

The Travel Bans

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Introduction

Historically, landmark cases that present foundational constitutional questions trickle up to the Supreme Court over the course of several years. For example, *NFIB v. Sebelius* was decided more than three years after the Affordable Care Act was signed into law.¹ *Obergefell v. Hodges* built upon two decades of LGBT litigation.² And, during that deliberative process, advocates on both sides could develop arguments and implement a carefully crafted litigation strategy. Other landmark cases race to the Supreme Court following major crises. *Bush v. Gore* rushed through the judiciary in the wake of the disputed 2000 presidential election.³ Likewise, the *Steel Seizure Case* concluded two months after President Truman nationalized the steel mills.⁴ These latter cases arose out of true exigencies: the judiciary was forced to mobilize in response to an emergency that the other branches were unable to resolve.

Trump v. Hawaii fits into neither category: the legal issues were not difficult and the circumstances were not exigent.⁵ Without question, the president has the statutory and constitutional authority to deny entry to aliens from certain countries based on national-security concerns. Yet the judiciary still moved at warp speed to

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¹ 567 U.S. 519 (2012). See Josh Blackman, Unprecedented: The Constitutional Challenge to Obamacare (2013).

² 135 S. Ct. 2584 (2015).

³ 531 U.S. 98 (2000).

⁴ *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952).

⁵ See *Trump v. Hawaii*, 138 S. Ct. 2392 (2018).

halt President Donald Trump's signature policy. Why? The "travel bans"—which denied entry to aliens from predominantly Muslim nations—traced their roots to overtly anti-Muslim statements made by then-candidate Trump. Furthermore, the government could only offer the faintest patina of a rational basis to defend the policies. Confronted with these facts, the lower courts uniformly enjoined the travel bans. Ultimately, only the Supreme Court upheld the final version in its entirety. This essay recounts the travel bans' 18-month litigation blitz.

Part I discusses the first iteration of the travel ban, which President Trump signed one week after his inauguration. There were no exigent circumstances that justified the entry ban, and its rollout was a colossal disaster. Within hours, courts intervened to block its enforcement. Within days, the judiciary entered the first raft of nationwide injunctions. Following defeats in the court of appeals, the acting solicitor general declined to petition for certiorari. Instead, Travel Ban 1.0, as it became known, was withdrawn. Part II dissects Travel Ban 2.0. After it was signed in March 2017, the self-professed "legal resistance" replayed its playbook: nationwide injunctions halting the policy were promptly affirmed by the courts of appeals. Except this time, the Supreme Court allowed most of the policy to go into effect. The message to the lower courts was apparent: treat this case like a normal case. Part III introduces Travel Ban 3.0, which was announced in September 2017. This policy—designed to be permanent—was promptly challenged in district courts. Once again, nationwide injunctions were affirmed by the courts of appeals. Yet, in December 2017, the Supreme Court permitted the *entire* policy to go into effect. This decision was a conclusive indication that the lower courts had gone astray. As a result, there should have been no surprises when, in June 2018, the Supreme Court upheld the third iteration in its entirety.

Now that this saga has drawn to an anti-climactic close, Part IV places the travel ban in perspective. First, this essay considers how the Court applies rational basis review to the proclamation: the judiciary must focus on *legality*, even if it conflicts with *reality*. Second, this essay contrasts the arguments raised by the "legal resistance" against the Trump administration with the presumption of regularity afforded by the Supreme Court. Finally, this section identifies how the law often applies differently to the president, through the "presidential avoidance canon."

The three iterations of the travel ban, like the president who signed them, were in all regards “unpresidential.”⁶

I. Travel Ban 1.0

On Friday, January 27, 2017, one week after taking the oath of office, President Trump signed Executive Order No. 13769.⁷ The order directed the executive branch to review information shared by foreign countries about their nationals who seek entry into the United States. During that 90-day period, the order suspended entry of aliens from seven countries: Iran, Iraq, Libya, Somalia, Sudan, Syria, and Yemen. To maintain the element of surprise, the White House did not provide any advance notice to the Departments of Justice, State, and Homeland Security. As a result, chaos erupted. Aliens from those seven nations, who were in transit while the order was signed, were detained upon landing at airports. Many of those aliens were Lawful Permanent Residents—that is, green-card holders—and had a statutory right to enter the United States. Over the next 24 hours, federal judges granted writs of habeas corpus, and ordered the release of those detained.⁸ These emergency actions, which I dubbed “The Airport Cases,” were the first round of litigation filed against the Trump administration.⁹

Soon the litigation would transition from releasing those in custody at airports, however, to halting the policy altogether. The Washington attorney general filed suit against Travel Ban 1.0. He asserted that Executive Order No. 13769 was unconstitutional, and sought a nationwide injunction.¹⁰ After an expedited proceeding, on February 3, 2018, Judge James L. Robart barred enforcement

⁶ See Donald J. Trump (@realDonaldTrump), Twitter (Dec. 17, 2016, 4:30 AM), archived at <https://bit.ly/2KAA9tZ>.

⁷ 82 Fed. Reg. 8977 (2017).

⁸ See e.g., *Darweesh v. Trump*, No. 17 CIV. 480 (AMD), 2017 WL 388504, at *1 (E.D.N.Y. Jan. 28, 2017); see also Josh Blackman, *Nationwide Injunction (Stay, Really) Issued in Darweesh v. Trump*, Josh Blackman’s Blog, Jan. 28, 2017, <https://bit.ly/2MhKUpZ>.

⁹ See Josh Blackman, *The Procedural Aspects of “The Airport Cases,”* Josh Blackman’s Blog, Jan. 29, 2017, <http://bit.ly/2Kmqbfz>.

¹⁰ See Josh Blackman, *Washington Seeks Nationwide Injunction of Immigration Order, Relying on Argument It Opposed U.S. v. Texas*, Josh Blackman’s Blog, Feb. 1, 2017, <http://bit.ly/2M3XRDp>.

of the travel ban.¹¹ The order had only the most threadbare analysis.¹² There was one paragraph describing the procedural background, and another two paragraphs reciting the standards for granting a temporary restraining order. (As a former district court clerk, I recognize copy-and-pasted boilerplate when I see it.) The actual legal analysis stretched across two conclusory paragraphs. The court did not cite any provision of the Constitution, or any statute that was violated. There was no real analysis here.

Even in times of conflict, courts have a duty to explain their reasoning through written opinions. This decision fell far, far short of that standard. Further, unlike the *Airport Cases*, which were decided in the wee hours after the executive order was issued, the Seattle court had several days to think about these issues. Such a momentous decision warrants some analysis. Yet, on this conclusory basis, the court issued a nationwide injunction against the executive order.

The government appealed. The U.S. Court of Appeals for the Ninth Circuit held oral arguments and, on February 10, 2017, declined to stay the nationwide injunction. I described the decision as a “contrived comedy of errors.”¹³ First, the court grossly erred by treating a temporary restraining order—that contained no reasoning—as a preliminary injunction. Second, the panel offered zero analysis of the underlying statutory scheme in the Immigration and Nationality Act (INA), which is exceedingly complex and intricate. While it is true that this approach would not resolve all claims—especially of those traveling on nonimmigrant visas—as Justice Robert Jackson reminded us six decades ago, the conjunction or disjunction between Congress and the presidency informs the exactness of judicial review.¹⁴ This timeless lesson was lost on the panel, which, third, applied the strictest of scrutiny to assess whether the executive order was justified based on

¹¹ *Washington v. Trump*, No. C17-0141-JLR, 2017 WL 462040, at *2 (W.D. Wash. Feb. 3, 2017).

¹² See Josh Blackman, *Instant Analysis Nationwide Injunction in Washington v. Trump*, Josh Blackman’s Blog, Feb. 4, 2017, <http://bit.ly/2vDzbYq>.

¹³ *Washington v. Trump*, 847 F.3d 1151, 1156 (9th Cir. 2017) (per curiam); Josh Blackman, *The 9th Circuit’s Contrived Comedy of Errors in Washington v. Trump*, 95 *Tex. L. Rev.* See Also 221 (2017), <https://bit.ly/2Mc52tt>.

¹⁴ *Youngstown Sheet & Tube Co.*, 343 U.S. at 635–39 (Jackson, J., concurring).

a real risk rather than alternative facts.¹⁵ Fourth, the panel refused to narrow an overbroad injunction. Once again, a study of the underlying statutory scheme could have afforded a plausible method of saving part of the order, while excising the unconstitutional portions.

The government asked the Ninth Circuit to rehear the case en banc. That petition was denied over five dissenting opinions.¹⁶ Instead of petitioning for certiorari, the Trump administration announced that the president would simply issue a new version.

II. Travel Ban 2.0

On March 6, 2017, President Trump signed Executive Order No. 13780, known as Travel Ban 2.0.¹⁷ Like the earlier iteration, this new executive order called for a 90-day worldwide review to assess the risks of aliens entering the United States. During this period, nationals from Iran, Libya, Somalia, Sudan, Syria, and Yemen would be barred from the country. (Iraq was removed from the prior list.) The order noted that these six nations were selected because each was “a state sponsor of terrorism, has been significantly compromised by terrorist organizations, or contains active conflict zones.”¹⁸ This revised version cleaned up many of the deficiencies of its predecessor. For example, green-card holders were expressly exempted from the order. Travel Ban 2.0 was challenged in multiple fora. On March 15, 2017, the district court in Hawaii entered a nationwide injunction that blocked the entry ban; the following day, the district court in Maryland did the same.¹⁹

On May 25, 2017, the U.S. Court of Appeals for the Fourth Circuit, sitting en banc, found that Travel Ban 2.0 was unconstitutional.²⁰ Its analysis traced back to the campaign trail, when then-candidate Trump called for a “total and complete shutdown of Muslims entering the United States until our country’s representatives can figure

¹⁵ See Josh Blackman, *Second-Guessing on National Security*, Josh Blackman’s Blog, Feb. 6, 2017, <http://bit.ly/2vAJxbq>.

¹⁶ *Washington v. Trump*, 858 F.3d 1168 (9th Cir. 2017) (en banc).

¹⁷ 82 Fed. Reg. 13209 (Mar. 6, 2017).

¹⁸ *Id.*

¹⁹ *Hawai’i v. Trump*, 241 F. Supp. 3d 1119 (D. Haw. 2017); *Int’l Refugee Assistance Project v. Trump*, 241 F. Supp. 3d 539 (D. Md. 2017).

²⁰ *Int’l Refugee Assistance Project [IRAP] v. Trump*, 857 F.3d 554 (4th Cir. 2017) (en banc).

out what is going on.”²¹ Then-candidate Trump also said “‘Islam hates us’ and asserted that the United States was ‘having problems with Muslims coming into the country.’”²² In her dissenting opinion, Justice Sonia Sotomayor would remark that “[a]s Trump’s presidential campaign progressed, he began to describe his policy proposal in slightly different terms.”²³ Specifically, “he characterized the policy proposal as a suspension of immigration from countries ‘where there’s a proven history of terrorism.’”²⁴ Closer to his election, “Trump reiterated that his proposed ‘Muslim ban’ had ‘morphed into a[n] extreme vetting from certain areas of the world.’”²⁵

On the basis of statements made by the president and his associates, before and after the inauguration, the Fourth Circuit ruled that Travel Ban 2.0 violated the Establishment Clause.²⁶ Specifically, Chief Judge Roger Gregory’s majority opinion found that the executive order “drips with religious intolerance.”²⁷ There were three concurring opinions, and three dissenting opinions.²⁸

On June 12, 2017, a Ninth Circuit panel ruled that the travel ban violated the INA.²⁹ That court did not reach the constitutional question.

²¹ *Trump v. Hawaii*, 138 S. Ct. 2392, 2417 (2018). The president did not remove that statement from his website until May 2017.

²² *Id.*

²³ *Id.* at 2436 (Sotomayor, J., dissenting).

²⁴ *Id.*

²⁵ *Id.*

²⁶ See Josh Blackman, Analysis of *IRAP v. Trump* Part I: The Fourth Circuit’s Reliance on Pre- and Post-Inauguration Statements, *Lawfare*, May 27, 2017, <http://bit.ly/2KsKg3X>; Josh Blackman, The Legality of the 3/6/17 Executive Order, Part II: The Due Process Clause Analysis, *Lawfare*, Mar. 12, 2017, <http://bit.ly/2Mk9iUC>; Josh Blackman, The Legality of the 3/6/17 Executive Order, Part III: The Establishment Clause, *Lawfare*, Mar. 15, 2017, <http://bit.ly/2LXBxfP>; Josh Blackman, Why Courts Shouldn’t Try to Read Trump’s Mind, *Politico Mag.*, Mar. 16, 2017, <https://politi.co/2M2XU2p>.

²⁷ *IRAP*, 857 F.3d at 572.

²⁸ Josh Blackman, Analysis of *IRAP v. Trump* Part III: The Concurring Opinions of Judges Thacker, Keenan, and Wynn, *Lawfare*, May 30, 2017, <http://bit.ly/2OLhfUn>; Josh Blackman, Analysis of *IRAP v. Trump* Part IV: Judge Niemeyer’s Dissent, *Lawfare*, June 2, 2017, <http://bit.ly/2ncVUGQ>; Josh Blackman, Analysis of *IRAP v. Trump* Part V: Judge Shedd and Judge Agee’s Dissents, and the Government’s Petitions for Certiorari and Applications for Stay, *Lawfare*, June 2, 2017, <http://bit.ly/2Mp8gXy>.

²⁹ *Hawaii v. Trump*, 859 F.3d 741, 755 (9th Cir. 2017) (per curiam). See Josh Blackman, The Legality of the 3/6/17 Executive Order, Part I: The Statutory and Separation of Powers Analyses, *Lawfare*, Mar. 11, 2017, <http://bit.ly/2vz7SOO>.

The acting solicitor general asked the Supreme Court to stay both rulings.³⁰ At the time, I urged the Supreme Court to provide closure on the legality of the travel ban.³¹ A less-than-satisfactory result would leave far too many issues open.³² The Court met me halfway.

On June 26, 2017—five months after Travel Ban 1.0 was signed—the Supreme Court finally intervened.³³ The per curiam opinion stayed the injunctions from the Fourth and Ninth Circuits, in part: the government could enforce the entry suspensions with respect to foreign nationals who lacked a “credible claim of a bona fide relationship with a person or entity in the United States.”³⁴ Simply put, the justices split the baby. Some aliens with American relations would be admitted, but most aliens could be denied entry. Justices Clarence Thomas, Samuel Alito, and Neil Gorsuch would have allowed the policy to go into effect in its entirety.³⁵

Once that stay was issued, the 90-day global review process began. During that time, the lower courts struggled to figure out what “bona fide” meant; but those disputes were to be short-lived.³⁶ The fact that a stay was granted, at least in part, was a positive omen for the government. Based on my research, “since Chief Justice John Roberts joined the Supreme Court in 2005, when the court grants a stay of a lower court decision and grants the petition for a writ of certiorari, in 22 out of 24 cases, the ultimate disposition is a reversal, at least in part.”³⁷ More specifically, the Court always reversed when

³⁰ Josh Blackman, Analysis of IRAP v. Trump Part V, *Supra* note 28.

³¹ Josh Blackman, America Needs Closure on the Travel Ban, N.Y. Times, June 11, 2017, <https://nyti.ms/2O9YVTR>.

³² Josh Blackman, Six Possible Options for the Supreme Court’s Review of the Travel Ban, Lawfare, June 24, 2017, <http://bit.ly/2KtsRYI>.

³³ Josh Blackman, The Scope of the Supreme Court’s Decision in IRAP v. Trump, Lawfare, June 27, 2017, <http://bit.ly/2MI91kh>.

³⁴ *Trump v. Int’l Refugee Assistance Project*, 137 S. Ct. 2080, 2088 (2017) (per curiam).

³⁵ *Id.* at 2089 (Thomas, J. concurring in part and dissenting in part).

³⁶ See Josh Blackman, A Nonchalant Conclusion to *Trump v. IRAP*, Lawfare, Oct. 13, 2017, <http://bit.ly/2vGkZh1> (“This is the way *Trump v. IRAP* ends: not with a bang, but with a whimper. At least for now.”).

³⁷ Josh Blackman, Understanding the Supreme Court’s Equitable Ruling in *Trump v. IRAP*, SCOTUSblog, July 12, 2017, <http://bit.ly/2OJgM59>.

Justice Anthony Kennedy acquiesced in the grant of a stay, and certiorari is subsequently granted.

III. Travel Ban 3.0

After the 90-day global review period concluded on September 24, 2017, Travel Ban 2.0 expired on its own terms. That same day, President Trump issued Proclamation No. 9645, known as Travel Ban 3.0.³⁸ This final policy “placed entry restrictions on the nationals of eight foreign states whose systems for managing and sharing information about their nationals the President deemed inadequate.”³⁹ Iran, Libya, Somalia, Syria, and Yemen remained on the list. Sudan was removed, but Chad, North Korea, and Venezuela were added. The proclamation explained that such restrictions were “most likely to encourage cooperation” while “protect[ing] the United States until such time as improvements occur.”⁴⁰

Once again, the proclamation was challenged in the Districts of Maryland and Hawaii. On October 17, 2017, both courts enjoined the entry bans.⁴¹ The Fourth Circuit affirmed the nationwide injunction in its entirety, again finding that the entry ban violated the Establishment Clause.⁴² The Ninth Circuit also affirmed the district court’s injunction, again concluding that the entry ban violated the INA.⁴³

On December 4, 2017, the Supreme Court put both preliminary lower-court rulings on hold.⁴⁴ The justices instructed the courts of appeals to “render their decision[s] with appropriate dispatch.”⁴⁵ As a result, the entry ban could go into effect, in its entirety, while the lower courts considered the appeal on the merits. By that point, the writing was on the wall for the challengers. On December 22, 2017, the Ninth Circuit invalidated Travel Ban 3.0 on the same statutory

³⁸ 82 Fed. Reg. 45161 (Sept. 24, 2017).

³⁹ Trump, 138 S. Ct. at 2404.

⁴⁰ 82 Fed. Reg. 45161, 45164.

⁴¹ Int’l Refugee Assistance Project v. Trump, 265 F. Supp. 3d 570 (D. Md. 2017); State v. Trump, 265 F. Supp. 3d 1140 (D. Haw. 2017).

⁴² Int’l Refugee Assistance Project v. Trump, 883 F.3d 233 (4th Cir. 2018).

⁴³ Hawaii v. Trump, 878 F.3d 662 (9th Cir. 2017).

⁴⁴ See Trump v. IRAP, 138 S. Ct. 542 (2017) (Mem); Trump v. Hawaii, 138 S. Ct. 542 (2017) (Mem).

⁴⁵ *Id.*

grounds it set aside Travel Ban 2.0.⁴⁶ The government appealed that decision, and the Supreme Court granted certiorari on January 19, 2018. On February 15, 2018, the dilatory Fourth Circuit issued its decision, which invalidated Travel Ban 3.0 for substantially the same constitutional reasons it invalidated Travel Ban 2.0.⁴⁷

Oral arguments were heard on the last scheduled day of the term: April 25, 2018. Ultimately, the Court sharply split 5-4 and upheld Travel Ban 3.0 in its entirety. Chief Justice Roberts wrote the majority opinion for the Court. He found that the proclamation did not violate the INA, nor did it run afoul of the Establishment Clause. Justice Kennedy concurred to explain why the president can exercise “discretion free from judicial scrutiny.”⁴⁸ Justice Thomas also wrote a concurring opinion to criticize the usage of nationwide injunctions by district courts.

Justice Stephen Breyer, joined by Justice Elena Kagan, dissented on fairly narrow grounds: they contended that the failure of the government to faithfully implement the waiver program suggests that the program is in fact a Muslim ban. Justice Sotomayor, joined by Justice Ruth Bader Ginsburg, wrote a separate dissent. A “reasonable observer,” they wrote, “would conclude that the Proclamation was motivated by anti-Muslim animus.”⁴⁹ Neither dissent engaged the statutory analysis advanced by the majority.

A. Chief Justice Roberts’s Statutory Analysis

The Court’s statutory analysis begins with 8 U.S.C. § 1182(f), which was enacted in 1952. This provision enables the president to “suspend the entry of all aliens or any class of aliens,” “for such period as he shall deem necessary,” whenever he “finds” that their entry “would be detrimental to the interests of the United States.” The challengers asserted that “§ 1182(f) confers only a residual power to temporarily halt the entry of a discrete group of aliens engaged in harmful conduct.”⁵⁰ In other words, it cannot be used to deny entry to a class of aliens absent a showing of individualized harm.

⁴⁶ *Hawaii v. Trump*, 878 F.3d. 662 (9th Cir. 2017).

⁴⁷ *IRAP v. Trump*, 883 F.3d 233 (4th Cir. 2018) (en banc).

⁴⁸ *Trump*, 138 S. Ct. at 2424 (Kennedy, J., concurring).

⁴⁹ *Id.* at 2433 (Sotomayor, J., dissenting).

⁵⁰ *Id.* at 2408 (majority op.).

The Supreme Court swiftly dispatched this argument: “§ 1182(f) grants the President broad discretion to suspend the entry of aliens into the United States” based on “his findings . . . following a world-wide, multi-agency review . . . that entry of the covered aliens would be detrimental to the national interest.”⁵¹ Chief Justice Roberts added that “§ 1182(f) exudes deference to the President in every clause.” He can decide “whether and when to suspend entry . . . whose entry to suspend . . . for how long . . . and on what conditions.”⁵² Therefore, the Proclamation fell “well within this comprehensive delegation” of authority from Congress.⁵³ The president was not required to make any *individualized* findings of harm for each excluded alien.

Furthermore, the Court rejected the challengers’ argument that the president’s finding must be made “with sufficient detail to enable judicial review.”⁵⁴ Chief Justice Roberts found that “premise . . . questionable.”⁵⁵ In other words, the Court strongly doubted that the findings need to meet *any* level of specificity that would allow judicial scrutiny. Such a “searching inquiry into the persuasiveness of the President’s justifications,” the Court explained, “is inconsistent with . . . the deference traditionally accorded the President in this sphere” of foreign affairs.⁵⁶ Yet, “even assuming that some form of review is appropriate, Roberts observed, “[t]he 12–page Proclamation—which thoroughly describes the process, agency evaluations, and recommendations underlying the President’s chosen restrictions—is more detailed than any prior order a President has issued under § 1182(f).”⁵⁷ To call into question the sufficiency of President Trump’s order would immediately call into question the sufficiency of similar orders issued by past presidents. Stated differently, because no one objected to orders issued by past president, the Court should hesitate before objecting to the order issued by the current president.

The challengers raised a second statutory argument, relating to 8 U.S.C. § 1152(a)(1)(A). It provides that “no person shall . . .

⁵¹ *Id.*

⁵² *Id.*

⁵³ *Id.*

⁵⁴ *Id.* at 2409.

⁵⁵ *Id.*

⁵⁶ *Id.* (citing *Holder v. Humanitarian Law Project*, 561 U.S. 1, 35 (2010)).

⁵⁷ *Id.* at 2409.

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." The challengers asserted that this nondiscrimination provision, enacted as part of the landmark 1965 INA, placed a limitation on the president's power to exclude aliens under § 1182(f). That is, the president could not deny entry on the basis of "race" or "nationality."

Early on in the litigation, I pointed out an obvious response to this argument: § 1182(f) concerns "entry" while § 1152(a)(1)(A) concerns the "issuance of an immigrant visa."⁵⁸ The provisions are not at all in tension. Unless an alien is admissible in the first place, it is irrelevant whether he has a visa. For example, an alien can arrive at an airport with a valid visa, but be denied entry if a federal official determines he is inadmissible. Moreover, Presidents Carter and Reagan had denied entry to Iranian and Cuban nationals, respectively.⁵⁹ No one claimed that these actions violated the INA. Furthermore, it would be unthinkable for Congress to deny the president the power to exclude aliens from belligerent nations, even absent a formal declaration of war. Sections 1182(f) and 1152(a)(1)(A) are best read to operate on different aspects of immigration law, rather than to conflict with each other.

The Supreme Court's analysis closely tracked my statutory arguments. First, Chief Justice Roberts observed that § 1152(a)(1)(A) does not affect "the *entire* immigration process" because it references "the act of visa issuance alone."⁶⁰ The challengers' construction, he wrote, "ignores the basic distinction between admissibility determinations and visa issuance that runs throughout the INA."⁶¹ Specifically, the "concepts of entry and admission—but not issuance of a visa—are used interchangeably in the INA."⁶² The chief justice explained

⁵⁸ See Josh Blackman, *The Statutory Legality of Trump's Executive Order on Immigration*, Josh Blackman's Blog, Feb. 5, 2017, <http://bit.ly/2OdAhs7>; Josh Blackman, *The Statutory Legality of Trump's Executive Order on Immigration: Part II*, Josh Blackman's Blog, Feb. 5, 2017, <http://bit.ly/2AGLLf0>; Josh Blackman, *The Statutory Legality of Trump's Executive Order on Immigration: Part III*, Josh Blackman's Blog, Feb. 7, 2017, <http://bit.ly/2LR7ZQG>; Josh Blackman, *The Statutory Legality of Trump's Executive Order on Immigration: Part IV*, Josh Blackman's Blog, Feb. 11, 2017, <http://bit.ly/2OdBbOv>.

⁵⁹ Exec. Order No. 12172, 3 C.F.R. 461 (1979), as amended by Exec. Order No. 12206, 3 C.F.R. 249 (1980); Proclamation No. 5517, 3 C.F.R. 102 (1986).

⁶⁰ Trump, 138 S. Ct. at 2414.

⁶¹ *Id.*

⁶² *Id.* at 2414 n.4.

that “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).”⁶³ The Court dismissed any construction under which the president could not “suspend entry from particular foreign states in response to an epidemic confined to a single region, or a verified terrorist threat involving nationals of a specific foreign nation, or even if the United States were on the brink of war.”⁶⁴ Simply stated, “Sections 1182(f) and 1152(a)(1)(A) . . . operate in different spheres.”⁶⁵

The challengers’ briefing before the Ninth Circuit and the Supreme Court focused almost entirely on the statutory argument. Yet, Chief Justice Roberts observed, “neither dissent even attempts any serious argument to the contrary.”⁶⁶ Justice Sotomayor explained that she did not address the “complex statutory claims” because the constitutional question “prove[d] far simpler than the statutory one.”⁶⁷

B. Chief Justice Roberts’s Constitutional Analysis

1. No “spiritual and dignitary” injury for Article III standing

After dismissing the statutory claims, the Court addressed whether “the Proclamation was issued for the unconstitutional purpose of excluding Muslims.”⁶⁸ As a threshold matter, the Court declined to find Article III standing based on a purported “spiritual and dignitary” injury—that is, the Proclamation “establishes a disfavored faith.”⁶⁹ Rather, the plaintiffs could only rely on a “more concrete injury” based on family reunification.⁷⁰

⁶³ *Id.* at 2414.

⁶⁴ *Id.* at 2415.

⁶⁵ *Id.*

⁶⁶ *Id.* at 2415.

⁶⁷ *Id.* at 2434 (Sotomayor, J., dissenting).

⁶⁸ *Id.* at 2415 (majority op.).

⁶⁹ *Id.* at 2416.

⁷⁰ *Id.* I had correctly predicted that the Supreme Court would reject any injury based on mere “stigmatization.” Josh Blackman, *Analysis of IRAP v. Trump Part II: The Fourth Circuit’s Misuse of Mandel, Din, Lemon, and Town of Greece*, *Lawfare*, May 28, 2017, <https://bit.ly/2nfVGib>.

2. Domestic Establishment Clause cases do not apply

The Court's framing of the constitutional question was dispositive: "Relying on Establishment Clause precedents concerning laws and policies applied *domestically*, plaintiffs allege that the primary purpose of the Proclamation was religious animus and that the President's stated concerns about vetting protocols and national security were but pretexts for discriminating against Muslims."⁷¹ The key word is "domestic." The Fourth Circuit had simply assumed that the Court's Establishment Clause precedents, which all concerned *domestic* policies, applied to the President's foreign policy decisions. There is good reason to exempt foreign policy decisions from the Court's domestic Establishment Clause cases, such as the so-called *Lemon* test, or the analysis established in *McCreary County v. ACLU*.⁷²

Chief Justice Roberts found that this case "differs in numerous respects from the *conventional* Establishment Clause claim."⁷³ He observed that "[u]nlike the typical suit involving religious displays or school prayer," that is, mundane domestic matters, the challengers "seek to invalidate a national security directive regulating the entry of aliens abroad." As a result, this case "raises a number of delicate issues regarding the scope of the constitutional right and the manner of proof." Critically, in the domestic context, the Court in the past had no trouble looking to "extrinsic statements" to peek behind a facially neutral action, in order to ascertain whether the government had an impermissible, nonsecular purpose. With respect to the proclamation, however, the Court hesitated before "prob[ing] the sincerity of the stated justifications for the policy by reference to extrinsic statements—many of which were made before the President took the oath of office."⁷⁴

In dissent, Justice Sotomayor faulted the majority for its "apparent willingness to throw the Establishment Clause out the window and forgo any meaningful constitutional review at the mere mention of

⁷¹ Trump, 138 S. Ct. at 2417 (emphasis added).

⁷² *Lemon v. Kurtzman*, 403 U.S. 602 (1971); *McCreary County v. ACLU*, 545 U.S. 844 (2005). See Josh Blackman, *The Domestic Establishment Clause*, 23 *Roger Williams L. Rev.* 435 (2018) (arguing that the Supreme Court's "domestic" Establishment Clause cases should not apply to the resolution of the travel ban's constitutionality).

⁷³ Trump, 138 S. Ct. at 2418 (emphasis added).

⁷⁴ *Id.*

a national-security concern.”⁷⁵ The Court responded that applying “the *de novo* ‘reasonable observer’” standard, as articulated in *McCreary County v. ACLU*, was not appropriate for cases that involve “immigration policies, diplomatic sanctions, and military actions.”⁷⁶ Chief Justice Roberts added that “a circumscribed inquiry applies to any constitutional claim concerning the entry of foreign nationals.” There is no authority to support a “free-ranging inquiry . . . in the national security and foreign affairs context.”⁷⁷

Instead, Chief Justice Roberts proposed a POTUS-specific-framework: How should the Court consider “not only the statements of a particular President, but also the authority of the Presidency itself” when “reviewing a Presidential directive, neutral on its face, addressing a matter within the core of executive responsibility”?⁷⁸ This test is quite possibly the most important element of the entire decision. On the eve of oral arguments, *Washington Post* reporter Robert Barnes aptly summarized *Trump v. Hawaii* in a pithy headline: “In travel ban case, Supreme Court considers ‘the president’ vs. ‘this president.’”⁷⁹ The majority opinion chose the former. Instead of focusing on the norm-busting behavior of the 45th president, the Court resolved this case with an eye toward all 45 presidents. “[W]e must consider not only the statements of a particular President,” Chief Justice Roberts explained, “but also the authority of *the Presidency itself*.”⁸⁰ Specifically, the Court concluded that “[t]he entry suspension is an act that is well within executive authority and could have been taken by any other President—the only question is evaluating the actions of this particular President in promulgating an otherwise valid Proclamation.”⁸¹

The Court explained that “[t]he upshot of our cases in this context is clear: ‘Any rule of constitutional law that would inhibit the flexibility’ of the President ‘to respond to changing world conditions should be

⁷⁵ *Id.* at 2441 n.6 (Sotomayor, J., dissenting).

⁷⁶ *Id.* at 2420 n.5 (majority op.).

⁷⁷ *Id.*

⁷⁸ *Id.* at 2418.

⁷⁹ Robert Barnes, In Travel Ban Case, Supreme Court Considers ‘the President’ vs. ‘This President,’ *Wash. Post*, Apr. 22, 2018, <https://wapo.st/2vBIHfO>.

⁸⁰ *Trump*, 138 S. Ct. at 2418 (emphasis added).

⁸¹ *Id.* at 2423.

adopted only with the greatest caution,’ and [the Court’s] inquiry into matters of entry and national security is highly constrained.”⁸² Whatever precedents were set here, would constrain presidential power “in diverse contexts, including those presently unimagined, and will have the effect of [weakening] the Presidency [within] its constitutional bounds and undermining respect for the separation of powers.”⁸³

This principle, in large part, informed my personal approach to all three travel bans: “The judiciary should not abandon its traditional role simply because the president has abandoned his.”⁸⁴

3. The proclamation is “largely immune from judicial control”

Ultimately, the Court reviewed the Proclamation in an extremely deferential manner because it implicated “the admission and exclusion of foreign nationals,” which “is a ‘fundamental sovereign attribute exercised by the Government’s political departments *largely immune from judicial control.*”⁸⁵ *Kleindienst v. Mandel*, and not the Court’s Establishment Clause cases, provides the appropriate “circumscribed judicial inquiry when the denial of a visa allegedly burdens the constitutional rights of a U.S. citizen.”⁸⁶ Specifically, the Court’s review was limited “to whether the Executive gave a ‘facially legitimate and bona fide’ reason for its action.”⁸⁷ In my writings, I contended that the adjective “facially” modified *both* “legitimate” and “bona fide.”⁸⁸ That is, the Court does not peek behind the

⁸² *Id.* at 2419–20 (quoting *Matthews v. Diaz*, 426 U.S. 67, 81–81 (1976)).

⁸³ Cf. *N.L.R.B. v. Noel Canning*, 134 S. Ct. 2550, 2617–18 (2014) (Scalia, J., concurring) (“Sad, but true: The Court’s embrace of the adverse-possession theory of executive power (a characterization the majority resists but does not refute) will be cited in diverse contexts, including those presently unimagined, and will have the effect of aggrandizing the Presidency beyond its constitutional bounds and undermining respect for the separation of powers.”).

⁸⁴ Blackman, *Why Courts Shouldn’t Try to Read Trump’s Mind*, *Supra* note 26.

⁸⁵ *Trump*, 138 S. Ct. at 2418 (quoting *Fiallo v. Bell*, 430 U.S. 787, 792 (1977)) (emphasis added).

⁸⁶ *Id.* at 2419 (citing *Kleindienst v. Mandel*, 408 U.S. 753 (1972)).

⁸⁷ *Id.*

⁸⁸ See Blackman, *Analysis of IRAP v. Trump Part II: Supra* note 70 (“The operative phrase in *Mandel* is ‘facially legitimate and bona fide reason.’ Both ‘legitimate’ and ‘bona fide’ are best read as being modified by ‘facially.’ It is not ‘legitimate’ on the face, but ‘bona fide’ as a whole. The lack of good faith must be represented on the face of the action, not beyond its face.”).

curtains to ascertain if the policy was not bona fide. Once again, the Court's analysis was consistent with my own.

Chief Justice Roberts explained that “when 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 asserted constitutional interests of U.S. citizens.”⁸⁹ Critically, “[j]udicial inquiry into the national-security realm raises concerns for the separation of powers” by intruding on the president’s constitutional responsibilities in the area of foreign affairs.⁹⁰ Finally, the Court added, Justice Kennedy’s concurring opinion in *Kerry v. Din* reaffirmed the surface-deep-scrutiny required by the *Mandel* test.⁹¹ The inquiry, and resolution, is straightforward: “A conventional application of *Mandel*, asking only whether the policy is facially legitimate and bona fide, would put an end to our review”—*regardless of the statements that inform the policy’s purpose*.⁹²

4. The proclamation survives rational basis scrutiny

Yet, the Court still probed just a bit below the surface. Why? Because the solicitor general “suggested that it may be appropriate here for the inquiry to extend beyond the facial neutrality of the order.”⁹³ As a result, the Court “assume[d]” that it could “look behind the face of the Proclamation to the extent of applying rational basis review.”⁹⁴ This alternative argument is important: absent the solicitor general’s concession, the Court’s precedents suggest applying a standard of review even *less* stringent than rational basis review. In his concurring opinion, Justice Kennedy aptly described this standard: “discretion *free* from judicial scrutiny.”⁹⁵ Even applying some form of rational-basis review—is the “entry policy . . . plausibly related to the Government’s stated objective to protect the country and improve

⁸⁹ *Trump*, 138 S. Ct. at 2419 (citations omitted).

⁹⁰ *Id.* (quoting *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1861 (2017)).

⁹¹ *Id.* (citing *Kerry v. Din*, 135 S. Ct. 2128, 2141 (2015) (Kennedy, J., concurring)).

⁹² *Id.* at 2420.

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ *Id.* at 2424 (Kennedy, J., concurring) (emphasis added).

vetting processes”⁹⁶—results in a government victory. The extrinsic evidence can be “considered,” but the policy must be upheld “so long as it *can reasonably be understood* to result from a justification independent of unconstitutional grounds.”⁹⁷

Critically, the justification need not be the actual justification. Rather, it must be a *reasonable* justification to support the policy. Justice Sotomayor is correct that “the Government remains wholly unable to articulate any *credible* national-security interest that would go unaddressed by the current statutory scheme absent the Proclamation.”⁹⁸ The critical word, however is “credible.” And, under current law, it is not for the judiciary to decide what interests are *credible*, or *wise*, or *justified*. Under rational basis review, the Court declined to “substitute [its] own assessment for the Executive’s predictive judgments on such matters, all of which ‘are delicate, complex, and involve large elements of prophecy.’”⁹⁹

Based on the record, the majority opinion found, “there is persuasive evidence that the entry suspension has a legitimate grounding in national security concerns, quite apart from any religious hostility.” Chief Justice Roberts did not deny the existence of any religious hostility, but the Court was still required to “accept that independent justification.”¹⁰⁰ As a result, the extrinsic statements played no meaningful role in the majority’s analysis. They were merely mentioned, and discarded. At bottom, “the Government has set forth a sufficient national security justification to survive rational basis review.”¹⁰¹

C. Justice Kennedy’s Concurring Opinion

The October 2017 term was unique: in 19 decisions that split 5-4, Justice Kennedy never joined the liberal quartet to form a majority. In 2 of those 19 cases, Chief Justice Roberts voted with the Court’s

⁹⁶ *Id.* at 2420 (majority op.) (citing *Railroad Retirement Bd. v. Fritz*, 449 U.S. 166, 179 (1980)).

⁹⁷ *Id.* (emphasis added).

⁹⁸ *Id.* at 2444 (Sotomayor, J., dissenting)

⁹⁹ *Id.* at 2421 (majority op.) (quoting *Chicago & Southern Air Lines, Inc. v. Waterman S.S. Corp.*, 333 U.S. 103, 111 (1948)).

¹⁰⁰ *Id.*

¹⁰¹ *Id.* at 2423.

liberal bloc.¹⁰² Even Justice Gorsuch crossed lines once.¹⁰³ But not Justice Kennedy, the Court's perennial swing vote. By way of comparison, in the October 2016 term, Justice Kennedy voted with the liberal bloc in 57 percent of the 5-4 decisions.¹⁰⁴ And in the October 2015 term, he joined the liberals in 75 percent of the 5-4 decisions. However, in his final term on the bench, that number dropped to zero. Justice Kennedy's concurring opinion in *Trump v. Hawaii* turned out to be his final writing as a member of the High Court. It warrants a careful study for what he said, and did not say.

First, he joined the Court's opinion in full, including its application of minimum-rational basis review. Critically, this concurrence was not one of Justice Kennedy's typical *conservatish* writings, where he concurred only in judgment, or watered down the majority opinion.¹⁰⁵ Second, he explained that "in some instances, governmental action may be subject to judicial review to determine whether or not it is 'inexplicable by anything but animus,'" such as "animosity to a religion."¹⁰⁶ But such "judicial review" is not appropriate for the entry ban. Third, Justice Kennedy cast doubt on whether future "judicial proceedings may properly continue in this case, in light of the substantial deference that is and must be accorded to the Executive in the conduct of foreign affairs."¹⁰⁷ Here, the soon-to-be-retired justice sent a subtle message to the inferior courts: their judgments remain inferior, and they should not supplant the Supreme Court's conclusive determination about the proclamation's legality. Specifically, Justice Kennedy sought to preemptively slam shut the door on "discovery and other preliminary matters" that may "intrude on the foreign affairs power of the Executive."¹⁰⁸

¹⁰² See *Artis v. District of Columbia*, 138 S. Ct. 594 (2008); *Carpenter v. United States*, 138 S. Ct. 2206 (2018).

¹⁰³ See *Sessions v. Dimaya*, 138 S. Ct. 1204 (2018).

¹⁰⁴ Kedar Bhatia, *Final October Term 2017 Stat Pack and Key Takeaways*, SCOTUSblog, June 29, 2018, <http://bit.ly/2LW44et>.

¹⁰⁵ See e.g., *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2785 (Kennedy, J., concurring) ("It seems to me appropriate, in joining the Court's opinion, to add these few remarks").

¹⁰⁶ *Trump*, 138 S. Ct. at 2423–24 (Kennedy, J., concurring) (quoting *Romer v. Evans*, 517 U.S. 620, 632 (1996)).

¹⁰⁷ *Id.* at 2424.

¹⁰⁸ *Id.*

Fourth, Justice Kennedy made a “further observation.” He explained that “[t]here are numerous instances in which the statements and actions of Government officials are not subject to judicial scrutiny or intervention.”¹⁰⁹ Justice Kennedy does not explain why the proclamation is immune from “judicial scrutiny.” Though, because he joined the majority opinion in full, the answer is straightforward: the government’s denial of entry to noncitizens here is not subject to judicial intervention.

Justice Kennedy’s fifth point is at once profound, yet perplexing: the fact that certain actions are “not subject to judicial scrutiny . . . does not mean those officials are free to disregard the Constitution and the rights it proclaims and protects.”¹¹⁰ For a generation, Justice Kennedy was content to serve as the moral compass of our polity: he cast the deciding vote on cases involving affirmative action, abortion, the death penalty, same-sex marriage, and countless other topics. For the travel ban, however, he is content to let the elected branches monitor their own actions.

Justice Kennedy closed his tenure on the Supreme Court with an ephemeral elegy for egalitarianism: “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.”¹¹¹ Your guess is as good as mine as to the meaning of this sentence. Perhaps it’s a fitting bookend to his “sweet mystery of life” passage from *Planned Parenthood v. Casey*. In any event, this “mic drop” was an elusive conclusion for the career of an elusive justice.

D. Justice Thomas’s Concurring Opinion

Justice Thomas, as usual, would have gone further than did the majority. Instead of applying minimum rational basis review, Justice Thomas’s concurring opinion contended that “Section 1182(f) does not set forth *any* judicially enforceable limits that constrain the President.”¹¹² Full stop. Recall that Justices Thomas, Alito, and

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² *Id.* at 2424 (Thomas, J., concurring) (emphasis added).

Gorsuch would have upheld Travel Ban 2.0 in its entirety. Here, however, only Justice Thomas wrote separately.

Second, Justice Thomas reached a constitutional question the majority did not: he found “the President has *inherent* authority to exclude aliens from the country” under Article II.¹¹³ The president’s power to exclude aliens is supported by a unique amalgamation of inherent authority over foreign affairs, as well as explicit delegations of statutory authority. Note that this power is *inherent*, not *exclusive*.¹¹⁴ That is, Congress can still impose meaningful limitations on this authority. And it should. The legislature, and not the judiciary, has the responsibility to enforce such constraints on immigration laws.

Third, while the majority was content to distinguish this case from other *domestic* Establishment Clause cases, Justice Thomas would simply eliminate the “reasonable observer” standard from the Court’s jurisprudence altogether. Moreover, he would exclude from the ambit of the First Amendment any “alleged religious discrimination [that is] directed at aliens abroad.”¹¹⁵ Finally, though Justice Thomas found that the proclamation was not subject to any judicial review, he added that “the plaintiffs’ proffered evidence of anti-Muslim discrimination is unpersuasive.”¹¹⁶

Those four points would have been adequate to resolve the case. But Justice Thomas wrote further—at some length—to criticize the district courts’ imposition of “universal” or “nationwide” injunctions. Justice Thomas added that “[d]istrict courts, including the one here, have begun imposing universal injunctions without considering their authority to grant such sweeping relief.”¹¹⁷ Such overly broad relief inflicts three distinct costs on the federal judiciary: “preventing legal questions from percolating through the federal courts, encouraging forum shopping, and making every case a national emergency for the courts and for the Executive Branch.”¹¹⁸

¹¹³ *Id.* (citing *Knauff v. Shaughnessy*, 338 U.S. 537, 542–43 (1950)) (emphasis added).

¹¹⁴ *Zivotofsky ex rel. Zivotofsky v. Kerry*, 135 S. Ct. 2076, 2094 (2015) (“The weight of historical evidence indicates Congress has accepted that the power to recognize foreign states and governments and their territorial bounds is *exclusive to the Presidency*.”) (emphasis added).

¹¹⁵ *Trump*, 138 S. Ct. at 2424 (Thomas, J., concurring).

¹¹⁶ *Id.*

¹¹⁷ *Id.* at 2425.

¹¹⁸ *Id.*

Hawaii v. Trump was not the appropriate case for the Court to decide the propriety of nationwide injunctions, because the Court ultimately found the policy lawful. But in a future case, Justice Thomas predicted, “this Court is dutybound to adjudicate” the propriety of nationwide injunctions.¹¹⁹

E. Justice Breyer’s Dissenting Opinion

Justice Breyer dissented, joined by Justice Kagan. As a threshold matter, they did not conclude—as did Justices Sotomayor and Ginsburg—that the proclamation was “significantly affected by religious animus against Muslims.”¹²⁰ Nor did they conclude, as did the majority, that the proclamation’s purpose was to protect national security. Instead, Justices Breyer and Kagan took a far more circumspect route that would have left the nationwide injunction in place, at least temporarily.

Chief Justice Roberts’s majority opinion highlighted the fact that “the Proclamation creates a waiver program open to all covered foreign nationals seeking entry as immigrants or nonimmigrants.”¹²¹ Even those aliens who are otherwise subject to the entry ban can still petition the government for a discretionary exemption. This “additional feature,” the Court explained, bolstered the government’s “claim of a legitimate national security interest.”¹²² The dissenting duo respectfully disagreed with this claim.

Instead, as Justice Breyer is wont to do, he crafted a carefully calibrated balancing test. If the waiver program was faithfully executed on a case-by-case basis, the government could rebut the presumption that the proclamation is a veiled Muslim ban. However, if the waiver program was not faithfully executed—that is, exemptions were arbitrarily denied—the government could not rebut the presumption that the proclamation was a veiled Muslim ban. In other words, “since the case-by-case exemptions and waivers apply without regard to the individual’s religion, application of that system would help make clear that the Proclamation does not deny visas to numerous Muslim individuals (from those countries) who do not

¹¹⁹ *Id.* at 2429.

¹²⁰ *Id.* at 2429 (Breyer, J., dissenting).

¹²¹ *Id.* at 2422 (majority op.).

¹²² *Id.*

pose a security threat.” Alternatively, Justice Breyer explained, “denying visas to Muslims who meet the Proclamation’s own security terms would support the view that the Government excludes them for reasons based upon their religion.”¹²³

Ultimately, based on his study of how the waivers have been issued, Justice Breyer found that “the Government is not applying the Proclamation as written.”¹²⁴ In other words, no guidance existed that would explain how the exemptions should be issued. Additionally, too few waivers had been granted. As a result, the dissenters surmised, this process merely served as window dressing for a Muslim ban. Such selective enforcement supported the inference that the proclamation was in fact designed to implement anti-Muslim animus. Therefore, Justices Breyer and Kagan would “send this case back to the District Court for further proceedings” to determine whether the travel ban in fact “rest[s] upon a ‘Muslim ban.’”¹²⁵ (Justice Sotomayor, in dissent, took this charge a step further: she concluded that “there is reason to suspect that the Proclamation’s waiver program is nothing more than a sham.”¹²⁶)

Chief Justice Roberts responded that Justice Breyer’s analysis is premised on “selective statistics, anecdotal evidence, and a declaration from unrelated litigation” that is not “appropriate under rational basis review.”¹²⁷ That’s precisely the point: the mild dissenters duo did not conclude that minimum rationality was the correct standard. Justice Breyer hinted at that conclusion in the penultimate sentence of his dissent: “If this Court must decide the question without this further litigation, I would . . . find the evidence of antireligious bias, including statements on a website taken down only after the President issued the two executive orders preceding the Proclamation, along with the other statements . . . [would provide] a sufficient basis to set the Proclamation aside.”¹²⁸ Justice Breyer was able to punt on this difficult question, however, because a future study of the waiver process could resolve the case more simply.

¹²³ Trump, 138 S. Ct. at 2430 (Breyer, J., dissenting).

¹²⁴ *Id.* at 2431.

¹²⁵ *Id.* at 2433.

¹²⁶ *Id.* at 2445 (Sotomayor, J., dissenting).

¹²⁷ *Id.* at 2423 n.7 (majority op.).

¹²⁸ *Id.* at 2433 (Breyer, J., dissenting).

F. Justice Sotomayor's Dissenting Opinion

Justices Breyer and Kagan wrote a cautious dissent that tried to avoid the implication that President Trump instituted a "Muslim ban." Justice Sotomayor, joined by Justice Ginsburg, made the charge explicitly. They faulted the Court for upholding "a policy first advertised openly and unequivocally as a 'total and complete shut-down of Muslims entering the United States' because the policy now masquerades behind a facade of national-security concerns." Furthermore, the dissent assailed the Court for "ignoring the facts, misconstruing our legal precedent, and turning a blind eye to the pain and suffering the Proclamation inflicts upon countless families and individuals, many of whom are United States citizens." Justice Sotomayor ultimately described that outcome as a "troubling result [that] runs contrary to the Constitution and our precedent."¹²⁹

She offered an even blunter criticism for the Department of Justice: "Given President Trump's failure to correct the reasonable perception of his apparent hostility toward the Islamic faith, it is unsurprising that the President's lawyers have, at every step in the lower courts, *failed in their attempts to launder* the Proclamation of its discriminatory taint."¹³⁰ However, she added, "this new window dressing cannot conceal an unassailable fact: the words of the President and his advisers create the strong perception that the Proclamation is contaminated by impermissible discriminatory animus against Islam and its followers."¹³¹

Critically, unlike the majority, Justice Sotomayor's dissent applied the Court's domestic Establishment Clause precedents to find that the proclamation ran afoul of the constitutional guarantee of religious neutrality. "[A] reasonable observer would readily conclude that the Proclamation was motivated by hostility and animus toward the Muslim faith," and not "the Government's asserted national-security justifications."¹³²

¹²⁹ *Id.* at 2433 (Sotomayor, J., dissenting).

¹³⁰ *Id.* at 2439.

¹³¹ *Id.* at 2440.

¹³² *Id.* at 2435, 2438. Cf. Josh Blackman, *Hawaii v. Trump: What Would an "Objective Observer" Think of President Trump's Travel Ban?*, *Lawfare*, May 16, 2017, <http://bit.ly/2LYSCVN> ("a handful of ambiguous post-inauguration statements, including Trump's declaration that 'we all know what that means' on signing the executive order, will be insufficient to demonstrate to an 'objective observer' an improper motive.").

Justices generally dissent “respectfully.”¹³³ But this dissent was unadorned—and it didn’t simply focus on the presidency in the abstract. It focused on *this* president. Indeed, Professor Will Baude pointed out that “Justice Sotomayor’s dissent contains repeated references to ‘President Trump,’” and “mentions the ‘Trump administration.’” He added, “I doubt that either is an accident.”¹³⁴ Indeed, during her announcement of the opinion, Justice Sotomayor referred to “President *Donald* Trump.” Seated in the gallery, I was shocked she used the president’s given name. Every time she uttered the word “Trump,” her voice was filled with disdain. That sentiment pervaded the entire dissent.

IV. Placing the Travel Bans in Perspective

During the 18-month litigation blitz, numerous courts repeatedly invalidated the three iterations of the travel ban. Only the Supreme Court upheld it—and by a 5-4 vote. This final section places the travel bans in perspective.

A. Legality, Reality, and Rationality

In *Trump v. Hawaii*, the dissenting justices were troubled by the majority’s unwillingness to consider what any “reasonable observer” would consider: namely, the President’s blatantly anti-Islamic rhetoric that undergirded the travel ban. This precise question arose in December 2017, when the Fourth Circuit heard oral arguments in *Trump v. IRAP*. Judge James A. Wynn Jr. asked the Justice Department lawyer about the relevance of the president’s inflammatory tweets to the Establishment Clause analysis.¹³⁵ “What do we do with that,” he asked referring to the tweets. “Do we just ignore reality and look at the *legality* to determine how to handle this case?” Though the framing of his question was somewhat unclear, the premise was pellucid: What should a judge do if the law cuts one way, but reality cuts the other?¹³⁶

¹³³ See Josh Blackman, *Disrespectful Dissents on the Roberts Court*, Josh Blackman’s Blog, Mar. 25, 2015, <http://bit.ly/2vFKcbs>.

¹³⁴ Will Baude, *Free Thoughts on Trump v. Hawaii, The Volokh Conspiracy*, June 26, 2018, <http://bit.ly/2OLIAgb>.

¹³⁵ Oral Arg. Transcript at 24:20, *Int’l Refugee Assistance Project v. Trump*, 883 F.3d 233 (4th Cir. 2018) (No. 17-2231), <http://bit.ly/2Ku5vIL>.

¹³⁶ Josh Blackman, *For Judges, ‘Legality’ Is Their Only ‘Reality’*, *Lawfare*, Dec. 11, 2017, <http://bit.ly/2vfA7Tu> (emphasis added).

All courts, including the Supreme Court, exist only because of “legalities,” and are limited by legalities. Article III jurisdiction is defined by legalities. The INA is constituted by a complicated scheme of legalities. The separation of powers embeds a host of legalities that restrict judicial power. The inherent powers of the president compose a legality that allows him to execute certain actions that no one else in the republic can execute. The difference between an op-ed and a published judicial opinion is a matter of “mere” legalities.

As for reality: the very nature of courts of limited jurisdiction requires courts to ignore reality unless the law makes it legally salient. If a fact is not present in the record, appellate courts cannot consider it. If parties are not properly injured and thus do not have standing, courts can take no action. If a case presents a political question, courts must look the other way. If Congress has deprived the court of jurisdiction, the case must be dismissed. Under the state-secret privilege, and related doctrines—like the executive-deliberative privilege—courts simply cannot inquire into the true reasons behind some actions.

In my writings, I accurately predicted that the Supreme Court would consider the proclamation under the rational basis review, based on the standard articulated in *Williamson v. Lee Optical*.¹³⁷ Under that level of scrutiny—which judges have no problem applying in other contexts—courts are required to imagine reasons why the government could have a rational basis, whether or not that reason has a basis in reality. Traditionally, courts have not held the government to an exacting means-ends scrutiny to justify actions taken to protect national security. Under this tier of scrutiny, laws are reviewed with a presumption of legality. The government’s defense of the law doesn’t need to be perfect, or even coherent. Indeed, under certain strands of rational-basis review, so long as the government provides a basis that could be the reason—even if it was not the real reason—courts will uphold it. As I tell my students, the word “rational” does not mean “logical” or “sensible,” but rather “conceivable.”¹³⁸

¹³⁷ 348 U.S. 483, 488 (1955) (“The day is gone when this Court uses the Due Process Clause of the Fourteenth Amendment to strike down state laws, regulatory of business and industrial conditions, because they may be unwise, improvident, or out of harmony with a particular school of thought.”).

¹³⁸ Josh Blackman, *The Travel Ban and the Rational Basis Test*, Lawfare, Oct. 23, 2017, <http://bit.ly/2vGus8l>.

If the Supreme Court wishes to revisit the uber-deferential rational basis test, it should do so in the context of a mundane domestic case; not a foreign-policy case in which the president acts with express statutory authority—as well as inherent constitutional authority—in order to exclude entry to non-U.S. persons.¹³⁹

B. Resistance and Regularity

Perhaps my most lasting contribution to the legal discourse over the travel ban, and the Trump Administration as a whole, concerns the concept of “resistance.” To be clear, I didn’t invent that term! Before the inauguration, the self-proclaimed “legal resistance” emerged to develop legal strategies to frustrate the Trump administration.¹⁴⁰ This movement’s first and most successful victories were the nationwide injunctions against the travel bans.¹⁴¹ These actions were completely rational—and unsurprising from the party that (unexpectedly) lost the election.

What has garnered the most opposition to my work in this context is the concept of the “judicial resistance.”¹⁴² I didn’t invent the concept of the “judicial resistance” either. It is derived from an essay titled “The Revolt of the Judges: What Happens When the Judiciary Doesn’t Trust the President’s Oath.” Benjamin Wittes and Quinta Jurecic explained that the judiciary simply did not trust President Trump’s oath of office. They asked whether courts would “actually treat Trump as a real president or, conversely, as some kind of accident—a person who somehow ended up in the office but is not quite the President of the United States in the sense that we would previously have recognized.”¹⁴³ Such judicial resistance is not partisan. Nor do I think the judges are acting in bad faith. The judges are writing legal opinions. There are citations and precedents and modalities of arguments. It is law. My objection, however, is the manner in

¹³⁹ See Josh Blackman, *The Burden of Judging*, 9 N.Y.U J. L. & Liberty 1105 (2014).

¹⁴⁰ See Josh Blackman, *The Legal Resistance*, 9 *Faulkner L. Rev.* 45 (2017).

¹⁴¹ See Josh Blackman, *The Legal Resistance to President Trump*, *Nat’l Rev.*, Oct. 11, 2017, <http://bit.ly/2OGwYnA>.

¹⁴² Josh Blackman, *On the Judicial Resistance*, *Lawfare*, Feb. 12, 2018, <http://bit.ly/2vkyP9t>.

¹⁴³ Benjamin Wittes & Quinta Jurecic, *The Revolt of the Judges: What Happens When the Judiciary Doesn’t Trust the President’s Oath*, *Lawfare*, Mar. 16, 2017, <http://bit.ly/2nfsTKO>.

which the courts have treated the president's role in the separation of powers.

Instead of resisting, the Supreme Court applied the “presumption of regularity” to the president's actions.¹⁴⁴ That is, the courts refused to modify their “screens of deference” in response to a norm-busting president.¹⁴⁵ Justice Kennedy's concurring opinion spoke directly to this issue. In his defense of the deferential standard of review applied to the proclamation, Justice Kennedy pointed to “[t]he oath that all officials take to adhere to the Constitution.” Actions taken pursuant to this oath, he added, are beyond “those spheres in which the Judiciary can correct or even comment upon what those officials say or do.” By virtue of taking the oath of office, a certain sphere of actions—including the “sphere of foreign affairs”—cannot be “correct[ed]” by the judiciary.¹⁴⁶

Justice Kennedy had first-hand knowledge of this oath: he sat steps away from President Trump during the inauguration. And—unlike members of the inferior courts—Justice Kennedy was not troubled by President Trump's execution of his powers. Indeed, one day after *Hawaii v. Trump* was decided, Justice Kennedy announced his retirement. That decision allowed President Trump to appoint his replacement, and shift the balance of the Court for a generation. Because President Trump has “discretion free from judicial scrutiny” in these broad areas, it is “all the more imperative for him . . . to adhere to the Constitution and to its meaning and its promise.”¹⁴⁷ But such adherence would not be compelled by the courts.

Going forward, *Trump v. Hawaii*—coupled with the imminent arrival of a new justice—should further lower the temperature of the judiciary toward President Trump. A ruling against the president, however, would have sent the opposite signal to an emboldened lower-court judiciary. Still, the lower courts will no doubt take notice of the fact that the Supreme Court considered extrinsic evidence—including preinauguration campaign-trail statements. Although that evidence did not tip the balance in this case, under the deferential

¹⁴⁴ See Josh Blackman, *IRAP v. Trump: Applying the “Presumption of Regularity” in “Uncharted Territories,”* Lawfare, May 9, 2017, <http://bit.ly/2vnwqLi>.

¹⁴⁵ Josh Blackman, “Neutral Principles” and the “Presumption of Regularity” in the Era of Trump, Lawfare, Sept. 7, 2017, <https://bit.ly/2gPrOcd>.

¹⁴⁶ *Trump*, 138 S. Ct. at 2424 (Kennedy, J., concurring).

¹⁴⁷ *Id.*

standard of review the Court applied, such evidence may yield a different result in cases involving domestic affairs—such as the ongoing Deferred Action for Childhood Arrivals (DACA) litigation—with more stringent scrutiny.

C. *The Presidential Avoidance Canon*

In her dissenting opinion, Justice Sotomayor faulted the majority—and by extension, Justice Kennedy—for a double standard. She noted that in *Masterpiece Cakeshop*, decided earlier in the term, the Court found a violation of religious freedom based on “less pervasive official expressions of hostility” to faith.¹⁴⁸ Sotomayor added that in both *Trump v. Hawaii* and *Masterpiece Cakeshop*, “the question is whether a government actor exhibited tolerance and neutrality in reaching a decision that affects individuals’ fundamental religious freedom.”¹⁴⁹ But who is that “government actor?”

During oral arguments, Justice Kennedy asked the solicitor general about the relevance of “hateful statements” made by a “local mayor . . . as a candidate.”¹⁵⁰ Justice Kennedy chose to focus on a “local mayor,” quite deliberately. His concurring opinion illustrated that a “local mayor” is very different from the president of the United States. Likewise, the president of the United States is in a very different position from that of a mere member of the Colorado Civil Rights Commission, who disparaged the beliefs of Jack Phillips, the owner of the *Masterpiece Cakeshop*.

Both the majority and concurring opinions in *Hawaii* reflect a principle I’ve referred to as the “presidential avoidance canon”: because of his unique role in the separation of powers, the law applies differently to the president than it does to anyone else.¹⁵¹ Without

¹⁴⁸ *Id.* at 2439 (Sotomayor, J., dissenting) (citing *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm’n*, 138 S. Ct. 1719, 1732 (2018) (“The official expressions of hostility to religion in some of the commissioners’ comments—comments that were not disavowed at the Commission or by the State at any point in the proceedings that led to the affirmation of the order—were inconsistent with what the Free Exercise Clause requires”).

¹⁴⁹ *Id.* at 2447 (emphasis added).

¹⁵⁰ Transcript of Oral Arg. at 28, *Trump v. Hawaii*, 138 S. Ct. 2392 (2018) (No. 17-965).

¹⁵¹ See Josh Blackman, Preview of New Article: “Presidential Speech,” Josh Blackman’s Blog, Apr. 15, 2018, <https://bit.ly/2MIEmr1>.

question, the president is not “above the law.”¹⁵² The far more important question is: What “law” applies to the president?¹⁵³ In *Hawaii v. Trump*, the Court recognized that domestic Establishment Clause precedents cannot restrict the president’s statutory and constitutional power to exclude.

Conclusion

This essay is somewhat bittersweet. In my prior contributions to the *Cato Supreme Court Review*, I wailed the law professor’s evergreen lamentation: the majority opinion failed to adopt my legal analysis!¹⁵⁴ Yet, *Trump v. Hawaii* largely tracked the legal arguments I developed throughout 2017 and 2018 on at least seven discrete issues.

First, standing was premised on a “concrete injury” based on family reunification, not a “spiritual and dignitary injury.”¹⁵⁵ Second, there was no conflict between Section 1182(f) of the INA, which allows the president to suspend *entry* to certain aliens, and Section 1152(a)(1)(a), which concerns the issuance of *visas*. These provisions “operate in different spheres.”¹⁵⁶ Third, the former provision does not impose temporal or other limitations on the president’s authority; rather, it “exudes deference to the President in every clause.”¹⁵⁷ Fourth, the travel ban does not run afoul of the nondelegation doctrine.¹⁵⁸ Fifth, the Court declined to apply its “Establishment Clause precedents concerning laws and policies applied domestically.”¹⁵⁹ Sixth, *contra* Justice Sotomayor’s dissent, the Court afforded President Trump the “presumption of regularity.” Finally, the Court concluded

¹⁵² See, e.g., *Nixon v. Fitzgerald* 457 U.S. 731, 758 n.41 (1982).

¹⁵³ See Josh Blackman, What Obstruction Law Applies to the President?, *Lawfare*, June 6, 2018, <http://bit.ly/2vgadis>.

¹⁵⁴ See Josh Blackman, *U.S. v. Texas* (Scalia, J., concurring), 2015–16 *Cato Sup. Ct. Rev.* 79 (2016); Alan Gura, Ilya Shapiro & Josh Blackman, The Tell-Tale Privileges or Immunities Clause, 2010–11 *Cato Sup. Ct. Rev.* 163 (2010).

¹⁵⁵ *Trump*, 138 S. Ct. at 2416.

¹⁵⁶ *Id.* at 2414.

¹⁵⁷ *Id.* at 2408.

¹⁵⁸ Josh Blackman, The Travel Ban, Article II, and the Nondelegation Doctrine, *Lawfare*, Feb. 22, 2018, <https://bit.ly/2OMa5iG>.

¹⁵⁹ *Trump*, 138 S. Ct. at 2417.

that the comparison between the travel ban and *Korematsu v U.S.* was inapposite.¹⁶⁰

Why then, is the essay bittersweet? Because in *Trump v. Hawaii*, the law enabled a capricious president to arbitrarily separate families with only the faintest patina of a rational basis. These egregious orders were borne, at least in part, on religious animus. The entry bans would have no discernible impact on homeland security, and would instead weaken American interests at home and abroad. Yet, the president could implement them based on broad delegations of statutory authority, as well as his own inherent powers. Furthermore, under longstanding doctrine, the judiciary was required to show the president great deference in the area of foreign affairs and national security. Simply put, the travel ban was awful, but lawful.

During the 18 months between the issuance of Travel Ban 1.0 and the Supreme Court's decision upholding Travel Ban 3.0, I found myself in what has become a familiar position: defending an unpopular action I detest, because of my far greater concerns for maintaining the separation of powers. Indeed, I took the inverse position concerning President Obama's deferred action policies, DACA and Deferred Action for Parents of Americans and Lawful Permanent Residents (DAPA): good policy, but bad law.¹⁶¹ This task is unforgiving, thankless, and largely misunderstood.

To that end, I deliberately did not file any amicus briefs in this case. Instead, I contented myself with advocating for the standard of review expressed in Justice Kennedy's final concurring opinion: "the very fact that an official may have broad discretion, *discretion free from judicial scrutiny*, makes it all the more imperative for him or her to adhere to the Constitution and to its meaning and its promise."¹⁶² Mr. Bumble expressed the sentiment in *Oliver Twist* far more simply: in this case, "the law is an ass."

¹⁶⁰ Josh Blackman, The Simple Answer to Judge Paez's Question about *Korematsu*, Lawfare, May 19, 2017, <http://bit.ly/2MkTile>.

¹⁶¹ Cf. Ilya Shapiro, Good Policy, Bad Law: Obama Correctly Rejected Again on Immigration Reform, *Cato at Liberty*, Nov. 10, 2015, <http://bit.ly/2OFMMqR>. Indeed, the editor of this volume and I often share the frustration of having our policy preferences and legal analyses go in opposite directions, particularly on immigration-related issues. See, e.g., Ilya Shapiro, Executive DACA Had to End, but Congress Must Now Legislate It, *Cato at Liberty*, Sept. 5, 2017, <https://bit.ly/2OTS16u>.

¹⁶² *Trump*, 138 S. Ct. at 2424 (Kennedy, J., concurring).