIEW OF "TRAVEL BAN" LITIGATION AND RECENT DEVELOPMENTS (Apr. 23, 2018), *available at* https://fas.org/sgp/crs/homesec/LSB10017.pdf.

[27] Trump v. Hawaii, 138 S. Ct. 2392, 2403 (2018).

[28] Exec. Order No. 13,769, 82 Fed. Reg. 8,977 (Jan. 27, 2017). President Trump's executive order affects travelers who have a nationality in those seven countries, but those who have dual nationality with a non-restricted country are not affected, so long as they travel on the passport from the other country. *Trump's executive order: Who Does the Travel Ban Affect*, BBC NEWS (Feb. 10, 2017), http://www.bbc.com/news/world-us-canada-38781302.

[29] Exec. Order No. 13,769, 82 Fed. Reg. 8,977 (Jan. 27, 2017).

[30] *Id.*

[31] U.S. EMBASSY & CONSULATES IN FRANCE, EXECUTIVE ORDER PROTECTING THE NATION FROM FOREIGN TERRORIST ENTRY INTO THE UNITED STATES (Mar. 6, 2017), https://fr.usembassy.gov/executive-order-protecting-nation-foreign-terrorist-entry-united-states/.

of confirming the identity of people seeking visas to enter the United States with precision.[32] Although the Trump Administration's justification for the travel ban centered on objective and logical concerns regarding national security and loose vetting practices, his critics voiced other motivations for the issuance of Travel Ban EO-1.[33] Pointing to some of Donald Trump's political campaign rhetoric, opponents complained that Travel Ban EO-1 was actually a guise for banning Muslims from entering the United States.[34] After locating a federal district judge in Washington State that was sympathetic to this theory, it was only a matter of days before Travel Ban EO-1 was blocked[35] by a universal or nationwide injunction,[36] an order which the Ninth Circuit shortly thereafter upheld.[37] In response to the Ninth Circuit's ruling, on March 6, 2017, President Trump revoked Travel Ban EO-1 and replaced it with a new travel ban per Executive Order No. 13780 ("Travel Ban EO-2").[38] The revised Travel Ban EO-2 stated in part:

> Given the foregoing [concerns about Iran, Libya, Somalia, Syria, Sudan, and Yemen], the entry into the United States of foreign nationals who may commit, aid, or support acts of terrorism remains a matter of grave concern. In light of the Ninth Circuit's observation that the political branches are better suited to determine the appropriate scope of any suspensions than are the courts, and in order to avoid spending additional time pursuing litigation, I am revoking Executive Order 13769 [(the original travel-ban)] and replacing it with this order, which expressly excludes from the suspensions categories of aliens that have prompted

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[32] Donald Trump implemented the ban on visa issuance until the Department of Homeland Security could improve its vetting system to properly exclude jihadist-infiltrators from the refugee flow. *Trump Expected to Sign Executive Orders on Immigration,* CNBC (Jan. 24, 2017, 6:36 PM), https://www.cnbc.com/2017/01/24/trump-to-restrict-immigration-from-several-middle-east-countries-reuters.html.

[33] *See* William Saletan, *Of Course It's a Muslim Ban*, SLATE (Jan. 31, 2017, 1:13 PM), http://www.slate.com/articles/news_and_politics/politics/2017/01/trump_s_executive_order_on_immigration_is_a_muslim_ban.html (arguing Trump's rhetoric clearly indicates his true intentions of banning all Muslims).

[34] *Id.*

[35] Washington v. Trump, No. C17-0141JLR, 2017 U.S. Dist. LEXIS 16012 (W.D. Wash. Feb. 3, 2017), *appeal dismissed*, No. 17-35105, 2017 U.S. App. LEXIS 4235 (9th Cir. Mar. 8, 2017). U.S. District Court Judge James Robart found that the plaintiffs filing the lawsuit "have met their burden of demonstrating that they face immediate and irreparable injury as a result of the signing and implementation of the Executive Order." *Id.* at *6–7. The Trump Travel Ban EO-1 was blocked nationwide. *Id.* at *8.

[36] For an overview of the use of nationwide injunctions by federal courts, *See* WILSON C. FREEMAN, CONG. RESEARCH SERV., LSB10124, LEGAL SIDEBAR: THE TRAVEL BAN CASE AND NATIONWIDE INJUNCTIONS (May 2, 2018), *available at* https://fas.org/sgp/crs/homesec/LSB10124.pdf.

[37] Washington v. Trump, 847 F.3d 1151 (9th Cir. 2017) (per curium).

[38] *See* Exec. Order No. 13,780, 82 Fed. Reg. 13,209 (Mar. 6, 2017) (revoking Executive Order 13,769—the original travel ban). President Trump was less than satisfied with this revised version of the travel ban, calling it a "watered down, politically correct version" of the prior executive order. Louis Nelson, *Trump Slams Justice Department for 'Watered Down' Travel Ban*, POLITICO (June 5, 2017, 7:17 AM), https://www.politico.com/story/2017/06/05/trump-travel-ban-justice-department-239131.

> judicial concerns and which clarifies or refines the approach to certain other issues or categories of affected aliens.
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> . . . .
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> To temporarily reduce investigative burdens on relevant agencies during the review period described in subsection (a) of this section, to ensure the proper review and maximum utilization of available resources for the screening and vetting of foreign nationals, to ensure that adequate standards are established to prevent infiltration by foreign terrorists, and in light of the national security concerns referenced in section 1 of this order, I hereby proclaim, pursuant to sections 212(f) and 215(a) of the INA, *8 U.S.C. 1182(f) and 1185(a)*, that the unrestricted entry into the United States of nationals of Iran, Libya, Somalia, Sudan, Syria, and Yemen would be detrimental to the interests of the United States. I therefore direct that the entry into the United States of nationals of those six countries be suspended for 90 days from the effective date of this order, subject to the limitations, waivers, and exceptions set forth in sections 3 and 12 of this order.[39]

Despite the Trump Administration's measured changes set out in the revised Travel Ban EO-2, opponents were not satiated, and the legal

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[39] Exec. Order No. 13,780, 82 Fed. Reg. 13,209 (Mar. 6, 2017). Iraq, a U.S. ally, was removed from the original Trump Travel Ban EO-1 due to the Iraqi government's concerted effort in combating ISIS and stabilizing the region. The executive order stated:

> Iraq presents a special case. Portions of Iraq remain active combat zones. Since 2014, ISIS has had dominant influence over significant territory in northern and central Iraq. Although that influence has been significantly reduced due to the efforts and sacrifices of the Iraqi government and armed forces, working along with a United States-led coalition, the ongoing conflict has impacted the Iraqi government's capacity to secure its borders and to identify fraudulent travel documents. Nevertheless, the close cooperative relationship between the United States and the democratically elected Iraqi government, the strong United States diplomatic presence in Iraq, the significant presence of United States forces in Iraq, and Iraq's commitment to combat ISIS justify different treatment for Iraq. In particular, those Iraqi government forces that have fought to regain more than half of the territory previously dominated by ISIS have shown steadfast determination and earned enduring respect as they battle an armed group that is the common enemy of Iraq and the United States. In addition, since Executive Order 13769 was issued, the Iraqi government has expressly undertaken steps to enhance travel documentation, information sharing, and the return of Iraqi nationals subject to final orders of removal. Decisions about issuance of visas or granting admission to Iraqi nationals should be subjected to additional scrutiny to determine if applicants have connections with ISIS or other terrorist organizations, or otherwise pose a risk to either national security or public safety.

Id. The order also exempted current visa holders and permanent residents from the travel ban. The ban on Syrian refugees remained but was changed to 120 days instead of indefinitely. *Id.*

challenges immediately resumed.[40] Detractors were in no way impressed with the ramification of Travel Ban EO-2, *vis-à-vis* Muslims, and continued to cite President Trump's campaign speeches about anti-Muslim animus as proof of his "real intent" on the matter, which they viewed as overt religious discrimination in violation of the Establishment Clause.[41] Predictably, it did not take long before the President's new Travel Ban EO-2 was once again blocked by means of another universal injunction, this time by federal district courts in Maryland and Hawaii.[42] On the Government's appeal of the Maryland district court's ruling, the Fourth Circuit made its concerns clear when it refused to allow Travel Ban EO-2 to take effect.[43] The Fourth Circuit's opinion upholding the lower court injunction was rubricated with numerous quotes from then-candidate Donald Trump.[44] The appellate court stated:

> On December 7, 2015, then-candidate Trump published a "Statement on Preventing Muslim Immigration" on his campaign website, which proposed "a total and complete shutdown of Muslims entering the United States until our country's representatives can figure out what is going on." That same day, he highlighted the statement on Twitter, "Just put out a very important policy statement on the extraordinary influx of hatred & danger coming into our country. We must be vigilant!" And Trump read from the statement at a campaign rally in Mount Pleasant, South Carolina, that evening, where he remarked, "I have friends

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[40] *See* Naureen Shah, *Trump's Muslim Ban 2.0 Is Just as Inhumane—and Even More Frightening*, TIMES (Mar. 6, 2017), http://time.com/4692814/trump-travel-ban-muslims/; Alexander Burns, *2 Federal Judges Rules Against Trump's Latest Travel Ban*, N.Y. TIMES (March 15, 2017), https://www.nytimes.com/2017/03/15/us/politics/trump-travel-ban.html.

[41] The Establishment Clause is contained in the First Amendment to the U.S. Constitution and provides, in part, that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof[.]" U.S. CONST. amend. I. *See* Alexander Burns, *2 Federal Judges Rules Against Trump's Latest Travel Ban*, N.Y. TIMES (March 15, 2017), https://www.nytimes.com/2017/03/15/us/politics/trump-travel-ban.html (citing some of President Trump's campaign documents which called for a total shutdown of all Muslims entering the United States); Kaitlyn Schallhorn, *Trump Travel Ban: Timeline of a Legal Journey*, FOX (June 6, 2018), http://www.foxnews.com/politics/2017/07/19/trump-travel-ban-timeline-legal-journey.html (arguing that the travel bans have little to do with national security and has more resemblance to furtherance to President Trump's "promised Muslim ban"); Naureen Shah, *Trump's Muslim Ban 2.0 Is Just as Inhumane—and Even More Frightening*, TIMES (Mar. 6, 2017), http://time.com/4692814/trump-travel-ban-muslims/ (arguing that those who disagree with the travel ban consider it an irrational misnomer which directly hurts the country by refusing to admit refugees). *See also* David B. Rivkin Jr. & Lee A. Casey, *The Fourth Circuit Joins the 'Resistance'*, WALL ST. J. (May 29, 2017, 11:30 AM), https://www.wsj.com/articles/the-fourth-circuit-joins-the-resistance-1496071859 (arguing that making foreign policy is not the job of the courts).

[42] Int'l Refugee Assistance Project v. Trump, 241 F. Supp. 3d 539 (D. Md. 2017), *aff'd in part, vacated in part*, 857 F.3d 554 (4th Cir. 2017), *cert. granted*, 137 S. Ct. 2080 (2017), *vacated*, 138 S. Ct. 353 (2017); Hawai'i v. Trump, 241 F. Supp. 3d 1119 (D. Haw. 2017).

[43] Int'l Refugee Assistance Project v. Trump, 857 F.3d 554 (4th Cir. 2017), *cert. granted*, 137 S. Ct. 2080 (2017), *vacated*, 138 S. Ct. 353 (2017).

[44] *Id.* at 575–76

> that are Muslims. They are great people—but they know we have a problem."
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> In an interview with CNN on March 9, 2016, Trump professed, "I think Islam hates us," and "[w]e can't allow people coming into the country who have this hatred," Katrina Pierson, a Trump spokeswoman, told CNN "[w]e've allowed this propaganda to spread all through the country that [Islam] is a religion of peace." In a March 22, 2016 interview with Fox Business television, Trump reiterated his call for a ban on Muslim immigration, claiming that this proposed ban had received "tremendous support" and stating, "we're having problems with the Muslims, and we're having problems with Muslims coming into the country." "You need surveillance," Trump explained, and "you have to deal with the mosques whether you like it or not."[45]

The Trump Administration sought immediate relief from the Fourth Circuit's findings at the United States Supreme Court. In a consolidated ruling issued in June 2017, the Court stayed the decisions of lower courts and allowed Trump's revised Travel Ban EO-2 to be implemented with minor adjustments, pending the Court's full review on the merits.[46] In summation, the Court held that Travel Ban EO-2 could be enforced against travelers from the six named countries if the traveler lacked a "credible claim of a bona fide relationship with a person or entity in the United States."[47]

Undaunted by this setback, opponents subsequently sought clarification from the Hawaiian federal district court on the Court's ruling with particular attention to the meaning of the term "bona fide relationship."[48] In quickstep, the Hawaiian district court modified the scope of the revised Travel Ban EO-2 to include exceptions for grandparents and other relatives from the prohibited countries if they had a "bona fide relationship" with a person(s) in the United States.[49] The Hawaiian district court also found that refugees with formal assurances from government-contracted resettlement agencies also met the "bona fide relationship" requirement.[50] The Ninth Circuit upheld the Hawaiian district court's modification in full.[51]

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[45] *Id.* (footnote omitted).

[46] Trump v. Int'l Refugee Assistance Project, 137 S. Ct. 2080 (2017) (per curium).

[47] *Id.* at 2088.

[48] Initially, the federal district court sitting in Hawaii refused to clarify anything, stating "Plaintiffs' request for [emergency] clarification is DENIED without prejudice to its re-filing with the Supreme Court." Hawai'i v. Trump, 258 F. Supp. 3d 1188, 1191 (D. Haw. 2017) (footnote omitted), *appeal dismissed*, 863 F.3d 1102 (9th Cir. 2017).

[49] State v. Trump, 263 F. Supp. 3d 1049, 1057–58 (D. Haw. 2017), *aff'd*, 871 F.3d 646 (9th Cir. 2017).

[50] *Id.* at 1059–60.

[51] *See generally* State v. Trump, 871 F.3d 646 (9th Cir. 2017).

Ironically, on the 16th anniversary of the terror attacks of September 11, 2001,[52] the Supreme Court issued a temporary stay of the new lower federal court actions, allowing the primary thrust of the Trump Travel Ban EO-2 to proceed until the Court could take up the full matter on October 10, 2017.[53] Without dissent, Justice Kennedy stated:

> UPON CONSIDERATION of the application of counsel for the applicants, IT IS ORDERED that the mandate of the United States Court of Appeals for the Ninth Circuit, case No. 17-16426, is hereby stayed with respect to refugees covered by a formal assurance, pending receipt of a response, due on or before Tuesday, September 12, 2017, by 12 p.m., and further order of the undersigned or of the Court.[54]

On September 24, 2017, as opponents were still preparing their initial arguments to the Court, the Trump Administration issued Presidential Proclamation 9645, "Enhancing Vetting Capabilities and Processes for Detecting Attempted Entry Into the United States by Terrorists or Other Public-Safety Threats" ("Travel Ban EO-3").[55] Travel Ban EO-3 somewhat refocused the previous Travel Ban EO-2, but more importantly had the effect of derailing the entire case set for adjudication before the Court.[56] The Trump

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[52] Anne Gearan, *At White House and Pentagon, Trump Marks 16th Anniversary of Sept. 11 Attacks*, WASH. POST (Sept. 11, 2017), https://www.washingtonpost.com/news/post-politics/wp/2017/09/11/trump-marks-16th-anniversary-of-sept-11-attacks-at-white-house-ceremony/?noredirect=on&utm_term=.3b373df5b01f.

[53] Trump v. Int'l Refugee Assistance Project, 138 S. Ct. 353 (2017).

[54] Trump v. Hawaii, 138 S. Ct. 1, 1 (2017).

[55] *See* Proclamation No. 9645, 82 Fed. Reg. 45,161 (Sept. 24, 2017).

[56] The issuance of Proclamation 9645 came on the very day the March travel-ban expired—September 24, 2017. Proclamation 9645 stated:

> In Executive Order 13780 of March 6, 2017 (Protecting the Nation from Foreign Terrorist Entry into the United States), on the recommendations of the Secretary of Homeland Security and the Attorney General, I ordered a worldwide review of whether, and if so what, additional information would be needed from each foreign country to assess adequately whether their nationals seeking to enter the United States pose a security or safety threat.
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> Despite those efforts, the Secretary of Homeland Security, in consultation with the Secretary of State and the Attorney General, has determined that a small number of countries--out of nearly 200 evaluated--remain deficient at this time with respect to their identity-management and information-sharing capabilities, protocols, and practices. In some cases, these countries also have a significant terrorist presence within their territory.
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> . . . .
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> After reviewing the Secretary of Homeland Security's report of September 15, 2017, and accounting for the foreign policy, national security, and counterterrorism objectives of the United States, I have determined to restrict and limit the entry of nationals of 7 countries found to be "inadequate" with respect to the baseline described in subsection (c) of this section: Chad, Iran, Libya, North Korea, Syria, Venezuela, and Yemen. These restrictions distinguish between the entry of immigrants and nonimmigrants. Persons admitted on immigrant visas become

Administration had simply allowed Travel Ban EO-2 to expire, and Trump's new Travel Ban EO-3 would now serve as the latest and final travel ban. Under Travel Ban EO-3, which had no expiration date, Sudan was removed from the Travel Ban EO-2 list of restricted countries, while three non-Muslim-majority countries, North Korea, Venezuela, and Chad were added.[57] The next day, September 25, 2017, the Supreme Court announced that it was removing the Travel Ban EO-2 case from its scheduled docket in order to determine if the new Travel Ban EO-3 had rendered the matter of Travel Ban EO-2 moot as a "live case or controversy."[58] After considering the legal briefs from both sides, the Supreme Court dropped the plaintiff's case against Travel Ban EO-2 on October 10, 2017, expressing no views on the merits.[59] In an 8-1 opinion, the Court stated:

> We granted certiorari in this case to resolve a challenge to "the temporary suspension of entry of aliens abroad under Section 2(c) of Executive Order No. 13,780." Because that provision of the Order "expired by its own terms" on September 24, 2017, the appeal no longer presents a "live case or controversy." Following our established practice in such cases, the judgment is therefore vacated, and the case is remanded to the United States Court of Appeals for the Fourth Circuit with instructions to dismiss as moot the

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> lawful permanent residents of the United States. Such persons may present national security or public-safety concerns that may be distinct from those admitted as nonimmigrants.
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> . . . .
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> The Secretary of Homeland Security determined that Somalia generally satisfies the information-sharing requirements of the baseline described in subsection (c) of this section, but its government's inability to effectively and consistently cooperate, combined with the terrorist threat that emanates from its territory, present special circumstances that warrant restrictions and limitations on the entry of its nationals into the United States. Somalia's identity-management deficiencies and the significant terrorist presence within its territory make it a source of particular risks to the national security and public safety of the United States. Based on the considerations mentioned above, and as described further in section 2(h) of this proclamation, I have determined that entry restrictions, limitations, and other measures designed to ensure proper screening and vetting for nationals of Somalia are necessary for the security and welfare of the United States.

Proclamation No. 9645, 82 Fed. Reg. 45,161 (Sept. 24, 2017).

[57] *Id.*

[58] *See* Trump v. Int'l Refugee Assistance Project, 138 S. Ct. 50 (2017) (mem.) (The Court's order directed the parties to file briefs concerning the issuance of the new travel ban policy and whether the issue before the Court had been rendered moot); *see* Trump v. Int'l Refugee Assistance Project, 138 S. Ct. 353 (2017). The order suggested that the Court was "contemplating dismissing the case and leaving the challengers to press their arguments at a federal trial court." Greg Stohr, *Supreme Court Drops Travel Ban Argument After Trump Revises Policy*, BLOOMBERG (Sept. 25, 2017, 12:25 PM), http://www.bloomberg.com/news/articles/2017-09-25/supreme-court-drops-travel-ban-case-from-argument-schedule-j80gj8qj.

[59] *See generally* Trump v. Int'l Refugee Assistance Project, 138 S. Ct. 353 (2017) (mem.).

> challenge to Executive Order No. 13,780. We express no view on the merits.[60]

Although the Supreme Court had seemingly avoided what would clearly have been viewed as a politically charged decision, they were sadly mistaken. New plaintiffs—"the State of Hawaii, three individuals with foreign relatives affected by the entry suspension, and the Muslim Association of Hawaii"—quickly filed suit in the same federal district court that had heard the previous challenge to Travel Ban EO-2, and the same objections were made.[61] Predictably, the plaintiffs argued that the new Travel Ban EO-3 was still nothing more than a "Muslim ban" in disguise[62] and violated two specific provisions of the Immigration and Nationality Act ("INA"), as well as the Establishment Clause of the First Amendment.[63] Hawaii federal district Judge Derrick Watson agreed with the plaintiffs and once again ordered a nationwide injunction to block Travel Ban EO-3 from taking effect.[64] In turn, the Trump Administration requested expedited briefing and a stay of the nationwide injunction to the Court of Appeals for the Ninth Circuit.[65] In granting a partial stay of the injunction,[66] the Ninth Circuit did not evaluate the Establishment Clause claim, but affirmed the district court's holding that Travel Ban EO-3 violated two specific provisions of the INA—section 1182(f) and section 1152(a)(1)(A).[67]

After reviewing the Ninth Circuit's ruling upholding the temporary injunction, the Supreme Court once again ruled in favor of the Trump Administration in early December 2007 when it voted 7-2 that the new Travel Ban EO-3 could take full effect pending the Government's appeal on the

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[60] *Id.* (citations omitted). On October 23, 2017, the Supreme Court had also vacated the original decision under appeal from the Ninth Circuit, which derails any new attempts to use that appellate court decision as precedent. *See generally* Trump v. Hawaii, 138 S. Ct. 377 (2017) (mem.); Adam Liptak, *Supreme Court Wipes Out Travel Ban Appeal*, N.Y. TIMES (Oct 24, 2017), https://www.nytimes.com/2017/10/24/us/politics/supreme-court-travel-ban-appeal-trump.html.

[61] Trump v. Hawaii, 138 S. Ct. 2392, 2400 (2018).

[62] *See* Richard Wolf & Adam Gomez, *Federal Judge in Hawaii Blocks Trump's Third Travel Ban*, USA TODAY (Oct. 18, 2017), https://www.usatoday.com/story/news/politics/2017/10/17/federal-judge-hawaii-strikes-down-trumps-third-travel-ban/773074001/ (citing Hawaii district federal Judge Derrick Watson's ruling which claimed that the new travel-ban "'suffers from precisely the same maladies as its predecessor'"). *See also* Richard Wolf, *Children of Japanese American Legal pioneers from World War II Fight Travel Ban*, USA TODAY (Oct. 11, 2017), https://www.usatoday.com/story/news/politics/2017/10/10/children-japanese-american-legal-pioneers-world-war-ii-fight-travel-ban/740910001/.

[63] *See* Smith & Ben Harrington, *supra* note 26, at 5.

[64] *See generally* Hawaii v. Trump, 878 F.3d 662, 702 (9th Cir. 2017), *rev'd*, 138 S. Ct. 2392, 2423 (2017).

[65] *Id.* at 675.

[66] *Id.* at 702.

[67] *Id.* at 694, 697, 702.

merits of the case.[68] Finally, six months later, on June 26, 2018, the full Court made a final determination on the merits of Trump's Travel Ban EO-3.[69]

In a 5–4 decision, the Court reversed the lower court's "grant of the preliminary injunction as an abuse of discretion" and remanded the case "for further proceeding consistent with [their] opinion."[70] In short, citing an impressive string of long-standing case law and employing the Court's "rational basis scrutiny" standard of review, Travel Ban EO-3 was deemed constitutional, handing President Donald J. Trump his first major judicial victory.[71] Chief Justice John Roberts penned the decision.[72]

IV. OVERVIEW OF *TRUMP V. HAWAII*

Signaling from the very beginning of its lengthy opinion that the Court was going to concentrate almost exclusively on the precise wording and related working history of Travel Ban EO-3 rather than on President Trump's offensive remarks about Muslims, Chief Justice Roberts was nevertheless meticulous in addressing the various challenges made by the plaintiffs including their Establishment Clause claim.[73] Accordingly, the Court heavily colored its opinion upholding Travel Ban EO-3 by outlining the detailed processes and steps taken by the Trump Administration in terms of the actual mechanics of Proclamation 9645.[74] The Court next dismantled the two textual challenges of the plaintiffs to show definitively that Travel Ban EO-3 did not conflict with the plain language of the INA, which grants the Executive broad enforcement powers to be wielded in his sole discretion.[75] In doing so, the Court also addressed external challenges aimed at the statutory structure and legislative purpose of the INA.[76] Finally, the Court addressed the heart of the matter raised by the plaintiffs that Travel Ban EO-3 was nothing more than a pretext for a Muslim ban that stemmed solely from President Trump's discriminatory attitude toward the religion of Islam.[77]

To show that Travel Ban EO-3 was premised on legitimate purposes and to ensure that certain foreign nationals satisfied the numerous lawful requirements for entry into the United States, the Court first looked squarely

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[68] Trump v. Hawaii, 138 S. Ct. 542 (2017) (mem.); Lawrence Hurley, *U.S. Top Court Lets Trump's Latest Travel Ban Go into Full Effect*, REUTERS (Dec. 4, 2017), https://www.msn.com/en-us/news/us/us-top-court-lets-trumps-latest-travel-ban-go-into-full-effect/ar-BBGexik?li=BBnb7Kz.

[69] Trump v. Hawaii, 138 S. Ct. 2392 (2018).

[70] *Id.* at 2423.

[71] *Id.* at 2420.

[72] *Id.* at 2403.

[73] *See id.* ("We now decide whether the President had authority under the Act to issue the Proclamation, and whether the entry policy violates the *Establishment Clause of the First Amendment*.").

[74] *See id.* at 2403–09 (finding each step taken pursuant to Proclamation 9645 "'craft[ed] . . . country-specific restrictions that would be most likely to encourage cooperation given each country's distinct circumstances,' while securing the Nation until such improvements occur"). *Id.* at 2409.

[75] *Id.* at 2408–10.

[76] *Id.* at 2410–15.

[77] *Id.* at 2416–23.

at the wording of the primary statutory authority, the INA.[78] The INA provides numerous grounds for restricting alien entry into the United States. Specifically, the INA provisions restrict entry based on grounds related to health, criminal history, terrorist activity, and foreign policy, as well as making aliens ineligible for receiving a temporary visa.[79] Additionally, Congress delegates to the President the absolute authority under his sole discretion to restrict the entry of aliens on other grounds such as whenever he concluded that their entry "would be detrimental to the interests of the United States."[80] The key text of INA at §1182(f) clearly empowers the President to take unilateral action:

> 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 nonimmigrants, or impose on the entry of aliens any restrictions he may deem to be appropriate.[81]

Given that the sole prerequisite for exercising such broad authority, *vis-à-vis* "aliens or any class of aliens[,]" rests in the President making a finding that admission of such individuals "would be detrimental to the interests of the United States," EO-3 was firmly set in this grant of power.[82] Under this view, Travel Ban EO-3 was specifically enacted by the Executive Branch to impose entry restrictions on nationals from countries that the President determined did not adequately share information to make an informed entry decision or that would otherwise pose a threat to national security.[83] Recognizing the deficiencies in gathering the required information needed to determine whether nationals of particular countries pose a threat to the public safety of Americans, section 1(a) of Travel Ban EO-3 asserted:

> It is the policy of the United States to protect its citizens from terrorist attacks and other public-safety threats. Screening and vetting protocols and procedures associated with visa adjudications and other immigration processes play a critical role in implementing that policy. They enhance our ability to detect foreign nationals who may commit, aid, or support acts of terrorism, or otherwise pose a safety threat, and they

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[78] 8 U.S.C. § 1182 (2012).
[79] *Id.* § 1182(a)(1), (a)(2), (a)(3)(B), (a)(3)(C).
[80] *Id.* § 1182(f). *See also* Trump v. Hawaii, 138 S. Ct. 2392, 2403 (2017).
[81] *Trump*, 138 S. Ct. at 2408.
[82] *Id.*
[83] Proclamation No. 9645, 82 Fed. Reg. 45,161 (Sept. 27, 2017).

> aid our efforts to prevent such individuals from entering the United States.[84]

The Court gave strong note to the fact that Travel Ban EO-3 was premised on a worldwide review of how all foreign states might satisfy the goal of ensuring compliance with fixed security concerns.[85] Included in the review process headed by the Department of Homeland Security ("DHS"), was the Department of State ("DOS") and the Director of National Intelligence ("DNI").[86] This triad developed a "baseline" of information required from foreign states "to confirm the identity of individuals seeking entry into the United States, and to determine whether those individuals pose a security threat."[87]

The required baseline for evaluation of adequacy was comprised of three separate components.[88] The first, "identity-management information," focused on the integrity of travel documents issued by a foreign country:

> The United States expects foreign governments to provide the information needed to determine whether individuals seeking benefits under the immigration laws are who they claim to be. The identity-management information category focuses on the integrity of documents required for travel to the United States. The criteria assessed in this category include whether the country issues electronic passports embedded with data to enable confirmation of identity, reports lost and stolen passports to appropriate entities, and makes available upon request identity-related information not included in its passports.[89]

The second baseline for evaluation centered on what American agencies considered an acceptable extent to which other countries disclosed information:

> The United States expects foreign governments to provide information about whether persons who seek entry to this country pose national security or public-safety risks. The criteria assessed in this category include whether the country makes available, directly or indirectly, known or suspected terrorist and criminal-history information upon request,

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[84] *Id.* at 45,162.

[85] *Trump*, 138 S. Ct. at 2421.

[86] Homeland Security Act of 2002, Pub. L. No. 107-296, 116 Stat. 2135 (2002) (establishing the Department of Homeland Security in response to the September 11, 2001 terrorist attacks, with the purpose of consolidating the executive branch organizations related to homeland security under one Cabinet level agency).

[87] *Trump*, 138 S. Ct. at 2404.

[88] Proclamation No. 9645, 82 Fed. Reg. at 45, 162–63.

[89] *Id.* at 45, 162.

> whether the country provides passport and national-identity document exemplars, and whether the country impedes the United States Government's receipt of information about passengers and crew traveling to the United States.[90]

Finally, the third criteria focused on what agencies assessed in terms of numerous indicators of national security risk:

> The national security and public-safety risk assessment category focuses on national security risk indicators. The criteria assessed in this category include whether the country is a known or potential terrorist safe haven, whether it is a participant in the Visa Waiver Program established under section 217 of the INA, 8 U.S.C. 1187, that meets all of its requirements, and whether it regularly fails to receive its nationals subject to final orders of removal from the United States.[91]

When DHS evaluated all foreign governments against the tiered baseline, the Secretary of Homeland Security identified sixteen separate countries as being "inadequate" based on an analysis of their identity-management protocols, information-sharing practices, and other risk factors.[92] Thirty-one additional countries were also classified as "at risk" of becoming inadequate based on those same criteria.[93] The DOS then undertook a "50-day engagement period to encourage all foreign governments" to improve their performance.[94] Resulting from those efforts, numerous countries shared travel documents with DHS and agreed to provide applicable information on known or suspected terrorists.[95]

At the end of the 50-day period, the Secretary of Homeland Security determined that eight countries—Chad, Iran, Iraq, Libya, North Korea, Syria, Venezuela, and Yemen—were deficient and unwilling to share the requested information.[96] Thus, the Secretary of DHS recommended entry restrictions on certain nationals from each of those countries except Iraq, finding that the limitations on Iraqi nationals were not warranted due to the strong and cooperative relationship between the United States and the Iraqi Government to combat ISIS.[97] The Secretary also determined that although Somalia

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[90] *Id.*
[91] *Id.* at 45, 162–63.
[92] *Id.* at 45, 163.
[93] *Id.*
[94] *Id.*
[95] *Id.*
[96] *Id.*
[97] *Id.* at 45, 163–64. ISIS is an English abbreviation which stands for *Ad-Dawlah al-Islāmiyah fīl-'Irāq wash-Shām*. ISIS is a Sunni based radical Islamic terror group that originated as a sub-component of al-Qa'eda when Osama Bin Laden franchised his group into Iraq, following the toppling of the regime of Saddam Hussein in 2003 by the United States military. ISIS formally established a caliphate under its

generally satisfied the information-sharing component, they had a deficiency in identity-management coupled with a significant terrorist presence in the country which presented special circumstances that warranted further limitations on that nation.[98]

After meeting with Cabinet members and considering the results of the review process, the President adopted the recommendations of the Secretary of DHS and issued Travel Ban EO-3.[99] Authorized under the provisions of federal law set out at 8 U.S.C. §§1182(f) and 1185(a), the President determined that entry restrictions were necessary "to prevent the entry of those foreign nationals about whom the United States Government lacks sufficient information[;]" "elicit improved identity-management and information-sharing protocols and practices from foreign governments;" and to "advance [the] foreign policy, national security, and counterterrorism objectives" of the United States.[100]

V. THE PLAINTIFFS' TEXTUAL ARGUMENT IN *TRUMP V. HAWAII*

The plaintiffs consisted of the State of Hawaii, three private individuals with foreign relatives affected by Travel Ban EO-3, and the Muslim Association of Hawaii.[101] As stated, they argued that Travel Ban EO-3 violated provisions of the INA as well as the First Amendment's Establishment Clause.[102] In terms of the INA, they asserted that EO-3 directly contravened two provisions of law—§1182(f) and §1152(a)(1)(A).[103] Section 1182(f) authorized "the President to 'suspend the entry of all aliens or any class of aliens' whenever he 'finds' that their entry 'would be detrimental to the interests of the United States[,]'" and §1152(a)(1)(A) provided that "no person shall . . . 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."[104]

Before addressing the merits of the plaintiffs' arguments regarding their INA claims, the Court first considered whether they had the standing to do so.[105] Relying upon the doctrine of consular non-reviewability, the Government argued that the plaintiffs' challenge to Travel Ban EO-3 was not justiciable under the INA.[106] The Government contended "that because aliens have no 'claim of right' to enter the United States, and because exclusion of

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leader Abu Bakr al-Baghdadi in 2014 in parts of Syria and Iraq but has been practically obliterated geographically under the Trump Administration's war policies. *See* Addicott, *supra* note 16, at 232–34.

[98] Proclamation No. 9645, 82 Fed. Reg. 45, 164–65 (Sept. 24, 2017).

[99] Trump v. Hawaii, 138 S. Ct. 2392, 2405 (2018).

[100] Proclamation No. 9645, 82 Fed. Reg. at 45, 164.

[101] *Trump*, 138 S. Ct. at 2406.

[102] *Id.*

[103] *Id.*

[104] *Id.* at 2407, 2413.

[105] *Id.* at 2407.

[106] *Id.*

aliens is 'a fundamental act of sovereignty' by the political branches, review of an exclusion decision 'is not within the province of any court, unless expressly authorized by law.'"[107] However, the Government failed to argue that the doctrine of consular nonreviewability goes to the Court's subject matter jurisdiction, and it failed to provide any express provision of the INA that directly stripped the Court of its jurisdiction.[108] The Court, therefore, proceeded without deciding whether the plaintiffs' claims were reviewable.[109]

As previously noted, the INA not only provides numerous reasons for which an alien abroad may be denied entry into the United States, but also delegates additional direct authority to the President, empowering him to "suspend or restrict the entry of aliens in certain circumstances[,]" particularly under Section 1182(f), which authorizes "the President to 'suspend the entry of all aliens or any class of aliens' whenever he 'finds' that their entry 'would be detrimental to the interests of the United States[.]'"[110] Despite these clear provisions of the INA, the plaintiffs argued that Travel Ban EO-3 was an invalid use of Presidential authority under the INA,[111] contending that §1182(f) only conferred "a residual power to temporarily halt the entry of a discrete group of aliens engaged in harmful conduct."[112] The Court rightly disagreed with this view, placing emphasis in its reasoning on the neutral nature of Travel Ban EO-3, as well as the Trump mandated multi-agency review that encompassed all nations, not just Muslim-majority nations, that took place prior to the order of EO-3. The Court held that:

> By its plain language, §1182(f) grants the President broad discretion to suspend the entry of aliens into the United States. The President lawfully exercised that discretion based on his findings—following a worldwide, multi-agency review—that entry of the covered aliens would be detrimental to the national interest. And plaintiffs' attempts to identify a conflict with other provisions in the INA, and their appeal to the statute's purposes and legislative history, fail to overcome the clear statutory language.[113]

The Court simply acknowledged what was patently obvious, according to the plain English of the Proclamation.[114] By its own terms, §1182(f) clearly "exudes deference to the President in every clause."[115]

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[107] *Id.*
[108] *Id.*
[109] *Id.*
[110] *Id.* (citing 8 U.S.C. §§ 1182(a)(1) (health-related grounds), (a)(2) (criminal history), (a)(3)(B) (terrorist activities), (a)(3)(C) (foreign policy grounds).
[111] *Id.* at 2408.
[112] *Id.*
[113] *Id.*
[114] *Id.*
[115] *Id.*

Indeed, the Court recognized the only prerequisite in §1182(f) was that the President "'find' that the entry of the covered aliens 'would be detrimental to the interests of the United States.'"[116] The Court found that President Trump satisfied that prerequisite based on the multi-agency groundwork.[117] The order for DHS to conduct a worldwide review of every country's cooperation with the "information and risk assessment baseline" established a clear and objective standard that was actually far beyond what the INA would require.[118] In addition, the Court took note that President Trump issued EO-3 only *after* describing how each country was reviewed utilizing the subject baseline.[119] Only after the review was completed, and at the recommendation of the Secretary of DHS, did the President find "that it was in the national interest to restrict entry of aliens who could not be vetted with adequate information—both to protect national security and public safety, and to induce improvement by their home countries."[120]

Plaintiffs also believed that the findings of the President to support the issuance of Travel Ban EO-3 were inadequate.[121] Specifically, they argued that EO-3 did not give an account for why nationality alone rendered a foreign national a security risk.[122] Plaintiffs further disregarded the President's concern over deficiencies in the vetting process because Travel Ban EO-3 "allows many aliens from the designated countries to enter on nonimmigrant visas."[123] The Court was unconvinced and found that the plaintiffs' arguments were grounded on the incorrect assumption that §1182(f) would require the President to explain his finding in full detail to enable judicial review.[124] Nevertheless, even if the Court had assumed some superior level of scrutiny was proper, the plaintiffs' attacks would still not be sustained.[125] The Court pointed out that the twelve-page Travel Ban EO-3 is more detailed than any travel ban order previously issued.[126] Additionally, the Court took little effort in finding that the plaintiffs' request for "inquiry into the persuasiveness of the President's justifications [was] inconsistent with the broad statutory text and the deference traditionally accorded the President in this sphere."[127] The Court was certainly not going to second-guess the President. Asserting long held precedent, the Court stated:

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[116] *Id.*
[117] *Id.*
[118] *Id.*
[119] *Id.* at 2408–09.
[120] *Id.*
[121] *Id.* at 2409.
[122] *Id.*
[123] *Id.*
[124] *Id.* (citing Webster v. Doe, 486 U.S. 592, 600 (1988) (concluding that a statute authorizing the CIA Director to terminate an employee when the Director "shall deem such termination necessary or advisable in the interests of the United States" forecloses "any meaningful judicial standard of review.")).
[125] *Id.*
[126] *Id.*
[127] *Id.*

> "Whether the President's chosen method" of addressing perceived risks is justified from a policy perspective is "irrelevant to the scope of his [§1182(f)] authority."[128] And when the President adopts "a preventive measure . . . in the context of international affairs and national security," he is "not required to conclusively link all of the pieces in the puzzle before [courts] grant weight to [his] empirical conclusions."[129]

Finally, the plaintiffs argued that the term "class of aliens" must refer to a definite group of people who share a common characteristic distinct from their nationality.[130] Travel Ban EO-3, however, clearly identifies a definite "class of aliens" that is not based on race or religion but on nationality—nationals of select countries—whose entry is suspended.[131] Finding that the text simply did not say what plaintiffs wished it to say, the Court held, "[i]n short, the language of §1182(f) is clear, and the Proclamation [Travel Ban EO-3] does not exceed any textual limit on the President's authority."[132]

VI. PLAINTIFFS' STRUCTURAL & LEGISLATIVE PURPOSE ARGUMENT

Unable to logically contend with the "facially broad grant of power" set out in the INA, the plaintiffs attacked the INA's statutory structure and the legislative purpose.[133] First, they looked for support in the overall immigration scheme set out in the INA as a whole, and then to the legislative history and historical practice of §1182(f).[134] The Court held that neither argument could justify ignoring the clear text of the statute.[135]

Plaintiffs' structural argument incorrectly presupposed that §1182(f) does not authorize the President to revoke Congressional policy judgments.[136] They argued that Travel Ban EO-3 actually countermanded Congressional power and prerogative because the INA "already specified a two-part solution to the problem of aliens seeking entry from countries that do not share sufficient information with the United States."[137] First, Congress implemented an individualized vetting process that placed the burden of proof on the alien to prove his admissibility.[138] Next, instead of banning entry of foreign nationals from particular countries, Congress encouraged information sharing such as through a "Visa Waiver Program" that offered fast-track

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[128] *Id.* (quoting Sale v. Haitian Ctrs. Council, Inc., 509 U.S. 155 (1993)).
[129] *Id.* (quoting Holder v. Humanitarian Law Project, 561 U.S. 1, 35 (2010)).
[130] *Id.* at 2410.
[131] *Id.*
[132] *Id.*
[133] *Id.* (citing Hawaii v. Trump, 878 F.3d 662, 688 (2017)).
[134] *Id.*
[135] *Id.*
[136] *Id.*
[137] *Id.* at 2411.
[138] 8 U.S.C. § 1361 (2012).

admission for those countries that cooperated with the United States in this regard.[139] Although the Court agreed that §1182(f) did not authorize the President to expressly override provisions of the INA,[140] the majority still found that the plaintiffs failed to identify any conflict whatsoever between the INA and Travel Ban EO-3 that would prohibit the President from addressing deficiencies that he might identify in the vetting process.[141] To the contrary, the Court easily brushed aside the objections and found that Travel Ban EO-3 supported Congress's individualized approach to the matter, stating:

> The INA sets forth various inadmissibility grounds based on connections to terrorism and criminal history, but those provisions can only work when the consular officer has sufficient (and sufficiently reliable) information to make that determination. The Proclamation [Travel Ban EO-3] promotes the effectiveness of the vetting process by helping to ensure the availability of such information.[142]

In other words, contrary to the plaintiffs' argument, the Court found that Travel Ban EO-3 did not supplant the INA, but instead found that it supplemented the intended purposes of the INA to include the President's participation when he deemed it was necessary in the interests of the nation to intervene.

Just as the Court found that there was no conflict between Travel Ban EO-3 and the INA's individualized vetting process, it also found that there was no conflict between EO-3 and the Visa Waiver Program.[143] Allowing travel without a visa for short-term visitors, the Visa Waiver Program only applies to those few countries that have entered into a "rigorous security partnership" with the United States.[144] Because Congress had chosen to bestow a special benefit to certain close allies of the United States, Congress did not imply an intention to handcuff the Executive Branch from implementing more severe restrictions against certain aliens or groups of aliens from specific high-risk countries.[145] The Court stated:

> The Visa Waiver Program creates a special exemption for citizens of countries that maintain exemplary security standards and offer "reciprocal [travel] privileges" to United States citizens. But in establishing a select partnership covering less than 20% of the countries in the world,

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[139] *Id.* § 1187.
[140] *Trump*, 138 S. Ct. at 2411.
[141] *Id.*
[142] *Id.*
[143] 8 U.S.C. § 1187(a)(2)(A) (2012).
[144] Trump v. Hawaii, 138 S. Ct. 2392, 2411 (quoting DEP'T OF HOMELAND SEC., U.S. VISA WAIVER PROGRAM (Apr. 6, 2016), *available at* http://www.dhs.gov/visa-waiver-program).
[145] *Id.*

> Congress did not address what requirements should govern the entry of nationals from the vast majority of countries that fall short of that gold standard—particularly those nations presenting heightened terrorism concerns. Nor did Congress attempt to determine—as the multi-agency review process did—whether those high-risk countries provide a minimum baseline of information to adequately vet their nationals. Once again, this is not a situation where "Congress has stepped into the space and solved the exact problem."[146]

Plaintiffs next sought to limit the scope of §1182(f) by looking at the "statutory background and legislative history."[147] Given the clear, plain language of the text, the Court stated there was really no need to consider extra-textual evidence.[148] Ironically, when the Court nevertheless looked at this issue, it found that the plaintiffs' extra-textual evidence actually supported the plain meaning of the statutory provision.[149] Appealing to selective legislative debates about §1182(f), the plaintiffs suggested "the President's suspension power should be limited to exigencies where it would be difficult for Congress to react promptly."[150] For example, during the First and Second World Wars, precursor provisions limited the Executive's exclusion authority to "times of 'war' and 'national emergency.'"[151] Thus, the plaintiffs pointed out that when Congress reenacted §1182(f) in 1952, they borrowed much of the language nearly verbatim from the original statute, but left out language pertaining to the national emergency standard.[152] Somehow the plaintiffs believed it logically followed "that Congress sought to delegate only a similarly tailored suspension power in [the 1952 version of] §1182(f)."[153] The Court gave short shift to this historical interpretation and found that the drafting history suggested the exact opposite of what the plaintiffs desired.[154] The Court stated:

> In borrowing "nearly verbatim" from the pre-existing statute, Congress made one critical alteration—it removed the national emergency standard that plaintiffs now seek to reintroduce in another form. Weighing Congress's conscious departure from its wartime statutes against an isolated floor statement, the departure is far more probative. When Congress wishes to condition an exercise of executive authority on the President's finding of an exigency or crisis,

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[146] *Id.* at 2412 (quoting Tr. of Oral Arg. 53).
[147] *Id.*
[148] *Id.*
[149] *Id.*
[150] *Id.*
[151] *Id.*
[152] *Id.*
[153] *Id.*
[154] *Id.*

> it knows how to say just that. Here, Congress instead chose to condition the President's exercise of the suspension of authority on a different finding: that the entry of an alien or class of aliens would be "detrimental to the interests of the United States."[155]

The plaintiffs' final statutory argument was that the President's entry restrictions set out in Travel Ban EO-3 violated the prohibition on discrimination against selected categories so clearly contained §1152(a)(1)(A).[156] Section 1152(a)(1)(A) provides that "no person . . . shall 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."[157] Plaintiffs contended that the provision should also be interpreted to prohibit nationality-based discrimination throughout the entire immigration process, to include Travel Ban EO-3.[158] The Court easily rejected that interpretation because "it ignore[d] the basic distinction between admissibility determinations and visa issuance that runs throughout the INA."[159] The Court explained the distinction, stating:

> Section 1182 defines the pool of individuals who are admissible to the United States. Its restrictions come into play at two points in the process of gaining entry (or admission) into the United States. First, any alien who is inadmissible under §1182 (based on, for example, health risks, criminal history, or foreign policy consequences) is screened out as "ineligible to receive a visa." Second, even if a consular officer issues a visa, entry into the United States is not guaranteed. As every visa application explains, a visa does not entitle an alien to enter the United States "if, upon arrival," an immigration officer determines that the applicant is "inadmissible under this chapter, or any other provision of law"—including §1182(f).
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> . . . .
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> Sections 1182(f) and 1152(a)(1)(A) thus operate in different spheres: §1182 defines the universe of aliens who are admissible into the United States (and therefore eligible to receive a visa). Once §1182 sets the boundaries of admissibility into the United States, §1152(a)(1)(A) prohibits discrimination in the allocation of immigrant visas based on

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[155] *Id.* at 2412–13 (citations omitted).
[156] *Id.* at 2413.
[157] *Id.* (quoting 8 U.S.C. § 1152(a)(1)(A) (2012)).
[158] *Id.* at 2413–14.
[159] *Id.* at 2414.

> nationality and other traits. The distinction between admissibility—to which §1152(a)(1)(A) does not apply—and visa issuance—to which it does—is apparent from the text of the provision, which specifies only that its protections apply to the "issuance" of "immigrant visa[s]," without mentioning admissibility or entry. Had Congress instead intended in §1152(a)(1)(A) to constrain the President's power to determine who may enter the country, it could easily have chosen language directed to that end. . . . "The fact that [Congress] did not adopt [a] readily available and apparent alternative strongly supports "the conclusion that *§1152(a)(1)(A)* does not limit the President's delegated authority under *§1182(f)*.[160]

At the end of the day, the plaintiffs were unable to provide any contradiction with any other provisions in the INA, allowing the Court to easily conclude, with minimal intellectual effort, that the President did not exceed his delegated authority under §1182(f).[161] In slamming home the fact that Travel Ban EO-3 was clearly within the scope of the Executive's authority under the INA, the majority noted that the four justices that dissented never really focused on attacking Trump's Travel Ban EO-3 on the basis of a statutory argument.[162] The Court wrote: "Indeed, neither dissent even attempt[ed] any serious argument to the contrary, despite the fact that plaintiffs' primary contention below and in their briefing before th[e] Court was that the Proclamation violated the statute."[163]

VII. MUSLIM BAN ARGUMENT UNDER THE ESTABLISHMENT CLAUSE

Fully embraced by Justice Sotomayor in her dissent, the plaintiffs' dispositive argument was that Travel Ban EO-3 was issued by President Trump for the sole purpose of excluding Muslims in violation of the First Amendment's Establishment Clause.[164] The Establishment Clause provides that "Congress shall make no law respecting an establishment of religion, or

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[160] *Id.* at 2414–15 (citations omitted).

[161] *Id.* at 2415.

[162] *Id.*

[163] *Id.*

[164] *Id.*; *id.* at 2433 (Sotomayor, J., dissenting). Prior courts having found difficulty in resolving cases dealing with the Establishment Clause. *See* Van Orden v. Perry, 545 U.S. 677, 685 (2005) (majority opinion by Rehnquist, C.J.) (describing inconsistent application of Establishment Clause tests) ("Many of our recent cases simply have not applied [one particular] test. Others have applied it only after concluding that the challenged practice was invalid under a different Establishment Clause test."); *id.* at 692–93 (Thomas, J., concurring) (describing the "inconsistent guideposts [the Court] has adopted for addressing *Establishment Clause* challenges"); *see* also Smith v. Jefferson Cty. Bd. of School Comm'rs, 788 F.3d 580, 596 (6th Cir. 2015) (Batchelder, C.J., concurring in part) ("For more than four decades, courts have struggled with how to decide Establishment Clause cases, as the governing framework has profoundly changed several times. . . . This confusion has led our court to opine that the judiciary is confined to '*Establishment Clause* purgatory.'") (quoting ACLU v. Mercer Cty., 432 F.3d 624, 636 (6th Cir. 2005)).

prohibiting the free exercise thereof[.]"[165] As a practical matter, the argument of religious discrimination on the part of the President had always been the center of gravity argument for those who opposed all of the Trump travel bans. Sotomayor summed up the question as follows:

> [T]he dispositive and narrow question here is whether a reasonable observer, presented with all "openly available data," the text and "historical context" of the Proclamation [Travel Ban EO-3], and the "specific sequence of events" leading to it, would conclude that the primary purpose of the Proclamation [Travel Ban EO-3] is to disfavor Islam and its adherents by excluding them from the country.[166]

Having poised the question, Sotomayor was absolutely certain in her response: "The answer is unquestionably yes. Taking all the relevant evidence together, a reasonable observer would conclude that the Proclamation [Travel Ban EO-3] was driven primarily by anti-Muslim animus, rather than by the Government's asserted national-security justifications."[167]

The Court began by addressing whether the plaintiffs had the requisite standing to bring their Establishment Clause challenge before the Court.[168] This was an issue because the entry restrictions set out by Travel Ban EO-3 did not apply to the plaintiffs directly, but to foreign nationals seeking entry into the United States:[169]

> Federal courts have authority under the Constitution to decide legal questions only in the course of resolving "Cases" or "Controversies."[170] One of the essential elements of a legal case or controversy is that the plaintiff have standing to sue. Standing requires more than just a "keen interest in the issue."[171] It requires allegations—and, eventually, proof—that the plaintiff "personal[ly]" suffered a concrete and particularized injury in connection with the conduct about which he complains.[172] In a case arising from an alleged violation of the *Establishment Clause*, a plaintiff must show, as in other cases, that he is "directly affected by the laws and practices against which [his] complaints are directed."[173]

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[165] U.S. CONST. amend. I.
[166] *Trump*, 138 S. Ct. at 2438 (Sotomayor, J., dissenting).
[167] *Id.*
[168] *Id.* at 2416.
[169] *Id.* (majority opinion).
[170] *Id.* (citing U.S. CONST. art. III, § 2).
[171] *Id.* (quoting Hollingsworth v. Perry, 570 U.S. 693, 700 (2013)).
[172] *Id.* (citing Spokeo, Inc. v. Robins, 136 S. Ct. 1540 (2016)).
[173] *Id.* (quoting School Dist. of Abington Township v. Schempp, 374 U.S. 203, 224 n.9 (1963)).

The three individual plaintiffs argued that they had a concrete and particularized injury because Travel Ban EO-3 separated them from certain relatives seeking entry into the United States.[174] The Court agreed with the plaintiffs that a person's desire to be with their relatives is "sufficiently concrete and particularized to form the basis of an Article III injury in fact[,]"[175] giving the individual plaintiffs the proper standing to challenge the exclusion of their relatives under the Establishment Clause.[176]

The Court next addressed the matter of whether Travel Ban EO-3 was issued for an unconstitutional purpose, violating the Establishment Clause by targeting Muslims for unfavorable treatment.[177] Again, the plaintiffs alleged that the true purpose of EO-3 was religious animus, making the national security concerns about vetting and agency review regimens mere pretexts for discriminating against Muslims.[178] Of course, as with all the previous district court challenges, the center of the plaintiffs' argument revolved around the series of offending statements about Muslims made by the President and some of his advisors—statements that the Court took ample note of in its majority opinion.[179] Factually, since Travel Ban EO-3 was facially neutral toward religion, the plaintiffs could only ask the Court to nevertheless "probe the sincerity of the stated justifications" for issuing Travel Ban EO-3 by reference to extrinsic statements, most which were made by candidate Donald Trump, not President Donald Trump.[180]

Indeed, prior to the ruling in *Trump v. Hawaii*, a great many pundits weighed in concerning the baseline issues upon which the Court would ultimately anchor its decision.[181] Perhaps the best prognosis about the Court's thinking came from *The Washington Post* judicial reporter, Robert Barnes, who said that the Justices would decide the legality of Travel Ban EO-3 under the rubric of "this President," i.e., Donald Trump versus "the President," i.e., the power of the Executive.[182] Given that Congress had delegated sweeping powers to "the President" to bar "the entry of any aliens or of any class of aliens into the United States[,]" some predicted that the Court might only evaluate the legality of Travel Ban EO-3 on the basis of the words in the order

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[174] *Id.*
[175] *Id.*
[176] *Id.*
[177] *Id.* at 2416–17.
[178] *Id.* at 2417.
[179] *See supra* note 44–45 and accompanying text where the Fourth Circuit recounts anti-Muslim statements.
[180] *Trump*, 138 S. Ct. at 2418.
[181] Rachel Wolfe, *Vox Sentences: The Supreme Court Isn't About to Join the #Resistance*, VOX (Apr. 25, 2018, 8:00 PM), https://www.vox.com/vox-sentences/2018/4/25/17282436/vox-sentences-supreme-court-travel-ban.
[182] David French, *Will the Supreme Court Join the #Resistance*?, NAT'L REV. (Apr. 24, 2018, 2:39 PM), https://www.nationalreview.com/2018/04/donald-trump-travel-ban-supreme-court-resistance/.

and nothing else.[183] Under such a review, Travel Ban EO-3 would surely stand. On the other hand, if the Court felt that the words of "this President," President Trump, spoken outside the four corners of the order were so egregious, it might depart from settled precedent such as *Kleindienst v. Mandel*, and "create new precedent specifically designed to rein him [Donald J. Trump] in."[184] As it turned out, the "Barnes approach" was exactly what the Court did, although as will be detailed below, the Court employed a standard of review set at the lowest level of judicial scrutiny.[185]

So, while the plaintiffs argued that the Trump statements provided clear evidence of an Establishment Clause violation—one religious denomination was preferred over another—the Court rightly assessed the question by weighing the President's words against the President's authority.[186] Despite vociferous lamentations of dissenting Justices Sotomayor and Ginsburg, the Court would consider the cited language of President Trump as a far less persuasive matter.[187] To be sure, there can be no question that a great many of President Trump's words not only ran contrary to fundamental standards of respect and tolerance, but some of them constituted an alarming assault on the cherished American liberty of religious freedom.[188] Still, given that Travel Ban EO-3 had no hint of a "religious" test within the four corners of the order, the majority refocused the matter of the legality of Travel Ban EO-3 back to the weightier side of the equation—"the President"—stating the following:

> [It is] the significance of those [offensive] statements in reviewing a Presidential directive, neutral on its face, addressing a matter within the core of executive responsibility. In doing so we must consider not only the statements of a *particular President*, but also the authority of *the Presidency* itself [emphasis added].[189]

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[183] 8 U.S.C. § 1182(f) ("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 nonimmigrants, or impose on the entry of aliens any restrictions he may deem to be appropriate.").

[184] *See generally* Kleindienst v. Mandel, 408 U.S. 753 (1972), *aff'd*, 137 S. Ct. 2080, 2086 (2017), *aff'd*, 138 U.S. 2392, 2416 (2018); *see also* French, *supra* note 182.

[185] *Trump*, 138 S. Ct. at 2420.

[186] *Id.* at 2416–17 (quoting Larson v. Valente, 456 U.S. 228, 244 (1982)) ("[T]he clearest command of the *Establishment Clause* is that one religious denomination cannot be preferred over another.").

[187] *Id.* at 2417–18.

[188] *See* Ben Jacobs, *Donald Trump's Plan to Bar Muslims May Be an Outlandish Policy Too Far*, THE GUARDIAN (Dec. 8, 2015, 1:39 PM), https://www.theguardian.com/us-news/2015/dec/08/donald-trumps-plan-to-bar-muslims-may-be-an-outlandish-policy-too-far ("'Well, I think this whole notion that somehow we need to say no more Muslims and just ban a whole religion goes against everything we stand for and believe in,' responded former US vice-president Dick Cheney in a radio interview. "I mean, religious freedom's been an important part of our, our history."").

[189] *Trump*, 138 S. Ct. at 2418.

Before addressing the "statements of a particular President"—the "this President" side of the coin—the Court once again reiterated the "authority of the Presidency"—the "the President"—side of the coin. The Court took firm note of the fact that for more than a century it has been the constant juridical position that the entry of foreign nationals is a question better suited for the legislature or the executive, not the courts.[190] Without a doubt, the majority correctly understood that the Constitution did not task it to second-guess a sitting President as long as the reasons for his actions were "facially legitimate and bona fide."[191] Accordingly, the Court simply followed established precedent as set out in a variety of cases to include *Kleindienst v. Mandel*, which was specifically cited with strong approval.[192]

In *Mandel,* the Court rejected claims that the Government was required to grant entry into the United States to a self-described Marxist journalist from Belgium who had been invited to speak at an academic conference at Stanford University in California.[193] The plaintiffs, a collection of scholars and professors, argued that their First Amendment right to "receive information" from Mr. Ernest Mandel was implicated.[194] Although the Court in *Mandel* agreed that the First Amendment was most certainly implicated by banning Mandel from the country, the Court's majority strictly

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[190] *Id.* Still, while foreign nationals seeking entry into the United States have no right to admission in the Constitution, the Court "has engaged in . . . judicial inquiry when the denial of a visa allegedly burdens the constitutional rights of a U.S. citizen." *Id.* at 2402.

[191] *Id.* at 2419.

[192] *See generally* Kleindienst v. Mandel, 408 U.S. 753 (1972).

[193] Under the law as it then existed, entry into the U.S. was banned to individuals who advocated or published "the economic, international, and governmental doctrines of world communism."

> (a) Except as otherwise provided in this Act, the following classes of aliens shall be ineligible to receive visas and shall be excluded from admission into the United States:
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> . . . .
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> (28) Aliens who are, or at any time have been, members of any of the following classes:
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> . . . .
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> (D) Aliens . . . who advocate [or who are members of or affiliated with any organization that advocates] the economic, international, and governmental doctrines of world communism or the establishment in the United States of a totalitarian dictatorship . . .
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> . . . .
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> (G) Aliens who write or publish, or cause to be written or published, or who knowingly circulate, distribute, print, or display, or knowingly cause to be circulated, distributed, printed, published, or displayed, or who knowingly have in their possession for the purpose of circulation, publication, distribution, or display, any written or printed matter, advocating or teaching opposition to all organized government, or advocating or teaching . . . (v) the economic, international, and governmental doctrines of world communism or the establishment in the United States of a totalitarian dictatorship.

8 U.S.C. § 1182 (1972), *amended* Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 4978 (leaving only § 1182(a)(3)(D) "IMMIGRANT MEMBERSHIP IN TOTALITARIAN PARTY. (i) IN GENERAL. Any immigrant who is or has been a member of or affiliated with the Communist or any other totalitarian party (or subdivision or affiliate thereof), domestic or foreign, is inadmissible.").

[194] *Mandel*, 408 U.S. at 762.

limited its review to whether the Executive gave a "facially legitimate and bona fide" reason for the exclusion of the self-proclaimed Marxist.[195] Given the broad authority wielded by the political branches over restricting entry into the United States, the *Mandel* Court upheld Mandel's exclusion stating:

> [W]hen the Executive exercises this [delegated] power negatively on the basis of a *facially legitimate and bona fide reason*, the courts will neither look behind the exercise of that discretion, nor test it by balancing its justification against the *First Amendment* interests of those who seek personal communication with the applicant [emphasis added].[196]

In applying this paragraph set out in *Mandel* to the President's delegated power set out in Travel Ban EO-3, the Court added that it would not test the Executive's power "against the asserted constitutional interests of U.S. citizens."[197] In her dissent, Justice Sotomayor suggested that *Mandel* did not apply to Travel Ban EO-3, but the full Court unequivocally disagreed and found that *Mandel's* standard of review "has particular force" in entry and immigration cases when they overlap with "the area of national security."[198] Indeed, the Court held that a conventional application of *Mandel*, which asks only whether the "policy is facially legitimate and bona fide," would most certainly put an end to any further judicial review and completely uphold the validity of Travel Ban EO-3.[199] Curiously, however, the Government suggested in oral arguments before the Court that it might be "appropriate here for the [Court's] inquiry to extend beyond the facially neutrality of the order [Travel Ban EO-3]."[200] Accordingly, with the government unilaterally opening the proverbial "Pandora's box," and perhaps for the Court's stated purposes of engaging in a full review on the merits, the majority decided that it "may look behind the face of the Proclamation [Travel Ban EO-3] to the extent of applying rational basis review."[201]

Set at an admittedly low level of judicial scrutiny, the rational basis standard considers whether the entry policy set out in Travel Ban EO-3 is reasonably related to the Government's stated objective to protect the country and improve vetting deficiencies.[202] As a result, the Court could consider extrinsic evidence outside the language of Travel Ban EO-3—such as candidate Trump's cited words—but they would still uphold the travel ban "so long as it can reasonably be understood to result from a justification independent of unconstitutional grounds[,]"such as serving national security

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[195] *Id.* at 770.
[196] *Id.*
[197] Trump v. Hawaii, 138 S. Ct. 2392, 2419 (2018).
[198] *Id.; see also id.* at 2440–41 (Sotomayor, J., dissenting).
[199] *Id.* at 2420 (majority opinion).
[200] *Id.*
[201] *Id.*
[202] *Id.*

interests.[203] In its review, the Court noted that while the dissent placed great importance on the fact "that five of the seven nations currently included in the Proclamation [Travel Ban EO-3] have Muslim-majority populations[,]" the majority pointed out that this fact alone fails to infer religious hostility.[204] To the contrary, particularly telling for the Court was the fact that Travel Ban EO-3 only covered 8% of the world's Muslim population and was limited to countries previously designated by the Obama Administration as a risk to national security.[205] The Court also provided three additional features in support of the fact that the entry policy served a legitimate national security interest and weighed against the contention that Travel Ban EO-3 was motivated by anti-Muslim animus.[206] First, since the policy had been introduced, "three Muslim-majority countries—Iraq, Sudan, and Chad—had been removed from the list."[207] Second, for those countries still subject to entry restrictions, Travel Ban EO-3 provided exceptions for various foreign nationals in those Muslim nations.[208] Finally, Travel Ban EO-3 included an internal waiver program "open to all covered foreign nationals seeking entry as immigrants or nonimmigrants."[209]

Somewhat curiously, the majority took time to respond to Justice Sotomayor's dissenting opinion where she drew an unwarranted parallel between the World War II era case of *Korematsu v. United States* and the majority's decision in *Trump v. Hawaii*.[210] Agreeing with the majority in their formal repudiation of *Korematsu,* Sotomayor accused the majority of "blindly accepting the Government's misguided invitation to sanction a discriminatory policy motivated by animosity toward a disfavored group, all in the name of a superficial claim of national security[.]"[211] The Court clearly took offense at this accusation of wrongdoing and stated:

> Whatever rhetorical advantage the dissent may see in doing so, Korematsu has nothing to do with this case. The forcible relocation of U. S. [sic] citizens to concentration camps, solely and explicitly on the basis of race, is objectively unlawful and outside the scope of Presidential authority. But it is wholly inapt to liken that morally repugnant order to a

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[203] *Id.*
[204] *Id.* at 2421.
[205] *Id.*
[206] *Id.* at 2422–23.
[207] *Id.* at 2422.
[208] *Id.*
[209] *Id.*
[210] *Id.* at 2423; Korematsu v. U.S., 323 U.S. 214 (1944), *abrogated by* Trump v. Hawaii, 138 S. Ct. 2392 (2018). *See Trump*. 138 S. Ct. at 2447.
[211] *See Trump*, 138 S. Ct. at 2448 ("By blindly accepting the Government's misguided invitation to sanction a discriminatory policy motivated by animosity toward a disfavored group, all in the name of a superficial claim of national security, the Court redeploys the same dangerous logic underlying *Korematsu* and merely replaces one 'gravely wrong' decision with another.") (Sotomayor, J., dissenting).

facially neutral policy denying certain foreign nationals the privilege of admission.[212]

VIII. TRUMP BIAS IN THE COURTS

Much has been written in the past two years about the existence of a "deep state" apparatus within the Executive Branch devoted to obstructing the agenda of the Trump Administration.[213] With such an atmosphere of distrust and animosity at work, it not unreasonable to wonder if some of the lower court decisions, and perhaps even the Sotomayor/Ginsburg dissent might, to some degree, be tainted by an emotional "Trump animus."[214]

Indeed, in light of the well settled case law surrounding the validity of Travel Ban EO-3, such as *Mandel*, *Fiallo*, and *Din*, many see only a political motivation by certain judges to harm President Trump.[215] For instance, in his forceful dissent objecting to the Fourth Circuit's upholding of the nationwide injunction of the travel ban, Judge Paul Niemeyer alleged that the majority was motivated in their ruling not by the law but by "political" animus against President Trump:

> In looking behind the face of the government's action for facts to show the allege bad faith, rather than looking for bad faith on the face of the executive action itself, the majority grants itself the power to conduct an extratextual search for evidence suggesting bad faith, which is exactly what three Supreme Court opinions have prohibited. *Mandel*, *Fiallo*, and *Din* have for decades been entirely clear that courts are not free to look behind these sorts of exercises of executive discretion in search of circumstantial evidence of alleged bad faith. The majority, now for the first time, rejects these holdings in favor of its *politically desired* outcome [emphasis added].[216]

Without question, it is hard to imagine a more problematic situation for the country than an unbridled judiciary overreaching and micro-managing

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[212] *Id.* at 2423.

[213] *See* Julie H. Davis, *'Deep State'? Until Now, It Was a Foreign Concept*, N.Y. TIMES, Mar. 6, 2017, at A19 ("Neither Mr. Trump nor Mr. Bannon has used the term 'deep state' publicly. But each has argued that there is an orchestrated effort underway, fueled by leaks and enabled by the news media, to cut down the new president and interfere with his agenda").

[214] *See* French, *supra* note 182.

[215] Kleindienst v. Mandel, 408 U.S. 753 (1972); *see* Fiallo v. Bell, 430 U.S. 787, 799–800 (1977) (holding "the Immigration and Nationality Act of 1952 [is] not unconstitutional by virtue of the exclusion of the relationship between an illegitimate child and his natural father from the preferences accorded by the Act to the 'child' or 'parent' of a United States citizen or lawful permanent resident."); *see* Kerry v. Din, 135 S. Ct. 2128 (2015) (concluding that Din received the necessary due process to which she was entitled, particularly in light of the substantial finding in the Court's decision in *Kleindienst v. Mandel*, 408 U.S. 753 (1972)).

[216] Int'l Refugee Assistance Project v. Trump, 857 F.3d 554, 648 (4th Cir. 2017) (Neimeyer, J., Dissenting), *vacated as moot*, 138 S. Ct. 353 (2017).

issues regarding national security—substituting their judgment for the President's—based on their political motivations.[217] Of course, whether in the majority or in the dissent, all justices will assert with straight faces that their legal opinions are rendered solely as a consequence of following the law, not politics. Still, one cannot wonder if the "law they follow" might not sometimes be dictated by their positions set along an ideological spectrum, which ranges from the strict constructionist or originalist view of the Constitution to the so-called "living breathing document" view of the Constitution.[218]

One point of interest in the dissent of Justice Sotomayor, with whom Justice Ginsburg joined, is that there seems to be no consideration whatsoever to the possibility that President Trump's anti-Muslim statements, predominately made on the campaign trail, might not reflect what he *really* believes, particularly when viewed against the actual language contained in

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[217] Dissenting Justice Antonio Scalia often warned of the harm to America's constitutional fabric when the judicial branch overreaches into the realm of the executive branch. *See generally* Boumediene v. Bush, 128 S. Ct. 2229 (2008) (SCALIA J., dissenting).

> And if the understood scope of the writ of habeas corpus was "designed to restrain" (as the Court says) the actions of the Executive, the understood limits upon that scope were (as the Court seems not to grasp) just as much "designed to restrain" the incursions of the Third Branch. "Manipulation" of the territorial reach of the writ by the Judiciary poses just as much a threat to the proper separation of powers as "manipulation" by the Executive. As I will show below, manipulation is what is afoot here. The understood limits upon the writ deny our jurisdiction over the habeas petitions brought by these enemy aliens, and entrust the President with the crucial wartime determinations about their status and continued confinement.
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> . . . .
>
> But so long as there are some places to which habeas does not run--so long as the Court's new "functional" test will not be satisfied in every case--then there will be circumstances in which "it would be possible for the political branches to govern without legal constraint." Or, to put it more impartially, areas in which the legal determinations of the other branches will be (shudder!) supreme. In other words, judicial supremacy is not really assured by the constitutional rule that the Court creates. The gap between rationale and rule leads me to conclude that the Court's ultimate, unexpressed goal is to preserve the power to review the confinement of enemy prisoners held by the Executive anywhere in the world. The "functional" test usefully evades the precedential landmine of *Eisentrager* but is so inherently subjective that it clears a wide path for the Court to traverse in the years to come.

Id. at 2297–98, 2303.

[218] *See* Eric Segall, *The Supreme Court Is About to Get a Lot Less Honest About its Fake Originalism*, SLATE (July 16, 2018, 1:45 PM), https://slate.com/news-and-politics/2018/07/the-supreme-court-is-about-to-get-less-honest-about-fake-originalism.html. ("[Justice Kennedy] will be sorely missed because, although all the justices decide cases based on their own modern sensibilities, Kennedy was one of the few, left or right, to openly admit it."); *but see* Mark W. Hendrickson, *The U.S. Constitution: Living, Breathing Document or Dead Letter?*, VISON AND VALUES (May 28, 2009), http://www.visionandvalues.org/2009/05/the-us-constitution-living-breathing-document-or-dead-letter/ ("Liberals and progressives believe that the Constitution is a living, breathing document that should evolve with the times. They want Supreme Court justices to be flexible in interpreting the Constitution and adapting 18th-century language to 21st-century applications.").

Travel Ban EO-3.[219] In his concurring opinion, Justice Thomas certainly found this to be the case stating succinctly that "even on its own terms, the plaintiffs' proffered evidence of [President Trump's] anti-Muslim discrimination is unpersuasive."[220] In other words, Thomas was not willing to take a handful of cherry-picked, offensive statements and use them to then paint President Trump as a racist, suggesting that all of the things he undertook in terms of his travel ban were irrevocably tainted. Employing common sense, Thomas seemed to understand what Sotomayor disingenuously rejected out of hand—it is not uncommon for prominent government figures, including President Trump, to utter offensive remarks that might not necessarily reveal what that person actually believes as intrinsic truth.

Without question, one of the occupational hazards of anyone who engages in public speaking is the occasional misstatement, wrong statement, or even stupid statement. This phenomenon reaches across the political aisle. For instance, former Vice President Joe Biden is infamous in this regard with one of his most bizarre gaffs taking place at a speech he gave to the Institute for Advanced Learning and Research in Danville, Virginia, where he told a largely black audience that Republicans desired to "put y'all back in chains."[221] Surely, no one really believes that Joe Biden endorsed such nonsense. Even Justice Sotomayor herself has made extremely offensive public statements regarding what some might construe as bias against white males.[222] For example, it is widely reported that Sotomayor remarked:

> Whether born from experience or inherent physiological or cultural differences . . . our gender and national origins may and will make a difference in our judging. Justice O'Connor has often been cited as saying that a wise old man and wise old woman will reach the same conclusion in deciding cases. . . . I am [] not so sure that I agree with the statement.

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[219] Trump v. Hawaii, 138 S. Ct. 2392, 2433–40 (2018) (Sotomayor, J., dissenting). *See also* Veronica Rocha, et al., *President Trump Meets Kim Jong Un*, CNN (June 12, 2018, 11:03 AM), https://www.cnn.com/politics/live-news/trump-kim-jong-un-meeting-summit/h_97ccc50308b493e9f22e108ef7402249 ("I may be wrong and stand before you in six months and say, 'Hey I was wrong,' before pausing. 'I don't think I'll ever admit that,' he said.") (internal quotations removed); Karen Tumulty, *Trump: Never Wrong, Never Sorry, Never Responsible*, WASH. POST (Sept. 16, 2016), https://www.washingtonpost.com/politics/trump-never-wrong-never-sorry-never-responsible/2016/09/16/88446d0e-7c1c-11e6-ac8e-cf8e0dd91dc7_story.html?noredirect=on&utm_term=.1f63d89dc02f ("'I fully think apologizing is a great thing, but you have to be wrong,' Trump told 'Tonight Show' host Jimmy Fallon a year ago. 'I will absolutely apologize sometime in the distant future if I'm ever wrong.'").

[220] *Trump*, 138 S. Ct. at 2424 (Thomas, J., concurring).

[221] Ashley Killough, *Biden: Romney's Wall Street Will 'Put Y'all Back in Chains'*, CNN (Aug. 14, 2012, 12:24 PM), http://politicalticker.blogs.cnn.com/2012/08/14/biden-romneys-wall-street-will-put-yall-back-in-chains/; James Nye, *'They're Going to Put Y'all Back in Chains' Says Joe Biden to Black Crowd about Romney and Ryan Ticket*, ORIGINAL PEOPLE (Aug. 14, 2012, 3:33 PM), http://originalpeople.org/theyre-going-to-put-yall-back-in-chains-says-joe-biden-to-black-crowd-about-romney-and-ryan-ticket/ ("where a majority of people are African American.").

[222] Frank James, *Sotomayor's 'Wise Latina' Line Maybe Not So Wise*, NPR (May 27, 2009), https://www.npr.org/sections/thetwo-way/2009/05/sotomayors_wise_latina_line_ma.html.

> First, as professor Martha Minnow has noted, there can never be a universal definition of wise. Second, I would hope that *a wise Latina woman with the richness of her experiences would more often than not reach a better conclusion than a white male who hasn't lived that life* [emphasis added].[223]

Just as President Trump has denied allegations that he holds any religious animus against Muslims, Sotomayor has similarly denied charges of racism against white males.[224] Yet, Sotomayor was not willing to even remotely entertain the idea that President Trump might not hold discriminatory views about Muslims, despite his inappropriate statements.

The possibility that President Trump does not hold discriminatory views of Muslims, as Justice Thomas believes, requires one to examine more closely the unorthodox speaking style of President Trump. Even the most vociferous critics of President Trump have to admit that Trump's penchant for bombastic rhetoric and bluster can produce positive results.[225] One need only consider that his yearlong hard line against the Communist regime of North Korea which consisted of economic sanctions, military saber waving, and mocking Trump taunts to Kim Jong-un—"Little Rocket Man"—brought the dictator to the negotiating table regarding nuclear disarmament.[226] The White House said that the "campaign of maximum pressure" had created the "appropriate atmosphere for dialogue with North Korea[,]"but the language and tone of President Trump were certainly contributing factors.[227]

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[223] *Id.* ("Still, Judge Sotomayor questioned whether achieving impartiality 'is possible in all, or even, in most, cases.' She added, 'And I wonder whether by ignoring our differences as women or men of color we do a disservice both to the law and society.'").

[224] *See* Saagar Enjeti, *Trump Denies Hating Muslims: 'I Feel Love for All People'*, THE DAILY CALLER (Jan. 29, 2018, 12:30 PM), http://dailycaller.com/2018/01/29/trump-denies-hating-muslims-i-feel-love-for-all-people/ ("President Donald Trump denied feeling animus towards Muslims during a wide ranging interview with British TV personality Piers Morgan.").

[225] *See* David Jackson & Michael Collins, *Trump Celebrates 'Historic' Trade Deal with Canada and Mexico, but Hard Work Isn't Over*, USA TODAY (Oct. 3, 2018), https://www.usatoday.com/story/news/politics/2018/10/01/nafta-despite-new-trade-deal-hard-work-isnt-over/1489998002/ (describing the Trump Administration's new USAMCA economic treaty).

[226] *See* Mark Lander, *Trump Imposes More Sanctions on Pyongyang*, N.Y. TIMES (Feb. 23, 2018), https://www.nytimes.com/2018/02/23/us/politics/trump-north-korea-sanctions.html (announcing new economic sanctions against North Korea and alluding to a "phase 2" which could include military action should the sanctions not work); Donald J. Trump (@realDonaldTrump), TWITTER (Sept. 17, 2017, 4:53 AM), https://twitter.com/realDonaldTrump/status/909384837018112000 ("I spoke with President Moon of South Korea last night. Asked him how Rocket Man is doing. Long gas lines forming in North Korea. Too bad!"); Choe Sang-Hun, *Kim Jung-un Says He Wants Denuclearization in Trump's Current Term*, N.Y. TIMES (Sept. 6, 2018), https://www.nytimes.com/2018/09/06/world/asia/kim-jong-un-donald-trump-denuclearize.html ("Offering an olive branch to President Trump, Kim Jong-un told a South Korean envoy that he wanted to denuclearize North Korea before Mr. Trump's current term ends in early 2021, the envoy said on Thursday."); Donald J. Trump (@realDonaldTrump), TWITTER (Sept. 6, 2018, 3:58 AM), https://twitter.com/realdonaldtrump/status/1037656324010663937?lang=en ("Kim Jong Un of North Korea proclaims 'unwavering faith in President Trump.' Thank you to Chairman Kim. We will get it done together!").

[227] John Lyons, Jeremy Page, & Chun Han Wong, *North Korean Leader Meets with Xi in Surprise China Visit*, THE WALL STREET J. (Mar. 18, 2018), https://www.wsj.com/articles/china-says-north-korean-leader-kim-jong-un-visited-beijing-1522195885.

While his political opponents consistently decry Trump's occasional abandonment of "politically correct" language, one prominent opinion pollster suggests that it is a tenacious argument to view President Trump's language as a precise window into his actual thinking on any given matter.[228] Based on polling data, pollster Lee Carter believes that most Americans have now adjusted to the bluster and temperament of President Trump—particularly when he takes to pontificating with off-hand remarks—and have learned not to take President Trump's words so literally.[229] In this light, in many instances the key to understanding the real meaning of a Trump pronouncement is to listen to him with the eye rather than the ear. In other words, rather than fixating on individual words to then discern a precise meaning as to future actions, it is far more efficacious to look at the resulting actions to then understand what he "really" meant.

It is undeniable that many public figures have made improper and/or offensive statements that can easily be taken out of context by their critics to "prove a point" or simply to "score a point." Just as Presidents don't always speak in a manner considered to be "presidential"—a common criticism of the flamboyant style of Donald Trump—so too Supreme Court Justices don't always speak in a manner befitting the high station of the neutral judge sitting on the bench of justice.[230] For instance, Justice Ginsburg has made questionable public statements that reflect an extreme anti-Trump bias causing some to wonder if she has essentially disqualified herself from ruling on cases involving actions taken by the Trump Administration.[231]

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[228] *FOX & Friends* (FOX News television broadcast Sept. 8, 2018) (summing up President Trump's speaking style Lee Carter said "A lot of people have gotten to the point now where they are not taking the President quite so literally [in his political campaign remarks] as a lot of people on the left have taken everything so literally . . . people on the left scratch their heads and [do] not understand it [that Trump is not to be taken so literally in his rhetoric].").

[229] *Id.*

[230] *See* Bastien Inzaurralde, *This Linguist Studied the Way Trump Speaks for Two Years. Here's What She Found.*, WASH. POST (July 7, 2017), https://www.washingtonpost.com/news/the-fix/wp/2017/07/07/this-linguist-studied-the-way-trump-speaks-for-two-years-heres-what-she-found/?noredirect=on&utm_term=.d39b92a633de ("Trump is a 'unique' politician because he doesn't speak like one, according to Jennifer Sclafani, an associate teaching professor in Georgetown University's Department of Linguistics."); Charles M. Blow, *Degradation of the Language*, N.Y. TIMES (Apr. 30, 2017), https://www.nytimes.com/2017/05/01/opinion/donald-trump-degradation-of-the-language.html.

> America is suffering under the tyranny of gibberish spouted by the lord of his faithful 46 percent. As researchers at Carnegie Mellon pointed out last spring, presidential candidates in general use 'words and grammar typical of students in grades 6–8, though Donald Trump tends to lag behind the others.' Indeed, among the presidents in the university's analysis, Trump's vocabulary usage was the lowest and his grammatical usage was only better than one president: George W. Bush.

[231] *See* Tom Kertscher, *What Ruth Bader Ginsburg Said About Donald Trump*, POLITIFACT (July 13, 2016, 2:36 PM), https://www.politifact.com/wisconsin/article/2016/jul/13/what-ruth-bader-ginsburg-said-about-donald-trump/.

> Interview July 7, 2016 with Associated Press: Asked what if Trump won the presidency, Ginsburg said: "I don't want to think about that possibility, but if it should be, then everything is up for grabs."; Interview July 8, 2016 with *New York Times*: "I can't imagine what this place would be — I can't imagine what the country would be — with Donald Trump as our president. For the country, it could be four

One of the themes of the acrimonious 2018 Kavanaugh Senate hearings was that a judge should cherish and exhibit "common sense."[232] In his opening remarks to the senate committee Kavanaugh said: "In deciding cases, a judge must always keep in mind what Alexander Hamilton said in Federalist 83: 'the rules of legal interpretation are rules of common sense.'"[233] In this light, there is no greater source of wisdom, when it comes to addressing temptations to hyperventilate over untoward conversation, than the words found in the Biblical book of Ecclesiastes, which cautions all humans:

> Indeed, there is not a righteous man on earth who *continually* does good and who never sins. Also, do not take seriously all words which are spoken, so that you will not hear your servant cursing you. For you also have realized that you likewise have many times cursed others.[234]

IX. CONCLUSION

Trump v. Hawaii was decided correctly. When measured against both the statutory and inherent power of the Executive in restricting the entry of aliens into the United States, President Trump's remarks leading up to the order received little script by the Court. The majority had no stomach to second guess a sitting President particularly having established that the reasons for Travel Ban EO-3 were "facially legitimate and bona fide[.]"[235] Thus, the Court rightly found that: "The Proclamation is expressly premised on legitimate purposes: preventing entry of nationals who cannot be adequately vetted and inducing other nations to improve their practices. The text says nothing about religion."[236]

Although the Court made no judgement on the policy considerations behind Travel Ban EO-3, it specifically found no evidence on the face of Travel Ban EO-3 that demonstrated the discriminatory bias that opponents so loudly proclaimed. The text of Travel Ban EO-3 was neutral, a strong argument that Travel Ban EO-3 was not a function of religious discrimination,

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> years. For the court, it could be — I don't even want to contemplate that. Referring to something she thought her late husband, tax lawyer Martin Ginsburg, would have said, she said: "Now it's time for us to move to New Zealand."; Interview July 11, 2016 with CNN: "He is a faker. He has no consistency about him. He says whatever comes into his head at the moment. He really has an ego. . . . How has he gotten away with not turning over his tax returns? The press seems to be very gentle with him on that . . . . "At first I thought it was funny," she said of Trump's early candidacy. "To think that there's a possibility that he could be president . . . . Update: On July 14, 2016, Ginsburg apologized for her remarks, saying they were "ill-advised."

232 *'I will do equal right to the poor and the rich': Brett Kavanaugh's Remarks to the Senate Committee*, USA TODAY (Sept. 4, 2018, 7:07 PM), https://www.usatoday.com/story/news/politics/2018/09/04/brett-kavanaugh-supreme-court-nominees-remarks-senate-committee/1196833002/.

233 *Id.*

234 Eccl. 7:20–22 (New American Standard Version) (emphasis added).

235 Trump v. Hawaii, 138 S. Ct. 2392, 2420 (2018).

236 *Id.* at 2421.

but rather of national security. Coupled with the fact that the vast majority of Muslim-majority nations were never the focus of any of the three travel bans, is the incontrovertible fact that the nations that were targeted were deeply associated with the continuing threat of radical Islamic terrorism. Again, Travel Ban EO-3 was not based on the nationality of the individual or Muslim animus, but on the fact that certain named governments had not provided the necessary guarantees about the state of their security and vetting procedures.

In terms of upholding the rule of law, the Court certainly ruled correctly in *Trump vs. Hawaii*, but there is no doubt that the various off-hand negative remarks about Muslims made by President Trump cast an unnecessary shadow over one of the most sacred pillars of our republic—religious freedom. While the tides of jurisprudential history rise and fall, it is vitally important that religious tolerance must not wash up on the shoreline. Justice Kennedy understood the greater picture in this regard. Given that Justice Kennedy knew when he penned his concurrence with the majority that this would be his last case as a Supreme Court justice, it is no surprise that much of his short three-paragraph opinion exhibited a compelling poeticism about the necessity of religious tolerance regardless of ideological inclinations or political advantage.[237] The nation rightfully expects our leaders to avoid even the slightest appearance of evil when it comes to freedom of religion and religious tolerance. Kennedy wrote words of great wisdom:

> The First Amendment prohibits the establishment of religion and promises the free exercise of religion. From these safeguards, and from the guarantee of freedom of speech, it follows there is freedom of belief and expression. It is an urgent necessity that officials adhere to these constitutional guarantees and mandates in all their actions, even in the sphere of foreign affairs. An anxious world must know that our Government remains committed always to the liberties the Constitution seeks to preserve and protect, so that freedom extends outward, and lasts.[238]

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[237] *See* Tessa Berenson, *What Does the Supreme Court's Ruling on the Travel Ban Really Say?*, TIMES (July 8, 2018), http://time.com/5324727/whats-hidden-inside-the-supreme-courts-ruling-on-the-travel-ban/ (suggesting that Justice Kennedy's concluding paragraph was seeking an "epitaph for his career on the bench[.]").

[238] *Trump*, 138 S. Ct. at 2424.