***TRUMP V HAWAII*, 585 U. S. ____ (2018)**
US SUPREME COURT 26 JUNE 2018
EDITOR'S NOTE

In *Trump v Hawaii*, 585 U. S. ____ (2018), the US Supreme Court decided 5-4 in favour of President's Trump's Executive Order denying entry

Shortly after taking office, President Trump signed Executive Order No. 13769, Protecting the Nation From Foreign Terrorist Entry Into the United States. 82 Fed. Reg. 8977 (2017) (EO–1). EO–1 directed the Secretary of Homeland Security to conduct a review to examine the adequacy of information provided by foreign governments about their nationals seeking to enter the United States. Pending that review, the order suspended for 90 days the entry of foreign nationals from seven countries— Iran, Iraq, Libya, Somalia, Sudan, Syria, and Yemen— that had been previously identified by Congress or prior administrations as posing heightened terrorism risks. The District Court for the Western District of Washington entered a temporary restraining order blocking the entry restrictions, and the Court of Appeals for the Ninth Circuit denied the Government's request to stay that order.

In response, the President revoked EO–1, replacing it with Executive Order No. 13780 (EO-2), which again directed a worldwide review. EO–2 also temporarily restricted the entry (with case-by-case waivers) of foreign nationals from six of the countries covered by EO–1: Iran, Libya, Somalia, Sudan, Syria, and Yemen. The order explained that those countries had been selected because each "is a state sponsor of terrorism, has been significantly compromised by terrorist organizations, or contains active conflict zones." The entry restriction was to stay in effect for 90 days, pending completion of the worldwide review. The District Courts for the Districts of Maryland and Hawaii entered nationwide preliminary injunctions barring enforcement of the entry suspension, and the respective Courts of Appeals upheld those injunctions, albeit on different grounds.

On 24 September 2017, the President issued *Proclamation No. 9645, Enhancing Vetting Capabilities and Processes for Detecting Attempted Entry Into the United States by Terrorists or Other Public-Safety Threats. 82 Fed. Reg. 45161* (EO-3), seeking to improve vetting procedures for foreign nationals traveling to the United States by identifying ongoing deficiencies in the information needed to assess whether nationals of particular countries present a security threat. The Proclamation placed entry restrictions on the nationals of eight foreign states (Chad, Iran, Iraq, Libya, North Korea, Syria, Venezuela, and Yemen) whose systems for managing and sharing information about their nationals the President deemed inadequate…. I The Proclamation imposes a range of entry restrictions that vary based on the "distinct circumstances" in each of the eight countries. It exempts lawful permanent residents and provides case-by-case waivers under certain circumstances. It also directs DHS to assess on a continuing basis whether the restrictions should be modified or continued, and to report to the President every 180 days. At the completion of the first such review period, the President determined that Chad had sufficiently improved its practices, and he accordingly lifted restrictions on its nationals.

EO-3 included the following:

1. EO-3 described how foreign states were selected for inclusion based on the review undertaken pursuant to EO–2, including a "baseline" for the information required from foreign governments to confirm the identity of individuals seeking entry into the United States, and to determine whether those individuals pose a security threat. The baseline included 3 components:
    a. "identity-management information," focused on whether a foreign government ensures the integrity of travel documents by issuing electronic passports, reporting lost or stolen passports, and making available additional identity related information;
    b. extent to which the country discloses information on criminal history and suspected terrorist links, provides travel document exemplars, and facilitates the U. S. Government's receipt of information about airline passengers and crews traveling to the United States;
    c. weighing of various indicators of national security risk, including whether the foreign state is a known or potential terrorist safe haven and whether it regularly declines to receive returning nationals following final orders of removal from the United States.
2. DHS collected and evaluated data regarding all foreign governments. It identified 16 countries as having deficient information-sharing practices and presenting national security concerns, and another 31

countries as "at risk" of similarly failing to meet the baseline. The State Department then undertook diplomatic efforts over a 50-day period to encourage all foreign governments to improve their practices. As a result of that effort, numerous countries provided DHS with travel document exemplars and agreed to share information on known or suspected terrorists. Following the 50-day period, the Acting Secretary of Homeland Security concluded that eight countries—Chad, Iran, Iraq, Libya, North Korea, Syria, Venezuela, and Yemen—remained deficient in terms of their risk profile and willingness to provide requested information. The Acting Secretary recommended that the President impose entry restrictions on certain nationals from all of those countries except Iraq. In relation to Iraq, the Acting Secretary found that entry limitations on its nationals were not warranted given the close cooperative relationship between the U. S. and Iraqi Governments and Iraq's commitment to combating ISIS. The Acting Secretary further concluded that although Somalia generally satisfied the information-sharing component of the baseline standards, its "identity management deficiencies" and "significant terrorist presence" presented special circumstances justifying additional limitations. She therefore recommended entry limitations for certain nationals of that country. After consulting with multiple Cabinet members and other officials, the President adopted the Acting Secretary's recommendations and issued the Proclamation.

3. Invoking his authority under 8 U. S. C. §§1182(f) and 1185(a), President Trump determined that certain entry restrictions were necessary to "prevent the entry of those foreign nationals about whom the United States Government lacks sufficient information"; "elicit improved identity-management and information-sharing protocols and practices from foreign governments"; and otherwise "advance [the] foreign policy, national security, and counter-terrorism objectives" of the United States.

The state of Hawaii and others (the plaintiffs) argued that the Proclamation violates the Immigration and Nationality Act (INA) and the Establishment Clause. The District Court granted a nationwide preliminary injunction barring enforcement of the restrictions. The Ninth Circuit affirmed, concluding that the Proclamation contravened two provisions of the INA: §1182(f), which authorizes the President to "suspend the entry of all aliens or any class of aliens" whenever he "finds" that their entry "would be detrimental to the interests of the United States," and §1152(a)(1)(A), which provides that "no person shall . . . be discriminated against in the issuance of an immigrant visa because of the person's race, sex, nationality, place of birth, or place of residence." The court did not reach the Establishment Clause claim.

The US Supreme Court held 5-4 that the President had lawfully exercised the broad discretion granted to him under §1182(f) to suspend the entry of aliens into the United States.

The majority reasoned as follows:

1. By its terms, §1182(f) exudes deference to the President in every clause. It entrusts to the President the decisions whether and when to suspend entry, whose entry to suspend, for how long, and on what conditions. It thus vests the President with "ample power" to impose entry restrictions in addition to those elsewhere enumerated in the INA.
2. The sole prerequisite set forth in §1182(f) is that the President "find[ ]" that the entry of the covered aliens "would be detrimental to the interests of the United States." The President has undoubtedly fulfilled that requirement here.
3. The plaintiffs were unlikely to succeed on the Establishment Clause argument:
    a. The real issue is not President Trump's statements, but rather, the significance of those statements in reviewing the Presidential directive.
    b. The admission and exclusion of foreign nationals is a "fundamental sovereign attribute exercised by the Government's political departments largely immune from judicial control.
    c. On the few occasions where the Court has struck down a policy as illegitimate under rational basis scrutiny, a common thread has been that the laws at issue were "divorced from any factual context from which [the Court] could discern a relationship to legitimate state interests."
    d. Factors supporting the government's claim of a legitimate national security interest:
        i. 3 of the 8 countries (Iraq, Sudan, Chad) have been removed from the list since January 2017.
        ii. For the remaining countries, there are numerous exceptions for various categories of foreign nationals.
        iii. The Proclamation contains a waiver program to all foreign nationals seeking entry as immigrants or non-immigrants.

Roberts J, joined by Kennedy J, Thomas, J, Alito J, and Gorsuch J, concluded that the INA gives wide power to the President, and rejected an argument that EO-3 went beyond that power:

> ***By its plain language, §1182(f) grants the President broad discretion to suspend the entry of aliens into the United States. The President lawfully exercised that discretion based on his findings—following a worldwide, multi-agency review—that entry of the covered aliens would be detrimental to the national interest. And plaintiffs' attempts to identify a conflict with other provisions in the INA, and their appeal to the statute's purposes and legislative history, fail to overcome the clear statutory language.***
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> *By its terms, §1182(f) exudes deference to the President in every clause. It entrusts to the President the decisions whether and when to suspend entry ("[w]henever [he] finds that the entry" of aliens "would be detrimental" to the national interest); whose entry to suspend ("all aliensor any class of aliens"); for how long ("for such period as he shall deem necessary"); and on what conditions ("any restrictions he may deem to be appropriate"). It is therefore unsurprising that we have previously observed that§1182(f) vests the President with "ample power" to impose entry restrictions in addition to those elsewhere enumerated in the INA.*
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> *The Proclamation falls well within this comprehensive delegation. The sole prerequisite set forth in §1182(f) is that the President "find[]" that the entry of the covered aliens "would be detrimental to the interests of the United States." The President has undoubtedly fulfilled that requirement here.*

The majority dismissed the argument that the court should go behind the Proclamation and conclude that even if such review was appropriate, the sufficiency of the findings was not challenged in this case:

> *Plaintiffs believe that these findings are insufficient. They argue, as an initial matter, that the Proclamation fails to provide a persuasive rationale for why nationality alone renders the covered foreign nationals a security risk. And they further discount the President's stated concern about deficient vetting because the Proclamation allows many aliens from the designated countries to enter on non immigrant visas.*
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> *Such arguments are grounded on the premise that §1182(f) not only requires the President to make a finding that entry "would be detrimental to the interests of the United States," but also to explain that finding with sufficient detail to enable judicial review. That premise is questionable. ….. Moreover, plaintiffs' request for a searching inquiry into the persuasiveness of the President's justifications is inconsistent with the broad statutory text and the deference traditionally accorded the President in this sphere. "Whether the President's chosen method" of addressing perceived risks is justified from a policy perspective is "irrelevant to the scope of his [§1182(f)] authority." …… In short, the language of §1182(f) is clear, and the Proclamation does not exceed any textual limit on the President's authority.*
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> *The Proclamation is squarely within the scope of Presidential authority under the INA. Indeed, neither dissent even attempts any serious argument to the contrary, despite the fact that plaintiffs' primary contention below and in their briefing before this Court was that the Proclamation violated the statute.*

The majority then turned to the argument that EO-3 was made for an unconstitutional purpose of excluding Muslims. The majority reasoned:

> *The First Amendment provides, in part, that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." Our cases recognize that "[t]he clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another." …. Plaintiffs believe that the Proclamation violates this prohibition by singling out Muslims for disfavored treatment. The entry suspension, they contend, operates as a "religious gerrymander," in part because most of the countries covered by the Proclamation have Muslim-majority populations. And in their view, deviations from the information-sharing baseline criteria suggest that the results of the multi-agency review were "foreordained." 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. ……*

The majority set out the substantive basis for the Establishment Clause challenge, namely the statements by the President:

> *At the heart of plaintiffs' case is a series of statements by the President and his advisers casting doubt on the official objective of the Proclamation. For example, while a candidate on the campaign trail, the President published a "Statement on Preventing Muslim Immigration" that called for a "total and complete shutdown of Muslims entering the United States until our country's representatives can figure out what is going on."*
> *…..*

The majority referred to previous (better?) statements for US Presidents on religious freedom, leading to a conclusion that this President's statements might be less than "living up to those inspiring words":

> ***The President of the United States possesses an extraordinary power to speak to his fellow citizens and on their behalf. Our Presidents have frequently used that power to espouse the principles of religious freedom and tolerance on which this Nation was founded****. In 1790 George Washington reassured the Hebrew Congregation of Newport, Rhode Island that "happily the Government of the United States . . . gives to bigotry no sanction, to persecution no assistance [and] requires only that they who live under its protection should demean themselves as good citizens." ….. President Eisenhower, at the opening of the Islamic Center of Washington, similarly pledged to a Muslim audience that "America would fight with her whole strength for your right to have here your own church," declaring that "[t]his concept is indeed a part of America." …. And just days after the attacks of September 11, 2001, President George W. Bush returned to the same Islamic Center to implore his fellow Americans—Muslims and non-Muslims alike— to remember during their time of grief that "[t]he face of terror is not the true faith of Islam," and that America is "a great country because we share the same values of respect and dignity and human worth." ….. **Yet it cannot be denied that the Federal Government and the Presidents who have carried its laws into effect have—from the Nation's earliest days—performed unevenly in living up to those inspiring words.***

Ultimately, however, the majority concluded that its review of entry and national security matters was, in line with its previous decisions, to be "highly constrained":

> *Plaintiffs argue that this President's words strike at fundamental standards of respect and tolerance, in violation of our constitutional tradition. But the issue before us is not whether to denounce the statements. It is instead the significance of those statements in reviewing a Presidential directive, neutral on its face, addressing a matter within the core of executive responsibility. I**n doing so, we must consider not only the statements of a particular President, but also the authority of the Presidency itself.***
> *The case before us differs in numerous respects from the conventional Establishment Clause claim. Unlike the typical suit involving religious displays or school prayer, plaintiffs seek to invalidate a national security directive regulating the entry of aliens abroad. Their claim accordingly raises a number of delicate issues regarding the scope of the constitutional right and the manner of proof. The Proclamation, moreover, is facially neutral toward religion. Plaintiffs therefore ask the Court to probe 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. These various aspects of plaintiffs' challenge inform our standard of review.*
> ***For more than a century, this Court has recognized that the admission and exclusion of foreign nationals is a "fundamental sovereign attribute exercised by the Government's political departments largely immune from judicial control."*** *Fiallo v. Bell, 430 U. S. 787, 792 (1977); see Harisiades v. Shaughnessy, 342 U. S. 580, 588–589 (1952) ("[A]ny policy toward aliens is vitally and intricately interwoven with contemporaneous policies in regard to the conduct of foreign relations [and] the war power."). Because decisions in these matters may implicate "relations with foreign powers," or involve "classifications defined in the light of changing political and economic circumstances, "such judgments "are frequently of a character more appropriate to either the*

> *Legislature or the Executive." Mathews v. Diaz, 426 U. S. 67, 81 (1976).Nonetheless, although foreign nationals seeking admission have no constitutional right to entry, this Court has engaged in a circumscribed judicial inquiry when the denial of a visa allegedly burdens the constitutional rights of a U. S. citizen. In Kleindienst v. Mandel, the Attorney General denied admission to a Belgian journalist and self-described "revolutionary Marxist," Ernest Mandel, who had been invited to speak at a conference at Stanford University. 408 U. S., at 756–757. The professors who wished to hear Mandel speak challenged that decision under the First Amendment, and we acknowledged that their constitutional "right to receive information" was implicated. Id., at 764–765. But we limited our review to whether the Executive gave a "facially legitimate and bona fide" reason for its action. Id., at 769. Given the authority of the political branches over admission, we held 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 citizens.*
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> ***The 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 adopted only with the greatest caution," and our inquiry into matters of entry and national security is highly constrained.*** *Mathews, 426 U. S., at 81–82. We need not define the precise contours of that inquiry in this case. A conventional application of Mandel, asking only whether the policy is facially legitimate and bona fide, would put an end to our review. But the Government has suggested that it may be appropriate here for the inquiry to extend beyond the facial neutrality of the order. See Tr. of Oral Arg. 16–17, 25–27 (describing Mandel as "the starting point" of the analysis). For our purposes today, we assume that we may look behind the face of the Proclamation to the extent of applying rational basis review. That standard of review considers whether the entry policy is plausibly related to the Government's stated objective to protect the country and improve vetting processes. See Railroad Retirement Bd. v. Fritz, 449 U. S. 166, 179 (1980). As a result, we may consider plaintiffs' extrinsic evidence, but will uphold the policy so long as it can reasonably be understood to result from a justification independent of unconstitutional grounds.*

The majority, though not bearing on this decision, and undoubtedly in response to the dissent by Justice Sotomayor, and possibly also to secure support from Justice Kennedy, but perhaps because this was a rare opportunity to say something about it the previous decision in Korematsu) said the following:

> *Finally,* ***the dissent invokes Korematsu v. United States****, 323 U. S. 214 (1944). Whatever rhetorical advantage the dissent may see in doing so, Korematsu has nothing to do with this case.* ***The forcible relocation of U. S. citizens to concentration camps, solely and explicitly on the basis of race, is objectively unlawful and outside the scope of Presidential authority****.* ***But it is wholly inapt to liken that morally repugnant order to a facially neutral policy denying certain foreign nationals the privilege of admission****. See post, at 26–28. The 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 another wise valid Proclamation.*
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> *The dissent's reference to Korematsu, however, affords this Court the opportunity to make express what is already obvious: Korematsu was gravely wrong the day it was decided, has been overruled in the court of history, and—to be clear—"has no place in law under the Constitution." 323 U. S., at 248 (Jackson, J., dissenting).*

The majority concluded:

> *Under these circumstances, the Government has set forth a sufficient national security justification to survive rational basis review. We express no view on the soundness of the policy. We simply hold today that plaintiffs have not demonstrated a likelihood of success on the merits of their constitutional claim.*

The judgments included concurring an opinion from Justice Kennedy, moments before he announced his retirement, including the following:

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

Justice Kennedy, as part of the majority, was satisfied with EO-3 on the basis of the formal pre-Proclamation process carried out by the government. His Honour's words, however, might seem to some readers to fly in the face of President Trump's statements.

In a dissenting judgment, Justice Breyer, joined by Justice Kagan, agreeing with the conclusion of Sotomayor J and Ginsburg J that the evidence of antireligious bias, including the statements by the President, were a sufficient basis to set EO-3 aside:

> ***If this Court must decide the question without this further litigation, I would, on balance, 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 also set forth in JUSTICE SOTOMAYOR's opinion, a sufficient basis to set the Proclamation aside. And for these reasons****, I respectfully dissent.*

The principal dissent came from Sotomayor J, joined by Ginsburg J. In an opening that is likely to be repeated forever with pride (the Editor respectfully suggests that reading this makes you believe in decency):

> ***The United States of America is a Nation built upon the promise of religious liberty. Our Founders honored that core promise by embedding the principle of religious neutrality in the First Amendment. The Court's decision today fails to safeguard that fundamental principle. It leaves undisturbed a policy first advertised openly and unequivocally as a "total and complete shutdown of Muslims entering the United States" because the policy now masquerades behind a façade of national-security concerns. But this repackaging does little to cleanse Presidential Proclamation No. 9645 of the appearance of discrimination that the President's words have created. Based on the evidence in the record, a reasonable observer would conclude that the Proclamation was motivated by anti-Muslim animus. That alone suffices to show that plaintiffs are likely to succeed on the merits of their Establishment Clause claim. The majority holds otherwise by 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. Because that troubling result runs contrary to the Constitution and our precedent, I dissent.***