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Trump v. Hawaii: Dissecting the Controversy over Presidential Immigration Policies

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CASENOTE
***TRUMP v. HAWAII: DISSECTING THE CONTROVERSY OVER
PRESIDENTIAL IMMIGRATION POLICIES***

*Paul Taske**

I. INTRODUCTION

In the 2016 election cycle perhaps no other topic garnered more attention than the discussions around immigration. Then-candidate Donald Trump made immigration a key aspect of his campaign platform.² Almost immediately after assuming office President Trump attempted to fulfill his campaign promise to institute a “Muslim Ban” by issuing Proclamation 13769. This Proclamation suspended admission from seven countries in the Middle East and North Africa for 90 days.³ Litigation ensued almost immediately. A temporary restraining order was entered by the western district court of Washington preventing the enforcement of the entry restrictions.⁴ Ultimately, President Trump revised his order two more times, and each time the new order was challenged in court.⁵ Finally, this last proclamation ended up before the Supreme Court.⁶

This case note will examine the Court’s decision in *Trump v. Hawaii* and analyze the core of the decision in context with other relevant areas of constitutional law. Part II provides a detailed

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² Richard Lister, *Outcry as Donald Trump calls for US Muslim Ban*, BBC (Dec. 8, 2015), <https://www.bbc.com/news/av/world-us-canada-35036567/outcry-as-donald-trump-calls-for-us-muslim-ban>.

³ 82 Fed. Reg. 8977 (2017) (Foreign nationals from Iran, Iraq, Libya, Somalia, Sudan, Syria, and Yemen were barred from entering the United States for a 90-day period.).

⁴ *Washington v. Trump*, 847 F.3d 1151 (2017) (*per curiam*).

⁵ Executive Order No. 13780, 82 Fed. Reg. 13209 (2017); *International Refugee Assistance Project (IRAP) v. Trump*, 857 F.3d 554 (4th Cir. 2017); *Hawaii v. Trump*, 859 F.3d 741 (9th Cir. 2017) (*per curiam*); Proclamation No. 9645, 82 Fed. Reg. 45161.

⁶ *Trump v. Hawaii*, 585 U.S. ____ (2018).

factual background and summary of the majority opinion. Part III examines the opinion in relation to other aspects of constitutional law, primarily foreign affairs, immigration, and justiciability. Finally, Part IV focuses on the alternative result proposed by the dissenting opinions of Justices Breyer and Sotomayor and addresses the potential ramifications of their proposals.⁷

II. FACTS

In July of 2018, on one of the final days of the term, the Supreme Court decided *Trump v. Hawaii*. The Court, in a 5-4 decision, found for the administration. To say the decision in the case was controversial would be an understatement. In response to the Court's ruling, protests erupted across the country from New York City to Seattle.⁸ These protests conveyed a sense of injustice in the decision. The decision was seen as legitimizing President Trump's inflammatory rhetoric against Muslims.

The Court's opinion deals primarily with two issues. First, does the president have the authority, under the Immigration and Nationality Act (INA), to issue proclamations which place temporary restrictions on the admission of foreign nationals and restricts their entry into the United States? Second, does the exclusion in this case violate the Establishment Clause of the First Amendment? The Court split 5-4. Chief Justice Roberts wrote the opinion for the Court. Justices Breyer and Sotomayor authored the two dissenting opinions.⁹

The Court began its analysis by addressing the case's procedural posture. Notably, the Court pays particular attention to the different iterations of the Proclamation now before them. In its

⁷ Nothing in this case note is intended as a defense of the policies upheld by the Court's decision. Rather, this case note is intended to defend the outcome of the case given the relevant constitutional considerations discussed below.

⁸ Meg Wagner, Brian Ries, and Veronica Rocha, *Supreme Court Upholds Travel Ban*, CNN (June 27, 2018, 2:12 AM), <https://www.cnn.com/politics/live-news/supreme-court-travel-ban/index.html>.

⁹ Justices Thomas and Kennedy also authored separate concurring opinions.

first iteration the proclamation blocked immigration from Iran, Iraq, Libya, Somalia, Sudan, Syria, and Yemen for 90 days. These countries had previously been designated as posing heightened terrorism risks by Congress or prior administrations.¹⁰ These restrictions were, according to the Court, put in place to give the administration adequate time to make inquiries to the governments of these countries and collect necessary information to reduce the risk of terrorism.¹¹ The second proclamation was similar to the first and included all countries mentioned in the first proclamation minus Iraq. This second proclamation also included the ability to apply for a waiver. Waivers were to be awarded on a case-by-case basis. The second proclamation selected countries designated as “a state sponsor of terrorism, has been compromised by terrorist activities, or contains active conflict zones.”¹² These restrictions, like the first proclamation, were to be imposed for 90 days, pending completion of a worldwide review.

Finally, a worldwide review was completed, and the third proclamation was introduced.¹³ Included in the final set of restrictions were eight countries whose information management and sharing systems were deemed inadequate. This version included a description of how foreign states were selected and included. The State Department, the Department of Homeland Security (DHS), and several intelligence agencies developed a three-pronged baseline test to determine whether a country’s reporting system was adequate. First, does the country issue electronic passports, ensure integrity of travel documents, report lost or stolen information, and provide additional identity-related information? Second, does the country disclose information about external risks, e.g., criminal history, terrorist links, etc. Finally, the agencies weighed various factors related to national security risks posed by a given country.¹⁴ Chad, Iran, Iraq, Libya, North Korea, Syria, Venezuela, and Yemen

¹⁰ *Trump v. Hawaii*, 585 U.S. ____ (2018) (slip op., at 2).

¹¹ *Id.*

¹² Executive Order No. 13780, 82 Fed. Reg. 13209 §1(d) (2017).

¹³ Presidential Proclamation No. 9645, 82 Fed. Reg. 45161 (2017).

¹⁴ *Trump v. Hawaii*, 585 U.S. ____ (2018) (slip op., at 4-5).

were identified as deficient in their risk profile and willingness or ability to provide adequate information.¹⁵ Under the final version, the Proclamation established varying restrictions to suit the risk presented by each country and its willingness to cooperate with the United States.¹⁶ The Proclamation also directed continual review of the listed countries to determine whether any country had sufficiently improved its practices. Upon one such review, Chad was removed from the list of designated countries and the restrictions on its nationals were lifted.¹⁷

The Court kept this development and background in mind when considering the questions before it. Namely, whether the President's actions superseded his authority, contravened the INA, or violated the Establishment Clause. The Court proceeded to address each issue in turn.

When examining the scope of presidential authority, the Court looked at two sections of the INA, §1182(f) and §§1185(a)(1). In relevant part, §1182(f) states:

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.¹⁸

The language of §1182(f) provides a considerable amount of deference to the President by its own terms. Words and phrases like “Whenever,” “any,” “detrimental to the interests of the United States,” and “for such period as he shall deem necessary” informed the Court's reading and determination that Congress afforded immense deference to the President on matters of immigration

¹⁵ *Id.*

¹⁶ See Presidential Proclamation No. 9645, 82 Fed. Reg. 45161 § 2 (2017).

¹⁷ Presidential Proclamation No. 9723, 83 Fed. Reg. 15937 (2018).

¹⁸ 8 U.S.C. §1182.

restriction and national security.¹⁹ When examined in conjunction with §§1185(a)(1),²⁰ the Court found the delegation clear and unambiguous. It also held that the Proclamation fit within the broad grant provided by Congress.²¹

The INA does, however, impose one limitation on the exercise of this broad discretion. The President must “find” that the entry of some aliens is detrimental to the interests of the United States. Based on the review the President ordered, the findings of the relevant agencies, the crafting of a specific limitation scheme to particular countries, and the report presented to Congress the Court observed that it was clear the President met his statutory obligation in this case. Further, these findings were deemed more extensive than any previous administration’s immigration order.²²

Additionally, the Court found the argument that the Proclamation at issue violated other sections of the INA to be without merit. Although §§1152(a)(1)(A) does prohibit nationality-based discrimination for visa issuance it does not extend further. However, entry and visa issuance are separate matters. If, according to the Court, the President were to permit immigrants to enter the country he could not then use nationality as a justification to deny a visa application. However, he is permitted to make determinations about entrance based on nationality.²³

Finally, the Court turned to Appellee’s remaining argument, that the proclamation violated the Establishment Clause of the First Amendment.²⁴ Appellees cited multiple instances where President

¹⁹ *Trump v. Hawaii*, 585 U.S. ____ (2018) (slip op., at 10).

²⁰ The President has authority under the INA to adopt reasonable rules, regulations, and orders governing the entry and removal of aliens which may be subject to the exceptions and limitation he prescribes.

²¹ *Trump v. Hawaii*, 585 U.S. ____ (2018) (slip op., at 9) (citing 8 U.S.C. §§1182(a)(1), (a)(2), (a)(3)(B), and (a)(3)(C) which permit restrictions on the basis of health-related grounds, criminal history, terrorist activities, and foreign policy grounds respectively).

²² *Id.* at 11-15.

²³ *Id.* at 20-24.

²⁴ A brief discussion on standing was dealt with before turning to the Establishment Clause issue itself. The Court decided in favor of standing for the

Trump spoke about the dangers of Muslims, Muslim immigration, and Islamic terrorism. Also raised were the President’s references to the Proclamation as a “Muslim Ban,” a “complete shutdown of Muslim Immigration,” and other instances where the President spoke unfavorably about Muslims.²⁵ Yet, the Court distinguished between these statements and the Proclamation itself. The Court’s concern was solely with the Proclamation which, the Court observed, is “neutral on its face” with respect to religion.²⁶

One key aspect of the Court’s opinion on this issue is that unlike a typical Establishment Clause case, which deals with domestic policy regarding religion, this case concerns policies surrounding national security.²⁷ The Court noted that questions concerning foreign relations, classifications made on political and economic circumstances, and war powers are typically best handled by the Executive and Legislative branches. Precedent on this front has been uniform and robust—especially when cases involve an overlap of national security interests and immigration policy.²⁸ Such decisions are not unique to Establishment Clause jurisprudence. In Free Speech jurisprudence, where the Court typically affords the highest level of scrutiny, the Court recognized that those rules shift slightly when confronted with questions of national security.²⁹

Even, says the Court, were the Proclamation examined in further detail, and weight afforded to extrinsic evidence and statements, it would survive a rational basis review so long as a justification is established which would not offend the

parties based on prior standing and Establishment Clause cases. See *Id.* at 25 (citing *Spokeo v. Robins*, 578 U.S. ___, ___ (2016) (slip op., at 7); *School Dist. of Abington Township v. Schempp*, 377 U.S. 203, 224, n. 9 (1963).).

²⁵ *Trump v. Hawaii*, 585 U.S. ___ (2018) (slip op., at 27-28).

²⁶ *Id.* at 29.

²⁷ *Id.*

²⁸ *Id.* at 31 (citing *Kerry v. Din*, 576 U.S. ___ (2015) (Kennedy J. concurring in judgment) (slip op., at 3)).

²⁹ *E.g.*, *Holder v. Humanitarian Law Project*, 561 U.S. 1 (2010) (holding that Congress may proscribe monetary contributions to designated terrorist groups even when those funds are designated for non-terrorist activities).

Establishment Clause.³⁰ In the Court’s judgment there are three key factors which weigh against finding an Establishment Clause violation based on improper animus. First, the Proclamation is premised on legitimate purposes—restricting entry to nationals who cannot be adequately vetted and pressuring such countries to reform their own data collection practices.³¹ Second, since the first iteration of the Proclamation was introduced, three Muslim-majority countries have been removed from the list of restricted countries. Those remaining Muslim-majority countries retain “conditional restrictions” until the inadequacies of their reporting systems are rectified.³² Third, even for those countries that remain conditionally restricted, the policy permits exceptions for nationals to travel to the United States on a variety of nonimmigrant visas.³³ Finally, the Proclamation contains a waiver provision. This waiver provision covers all nationals seeking entry as immigrants or nonimmigrants.³⁴ These underlying considerations, the Court reasoned, provide a sufficient national security justification to survive rational basis review.³⁵

The Court, via Chief Justice Roberts, treads a very fine line in this opinion. It neither sanctions nor condones the wisdom of the President’s Proclamation. As, indeed, by its own rationale it would be a risk to do. Yet it firmly permits the President to continue exercising control over national security issues as permitted in the INA. The balance here is important as it involves a number of constitutional concerns. The remainder of this note shifts to examine some relevant considerations the Court touches on or implies

³⁰ *Trump v. Hawaii*, 585 U.S. ____ (2018) (slip op., at 32) (Noting that such findings are rare and have only occurred when the law itself is so clearly based on animus toward a protected group as to have no other possible conclusion).

³¹ *Id.* at 34.

³² *Id.* at 36.

³³ *Id.*

³⁴ *Id.* at 37 (requiring a determination to be made about whether denying entry causes an undue hardship, whether the entry would pose a threat to public safety, and if entry would be in the interest of the United States).

³⁵ *Id.* at 38.

throughout its opinion and the potential ramifications had the Court opted to intervene and strike down the proclamation.

II-B. HOLDING

The president lawfully exercised the broad discretion granted to him under 8 U. S. C. §1182(f) to suspend the entry of aliens into the United States; respondents have not demonstrated a likelihood of success on the merits of their claim that Presidential Proclamation No. 9645 violates the establishment clause.

III. BACKGROUND DISCUSSION

When dealing in constitutional law there are often many competing concerns that may arise in any given case. In fact, there are two issues which must be satisfied before any court is deemed competent to hear the case: standing and justiciability. Though not explicitly addressed in every merit decision, these considerations must be kept in mind. When these requirements are not sufficiently met a court must properly dismiss the case. In recent years, the Supreme Court has dismissed several cases for lack of standing³⁶ and justiciability.³⁷ Other substantive areas of constitutional law may also shed some light on the proper disposition of this case. Particularly, looking at other cases concerning the First Amendment abroad and other recent immigration cases ought to provide necessary clarity and context. The Court addressed, in one form or another, each of these issues. This section aims to add a bit of detail

³⁶ See e.g., *Hollingsworth v. Perry*, 570 U.S. 693 (2013) (Plaintiffs lacked standing to sue under Article III because they had not suffered a concrete and particularized injury and only presented a generalized grievance.).

³⁷ See e.g., *Vieth v. Jubelirer*, 541 U.S. 267 (2004) (plurality opinion) (The case was dismissed for lack of judicial standards by which to decide the issue at hand—political gerrymandering.). However, it should be noted that once deemed non-justiciable does not mean an issue is necessarily so categorized permanently. The Court has found renewed interest in formerly non-justiciable questions recently. *Gill v. Whitford*, 585 U.S. ____ (2018) is one such example.

and clarity about why these issues are important and how they apply to President Trump's Proclamation.

A. THRESHOLD CONCERNS

In *Trump v. Hawaii*, the Court explicitly addressed the standing concerns.³⁸ And, while the Court mentioned justiciability it made only a cursory reference to it rather than detail its application.³⁹ This failure to discuss justiciability thoroughly is a significant defect in the Court's opinion. Though reluctance to expand on justiciability concerns is understandable based on the nature of a justiciability inquiry itself.⁴⁰

Justiciability is the doctrine which gives guidance to courts about what issues are appropriate for review and which are best suited to other branches of government. More commonly, justiciability is also referred to as the Political Question Doctrine and was formally articulated in a 1963 case, *Baker v. Carr*.⁴¹

The *Baker* Court highlighted six categories of questions which, if brought before the Court, ought to be dismissed as nonjusticiable. These questions are as follows: (1) Is there a textually demonstrable constitutional commitment of the issue to a coordinate branch of government; (2) is there is a lack of judicially discoverable standards to resolve the issue; (3) would a decision demonstrate a lack of respect to a coordinate branch of government; (4) would a decision require an initial policy determination outside the discretion of the Court; (5) would making a decision require

³⁸ *Trump v. Hawaii* 585 U.S. ____ (2018) (slip op., at 24-26) (the Court found that the three plaintiffs before them had sufficient standing to bring the case).

³⁹ *Id.* at 8-9.

⁴⁰ Consider one fundamental difference between standing and justiciability: when the Court rejects a case on standing grounds it means the plaintiffs before them are bringing the suit improperly. Yet, this leaves open the possibility that still other plaintiffs might properly bring suit. In contrast, when the Court rejects a case on justiciability grounds it means that the Court itself is deficient in ability to hear the issue presented. *E.g.*, *Ex parte McCardle*, 7 Wall 506 (1869) (Congress deprived the Court of jurisdiction by legislation).

⁴¹ 369 U.S. 186 (1962).

unquestioning adherence to a political decision already made; or (6) would a decision leave open the door for embarrassment of one or more branches of government?⁴² Such issues as may fall into one or more of these categories should, the *Baker* Court said, be dismissed as nonjusticiable political questions.

The decision in *Trump v. Hawaii* falls into at least two categories outlined in *Baker*.⁴³ There is a “textually demonstrable constitutional commitment” in this area to both Congress and the President, and there is a clear “lack of judicially discoverable standards” to resolve the issue involved.

1. Textual Commitments

The Constitution divides power among the three branches of government and between the federal and state governments. Broadly speaking, the legislature is responsible for enacting laws which apply to those within its jurisdiction. The executive is responsible for ensuring the laws passed by the legislature are enforced. And the judiciary is tasked with reviewing the laws and actions of the other branches to ensure everything complies with the Constitution. Yet, the operation of a government is rarely as simple as the elementary explanation given above. The Constitution vests each branch with certain powers, duties, and limitations which can—in some instances overlap. For instance, Congress is granted complete and plenary power over the area of immigration.⁴⁴ The President acts as Commander-In-Chief of the armed forces and, as the Court has recognized, is the primary organ responsible for foreign affairs.⁴⁵ These aspects of legislative and executive power are not always

⁴² *Id.* at 210-12.

⁴³ It may be possible to identify additional categories occupied by this issue, but for purposes of clarity and brevity this note is restricted to arguably the two clearest limiting categories in this case.

⁴⁴ U.S. Const. Art. I § 8 cl. 4.

⁴⁵ U.S. Const. Art. II § 2; *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 320 (1936) (recognizing the President as the country’s sole organ in the realm of foreign affairs).

coextensive but can coincide given the proper context. In such circumstances Congress is permitted to delegate some of its authority over immigration to the President so he may fulfill his role in the realm of foreign affairs.⁴⁶

While finding a textual reference to a given power does not necessarily make an issue unreviewable by the courts, the existence of plenary authority outside the realm of the Court's expertise generally will. In this case the Court was presented with two complimentary plenary powers both dealing with the policies of the United States to be established by a coordinate branch of government. To review this case as if it were any other would challenge the constitutional division of power among the branches.

The Court, however, did exercise a limited examination of the underlying issue—the grant of authority itself. And, to that extend the Court found that the President did not overstep the authority granted by Congress's delegation. According to the Court, U.S.C. 8 §1182(f) explicitly grants the president authority to make broad determinations regarding the admission of aliens to the United States by proclamation. As the Court recognized in its decision, the language of U.S.C. 8 §1182(f) exudes deference to the President in every choice of word and phrase.⁴⁷

2. Lack of Judicially Discoverable Standards

Judicial standards are a somewhat amorphous concept often easier to point out where they are lacking than precisely where they exist. In brief, judicially discoverable standards are found, at least in part, by a combination of constitutional text and precedent. For instance, the Fourteenth Amendment's Equal Protection Clause contains judicially manageable standards. The Equal Protection Clause "are well developed and familiar, . . . if on the particular facts they must, that a discrimination reflects *no* policy, but simply arbitrary and capricious action."⁴⁸

⁴⁶ *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 320 (1936).

⁴⁷ *Trump v. Hawaii*, 585 U.S. ____ (2018) (slip op., at 10).

⁴⁸ *Baker v. Carr*, 369 U.S. 186, 226 (1962) (emphasis in original).

Yet, when dealing with issues of foreign affairs and immigration the standards are not so clearly developed. While the Equal Protection Clause requires what has come to be known as strict scrutiny, foreign affairs receive the most extreme form of deference possible—perhaps not even rising to the level of a rational basis standard. The Court has deferred to the executive’s judgement on these matters in times of war and conflict, and generally when matters arise concerning national security.⁴⁹ This standard of deference arises not because the Court has nothing to say about a given policy but because it has no firm grounding in which to base whatever may be said about a given policy whether positive or negative.⁵⁰

If no judicially manageable standards are present the Court should dismiss the case as improvidently granted or refuse to grant certiorari at all. These concerns, textually demonstrable constitutional commitment and judicially discoverable standards are crucial bedrock questions which must be sufficiently addressed before any merits of the case are reached no matter how juicy the policy question may be. Nonetheless, even if the plaintiffs in *Trump v. Hawaii* did sufficiently demonstrate that the case was justiciable, there are still substantive issues of constitutional law to address.⁵¹

⁴⁹ *E.g.*, Presidential Proclamation No. 5829 (1988) (President Regan) (suspending the entry of certain Panamanian nationals “until such time as . . . democracy has been restored in Panama”); Presidential Proclamation No. 6958 (1996) (President Clinton) (suspending entry for members of the Sudanese government and armed forces); Presidential Proclamation No. 8693 (2011) (President Obama) (suspending the entry of individuals subject to a travel restriction under United Nation Security Council resolutions); *Trump v. Hawaii*, 585 U.S. ____ (2018) (slip op., at 14) (noting that there have been 43 suspension orders issued since the enactment of the INA).

⁵⁰ Plaintiffs in *Trump v. Hawaii* attempt to provide judicially manageable standards by raising an Establishment Clause concern. This will be addressed in Part IV.

⁵¹ *Trump v. Hawaii*, 585 U.S. ____ (2018) (slip op., at 9) (The Court “assumes without deciding” that Plaintiff’s statutory claims are reviewable and do not violate the Political Question Doctrine.). Presumably, this assumption carries on to the Establishment Clause claim as well though justiciability is not mentioned in that section of the opinion.

B. SUBSTANTIVE CONSTITUTIONAL QUESTIONS

The Constitution, according to Chief Justice Marshall, was designed to provide the great outlines and important objectives explicitly designated. The rest—i.e., the interplay between these major objectives and any minor objectives—must be deduced from the outlines provided.⁵² However, it would be naïve to base our analysis on isolated clauses or even single Articles. As Justice Jackson recognized, the Constitution intends both for a division of power and for those powers to be integrated into a workable government.⁵³ In this case, it is helpful to examine the interplay on issues of foreign affairs, immigration, and the First Amendment.

1. Foreign Affairs

As noted above, the Constitution grants Congress plenary power over immigration.⁵⁴ It also grants the President sole authority in the field of foreign affairs.⁵⁵ These separate grants of power have not been understood as conflicting. Rather, in situations of overlapping authority cooperation is required between the two branches. Delegation has been one method of cooperation employed by Congress to achieve its goal of comprehensive and uniform immigration policy.⁵⁶

Yet, cooperation and agreement are not always possible, and when cooperation is possible a given action may still be challenged by the states or the People. In such situations the Court relies on a test developed by Justice Jackson to determine the permissible scope

⁵² *McCulloch v. Maryland*, 4 Wheat. 316, 200 (1819).

⁵³ *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (Jackson J. concurring).

⁵⁴ U.S. Const. Art. I § 8 cl. 4.

⁵⁵ U.S. Const. Art. II § 2.

⁵⁶ *E.g., United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304 (1936) (Congress can defer to the judgment of the President when dealing with foreign affairs and foreign nationals).

of presidential authority. Justice Jackson's framework divides the scope of presidential authority into three categories denoting the zenith, twilight, and ebb of presidential power.

First, if the President acts pursuant to an express or implied authorization by Congress, the President's power is said to be at its zenith or highest point. In such cases the President is able to act using the Article II powers plus whatever authority Congress has opted to delegate. Second, if the President acts without grant nor denial of congressional delegation, the President's power is said to be in a "Twilight Zone" because there may be concurrent powers held by both the President and Congress without a clear definition of which shall be responsible for such action. In such circumstances the President may take action not explicitly granted by Article II, but which are believed necessary to further the duties of the office. Finally, if the President acts in opposition to the express or implied will of Congress, the President's power is deemed to be at its weakest ebb. In such circumstances the President must rely solely on the powers explicitly vested by Article II.⁵⁷ When the President is acting at the lowest ebb of constitutional authority, courts may review these actions and sustain the action only by restraining Congress from acting concurrently—to avoid contradictory mandates from the two branches. However, because such reviews are, in practice, conclusive and preclusive they must be undertaken with the utmost caution.⁵⁸

In the present circumstances, President Trump's proclamation almost certainly falls squarely within the first of Justice Jackson's three categories. Congress's intent was made manifest in 1972 when the Immigration and Nationality Act was passed. The Act makes clear, in at least two separate provisions, that Congress intended to vest the President with the power to determine which foreign nationals are permitted into the country, for what reason foreign nationals may be denied entry, and to adopt

⁵⁷ *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635-38 (Jackson J. concurring).

⁵⁸ *Id.*

“reasonable rules” governing the admission and removal of aliens.⁵⁹ In fact, the Court determined that the language of §1182(f) exudes deference to the President at every opportunity.⁶⁰

A broad grant of authority, however, would not give the President authority to override sections of the INA which Congress has expressly outlined the proper policy of the United States. When a potential conflict is raised it is explicitly the province of the judiciary to review and resolve the potential conflict.⁶¹ Plaintiffs raised just such an argument before the Court. Plaintiffs alleged that the Proclamation issued under the authority of §1182 and 1185(a)(1) conflicted with §1152(a)(1)(A).⁶²

The Court, however, disagreed with Plaintiffs’ contention and highlighted the distinction between admissibility determinations—under which the Proclamation was made—and visa issuance which is a narrower subset of immigration policy. This reading still holds in tact the prohibition against nationality-based discrimination but refuses to expand the prohibition to the *whole* of the immigration system. Such a broadening of the prohibition would unduly hamper the President’s ability to make determinations related to national security concerns.⁶³

It is likely, however, even had the Court determined this statutory issue to involve a conflict, the Court would have deemed the Proclamation to balance these requirements appropriately based on the case-by-case waiver provisions present in the Proclamation itself. This, coupled with the Proclamation’s *prima facie* language about national security and the broad grant of authority in §1182(f), would have provided all necessary bases to uphold the Proclamation on statutory grounds.

⁵⁹ U.S.C. 8 §1182, 1185(a)(1).

⁶⁰ U.S.C. 8 §1182(f) (deferential language includes such phrases as “*Whenever* the President,” “*any* aliens or class of aliens,” “detrimental to the *interests of the United States*,” etc.) (emphasis added).

⁶¹ *Marbury v. Madison*, 5 Cranch 137, 177 (1803).

⁶² Providing 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.”

⁶³ *Trump v. Hawaii*, 585 U.S. ____ (2018) (slip op. at 21).

2. Immigration

The realms of immigration and foreign affairs often coincide with one another. Accordingly, it can be difficult to fully separate the two but can also be helpful when confronted by issues with several moving components. President Trump’s Proclamation is one such instance. Although the proclamation certainly is concerned with “foreign affairs” it is also directly related to “immigration” by the admission and denial of persons into the United States.

The Court’s prior policy on matters of immigration has been one of deference to the decisions made by the Executive and Legislative branches.⁶⁴ However, this policy is not necessarily absolute or intended as a firewall for legitimate claims. For instance, when other justiciable constitutional issues are present the Court may properly resolve the dispute.⁶⁵ In other words, immigration is not an immediate bar to jurisdiction, but the Court will be cautious when dealing in these areas to avoid overstepping its bounds and violating Separation of Powers principles.

In fact, the Court recognizes that the scope of its inquiry into matters of immigration which intersect with foreign affairs is necessarily circumscribed.⁶⁶ Further inquiry into the issue, even at the government’s behest, would only serve to confuse the issue because the question of jurisdiction is *non-waivable*.⁶⁷ Therefore, rather than examine the contours of immigration policy in this case, the Court pivots to the First Amendment question. The Court notes, however, even when examining the Proclamation from a different perspective—i.e., the Establishment Clause—the policy will still be upheld so long as it meets rational basis because of the caution the Court adopts when matters of national security are facially involved.

⁶⁴ *Matthews v. Diaz*, 426 U.S. 67, 81 (1967).

⁶⁵ See *Arizona v. United States*, 567 U.S. 387 (2012) (federalism concerns drove the Court’s decision to strike down Arizona’s law mirroring federal immigration policy because Congress has plenary authority over immigration which cannot be usurped by the states).

⁶⁶ *Trump v. Hawaii*, 585 U.S. ____ (2018) (slip op., at 32).

⁶⁷ *Id.*

3. The First Amendment

As in the other sections of this discussion, the First Amendment is tied, in this case, with issues of foreign affairs and immigration. The difficulty, however, is applying existing First Amendment precedent to the situation at hand. Most of the First Amendment jurisprudence, particularly regarding the Establishment Clause concerns purely domestic affairs.

There are rare exceptions, however. The Court references the most recent of these hybrid cases, *Holder v. Humanitarian Law Project*, at various point throughout its opinion.⁶⁸ In *Holder*, the Court was confronted with an issue of national security which intersected with traditionally protected First Amendment rights, namely free speech. Certain American citizens wished to donate funds to various international groups for humanitarian purposes; however, these groups had been designated as terrorist organizations by the Secretary of State.⁶⁹

Despite the general and robust protection of the First Amendment's Speech Clause domestically, even the protection of using money as speech,⁷⁰ the court upheld the restriction on donations to designated terrorist organizations. The Court stated that when First Amendment issues are concerned it will not blindly defer to the government's reading of the First Amendment but will consider such national security issues as the government raises recognizing its own deficiencies in that area. Recognizing both its role in protecting individual rights and its limitations in foreign affairs, the Court narrowly addressed the question and held that the material support statute in *Holder* did not violate the First Amendment.

Similarly, the Court in *Trump v. Hawaii* also took pains to recognize its deficiencies in the matter before them but did not abdicate its judicial role. The Court, looking at what it took to be the whole of relevant evidence, determined, both *prima facie* and in

⁶⁸ *Id.* at 13, 31-32, 35; 561 U.S. 1, 34 (2010).

⁶⁹ *Holder*, 561 U.S. at 35.

⁷⁰ *Citizen's United v. FEC*, 558 U.S. 310 (2010).

application, that the Proclamation did not violate the Establishment Clause. The Court pointed to various considerations but paid particular attention to the text of the Proclamation. The Proclamation itself dealt with territory for the stated purpose of prompting other countries to improve reporting practices with various United States agencies. The Court also noted that the travel restrictions have not been permanent and that once reporting has improved countries are removed from the list of restricted nations.⁷¹

IV. ALTERNATE POSSIBILITIES

The majority and dissent broadly agree on the case's underlying factual basis.⁷² While both dissenting opinions, the first by Justice Breyer and the second by Justice Sotomayor, would find the proclamation unconstitutional they arrive at that conclusion by separate rationales.

Justices Breyer's dissent is almost exclusively policy-driven. Justice Breyer places heavy emphasis on the application of the Proclamation's various waivers and exceptions. He holds that these exceptions to the blanket ban are largely being ignored and amount to little more than window-dressing in an attempt to legitimize naked religious discrimination.⁷³ This discrimination, taken together with President Trump's external statements, suggests that the injunction should remain in place until the issues has been fully litigated below.⁷⁴

Justice Sotomayor dissent, on the other hand, focuses on prior Free Exercise jurisprudence to highlight the issue presented by

⁷¹ *Trump v. Hawaii*, 585 U.S. ____ (2018) (slip op., at 11, 35).

⁷² Although the dissent places more emphasis on the importance on the President's external statements about Muslims and Islam. The dissent would find these statements clearly demonstrate that the Proclamation is motivated by naked animus toward Muslims. *Trump v. Hawaii*, 585 U.S. ____ (2018) (Sotomayor J., dissenting) (slip op., at 4).

⁷³ *Trump v. Hawaii*, 585 U.S. ____ (2018) (Breyer J., dissenting) (slip op., at 7).

⁷⁴ *Id.* at 4-6 (Breyer J., dissenting) (Justice Breyer supports his conclusion of discriminatory application of the waiver and exception provisions with statistics provided by various government agencies and amici).

the President’s Proclamation—the favoring or disfavoring of one religion (Islam) over another.⁷⁵ A reasonable observer, Sotomayor asserts, would, based on the openly available data, historical context of the proclamation, and the specific sequence of events leading to it, conclude that the Proclamation was primarily intended to disfavor Islam by excluding its adherents from the country.⁷⁶

IV-A. BREYER’S DISSENT

Justice Breyer points to several instances where the statistics surrounding the application of the Proclamation are disheartening. These statistics tend to show that the waiver and exception clauses contained within the Proclamation are not being utilized as robustly as they might otherwise be. That these provisions are underutilized, Breyer asserts, is evidence of invidious discrimination.⁷⁷ Yet, Breyer’s premise runs contrary to other decisions made by this Court. The Court, when examining a policy for potential constitutional issues, looks to the *purpose* of the policy itself—largely by examining a statute’s text. Statistical information and other external evidence are not sufficient to establish unconstitutional state action.⁷⁸ Rather, the policy itself must contain the offending or discriminating language.⁷⁹

This same standard is applied even when religious issues are at play. If a law is not neutral and generally applicable—leaving aside the potential issue of applicability to international issues—then the law must be justified by a compelling governmental interest

⁷⁵ *Trump v. Hawaii*, 585 U.S. ____ (2018) (Sotomayor J., dissenting) (slip op., at 2).

⁷⁶ *Id.* at 10.

⁷⁷ *Trump v. Hawaii*, 585 U.S. ____ (2018) (Breyer J., Dissenting) (slip op., at 4-6) (concluding that the evidence presented is not grounds for confidence in the Proclamation’s constitutionality).

⁷⁸ *Washington v. Davis*, 426 U.S. 229, 240 (1976) (The mere fact of disparate impact to one group is not sufficient to establish a constitutional violation.).

⁷⁹ *Romer v. Evans*, 517 U.S. 620 (1996) (A law which singles out a specific group as ineligible to receive protections available to all others contains sufficient evidence of invidious discrimination.).

and be narrowly tailored to achieve that interest.⁸⁰ Only if a statute is not facially neutral while also being generally applicable *or* is not justified by compelling interests achieved through a narrowly tailored law will a statute be invalidated under the First Amendment's Free Exercise Clause.⁸¹ Similarly, in Establishment Clause jurisprudence the neutrality principle is employed when evaluating governmental actions or policies.⁸²

The Proclamation, and its history, contains several key features which should assuage some trepidation surrounding the controversial policy. First, the Proclamation applies to countries and not specific religious sects within countries. Second, the exceptions to the broad restrictions prescribed by the proclamation are individual in nature and also fail to target religious sects for favored or disfavored treatment.⁸³ Finally, over the course of the Proclamation's development, and current implementation, three Muslim-majority countries were removed from the list of restricted countries.⁸⁴

Although Justice Breyer raises interesting points of concern about the Proclamation, his method of reasoning is not consistent with the standards generally persuasive to the Court on issues of constitutional law. And, as Justice Breyer mentions at the close of his opinion, despite the Court's striking down of the national injunction issued by the district court, the district court is still free to examine this issue further. Now the district court must simply do so without an injunction in place while it deliberates.⁸⁵

⁸⁰ *Employment Div., Dept. of Human Resources of Ore. v. Smith*, 494 U.S. 872 (1990).

⁸¹ *Church of Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520 (1993) (Statutes fail to meet constitutional muster when a single religious group is singled out and singularly impacted by the statute.).

⁸² *E.g., Lee v. Weisman*, 505 U.S. 577 (1992).

⁸³ Presidential Proclamation No. 9645, 82 Fed. Reg. 45161 (2017) (Waivers and exceptions are granted on a case-by-case basis and not issued to "Iranian Christians." Similarly, the waivers do not provide heightened seclusion for "Somali Muslims" or other such sectarian groups.).

⁸⁴ *Trump v. Hawaii*, 585 U.S. ____ (2018) (slip op., at 36).

⁸⁵ *Trump v. Hawaii*, 585 U.S. ____ (2018) (Breyer J., dissenting) (slip op., at 8).

IV-B. SOTOMAYOR'S DISSENT

Unlike Justice Breyer, in her dissent, Justice Sotomayor is primarily concerned with the First Amendment issues posed by President Trump's Proclamation. In short, Sotomayor believes that President Trump's statements and tweets about his Proclamation, "travel-ban," or "Muslim-ban" present enough evidence to show that plaintiffs are likely to succeed on their Establishment Clause claim because they depart so starkly from the Establishment Clause's guarantee of neutrality. Therefore, she would affirm the Ninth Circuit's decision and uphold the injunction.⁸⁶

Justice Sotomayor references a plethora of First Amendment precedent to justify her stance on this issue. The case law she cites highlights the importance of neutrality toward religion and refusing to favor or disfavor one religion or another.⁸⁷ She combines this principle with the argument that Congress has already enacted a fully sufficient system of immigration control. This system, therefore, renders the Proclamation unnecessary, repetitive, and to the extent that it deviates from Congress's established system, harmful.⁸⁸ This argument is bolstered by amici who contend that the policy set forth in the Proclamation is harmful to the interests of the

⁸⁶ *Trump v. Hawaii*, 585 U.S. ____ (2018) (Sotomayor J., dissenting) (slip op., at 1-2).

⁸⁷ See *Larson v. Valente*, 456 U.S. 228, 244 (1982); *Church of Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520, 532 (1993); *Edwards v. Aguillard*, 482 U.S. 578, 593 (1987); *Lynch v. Donnelly*, 465 U.S. 668, 673 (1984); *Epperson v. Arkansas*, 393 U.S. 97, 106 (1968); *Engel v. Vitale*, 370 U.S. 421, 431 (1962); *Santa Fe Independent School Dist. v. Doe*, 530 U.S. 290, 309 (2000); *Board of Ed. of Ed. of Kiryas Joel Village School Dist. v. Grumet*, 512 U.S. 687, 703 (1994); *McCreary County v. American Civil Liberties Union of Ky.*, 545 U.S. 844, 860 (2005); *Town of Greece v. Galloway*, 572 U.S. ____, ____ (2014) (plurality opinion) (slip op., at 19).

⁸⁸ *Trump v. Hawaii*, 585 U.S. ____ (2018) (Sotomayor J., dissenting) (slip op., at 19) (citing *Arizona v. United States*, 567 U.S. 387, 395 (2012)).

United States and extensive detailing of various provisions of the Immigration and Nationality Act.⁸⁹

Yet, Justice Sotomayor's argument is susceptible to at least three primary criticisms. First, despite her plethora of citations, the Establishment Clause jurisprudence she cites deals almost entirely with domestic application of the First Amendment. She does not address the implications cases such as *Holder v. Humanitarian Law Project* and the impact such internationally focused applications of the First Amendment would have on her theory.⁹⁰ Second, her use of *Arizona v. United States* is misplaced. *Arizona* focused on the dispersion of immigration authority between Congress and the individual states rather than the interplay of co-equal branches of government.⁹¹ And, finally, Justice Sotomayor's reliance on the opinions of various amici such as the "Former National Security Officials" highlights that these decisions are one of policy best left to other political branches to resolve. As such, these political decisions weigh against the Court having jurisdiction over the issue at all.⁹²

One final piece worth mentioning in Sotomayor's dissent comes from a footnote. Sotomayor challenges the notion that the Court should defer to the Executive Branch on this issue. This challenge is supported by the plurality opinion in *Hamdi v. Rumsfeld* which explicitly says that although the Constitution envisions a strong role for the executive in the context of foreign affairs, "it most assuredly envisions a role for all three branches of government when individual liberties are at stake."⁹³ Although this point may be enough to overcome issues concerning justiciability and political questions it would not extend so far as to govern the outcome of this

⁸⁹ *Id.* at 18-21.

⁹⁰ 561 U.S. 1 (2010) (First Amendment rights may be curtailed if the government provides a compelling justification and the restriction is narrowly tailored. Such permissible justifications include national security and preventing terrorism.).

⁹¹ 567 U.S. 387 (2012).

⁹² See *Baker v. Carr*, 369 U.S. 186 (1962).

⁹³ *Trump v. Hawaii*, 585 U.S. ____ (2018) (Sotomayor J., dissenting) (slip op., at 15-16 fn. 6)

or any given case where “a role for all three branches” exists when handling issues of national security.

IV-C. WHAT IF?

When examining hot-button issues, it can often be helpful to hypothesize about what the alternative outcome might have looked like to better understand the strengths or weaknesses of the actual outcome and of the dissenting or opposing view.

What might the alternative outcome have looked like in this case? In the concrete the answer is simple. The injunction would have been upheld and the Proclamation would have been deemed unconstitutional. The implications for that decision, however, would have been somewhat more complicated. Had the majority lost and the dissenting justices prevailed, the Supreme Court would have intervened in the area of foreign affairs and immigration. What’s more, it would have done so when Congress delegated its authority, in relevant part, to the executive and granted the Executive broad discretion. The Supreme Court would, in effect, have final authority over matters of immigration and foreign affairs where previously they had almost none.

Perhaps the most effective illustration of the impact of this hypothetical situation would be best accomplished through analogy. Luckily, it is not necessary to invent a hypothetical scenario. The Supreme Court has already provided an apt example for comparison.⁹⁴ In *McCreary* the State of Kentucky made several arguments before the Court regarding displays in the state courthouse. The first appearance dealt with a display of the Ten Commandments. The Court found this violated the establishment clause and showed evidence of state preference for the Jewish and Christian religions.⁹⁵ Kentucky fared no better in its second or third appearance before the Court. Each time Kentucky endeavored to comply with the Court’s mandate proscribing religious preference.

⁹⁴ *McCreary County v. American Civil Liberties Union of Ky.*, 545 U.S. 844 (2005).

⁹⁵ *Id.*

First Kentucky elected to include the Commandments among other religious passages to dispel the impression of state-preference to religion.⁹⁶ The second alteration still included the Ten Commandments but as a portion of a larger presentation focusing on the foundations of American law.⁹⁷ The Court considered these alterations in light of Kentucky's past displays and ultimately found each to still be unduly preferential toward religion and altogether lacking in a secular purpose.⁹⁸

It is not difficult to notice the similarities between the Court's approach in *McCreary* and the analysis engaged in by the dissenting justices in this case. As such, it is not unreasonable to assume that a similar standard would have applied had the result been in the dissenting justices' favor. And, while domestic issues—such as religious displays in a state courthouse—permit for long and drawn-out proceedings before the Court, issues dealing with national security do not always permit such lengthy periods of uncertainty. Yet, had the Court assumed a similar role here as it did in *McCreary*, uncertainty would surely have been introduced into foreign affairs. The President, current and future, would be subject to approval by the Court before he or she could confidently expect an order or policy to be put into effect. Such important spheres do not, of course, render a President immune from all potential action—nor should they. Yet, it is important to recognize the inadequacy of courts to deal with these issues and thus why they often defer to the Executive or Legislative branches in these areas.⁹⁹

⁹⁶ *Id.*

⁹⁷ *Id.* at 871.

⁹⁸ *Id.* at 874 (noting that the county's past actions do not permanently taint future displays, but rather, based on the serious nature of the inquiry, the present iteration did not present a sufficient secular purpose to survive constitutional muster).

⁹⁹ *Holder v. Humanitarian Law Project*, 561 U.S. 1, 34 (2010).

V. CONCLUSION

As this case demonstrates, several constitutional considerations might easily be presented by a single case. These issues are often difficult to resolve either for legal or other reasons. Yet, it is precisely the role of the courts to determine what the result of a given case ought to be and whether it has authority to resolve a given issue. It is also the responsibility of the Supreme Court to look forward and judge how a given opinion might impact *future* cases and other areas of law.¹⁰⁰ In this case, the Court opted to exercise caution. The Court chose to avoid future legal quadrangles and rely on a tested constitutional principle: Separation of Powers.

Although the Court refrained from striking down the Proclamation, neither this decision nor the Separation of Powers doctrine leaves the President immune in this area. Rather, the Court simply acknowledged the inherently *political* nature of these issues and left it to the political branches of government to resolve. Congress delegated some of its immigration authority to the President. It is Congress, therefore, that must assess and, if necessary, revise that delegation of power. The only question that remains is whether Congress will choose to reclaim its authority or whether Congress will permit the current distribution of power to persist. In either case, it is Congress that must take up the mantle of responsibility on this issue.

¹⁰⁰ AYN RAND, *Censorship: Local and Express* (1973), reprinted in PHILOSOPHY WHO NEEDS IT 240 (1982) (quoting *United States v. 12 200-ft. Reels of Super 8MM Film*, 413 U.S. 123, 127 (1973)).