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It's a Blowhorn, Not a Dog-Whistle: How President Trump's Travel Ban Orders, Not His Statements, Are Enough to Establish a Violation under the Religion Clauses

by CHARLES ADSIDE, III*

Introduction

Most bigots speak softly. They use dog-whistles, code words employed to prime bigoted sentiments within the listener.¹ Not President Donald J. Trump; his voice on Islam is like a blow horn.² His orders imposing travel bans on seven Muslim-majority countries were just as loud. Although the *Trump v. Hawaii* Court claimed that the executive order it reviewed was religiously neutral, adherence to precedent reveals that all three executive orders violated the Religion Clauses of the First Amendment.³ There is much discussion, however, regarding the President's remarks about Islam. Many jurists conclude that they should be used for interpretative purposes in

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1. See generally Jerry Kang, *Trojan Horses of Race*, 118 HARV. L. REV. 1489, 1505-14 (2005) (discussing research which reported that certain words subliminally primed stereotypical, and sometimes racist, views about whites and blacks among test participants). Ian Haney Lopez, *The racism at the heart of the Reagan presidency*, https://www.salon.com/2014/01/11/the_racism_at_the_heart_of_the_reagan_presidency/.

2. See *Trump v. Hawaii*, 138 S. Ct. 2392, 2435-38 (2018) (Sotomayor, J., dissenting) (presenting at least 20 anti-Muslim statements from President Trump).

3. *Trump*, 138 S. Ct. at 2418.

First Amendment controversies.⁴ The reason given for doing so is that they reveal that the travel bans are no different than the exclusion orders in *Korematsu v. United States*.

The *Korematsu* Court held that the forced relocation of Japanese-Americans during the Second World War did not violate the Equal Protection Clause, because the exclusion constituted a public necessity. Military imperatives left no time for the government to distinguish loyal Japanese from disloyal ones.⁵ That decision is universally assailed today.⁶ In fact, *Trump v. Hawaii* explicitly reversed the decision.⁷ But Justice Sotomayor's Dissent argued that dismissing President Trump's statements while upholding his travel ban made *Trump v. Hawaii* logically similar to *Korematsu*.⁸ The statements reveal, some argue, religious animus while race-based exclusion orders reveal racial animus.⁹ Personally, I agree, but the statements are not necessary to establish a constitutional violation, even as they are contrary to our constitutional values.

The Founders rejected a pure democratic system in part because they feared the rise of demagogues, who inflame group resentments for political purposes.¹⁰ These politicians do not address nuanced dimensions of public

4. *Trump*, 138 S. Ct. at 2435 (Sotomayor, J., dissenting) (arguing that a reasonable observer would consider President Trump's statements and conclude that the Proclamation was motivated by Muslim animus); *Int'l Refugee Assistance Project v. Trump*, 883 F.3d 233, 266 (4th Cir. 2018) ("Perhaps in implicit recognition of the rawness of the religious animus in the President's pre-election statements, the Government urges us to disregard them. This is a difficult argument to make given that the President and his advisors have repeatedly relied on these pre-election statements to explain the President's post-election actions related to the travel ban.") (footnote omitted); *Wash. v. Trump*, 847 F.3d 1151, 1167 (9th Cir. 2018) (rejecting the government's appeal of an emergency stay of the lower court's injunction in part because "the States have offered evidence of numerous statements by the President about his intent to implement a 'Muslim ban' as well as evidence they claim suggests that the Executive Order was intended to be that ban, including sections 5(b) and 5(e) of the Order. It is well established that evidence of purpose beyond the face of the challenged law may be considered in evaluating Establishment and Equal Protection Clause claims."); *Trump v. Hawaii*, No. 17-00050 DKW-KSC, at 34-35 (D. Haw. Mar. 15, 2017), <https://assets.documentcloud.org/documents/3518057/Order.pdf> (The Government appropriately cautions that, in determining purpose, courts should not look into the "veiled psyche" and "secret motives" of government decisionmakers and may not undertake a "judicial psychoanalysis of a drafter's heart of hearts." The Government need not fear. The remarkable facts at issue here require no such impermissible inquiry. "For instance, there is nothing 'veiled' about this press release: 'Donald J. Trump is calling for a total and complete shutdown of Muslims entering the United States.[]'").

5. *Korematsu v. U.S.*, 323 U.S. 214, 219 (1944).

6. *Trump*, 138 U.S. at 2423 (calling *Korematsu* "morally repugnant").

7. *Id.*

8. *Id.* at 2447.

9. *Id.* at 2435-38.

10. THE FEDERALIST NO. 10 (James Madison), available at http://thomas.loc.gov/home/hist/ox/fed_10.html ("A zeal for different opinions concerning religion, concerning government, and many other points, as well of speculation as of practice; an attachment to different leaders ambitiously contending for pre-eminence and power; or to persons of other descriptions whose

policy; rather, they employ calculated “culturally emasculating images” to stigmatize opponents.¹¹ They don’t care about individual rights, and they avoid meaningful dialogue.¹² Instead, they seek raw political power.¹³ Alexander Hamilton observed that “demagogues” begin their public careers appealing to populist sentiment to project the image that they are the people’s champion, but end their tenures as “tyrants.”¹⁴ In *Federalist Paper* No. 10, James Madison warned that such leaders are dangerous to the body politic because they arouse “factions” “who are united and actuated by some common impulse of passion, or of interest, adverse to the rights of other citizens.”¹⁵ The United States Constitution was designed to hinder the rise of such characters, and adhered to republican principles to do so.¹⁶ However, the Founders recognized that the normal operations of democracy in the constitutional system were at risk from the “tyranny of the mob.”¹⁷

Southern politicians turned the Framers’ nightmares into reality. “In the twentieth century, racist demagogues refined methods to control public discourse, encouraging hysteria about desegregation as an alien threat to Southern life.”¹⁸ Their rhetoric aimed to incite communities to violence via racist demagoguery.¹⁹ For instance, one governor earned a notorious reputation for angering crowds about “beastly black men” raping virgin white women: “We would be justified in slaughtering every Ethiop on earth to preserve unsullied the honor of one Caucasian home.”²⁰ Not one to be outdone, Senator Theodore G. Bilbo of Mississippi demanded that white males thwart black suffrage: “I call on every red-blooded white man to use

fortunes have been interesting to the human passions, have, in turn, divided mankind into parties, inflamed them with mutual animosity, and rendered them much more disposed to vex and oppress each other than to co-operate for their common good. So strong is this propensity of mankind to fall into mutual animosities, that where no substantial occasion presents itself, the most frivolous and fanciful distinctions have been sufficient to kindle their unfriendly passions and excite their most violent conflicts.”)

11. Michele Goodwin, *The Economy of Citizenship*, 76 TEMP. L. REV. 129, 186-94 (2003).

12. THE FEDERALIST NO. 10 (James Madison).

13. THE FEDERALIST NO. 1 (Alexander Hamilton), available at http://thomas.loc.gov/home/histdox/fed_01.html (“[T]hose men who have overturned the liberties of republics, the greatest number have begun their career by paying an obsequious court to the people; commencing demagogues, and ending tyrants.”).

14. *Id.*

15. THE FEDERALIST NO. 10 (James Madison).

16. *Id.*

17. Jamin B. Raskin, *From “Colorblind” White Supremacy to American Multiculturalism*, 19 HARV. J.L. & PUB. POL’Y 743, 749 (1996) (arguing that James Madison’s concern about the “tyranny of the mob” can apply to racial minorities that were terrorized by white majorities).

18. Mae Kuykendall & Charles Adside, III, *Unmuting the Volume: Fisher, Affirmative Action Jurisprudence, and the Legacy of Racial Silence*, 22 WM. MARY BILL RTS. J. 1011, 1042 (2014).

19. See generally V.O. KEY, JR., SOUTHERN POLITICS IN STATE AND NATION 261-71 (1949) (describing “Rural Demagogues”).

20. JAMES C. COBB, THE MOST SOUTHERN PLACE ON EARTH 147 (1992).

any means to keep the n[——] away from the polls[;] if you don't understand what that means you are just plain dumb."²¹ What he meant, of course, was lynching: the torture, mutilation, and murder of black men by white mobs. Politicians like Senator Bilbo knew what they were doing, and did it well. They stirred up terror against blacks in a region where lynching was ominous, routine, and heinous.²² Such appeals to violence by elected officials against an entire group seems unthinkable today.

Near the dawn of the 21st century, many hoped that such open bigotry was dead. Some commentators argued that we now live in an inclusive, even post-bigoted society, where characteristics like race no longer matter.²³ And yet, like a phoenix, public bigotry rises from the ashes: "[A] cottage industry of radio hosts, television personalities, and even politicians now specialize in manufacturing ethnic conflict by injecting divisive speech into political discourse; this dynamic is not limited to any political ideology or party."²⁴

21. Robert L. Fleeger, *Theodore G. Bilbo and the Decline of Public Racism, 1938-1947*, THE JOURNAL OF MISSISSIPPI HISTORY, <http://www.mdah.ms.gov/new/wp-content/uploads/2013/07/bilbo.pdf>.

22. Cobb, *supra* note 22, at 114-115, 163 (discussing lynch mobs attacking blacks in the Deep South).

23. The use of the term "post-bigoted society" as an umbrella term to not only include race, but other protected categories like religion in our discussion. The phrase "post-racial" has been more developed, however. See Girardeau A. Spann, *Postracial Discrimination*, 5 THE MOD. AM. 26, 39 (2009) ("[A] prospective commitment to colorblind race neutrality is now sufficient to promote racial equality, and any deviation from such neutrality will itself constitute unlawful discrimination. Although versions of this view have been around since the era of official segregation, the claim that we now live in a postracial society has acquired enhanced plausibility from the success of prominent racial minorities in roles that were traditionally reserved for whites. Those successes have ranged from the golfing achievements of mixed-race Tiger Woods in a traditionally white game, to the selection of black politician Michael Steele as head of the Republican Party, to the election of mixed-race Barack Obama as President of the United States.") (footnotes omitted); Mario L. Barnes, Erwin Chemerinsky & Trina Jones, *A Post-race Equal Protection?*, 98 GEO. L.J. 967, 968 (2010) ("Post-racialism is a set of beliefs that coalesce to posit that racial discrimination is rare and aberrant behavior as evidenced by America's and Americans' pronounced racial progress. One practical consequence of a commitment to post-racialism is the belief that governments—both state and federal—should not consider race in their decision making."). But see Reginald T. Shuford, *Why Affirmative Action Remains Essential in the Age of Obama*, 31 CAMPBELL L. REV. 503, 503-05 (2009) (observing that claims that the United States is a post racial society with the election of Barack Obama to the presidency are "decidedly premature."); Nikole Hannah-Jones, *The End of the Postracial Myth*, N.Y. TIMES MAG. (Nov. 15, 2016) (arguing that Donald Trump's election to the presidency disproves that the post-racial theory as many Trump supporters were primed by racial anxiety).

24. Charles Adside, III, *Replay That Tune: Defending Bakke on Stare Decisis*, 64 CLEV. ST. L. REV. 519, 559 (2016) (some scholars conclude that a variety of topics that confront the public are still vulnerable to demagoguery, which prevents collective action or impoverishes discussion on critical issues). Matthew J. Lindsay, *The Perpetual "Invasion": Past as Prologue in Constitutional Immigration Law*, 23 ROGER WILLIAMS U. L. REV. 369, 392 (2018) (referring to President Trump's anti-Muslim statements as "nativists demagoguery"); Robert A. Ferguson, *The Immigrant Plight/Immigration Law: A Study of Intractability*, 2 COLUM. J. RACE & L. 241, 248-49 (2012) (accusing politicians, like Senator John McCain and Governor Jan Brewer, of engaging

Presidential electoral politics is not immune. Like Noah, President Trump is “perfect in his generation” among the demagogues. For three decades, he has injected hateful rhetoric into the national discourse with abandon.²⁵

in “excessive rhetoric” and “demagoguery” with claims that illegal immigrants intentionally cause car wrecks or commit beheadings in Arizona); David Aronofsky, *The War on Terror: Where We Have Been, Are, And Should Be Going*, 40 DENV. J. INT’L L. & POL’Y 90, 102 (2012) (identifying “political demagoguery” as creating a climate in which Congress cannot pass legislation to adequately address the status of combatants detained at Guantanamo Bay); Muriel Morisey, *Fifty Years After the Sit-Ins: Events, Trends, and Recommendations*, 18 VA. J. SOC. POL’Y & L. 82, 92 (2010) (claiming that the opponents of the Affordable Care Act “engaged in demagoguery” by fostering the belief that the law would “kill grandma”).

25. Well before his presidency, Donald J. Trump interjected rank bigotry into public discourse, making claims with no basis in fact. In 1989, he purchased full-page advertisements in four New York City newspapers, calling for the death penalty in response to the arrest of five black and Latino teenagers, known as the Central Park Five. The teens were wrongfully accused and sentenced for the rape of a white woman. Even though the teens were recently exonerated via DNA evidence, President Trump refused to apologize for his advertisements. Jan Ransom, *Trump Will Not Apologize for Calling for Death Penalty Over Central Park Five*, N.Y. TIMES (June 18, 2019), <https://www.nytimes.com/2019/06/18/nyregion/central-park-five-trump.html>. Years later, Trump continued to arouse racial suspicions, becoming the national spokesperson for “birtherism.” In this role, he accused the first black president of being born in Kenya and thus ineligible to occupy the office. Aaron Sharockman, *Full Flop: Donald Trump abandons Barack Obama birther conspiracy*, POLITIFACT (Sept. 16, 2016, 11:33AM), <https://www.politifact.com/truth-o-meter/statements/2016/sep/16/donald-trump/full-flop-donald-trump-abandons-barack-obama-birth/>; U.S. CONST. art. II, § 1, cl. 5 (“No Person except a natural born Citizen . . . shall be eligible to the Office of President.”). This debunked claim had profound racial implications, since the Court held, in *Dred Scott v. Sanford*, 60 U.S. 393 (1857), that blacks could not be American citizens. He based his presidential campaign on xenophobic fears too, announcing that “When Mexico sends its people, they’re not sending their best . . . They’re sending people that have lots of problems, and they’re bringing those problems with us. They’re bringing drugs. They’re bringing crime. They’re rapists. And some, I assume, are good people.” *Here’s Donald Trump’s Presidential Announcement Speech*, TIME (June 16, 2015), <https://time.com/3923128/donald-trump-announcement-speech/>. As president, he justified hate crimes, drawing a moral equivalence between white supremacists and so-called left-wing activists during a clash. A neo-Nazi ran into a crowd with his truck, injuring nineteen people and killing one during a demonstration in Charlottesville, Virginia. There, neo-Nazis marched with tiki torches and clubs to protest the removal of a statue honoring Confederate General Robert E. Lee, chatting “You will not replace us!” and “Jews will not replace us!” Joe Heim, *Recounting a Day of Rage, Hate, Violence and Death*, WASH. POST (Aug. 14, 2017), <https://www.washingtonpost.com/graphics/2017/local/charlottesville-timeline/>. After the tragedy, the President argued that “I think there is blame on both sides,” he remarked in a press conference, “You had a group on one side that was bad. You had a group on the other side that was also very violent. . . .” Michael D. Shear and Maggie Haberman, *Trump Defends Initial Remarks on Charlottesville; Again Blames ‘Both Sides’*, N.Y. TIMES (Aug. 15, 2017), <https://www.nytimes.com/2017/08/15/us/politics/trump-press-conference-charlottesville.html>. Shockingly, he believes that African and Afro-Caribbean nations are inferior, debasing them as “shithole countries” in a meeting with senators. Ali Vitali, Kasie Hunt & Frank Thorp V, *Trump referred to Haiti and African nations as ‘shithole’ countries*, NBCNEWS.COM (Jan. 11, 2018, 2:19 PM), <https://www.nbcnews.com/politics/white-house/trump-referred-haiti-african-countries-shithole-nations-n836946>. President Trump dismisses his political opponents on racial and religious grounds, denouncing his non-white critics as un-American. Referring to four Congresswomen of color, he tweeted “[w]hy don’t they go back and help fix the totally broken and crime infested places from which they came.” Donald J. Trump (@realDonaldTrump), Twitter (July 14, 2019, 5:27 AM),

On his campaign website, then-candidate Donald J. Trump proposed a religious test for entry into the United States; “Calling for a total and complete shutdown of Muslims entering the United States.”²⁶ He justified his position to CNN’s Anderson Cooper, saying that “Islam hates us [W]e can’t allow people coming into this country who have this hatred of the United States”²⁷ Then-candidate Trump gave historical precedent for his “Muslim ban,” recounting that President Franklin D. Roosevelt “did the same thing” when he excluded the Japanese during World War II.²⁸ The Trump administration ordered these sentiments into public policy.²⁹

If this demagoguery didn’t help him in the election, it didn’t hurt him: he won. He lost no time in seeking to keep this campaign promise.

President Trump issued three travel bans in less than nine months. In January 2017, President Trump signed Executive Order No. 13769 (“EO-1”)

<https://twitter.com/realdonaldtrump/status/1150381395078000643> (emphasis added). All four Congresswomen are, in fact, American citizens, and three are natural born citizens. Domenico Montanaro, *Trump’s ‘Go Back’ Rhetoric Is Sign Of A Racially Divisive And Turbulent Year To Come*, NPR (July 19, 2019, 10:49 AM), <https://www.npr.org/2019/07/19/743310472/trumps-go-back-rhetoric-is-sign-of-a-racially-divisive-and-turbulent-year-to-come>. His interactions with crowds are borderline incitement. On one occasion, the President joked about vigilante justice against illegal immigrants at the border. Asking a crowd in Panama City Beach, Florida, what should be done when unarmed border patrol agents confront thousands of migrants, a crowd member shouted “‘Shoot ‘em!’ as laughter and cheers rang out across the room Trump seemed to laugh and pointed to the crowd member who said it, before joking: ‘That’s only in the Panhandle you can get away with that statement,’ as the crowd continued to clap and cheer. ‘Only in the Panhandle!’” Chantal Da Silva, *Donald Trump Jokes about Shooting Migrants at the Border: ‘That’s Only in The Panhandle You Can Get Away With That Statement,’* NEWSWEEK (May 9, 2019, 3:33 AM), <https://www.newsweek.com/donald-trump-jokes-about-shooting-migrants-border-thats-only-panhandle-you-1420611>.

26. *Trump v. Haw.*, 138 S. Ct. 2392, 2417 (2018) (Sotomayor, J., dissenting).

27. *Id.*; Theodore Schleiter, *I think Islam Hates Us* CNN POLITICS, (Mar. 10, 2016), <https://www.cnn.com/2016/03/09/politics/donald-trump-islam-hates-us/index.html> (“I think Islam hates us,” Trump told CNN’s Anderson Cooper, deploring the “tremendous hatred” that he said partly defined the religion. He maintained the war was against radical Islam, but said, “it’s very hard to define. It’s very hard to separate. Because you don’t know who’s who.”).

28. *Id.* at 2435.

29. To be sure, these statements were not gaffes. Nor were they “got-cha” moments. Rather, they were calculated messages designed to prime anti-Muslim attitudes among certain voters. *See supra* note 2. He promised to put Muslim immigrants through “extreme vetting” before entry and then place them on a national registry. *Trump v. Hawaii*, 138 S. Ct. at 2436 (Sotomayor, J., dissenting). These measures were necessary, because “Islam hates us,” the President exclaimed. *Id.* at 2417. These statements primed a public which negatively views Muslims. *See generally Polling Report. Com: Religion*, <http://www.pollingreport.com/religion.htm> (last visited Oct. 27, 2019). Citing to a comprehensive study, Professors Sides and Gross found that “[o]n average, respondents saw both Muslims and Muslim-Americans as more violent than peaceful and as more untrustworthy than trustworthy.” John Sides & Kimberly Gross, *Stereotypes of Muslims and Support for the War on Terror*, 75 THE JOURNAL OF POLITICS 583, 587 (2013). In fact, “[f]orty-five percent of respondents placed Muslim-Americans on the ‘violent’ side of the spectrum, and 51% placed Muslims on this side of the scale.” *Id.*

entitled “Protecting the Nation from Foreign Terrorist Entry into the United States.”³⁰ It banned foreign nationals from seven majority-Muslim nations from entering the United States for 90 days.³¹ It also suspended the Refugee Admissions Program (“RAP”) for 120 days.³² However, the order, in Section 5(e), carved out an exception. It permitted the admission of refugees when doing so was in the national interest, and said this condition was met when the person is a “religious minority” in their country.³³ This is a religious gerrymander, where the law is drawn up in a way that favors one religion over the other, in the same way that traditional gerrymandering draws political boundaries to favor one political party over another.³⁴ This would have allowed the Trump Administration to admit more Christians from the Middle East, a major goal of the evangelical Christian wing of the Republican Party.³⁵ This religious gerrymander is institutionalized in Section 5(b), which instructs that upon the resumption of RAP, the administration had to “prioritize” a refugee claim if it met two requirements: (1) the claim is based on religious persecution, and (2) the claimant is a religious minority in their country.³⁶ The District Court for the Western District of Washington blocked the order, however, on First and Fourteenth Amendment grounds.³⁷

Over a month later, the President revoked EO 1 and replaced it with Executive Order No. 13780 (“EO-2”).³⁸ EO-2 explained that the refugee prioritization program for religious minorities “was not motivated by animus toward any religion.”³⁹ And yet, EO-2 removed E.O. 1’s language that prioritized refugee claims found in Sections 5(b) and 5(e).⁴⁰ This raises a question. If EO-1 did not discriminate on the basis of religion, then why revoke its prioritization program for refugee claims based on religious minority status? This change seems more prompted by the prospect of legal challenges than specific policy concerns. The Trump administration tried to

30. Exec. Order No. 13769, 82 Fed. Reg. 8977 (Jan. 27, 2017) [hereinafter EO-1].

31. EO-1, *supra* note 32 at 8978.

32. EO-1, *supra* note 32 at 8979. Only the entry of Syrian refugees was suspended indefinitely. The order mentioned countries that didn’t meet safety standards. Then, DHS named these countries.

33. EO-1, *supra* note 32 at 8979-80.

34. *See Church of the Lukumi Babalu Aye v. Hialeah*, 508 U.S. 520 (1993).

35. Marco Rubio and Russell Moore: This Christmas, we must remember slaughtered Christians in the Middle East. <https://www.washingtonpost.com/news/acts-of-faith/wp/2015/12/24/marco-rubio-and-russell-moore-this-christmas-we-must-remember-slaughtered-christians-in-the-middle-east/>.

36. EO-1, *supra* note 32 at 8979.

37. *Trump*, 138 S. Ct. at 2403 (2018) (The Court entered a temporary restraining order blocking the restrictions.).

38. Exec. Order No. 13780, 82 Fed. Reg. 13209 (Mar. 6, 2017). [hereinafter EO-2].

39. EO-2, *supra* note 38 at 13,210.

40. *See generally* EO-2 and EO-1.

achieve two mutually exclusive objectives. Stunningly, the order also removed Iraq from the target list.⁴¹ EO-2 claimed that Iraq presented “a special case,” arguing that, since EO-1, the “Iraqi government has expressly undertaken steps to enhance travel documentation, information sharing, and the return of Iraqi nationals subject to final orders of removal.”⁴² Apparently, Iraq performed this Herculean task in one month and a week—miraculous, but not surprising, for a country as well-run and honest as Iraq. That order expired.⁴³

In September 2017, the President issued a third order, entitled “Enhancing Vetting Capabilities and Processes for Detecting Attempted Entry Into the United States or Other Public-Safety Threats” (“EO-3”).⁴⁴ This order imposed restrictions on entry of immigrants from seven countries—Chad, Iran, Libya, North Korea, Syria, Venezuela, and Yemen—because these nations did not meet the administration’s “baseline” for sharing information about the identities of those seeking entry into the United States.⁴⁵ On procedural grounds, the Court concluded that this order, and only this order, was before it.⁴⁶

Trump v. Hawaii held that E.O. 3 was legal; the President could suspend the entry of undocumented people⁴⁷ from the covered nations. The Court found that Section 1182(f) of the Immigration and Nationality Act “exudes deference” to presidential findings that entry of a class of undocumented people would be detrimental to the United States.⁴⁸ Thus, the procedures developed to determine whether a country met the “baseline” for information sharing were more than enough to make President Trump’s “findings” permissible.⁴⁹ However, while Section 1182(f) is deferential to presidential findings, no statute can empower the President to abrogate provisions of our Constitution.⁵⁰ The Religion Clauses supersede any presidential order that construes a congressional enactment to impose a Muslim ban on entry into the United States. On this issue, the Justices disagreed as to whether President Trump’s statements should be used to interpret the order.⁵¹ There

41. EO-2, *supra* note 38 at 13212.

42. *Id.*

43. *Trump v. Hawaii*, 138 S. Ct. at 2404. The order expired September 24, 2017, when the President issued his new proclamation.

44. Proclamation No. 9645, 82 Fed. Reg. 45161 (Sept. 24, 2017) [hereinafter EO-3].

45. EO-3, *supra* note 43 at 45164.

46. *Trump*, 138 S. Ct. at 2404.

47. The legalese “alien” is replaced with undocumented people or persons hereinafter.

48. *Trump*, 138 S. Ct. at 2408.

49. *Id.* at 2400-01.

50. *Marbury v. Madison*, 5 U.S. 137 (1803).

51. *Compare* *Trump v. Haw.*, 138 S. Ct. at 2418 (“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

are competing views. One may argue that presidential or campaign statements are more reliable than legislative history.⁵² The argument for the reliability of legislative history posits that an interpreter consults a voluminous amount of information to discover the intent of a multi-member body, such as floor statements or committee reports.⁵³ Executive intent, on the other hand, only requires an interpreter to investigate a single mind. By this argument, if legislative history is a permissible source for statutory interpretation, then presidential statements are even better. But like “extreme vetting,” these statements are subject to “extreme manipulation” because the President can issue new proclamations, signing statements, or have aides appear on CNN, FOX, MSNBC or any other news broadcasts to convey propaganda designed to obscure or reinterpret the purpose of his actions.⁵⁴ We cannot tell if they were telling the truth at one point but not another.

This Article concludes that this debate on these bigoted statements are unnecessary to resolve constitutional questions under the First Amendment. All three orders violated the Religion Clauses on their own terms, structure, and circumstances. Importantly, Religion Clause jurisprudence should lead interpreters to examine EO 1. President Trump issued EO-2 and EO-3 in response to litigation designed to conceal anti-Muslim bias in federal courthouses. Viewed in context, EO-2 and EO-3 actually reveal a religious test for entry. However, in *Trump v. Hawaii*, the Court put on blinders, and pointed to EO-3 as the only order before it.⁵⁵ This shortsighted view is contrary to Establishment Clause jurisprudence, which requires a contextualized approach to evaluating the actions at issue. The Court has not been so easily fooled in the past.

In *McCreary v. American Civil Liberties Union of Kentucky*, the Court used the context of actions to uncover an impermissible motive; they invalidated a religious display, even though the plaintiff (a Kentucky county) changed their displays three times in response to litigation.⁵⁶ The Court found that the third display did not remove the religious motive in the first

the core of executive responsibility.”) *with id.* at 2435-38 (Sotomayor, J., dissenting) (“Although the majority briefly recounts a few of the statements and background events that form the basis of plaintiffs’ constitutional challenge . . . that highly abridged account does not tell even half of the story The full record paints a far more harrowing picture, from which a reasonable observer would readily conclude that the Proclamation was motivated by hostility and animus toward the Muslim faith.”).

52. See *infra* Part I.C of this Article; *Presidential Statements Are Worse Than Legislative History*.

53. *Id.*

54. See *infra* Part I.C of this Article; *Presidential Statements Are Worse Than Legislative History*.

55. 138 S. Ct. at 2404.

56. *McCreary County v. ACLU*, 545 U.S. 844, 874 (2003). See *infra* Part II. A; *Three Displays, Three Orders: How McCreary and Trump v. Hawaii Are Similar*.

display, as the government's actions were not "genuine, but a sham."⁵⁷ The changes were only meant to conceal the government's religious intent. This Article contends that there are stark parallels between that case and *Trump v. Hawaii*. Like the displays in *McCreary*, the President issued two subsequent executive orders within a few months "only as a litigating position" to conceal a religious test to gain entry into the United States.⁵⁸ The orders also violated the Free Exercise Clause, as explained in *Church of the Lukumi Babalu Aye, Inc. v. Hialeah*.⁵⁹ There, the Court identified a religious gerrymander when an ordinance solely banned animal sacrifices, which were performed as part of a religious ceremony.⁶⁰ Similarly, the Refugee Prioritization Program in EO-1 created a gerrymander too, disfavoring Islamic refugee claimants while giving priority to refugee claims filed by non-Muslims.

This Article discusses the following. Part I explains the effect of the travel bans, the procedural history leading up to *Trump v. Hawaii*, and the Court's reasoning in this case. I conclude that courts should not use either campaign nor presidential statements to interpret law, because they are less reliable and legitimate than legislative history. Furthermore, Part II concludes that the President's statements are not needed to find the orders' violations under the Religion Clauses. The text and structure of the orders are enough. Thus, Part III disagrees with *Trump v. Hawaii*, and contends that this case, like *Korematsu*, does not solely involve national security matters; rather, it is an individual rights case that fails a strict scrutiny analysis.

I. How Executive Orders Became Blowhorns: Procedural History, *Trump v. Hawaii*, and the Unreliability of Campaign and Presidential Statements.

A. Three Travel Bans in Nine Months

As previously mentioned, EO 1 banned all citizens from seven Muslim majority countries—Iran, Iraq, Libya, Somalia, Sudan, Syria, and Yemen—from entering the country for 90 days.⁶¹ The administration also suspended RAP for 120 days to allow the relevant agencies time "to determine what additional procedures should be taken to ensure that those approved for refugee admission do not pose a threat to the security and welfare of the

57. *Id.* at 864.

58. *See McCreary County*, at 871.

59. *Church of the Lukumi Babalu Aye v. Hialeah*, 508 U.S. 520 (1993) [hereinafter *Santeria*].

60. *Id.* at 536 (Although the ordinance banned religious sacrifices, it included an exception for killing animals for consumption.).

61. EO-1, *supra* note 32, at § 5.

United States.”⁶² Notably, the order “prioritize[d] refugee claims made on the basis of religious persecution, provided that the religion of the individual is a minority religion in the individual’s country of nationality.”⁶³ Within one week, the District Court for the Western District of Washington issued a temporary restraining order (“TRO”) blocking the administration from enforcing the order nationwide.⁶⁴ The United States Court of Appeals for the Ninth Circuit rejected the Government’s appeal to stay the injunction, concluding that “[t]he Government has not shown that it is likely to succeed on appeal,” and “not[ing] the serious nature of the allegations the States have raised with respect to their religious discrimination claims.”⁶⁵

Thirty-eight days later, President Trump revoked EO-1 and issued EO-2. Significantly, EO-2 removed Sections 5(b) and 5(e) of EO 1, which gave priority to claimants who were religious minorities in their nation of origin.⁶⁶ Even though EO 2 expunged those sections, it defended them, positing that the revoked sections did not intend to religiously discriminate:

[EO-1] did not provide a basis for discriminating for or against members of any particular religion. While that order allowed for prioritization of refugee claims from members of persecuted religious minority groups, that priority applied to refugees from every nation, including those in which Islam is a minority religion, and it applied to minority sects within a religion. That order was not motivated by animus toward any religion, but was instead intended to protect the ability of religious minorities—whoever they are and wherever they reside—to avail themselves of [RAP].⁶⁷

EO-2 strived to further vindicate EO-1, explaining that six out of the seven countries targeted in EO-1 were selected because they were either state sponsors of terrorism, compromised by terrorist groups, or contained combat zones.⁶⁸ However, the administration removed Iraq from the list because, as per the order, it presented a “special case.”⁶⁹ Although Iraq’s conflict with the Islamic State of Iraq and Syria (“ISIS”) impacted its ability to secure its national borders and systematically identify fraudulent travel documents, EO-2 indicated that Iraq must be treated differently because it maintains a “close cooperative relationship” with the United States.⁷⁰

62. *Id.* § 5.

63. EO-1, *supra* note 32, at § 5(b).

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

65. *Wash. v. Trump*, 847 F.3d 1151, 1164 (9th Cir. 2017).

66. EO-2, *supra* note 38, at § 1(b)(iv).

67. *Id.*

68. *Id.* § 1(d).

69. *Id.* § 1(g).

70. *Id.*

Nevertheless, Judge Derrick K. Watson of the District Court for the District of Hawaii issued a (“TRO”) based, in part, on President Trump’s statements; the administration argued that the court should not examine the “veiled psyche” and “secret motives” of government decisionmakers, and should not engage in “judicial psychoanalysis of a drafter’s heart of hearts.”⁷¹ Judge Watson strongly disagreed. He said that “there is nothing ‘veiled’ about this press release: ‘Donald J. Trump is calling for a total and complete shutdown of Muslims entering the United States.’”⁷² The Court granted a partial stay of the TRO issued by Judge Watson, requiring that those who have a “credible claim of bona fide relationship with a person or entity in the U.S.,” will be exempt from the 90 day suspension.⁷³ If such a relationship is enough for the administration to be satisfied about the safety of allowing such individuals into the country, perhaps their concerns are not as serious as they claimed. EO-2 expired, however, before the Court could take action.⁷⁴

President Trump issued EO-3 on September 24, 2017.⁷⁵ This order developed an information sharing “baseline” for foreign governments’ capability and willingness to identify the identities and security risks of their citizens who are seeking entry into the United States.⁷⁶ The baseline examined three areas: (1) the integrity of travel documents issued by the foreign country, (2) the extent to which the foreign government discloses the criminal history or links to terrorists groups of passengers traveling to the U.S., and (3) the national security risk posed by the foreign government.⁷⁷ Supposedly applying this calculus to every country on Earth, the President removed Sudan from the list of designated countries; added Chad, North Korea, and Venezuela; removed the expiration dates of the ban; and, added a cap to the number of refugees allowed to enter the United States.⁷⁸ On October 17, 2017, Judge Watson granted another TRO.⁷⁹ Instead of focusing on the Establishment Clause, he focused on discrimination based on a nationality: “EO-3 suffers from precisely the same maladies as its predecessor: it lacks sufficient findings that the entry of more than 150 million nationals from six specified countries would be ‘detrimental to the interests of the United States.’”⁸⁰ For Judge Watson, the administration’s

71. *Trump v. Haw.*, NO. 17-00050 DKW-KSC, 34-35, <https://assets.documentcloud.org/documents/3518057/Order.pdf>.

72. *Id.*

73. *Trump*, 138 S. Ct. at 2404.

74. *Id.*

75. Proclamation No. 9645, 82 Fed. Reg. 45161 (Sept. 24, 2017).

76. EO-3, *supra* note 44, at § 1(c).

77. *Id.* § 1(c)(i)-(iii).

78. *See Trump*, 138 S. Ct. at 2405-06.

79. *Haw. v. Trump*, 265 F. Supp. 3d 1140, 1145 (D. Haw. 2017).

80. *Id.*

“baseline” did not justify the order. However, the Ninth Circuit stayed Judge Watson’s TRO, with the exception of allowing the entry of foreign nationals with a bona fide relationship with a person or entity in this country.⁸¹ Satisfied with the language of the proclamation, the Court allowed the proclamation to go into effect.⁸² The United States Supreme Court granted certiorari to hear *Trump v. Hawaii*.⁸³

B. *Trump v. Hawaii*

Chief Justice Roberts’s analysis focused only on EO-3, the only order remaining active at the time. He ignored E.O. 1, which the administration revoked, and E.O. 2, which expired. This cramped view divorces the review of EO-3 from Establishment Clause jurisprudence, which requires reviewing courts to place the order within its legal context. It had significant context, considering that it was the third issued in less than nine months, and all of them were responses to national injunctions.⁸⁴ The Court’s myopic approach permitted the administration to conceal its religious motives, which allowed the *Trump v. Hawaii* Court to rest its ruling on the INA’s broad, discretionary language. That Act renders an undocumented person inadmissible to the United States for multiple reasons.⁸⁵ The decision here turned on 8 U.S.C. Section 1182(f). That statute delegates broad authority to the President to suspend entry of an entire group of undocumented people if he considers it necessary. Section 1182(f) provides that:

Whenever the President finds that the entry of any [undocumented people] or of any class of [undocumented people] 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 [undocumented people] or any class of [undocumented people] as immigrants or nonimmigrants, or impose on the entry of . . . any restrictions he may deem to be appropriate.⁸⁶

The Chief Justice found that every statutory clause supported the notion of presidential deference. First, he reasoned that § 1182(f)’s only requirement for the president to prohibit entry is for him to “find[]” that admissibility of an undocumented person “would be detrimental to the

81. *Trump*, 138 S. Ct. at 2406.

82. *Id.*

83. *Trump v. Hawaii*, 138 S. Ct. 923.

84. *See infra* discussion on McCreary, Part II. A.

85. *Trump v. Hawaii*. at 2407. Example reasons are participation in genocide, use of child soldiers, and terrorist activities.

86. *Id.* at 2408.

interests of the United States.”⁸⁷ In fact, the clause does not impose any set of guidelines for the President to follow when making this determination. Thus, the information sharing baseline used to make the finding at issue was more than sufficient.⁸⁸ Second, he found that the term “suspend” denoted deference too, as the statute placed no limitation on the duration of such suspension.⁸⁹ The suspension may last “for such period as [the President] shall deem necessary.”⁹⁰ Lastly, this suspension may be applied to “any class of [undocumented people].”⁹¹ The term “class” is undefined, and thus broad enough to encompass a class of undocumented people “linked by nationality.”⁹²

This decision has two profound consequences, but the logic behind each, contradicts the other. As stated, the majority Opinion affirmed broad congressional delegation of presidential authority in the area of immigration policy.⁹³ However, the Court also overturned *Korematsu*, a case which supported such broad executive discretion.⁹⁴ The Majority made a questionable distinction between the different executive actions in *Korematsu* and *Trump v. Hawaii*: the action in the former was taken “solely and explicitly on the basis of” anti-group sentiment, but the action in the latter was based on legitimate grounds.⁹⁵ Justice Sotomayor strongly disagreed. In her Dissenting Opinion, she pointed to President Trump’s campaign statements regarding Islam as evidence of religious animus.⁹⁶

While Chief Justice Roberts nodded to the existence of the President’s anti-Muslim statements, he concluded that they carried no interpretative weight.⁹⁷ He described EO-3 as a “directive, neutral on its face, addressing a matter within the core of executive responsibility.”⁹⁸ He argued that such a ban was facially neutral, and that merely “denying certain foreign nationals the privilege of admission” could not be compared to *Korematsu*’s forcible relocation of American citizens based on race.⁹⁹ Satisfied with the facially neutral order, Chief Justice Roberts concluded his investigation. Justice Sotomayor’s dissent furiously rejected the Court’s circumscribed approach.

87. *Id.* at 2408-09.

88. *Trump v. Hawaii*. at 2409.

89. *Id.* at 2409-10.

90. *Id.* at 2410.

91. *Id.*

92. *Id.*

93. *Id.* at 2407-10.

94. *Trump v. Hawaii*. at 2447-48 (Sotomayor, J., dissenting).

95. *Id.* at 2423.

96. *Id.* at 2435-39 (Sotomayor, J., dissenting).

97. *Trump*, 138 S. Ct. at 2418.

98. *Id.*

99. *Id.* at 2423.

She criticized EO-3 as “motivated by anti-Muslim animus.”¹⁰⁰ She said that the Court’s reasoning in *Trump v. Hawaii* had “stark parallels” to *Korematsu*; the travel ban, like the exclusion order, was based on an “ill-defined national security threat” to justify a sweeping policy.¹⁰¹ She pointed to at least 20 of President Trump’s campaign statements, as well as various press releases and interviews, as strong evidence that the order was based on animus towards Muslims.¹⁰² Although I agree that the orders are motivated by anti-Muslim animus, I need not examine the President’s comments to find it. It is tempting to view this President’s statements in a vacuum. The issue is not whether *this* President’s prior statements should be admitted, but whether *any* presidential statements should be considered fair game when interpreting the law. Such statements present a jurisprudential problem when employed as a tool for interpretation.

C. Presidential Statements Are Worse Than Legislative History

Presidential statements are untenable as interpretive tools. This becomes apparent when one compares informal statements by the Commander-in-Chief to the more traditional theory of statutory interpretation, legislative history. Scholars and jurists have questioned the latter’s reliability, in part because actors frequently manipulate legislative history to reflect their interests.¹⁰³ Lobbyists create legislative history to deceitfully make Congress “appear to embrace their particular view” of a law, and Congress engages in the “post-enactment creation of ‘legislative history’” by inserting their views into the Congressional Record after enacting a law.¹⁰⁴ Should jurists overemphasize these questionable sources, they give effect to text and presumed consequences never written into law. This damages the legitimacy of the democratic process of lawmaking. However, Congress’ size somewhat mitigates the problem of manipulation. Congress consists of 535 members, meaning that groups with competing interests engage in the creation of legislative history.¹⁰⁵ Consequently, it is difficult for any one group to manipulate legislative history into a single, coherent message.¹⁰⁶

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

101. *Trump*, 138 S. Ct. at 2447.

102. *Id.* at 2435-39.

103. Kenneth W. Starr, *Observations about the Use of Legislative History*, 1987 DUKE L.J. 371, 377 (1987).

104. *Id.*

105. See Max Radin, *Statutory Interpretation*, 43 HARV. L. REV. 863, 870 (1930) (“The chances that of several hundred men each will have exactly the same determinate situations in mind as possible reductions of a given determinable, are infinitesimally small.”).

106. See *Thompson v. Thompson*, 484 U.S. 174, 192 (1988) (Scalia, J., concurring) (“It is at best dangerous to assume that all the necessary participants in the law-enactment process are acting upon the same unexpressed assumptions.”).

In contrast, the unitary executive theory holds that the President can manipulate the history of the Executive Branch with ease.¹⁰⁷ The President controls a vast communications apparatus. He can communicate a unified message through “political storytelling, civic interpretation, persuasion, and mobilization” because there are no competing sources of power within the Executive Branch.¹⁰⁸ Moreover, the White House employs numerous surrogates to spread the President’s message in the media. The White House Office of Communications, for example, crafts executive statements to “strategically . . . advance the agenda of the President.”¹⁰⁹ The Office of Digital Strategy uses social media to “amplify the President’s message.”¹¹⁰ Finally, the White House Press Secretary is the “official spokesperson” for the President and provides official “comment[s] and response[s] to events and criticism” on his behalf.¹¹¹ Finally, the President has his Twitter account. With nearly 65 million followers—about one fifth of the country—the Presidential Twitter account is a powerful communications tool. A presidential tweet can become instant news, influencing the national conversation—just ask poor Mitt Romney.¹¹² Should the President desire to manipulate his statements, or the interpretation of past ones, the White House has substantial resources to do so. The Trump administration has made substantial use of these resources to recast the travel bans as a homeland security issue unaffected by anti-Muslim bias.¹¹³ Some opinion polls suggest

107. Katherine Shaw, *Beyond the Bully Pulpit: Presidential Speech in the Courts*, 96 TEX. L. REV. 71, 76 (2017).

108. Shaw, *supra* note 107.

109. See *White House Internship Program*, Presidential Departments, WHITEHOUSE.GOV (last visited Oct. 3, 2019), <https://www.whitehouse.gov/get-involved/internships/presidential-departments/> (The White House Internship Program website gives a short description of each department within the White House.).

110. *Id.*

111. Martha Joynt Kumar, *The Office of the Press Secretary*, 31 PRESIDENTIAL STUD. Q. 296, 296 (2001).

112. <https://twitter.com/realDonaldTrump/status/1180487139546546182>.

113. The Trump Communication Team has repeatedly insisted that EO-1 targeted countries based on national security concerns and not religion. Before he took office, his team began to downplay his past comments. In a December 2016 interview with CNN, White House Aide Kellyanne Conway said that people who referred to proposed policy as a Muslim ban were ignoring the fact that he “talked about countries where we know that they’ve got a higher propensity of training and exporting terrorists” Gregory King, *Conway: Trump Will Not Pursue Immigration Ban Based Solely On Religion*, CNN (Dec. 22, 2016, 10:22 AM), <https://www.cnn.com/2016/12/22/politics/kellyanne-conway-donald-trump-muslim-ban/index.html>. The day after President Trump signed EO-1, his Cybersecurity Advisor Rudolph Giuliani told an interviewer that the ban was “not based on religion” but “places where there [is] substantial evidence that people are sending terrorists in the country.” Amy B Wang, *Trump Asked For A ‘Muslim Ban,’ Giuliani Says - And Ordered A Commission To Do it ‘Legally’*, WASH. POST (Jan. 29, 2017, 3:32 PM), <https://www.washingtonpost.com/news/the-fix/wp/2017/01/29/trump-asked-for-a-muslim-ban-giuliani-says-and-ordered-a-commission-to-do-it-legally/>. Trump’s surrogates continued to insist that the policy was based on national security concerns and not religious bias

that the President's efforts have been largely successful among voters.¹¹⁴ So the White House Communications apparatus can serve as a smokescreen covering the executive's true intent.

Despite these problems, proponents of using presidential and campaign statements argue that executive intent is easier to discover than legislative intent. Since the President is a single person, investigating his or her intentions requires a smaller universe of information; the press statements, speeches, and signing statements, where the President announces his or her legal interpretations.¹¹⁵ In fact, the President often issues signing statements to announce the personal intent not to enforce some statutory provisions in ways that may infringe on his constitutional powers.¹¹⁶ Anyone trying to interpret legislative history, on the other hand, must consult the drafts, floor statements, and voluminous committee reports.¹¹⁷ Such an inquiry may be a fool's errand; representatives have a myriad of motives for voting for a law with competing interpretations.¹¹⁸ In contrast, the unitary executive, has but one motive to discover and thus only that person can shed light on

throughout the legal proceedings against it, although the President Trump refused to disavow his prior statements regarding a Muslim ban. Solicitor General Noel Francisco said that President Trump "has made crystal-clear that Muslims in this country are great Americans and there are many, many Muslim countries who love this country, and he has praised Islam as one of the great countries [sic] of the world." Christopher Cadelago, Josh Gerstein and Louis Nelson, *Being Trump Means Never Having To Say You're Sorry*, POLITICO (Apr. 30, 2018, 7:07 PM), <https://www.politico.com/story/2018/04/30/trump-muslim-ban-no-apologies-560287>. Similarly, White House Press Secretary Sarah Sanders stated in a 2018 press conference that the Executive Orders were focused on security, and stressed that it was "limited to a small number of countries" and allowed citizens from "a lot of Muslim-majority countries" to continue "to travel to and from the United States" *Press Briefing by Press Secretary Sarah Sanders*, WHITEHOUSE.GOV. (Apr. 25, 2018, 2:19 PM), <https://www.whitehouse.gov/briefings-statements/press-briefing-press-secretary-sarah-sanders-042518/>.

114. *55% Agree Trump's Travel Ban Targets Terrorists, Not Muslims*, RASMUSSEN REPORTS: POLITICS (Apr. 26, 2018), http://www.rasmussenreports.com/public_content/politics/general_politics/april_2018/55_agree_trump_s_travel_ban_targets_terrorists_not_muslims; Steven Shepard, *Poll: Majority of Voters Back Trump Travel Ban*, POLITICO (July 5, 2017, 5:58 AM), <https://www.politico.com/story/2017/07/05/trump-travel-ban-poll-voters-240215>; CNN ORC INT'L POLL 7 (Feb. 2, 2017, 4:00 PM), <http://i2.cdn.turner.com/cnn/2017/images/02/03/re12a.-trump.pdf> (reporting that the public was split on the travel bans with 53% opposed, and 47% in favor).

115. See FEDERALIST PAPER No. 10, *supra* note 16.

116. For example, when President Barack Obama signed the National Defense Authorization Act he indicated that he would not abide by Section 1032 and Section 1034, which related to Guantanamo detainee transferrers in situations where he determined they would violate the Constitution. Press Release, Barack Obama, President of the United States, Statement by the President on Signing the National Defense Authorization Act for Fiscal Year 2017 (Dec. 23, 2016), <https://obamawhitehouse.archives.gov/the-press-office/2016/12/23/statement-president-signing-national-defense-authorization-act-fiscal>.

117. *Edwards v. Aguillard*, 482 U.S. 578, 636–38 (1987) (Scalia, J., dissenting).

118. *Id.*

statutory meaning.¹¹⁹ The interpretative process is made even easier with an executive order, some say, since it is purely an executive action. Congress is, thus, irrelevant.

Nevertheless, presidential statements are less constitutionally legitimate than legislative history. While the President and Congress both possess law-making authority, they have different roles in that process. The Constitution vests Congress with “all” legislative power, which includes the power to write laws.¹²⁰ Thus, it makes sense to consult the drafters of a law to determine its meaning.¹²¹ The President does not write law. The Constitution limits the President’s powers to signing, vetoing, and enforcing laws.¹²² Neither legislative history nor presidential statements, however, pass through the process of bicameralism and presentment. Consequently, they carry no legal force.¹²³ Therefore, judges should use neither legislative history nor presidential statements for interpretative purposes. If presidential statements do not carry legal weight, surely mere campaign statements do not. Campaign statements, like legislative history, are “susceptible to multiple interpretations, depending on the outlook of the recipient.” Their use would allow courts to adopt whichever interpretation “best supports its desired conclusion.”¹²⁴ In fact, there is no principled way to distinguish between statements to use versus discard. Take the following thought experiment as an example.

Suppose a presidential candidate says, “I despise the South. I wish Sherman had finished the job and burnt it all down!” He is elected President. After his inauguration, he orders the small business administration to deprioritize loan requests from states which joined the Confederacy. The order is challenged on Due Process grounds. Plaintiffs argue that the order does not provide adequate process to Southern applicants, and point to his earlier campaign statement as evidence. During litigation, the President addresses the nation from the Oval Office and states, “I love the South, and they’re great businesspeople!” If presidential or campaign statements are

119. Kathryn Marie Dessayer, *The First Word: The President’s Place in “Legislative History”*, 89 MICH. L. REV. 399, 411 (1990) (When the President vetoes a bill, his reason for doing so is entered into the congressional record. If he signs a later version with his recommended changes, his interpretation arguably should be an important factor interpreting it.).

120. U.S. CONST. art. I, § 1.

121. William N. Eskridge, *The New Textualism*, 37 UCLA REV. L. 621, 686 (1990) (arguing that if there is more than one plausible meaning, consulting legislative history can be useful for determining which one Congress intended).

122. William D. Popkin, *Judicial Use of Presidential Legislative History: A Critique*, 66 IND. L.J. 699, 709-10. (1991).

123. Starr, *supra* note 95, at 377; *Thompson*, 484 U.S. at 191-92 (Scalia, J., concurring).

124. *Int’l Refugee Assistance Project v. Trump*, 883 F.3d 233, 264 (2018) (Niemeyer, J., dissenting).

used to interpret executive orders, then which statement should a judge consider in this case? They conflict with each other.

At best, these statements are expressions of developing ideas and policies that are “explained, modified, retracted, and amplified” as campaign events progress and administrations mature.¹²⁵ At worst, perhaps the Oval Office comments were in response to litigation and should be ignored. Or, as a cynical approach, both statements have no meaning at all. A presidential candidate can express a policy position during a campaign with no intention to implement that policy once elected into office. A politician breaking campaign promises—perish the thought!

While Chief Justice Roberts was correct to not consider extrinsic statements to interpret the order, his overall conclusion was fundamentally flawed for two reasons. First, the order was not facially neutral. Establishment Clause jurisprudence requires that the reviewed text be contextualized, and the order was not reviewed in context. Second, he forgets that the Constitution *trumps* all statutes. Section 1182(f) does not empower the President to base his findings that entry of a call of undocumented people would harm the nation on the basis of unconstitutional grounds, such as an alien’s Islamic faith. When viewed in context, EO-3 violates the Religion Clauses. *McCreary* and the *Santeria* case are instructive here.

II. Religion Clause Principles: No Shams, No Gerrymanders

A. Three Displays, Three Orders: How *McCreary* and *Trump v. Hawaii* Are Similar

In *McCreary*, the Court saw through governmental attempts to hide religious motivations of an action. It reviewed several displays which a Kentucky county placed in their courthouses. At first, each county had gold-framed copies of the King James Version of the Ten Commandments hanging visibly in the hallway.¹²⁶ After the ACLU sued the counties, they erected a second display, expanding the Ten Commandments display to include eight other framed documents that had a religious theme.¹²⁷ Some of the documents included the “endowed by their Creator” passage from the Declaration of Independence and the national motto, “In God We Trust.”¹²⁸ Unpersuaded, the District Court ordered the display be removed.¹²⁹ In response, the courthouses hired new counsel and hung nine framed

125. *International Refugee*, 883 F.3d at 264.

126. *International Refugee*, 883 F.3d at 851-52.

127. *Id.* at 853.

128. *Id.* at 853-54.

129. *Id.* at 854.

documents of equal size, one of them setting out the Ten Commandments, the Magna Carta, the Declaration of Independence, the Bill of Rights, the lyrics of the Star Spangled Banner, the Mayflower Compact, the National Motto, the Preamble to the Kentucky Constitution, and a picture of Lady Justice.¹³⁰ The collection entitled “The Foundations of American Law and Government Display” has each document with a statement about its historical and legal significance.¹³¹ *McCreary* held that their final display (along with the others) violated the Establishment Clause. The original religious motive was still there, even after the counties changed their displays three times in one year.¹³² The counties only changed the display to improve their litigation position.¹³³ This is like another, nobler Kentucky practice, that of putting a little water in one’s bourbon; It may go down smoother, but the liquor is still there! Here, the “bourbon” was the religious content, and the diluting “water” were the neutral documents.

McCreary found that Establishment Clause analysis examines if government has a “secular purpose.” The Court found that this purpose cannot be secondary to a religious one; the secular purpose must be genuine and not a sham.¹³⁴ To determine whether the government’s purpose is valid, an interpreter can examine evolving texts in light of the circumstances. Legislative statements are not needed for this analysis: “[P]urpose needs to be taken seriously under the Establishment Clause and needs to be understood in light of context; an implausible claim that governmental purpose has changed should not carry the day in a court of law any more than in a head with common sense.”¹³⁵ The fact that the courthouses changed the display twice did not conceal religious motives in the solo Ten Commandments display, particularly when the changes were enacted in response to a year-long litigation.

There are stark parallels between three religious displays in *McCreary* and the three travel ban orders in *Trump v. Hawaii*. Like the courthouses in *McCreary*, President Trump changed the order’s text to conceal a religious motive in response to litigation.¹³⁶ In January 2017, E.O. 1 imposed a 90-day suspension of entry of aliens from covered seven countries, and prioritized religious-based refugee claims if an alien is a religious minority in the covered nation.¹³⁷ But this order, like the display in *McCreary*, was struck by lower courts, who found that it violated the Establishment

130. *Id.* at 855.

131. *Id.* at 856.

132. *International Refugee*, 883 F.3d at 855.

133. 545 U.S. 844, 850 (2005).

134. *Id.* at 864.

135. *Id.* at 874.

136. *See* 545 U.S. at 871.

137. E.O. 1 § 1(c).

Clause.¹³⁸ Two months later, E.O.2 removed language prioritizing religious minorities in the refugee program. E.O. 2 lasted only six months but the District Courts for Maryland and Hawaii imposed nationwide injunctions against the order, which the Fourth and Ninth Circuit Court of Appeals upheld.¹³⁹

Similar to *McCreary*, the travel ban's national security purpose is a sham because substantial alterations to the text were ordered for litigation purposes.¹⁴⁰ They were only inserted into the text to cover up the President's intention to ban Muslims. President Trump revoked E.O. 1 when the Ninth Circuit rejected the Executive's appeal to seek an emergency stay to allow the order to go into effect.¹⁴¹ In fact, changes to the executive orders were as insincere, if not more so, than the display changes. The three displays were posted within only one year, whereas the President issued three separate travel bans in a shocking nine months.¹⁴² If *Trump v. Hawaii* followed *McCreary*, it would have concluded that "in light of the context" the "implausible claim" that governmental purpose to impose a Muslim ban suddenly changed within 38 days after the President revoked E.O.1 "should not carry the day in a court of law any more than in a head with common sense."¹⁴³ Following *McCreary*, the purpose inquiry does not need to consult presidential or campaign statements. An interpreter only needs to examine text changes in response to litigation to determine intent. Here, alterations to the text, not statements, remain the touchstone.

B. How The Orders Created a Religious Gerrymander

When EO-1 can no longer hide behind the facially neutral EO-3, its Free Exercise violation becomes apparent. In the *Santeria* case, the Court struck down animal cruelty ordinances for discriminating against the Santeria religion; respondents criminalized ritualistic animal sacrificing (not for food consumption), yet exempted animal killing, including kosher butchering: "The net result of the gerrymander is that few if any killings of animals are prohibited other than Santeria sacrifice, which is proscribed because it occurs during a ritual or ceremony and its primary purpose is to make an offering to the *orishas*, not food consumption."¹⁴⁴ Here, the Free Exercise analysis did

138. *Int'l Refugee Assistance Project v. Trump*, 883 F.3d 233, 266 (4th Cir. 2018); *Washington v. Trump*, 847 F.3d 1151, 1167 (9th Cir. 2018).

139. *Trump v. Hawaii*, 138 S. Ct. 2392, 2404 (2018).

140. *Id.*

141. *Hawaii v. Trump*, 859 F.3d 741 (9th Cir. 2017).

142. The President signed E.O.1 on January 27, 2017, and signed E.O. 3 on September 24, 2017.

143. *Id.* at 874.

144. *Santeria*, 508 U.S. at 536.

not need to investigate the ordinance's legislative history.¹⁴⁵ Rather, the ordinance's text and structure revealed the gerrymander, since Santeria sacrifice did not permit food consumption. Thus, the city designed the ordinance to target that faith.

Like the animal sacrifice ordinances, Section 5 of EO-1 created a Christian or non-Muslim gerrymander in violation of the Free Exercise Clause. Undoubtedly, Trump targeted Muslim-majority countries in EO-1, where he declared in Section 3(c):

I hereby proclaim that the immigrant and nonimmigrant entry into the United States of [undocumented people] from [Iran, Iraq, Libya, Somalia, Sudan, Syria, and Yemen] would be detrimental to the interests of the United States, and I hereby suspend entry into the United States, as immigrants and nonimmigrants, of such persons for 90 days from the date of this order.¹⁴⁶

Section 5(a) suspended the refugee program worldwide for 120 days.¹⁴⁷ Like the kosher butchering exemption in the *Santeria* case, Section 5(e) is an explicit exemption carved out along religious lines:

Notwithstanding the temporary suspension imposed pursuant to subsection (a) of this section, the Secretaries of State and Homeland Security may jointly determine to admit individuals to the United States as refugees on a case-by-case basis, in their discretion, but *only so long as they determine that the admission of such individuals as refugees is in the national interest—including when the person is a religious minority in his country of nationality facing religious persecution . . .*¹⁴⁸

145. *Id.* at 534-36.

146. EO-1, *supra* note 32.

147. *Id.*

148. *Id.* (emphasis added); *Santeria*, 508 U.S. at 535-36 (“[A]lmost the only conduct subject to [the] Ordinances . . . is the religious exercise of Santeria church members. The texts show that they were drafted in tandem to achieve this result. We begin with Ordinance 87-71. It prohibits the sacrifice of animals, but defines sacrifice as “to unnecessarily kill . . . an animal in a public or private ritual or ceremony not for the primary purpose of food consumption.” The definition excludes almost all killings of animals except for religious sacrifice, and the primary purpose requirement narrows the proscribed category even further, in particular by exempting kosher slaughter . . . It suffices to recite this feature of the law as support for our conclusion that Santeria alone was the exclusive legislative concern.”). *Id.* at 536 (“The ordinance exempts, however, “any licensed [food] establishment” with regard to “any animals which are specifically raised for food purposes,” if the activity is permitted by zoning and other laws. This exception, too, seems intended to cover kosher slaughter.”).

This section strikes at the sincerity of the President's national security justifications. What about religious minorities from any country makes them safer to admit than those in the majority? Section 5(b) bolsters the Section 5(e) exemption favoring non-Muslim refugee claims upon the resumption of the refugee program. In other words, the religious gerrymander would be a permanent feature of the program, because the administration would "prioritize refugee claims made by individuals on the basis of religious-based persecution, provided that the religion of the *individual is a minority religion in the individual's country of nationality*."¹⁴⁹ While the words "Islam" and "Muslim" are not explicitly mentioned, the order structurally disfavors Muslim refugee claims since these applicants are not individuals from a minority religion in the seven named countries. The Trump administration's supposed rebuttal to this point can be found in Section 1(b)(iv) of EO-2, which explained that EO-1 did not discriminate against refugee claims on a religious basis: "While that order allowed for prioritization of refugee claims from members of persecuted religious minority groups, that priority applied to refugees from every nation, including those in which Islam is a minority religion, and it applied to minority sects within a religion."¹⁵⁰ The first claim of the Trump administration—that the priority applied to refugees from every nation, including those in which Islam is a minority religion—is irrelevant because EO-1 exclusively applied to Muslim-majority countries.¹⁵¹ The second claim—that the exemption reached minority sects within a religion—requires more careful consideration. Theoretically, Shia Muslims from Iraq and Syria and Sunni Muslims from Iran would receive priority status just as Christian applicants in the targeted countries.¹⁵² However, this argument is unpersuasive for two reasons.

The contention that Sections 5(b) and 5(e) of EO-1 include minorities within Islam defies plain English. The original executive order promised to "prioritize refugee claims made by individuals on the basis of religious-based persecution, provided that the religion of the individual is a *minority religion in the individual's country of nationality*."¹⁵³ In effect, this would protect Christians, who are the minority religion in each of the predominantly Muslim countries listed on the travel ban.¹⁵⁴ But Sunni and Shia Muslims are different sects within the same religion—each makes up the *majority*

149. EO-1, *supra* note 32 (emphasis added).

150. EO-2, *supra* note 38.

151. EO-1, *supra* note 32.

152. EO-2, *supra* note 38.

153. EO-1, *supra* note 32 (emphasis added).

154. See generally WORLD POPULATION REVIEW: SUNNI COUNTRIES (Sept. 27, 2019), <http://worldpopulationreview.com/countries/sunni-countries/>.

religion in the banned countries.¹⁵⁵ In a country like Iraq, where the Sunni minority faces persecution similar to the Christian minority, only the Christian minority has a valid claim for refugee status under the order's minority religion exemption. The persecuted Shia are lumped in as a member of the majority religion, albeit a minority member. The orders do not recognize the basic distinctions between the terms "religion" and "sect;" however, the distinction between sect and religion makes no difference under the Establishment Clause. It ought to be noted that the Trump Administration's attempts to dissemble about what the first order did is exactly the sort of *post-hoc* manipulation of the record which makes the use of Presidential statements untenable for interpretive purposes.

In *Larson v. Valente*, the Court struck down a Minnesota statute exempting religious organizations from certain registration and reporting requirements if the organizations received more than 50% of their contributions from members because, "[t]he clearest command of the Establishment Clause is that one religious *denomination* cannot be officially preferred over another."¹⁵⁶ So, according to the Trump administration's own rationale, the refugee prioritization program violates the Establishment Clause; it favored Shia Muslim refugees over Sunni Muslim refugees.¹⁵⁷ Six of the seven countries in EO-1 are Sunni-majority, while only one—Iran—is predominantly Shia.¹⁵⁸ Therefore, the unavoidable effect of the administration's policy is that Sunni refugees were largely disfavored from entry into the United States to the benefit of Shia refugees. This government preference toward a specific religious sect is the kind of religious discrimination that left "the newly independent States . . . powerless to tax their citizens for the support of a denomination to which they did not belong [T]his reasoning led to the abolition of most [state denominations] by the 1780s, and led ultimately to the inclusion of the Establishment Clause . . . in 1791."¹⁵⁹ Finally, if this prioritization did not discriminate on a religious basis, then it raises the question as to why EO-2 removed language that prioritized claims of individuals from the minority religion in their country of origin. EO-2 attempted to "have its cake and eat

155. *Id. Sect*, MERRIAM-WEBSTER ONLINE DICTIONARY, <https://www.merriam-webster.com/dictionary/sect> (last visited Oct. 27, 2019) (The term "sect" is defined as "a religious group that is a smaller part of a larger group and whose members all share similar beliefs.").

156. *Larson v. Valente*, 456 U.S. 228, 244 (1982). "Denomination" and "sect" can be used interchangeably. *Denomination*, CAMBRIDGE DICTIONARY, <https://dictionary.cambridge.org/us/dictionary/english/denomination> (last visited Oct. 27, 2019) (defines denomination as "a religious group whose beliefs differ in some ways from other groups in the same religion"); thus, it is similarly defined as "sect." In other words, denomination and sect mean sub-groups with similar beliefs in the same religion.

157. See EO-2, *supra* note 38.

158. See generally WORLD POPULATION REVIEW, *supra* note 143.

159. *Larson*, 486 U.S. at 244-45.

it too” by refuting an intent to discriminate while revoking the prioritization program. But the damage had already been done.

Chief Justice Roberts concluded, however, that these cases are irrelevant, because “the admission and exclusion of foreign nationals is a ‘fundamental sovereign attribute exercised by the Government’s political departments largely immune from judicial control.’”¹⁶⁰ The next section explains that *Trump v. Hawaii* is not solely a national security case where the President receives deference; rather, it is an individual rights case that should have been placed in the crosshairs of strict scrutiny.¹⁶¹

III. Why President Trump’s Travel Bans Should Not Receive Deference

A. Presidents Receive Deference in Foreign Policy Matters

In Article II, the Framers vested “the executive power” in one President of the United States.¹⁶² This design was implemented to remedy the defects of the Articles of Confederation, which provided for a unicameral Congress.¹⁶³ The Founders concluded that the Articles were weak in its administration of the law.¹⁶⁴ A government created by the Articles stands in stark contrast to a unitary executive. Hamilton argued that a plural executive or multiple Presidents would create “mischiefs” and “dissension” like those

160. *Trump*, 138 S. Ct. at 241.

161. Some may argue that the Court could have invalidated the travel bans under other theories in the Fourteenth Amendment. Justice Sotomayor argued whether that the orders violated the animus principle announced in *Romer v. Evans*. *Trump v. Haw.* 138 U.S. at 2442 (Sotomayor, J., dissenting). Perhaps, it could be argued that the orders denied Muslims “equal dignity” under the law. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2595 (2015) (holding that the Fourteenth Amendment recognizes same-sex marriage). Neither theory is necessary in this case, however. The Free Exercise Clause is designed to ferret out religious-based discrimination sponsored by the government. See *Santeria*. But the Fourteenth Amendment is concerned with broad-group based discrimination, such as race, national origin, and alienage. Gender is given intermediate scrutiny status and it appears that the Court extended protections on basis of sexual orientation. *Romer v. Evans*, 517 U.S. 620 (1996) (holding that a state constitutional amendment that denied protected status to gays, lesbians, and bisexuals violated the Equal Protection Clause); *U.S. v. Windsor*, 570 U.S. 744 (2013) (invalidating the Defense of Marriage Act); *Obergefell*, 135 S. Ct. 2584. With emerging theories like animus and even equal dignity in *Romer* and *Obergefell*, the Fourteenth Amendment still has room to include new groups. Thus, it is not necessary to bleed these doctrines and create confusion. Free Exercise has developed its own rules and it is adequate to handle these sorts of cases. *Santeria*, 508 U.S. at 532 (explaining that the court uses strict scrutiny in Free Exercise cases). As I will prove, strict scrutiny is sufficient to resolve *Trump v. Hawaii*.

162. U.S. Const. art. II, § 1.

163. Saikrishna B. Prakash, *Hail to the Chief Administrator*, 102 YALE L.J. 991, 994-99 (1993).

164. *Id.*

which occurred between the Roman Consuls.¹⁶⁵ Accordingly, the Framers rejected a proposal to select three executives. They feared divisions on public policy, particularly in military affairs.¹⁶⁶ A unitary executive, on the other hand, can act unilaterally in response to emergencies with considerable “energy” and “dispatch.”¹⁶⁷ As a multimember body governed by rules and procedures, Congress is a slow-moving institution designed to produce more calculated and possibly better legislation.¹⁶⁸ While deliberation may be a virtue in domestic policy, it is a detriment in foreign affairs. As the attack on Pearl Harbor and the September 11 attacks demonstrate, foreign crises may occur at any time, and require a rapid response. Thus, the President is the only actor who “can respond to a looming threat or emergency.”¹⁶⁹ This is why Hamilton, in *Federalist* No. 70, identified an energetic executive as essential to repelling foreign invasions and thus is “the bulwark of national security.”¹⁷⁰

To this end, Article II grants the President broad authority as the Commander-in-Chief.¹⁷¹ Presidents have regularly used this authority to act unilaterally during wars and national emergencies, and have received deference from Congress in doing so. For example, President Abraham Lincoln suspended habeas corpus, seized railroads and issued the Emancipation Proclamation without statutory authorization.¹⁷² He “consistently maintained” that his role as Commander-in-Chief authorized these bold actions.¹⁷³ President Lincoln eventually sought and received legislative authorization for the presidential proclamation and executive order because of judicial criticism, yet Congress never insinuated that Lincoln had acted unconstitutionally.¹⁷⁴ Likewise, President Franklin D. Roosevelt routinely seized munition plants to avoid closures during World War II.¹⁷⁵ In 1943, Congress enacted the War Labor Disputes Act to provide a statutory basis for President Roosevelt’s seizures.¹⁷⁶ It recognized, however, that he “already had the necessary power” to seize.¹⁷⁷ This robust view of presidential power continued in the post-World War II era.

165. THE FEDERALIST NO. 70 (Alexander Hamilton).

166. Prakash, *supra* note 152, at 999.

167. Hamilton, *supra* note 154.

168. Robert J. Delahunty & John C. Yoo, *The Obama Administration’s Nonenforcement of Immigration Laws, the DREAM Act, and the Take Care Clause*, 91 TEX. L. REV. 812, 826 (2013).

169. *Id.* at 827.

170. Hamilton, *supra* note 154.

171. See Madison, *supra* note 16, at §1.

172. Delahunty & Yoo, *supra* note 157, at 819-21.

173. *Id.* at 819.

174. *Id.* at 820.

175. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 695-97 (1952) (Vinson, C.J., dissenting).

176. *Youngstown*, 343 U.S. at 697.

177. *Id.*

More recently, President George W. Bush argued in favor of a robust executive with plenary war powers.¹⁷⁸ He maintained that “no explicit congressional authorization” was needed to indefinitely detain suspected terrorists as “enemy combatants.”¹⁷⁹ Congress displayed a similar understanding of presidential power in the Authorization for Use of Military Force of 2001 (“AUMF”).¹⁸⁰ In its preamble, the AUMF declares that the Constitution empowers the President to act “to deter and prevent” terrorist attacks against the United States.¹⁸¹ Section 2 then grants broad presidential power to combat international terrorism, authorizing the President to use “all necessary and appropriate force” to respond to future terrorist attacks.¹⁸² The statute does not define “force.” Nor does it specify the targets of that force.¹⁸³ Congress delegated authority to the President to decide when force is “necessary and appropriate,” and how to apply that force on any person, organization, or nations “he determines” can prevent future terrorist activity.¹⁸⁴ As these examples show, unilateral Presidential action in national security affairs is consistent with this nation’s historical practices.

The Court instructs deference to the President in immigration matters because they are tied to national security and foreign policy issues.¹⁸⁵ In *Arizona v. United States*, they found that immigration enforcement requires “discretionary decisions” that “bear on [the United States’] international relations” because the President must “confer and communicate” with other nations regarding the presence, entry, and removal of their citizens.¹⁸⁶ *Trump v. Hawaii*’s Section 1182(f) shows that Congress defers to the President in this area, too. It has delegated vast discretion to the President to determine when a noncitizen can enter the United States.¹⁸⁷ Even if the courts should defer to the President in foreign affairs, deference was not warranted in *Trump v. Hawaii*. That case does not solely involve national security matters.

178. *Hamdi v. Rumsfeld*, 542 U.S. 507, 516 (2004).

179. *Id.*

180. Authorization for Use of Military Force Against Terrorists, 50 U.S.C. § 1541 (2001) [hereinafter “AUMF”].

181. *Id.*

182. *Id.*

183. *See generally id.*

184. *Id.*

185. *Ariz. v. U.S.*, 567 U.S. 387, 395-96 (2012). “The Government of the United States has broad, undoubted power over the subject of immigration and . . . Immigration policy can affect . . . diplomatic relations for the entire nation . . .”

186. *Id.* “Citizens” here means citizens of the foreign countries.

187. *See generally* Delahunty & Yoo, *supra* note 157, at 851-52.

B. *Trump v. Hawaii* is not Solely a National Security Case

Comparing *Trump v. Hawaii* to modern detention cases reveal that it is *not* the ordinary national security case—if it even should be described as such. In the detention cases, *Hamdi v. Rumsfeld*, 542 U.S. 507, 516 (2004), *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006) and *Boumediene v. Bush*, 553 U.S. 723 (2008), the petitioners challenged the President’s authority to detain them as “enemy combatants” during an armed conflict. Therefore, these cases directly implicated the President’s role as Commander-in-Chief. However, *Trump v. Hawaii*, like *Korematsu*, is a hybrid case involving an executive order which targets a constitutionally protected class where national security is only superficially related to the case. A comparison to *Hamdi*, *Hamdan*, and *Boumediene* highlights these differences.

In *Hamdi*, the petitioner was an American citizen that the U.S. military detained as an “enemy combatant” at Guantanamo Bay detention camp (“Guantanamo Bay”). Hamdi argued that the government violated his due process rights because it prevented him from challenging his detention; the government responded that the President’s role as Commander-in-Chief, and empowered him to detain anyone fighting against the U.S. without due process until the cessation of hostilities to “prevent captured individuals from returning to the field of battle.”¹⁸⁸ The Court employed the *Mathews v. Eldridge* balancing test to weigh Hamdi’s “private interest” in due process against the government’s “asserted interest” in preventing enemy forces from returning to the battlefield.¹⁸⁹ Ultimately, the Court held that the government violated the Due Process Clauses of the Fifth and Fourteenth Amendments because the risk of an erroneous detention was high since Hamdi could not challenge his status detention or designation as an “enemy combatant.”¹⁹⁰

In *Hamdan*, the petitioner was a Yemeni national detained at the Guantanamo Bay detention camp whom the federal government tried for “conspiracy ‘to commit . . . offenses triable by military commission.’”¹⁹¹ Hamdan argued that the Bush administration’s military commissions tried detainees in a manner violating Common Article 3 of the Geneva

188. *Hamdi*, 542 U.S. at 528 (“Hamdi emphasizes that this Court consistently has recognized that an individual challenging his detention may not be held at the will of the Executive without recourse to some proceeding before a neutral tribunal to determine whether the Executive’s asserted justifications for that detention have basis in fact and warrant in law.”); *see also id.* at 518.

189. *Id.* at 529-32 (quoting *Mathews v. Eldridge*, 424 U.S. 319, 355 (1976)).

190. *Id.* at 535; *see also id.* at 532 (“We therefore hold that a citizen-detainee seeking to challenge his classification as an enemy combatant must receive notice of the factual basis for his classification, and a fair opportunity to rebut the Government’s factual assertions before a neutral decisionmaker.”).

191. *Hamdan v. Rumsfeld*, 548 U.S. 557, 566 (2006).

Conventions.¹⁹² The government contended that Common Article 3 did not apply as the conflict with Al-Qaeda and the Taliban was not a “conflict not of an international character.”¹⁹³ The Court disagreed, finding that the Convention’s official commentaries instructed parties to give Common Article 3 an application that is “as wide as possible.”¹⁹⁴ Thus, the process afforded to Hamdan failed to grant the judicial protections which Geneva requires be given to enemy combatants.

In *Boumediene*, the petitioner, again a foreign national detained at Guantanamo Bay, asserted that the government deprived him of the constitutional right to habeas corpus by failing to provide him a “meaningful opportunity” to challenge his detention.¹⁹⁵ President George W. Bush maintained that the Suspension Clause did not extend to the individuals detained at Guantanamo Bay because Cuba held de jure political jurisdiction there.¹⁹⁶ However, the *Boumediene* Court held that the Suspension Clause “has full effect at Guantanamo Bay” because the United States exercised de facto control over the territory.¹⁹⁷ Furthermore, it held that the process Congress provided to detainees was not “an adequate substitute for the writ of habeas corpus” because it did not provide detainees sufficient opportunity to challenge their imprisonment or enable a court to “order the conditional release of an individual unlawfully detained.”¹⁹⁸

These detention cases are different from *Trump v. Hawaii*. The issues presented there were directly related to the President’s role as Commander-in-Chief. All three petitioners were enemy combatants who posed serious risks to national security. If not detained, they would have continued to fight the United States on the battlefield. This is evident from the circumstances of their capture. For example, the government asserted that the Northern Alliance captured Hamdi after a “battle with the Taliban.”¹⁹⁹ Hamdi was holding an assault rifle when he surrendered.²⁰⁰ The government inferred from this evidence that Hamdi was fighting as part of the Taliban, and thus

192. *Hamdan* 548 U.S. at 571.

193. *Id.* at 630. Common Article 3 only applies in conflicts of an international character. [hl-databases.icrc.org/applic/ihl/ihl.nsf/1a13044f3bbb5b8ec12563fb0066f226/466097d7a301f8c4c12563cd00424e2b](http://databases.icrc.org/applic/ihl/ihl.nsf/1a13044f3bbb5b8ec12563fb0066f226/466097d7a301f8c4c12563cd00424e2b). See commentary.

194. *Id.* at 631.

195. *Boumediene v. Bush*, 553 U.S. 723, 799 (2008) (quoting *INS v. St. Cyr*, 533 U.S. 289, 302 (2001)) (internal quotation marks omitted).

196. *Boumediene*, 553 U.S. at 753 (“[T]he [G]overnment says the Suspension Clause affords petitioners no rights because the United States does not claim sovereignty over the place of detention.”).

197. *Id.* at 770-71 (“The detainees . . . are held in a territory that, while technically not part of the United States, is under the complete and total control of our Government.”).

198. *Id.* at 771, 779.

199. *Hamdi*, 542 U.S. at 513.

200. *Id.*

posed a national security threat.²⁰¹ This inference justified his indefinite detention under the President's plenary war powers. In contrast, the order reviewed in *Trump v. Hawaii* does not involve enemy combatants detained on the battlefield. It involves "ordinary" men, women, and children who have not attacked the United States.²⁰² The order says that individuals pose a security threat not because of their own actions, but rather because of their religious affiliations. Thus, *Trump v. Hawaii*'s national security issues appear to be secondary to discrimination claims—just like in *Korematsu*.

Both *Trump v. Hawaii* and *Korematsu* involved allegations of bigotry against constitutionally protected classes, implicating the First and Fourteenth Amendments respectively. In both cases, the national security claims are secondary to the group-based discrimination claims. There is no evidence that an "[undocumented person] or class of [undocumented people]" from the covered nations in the travel bans are planning to attack the United States as occurred at Pearl Harbor or on September 11—or that being from those places made them more of a threat than someone from another country.²⁰³ Similarly, concerns of foreign espionage and invasion were superficial in *Korematsu*. The race-based exclusion of Japanese Americans rested on the abstract assertions that the military lacked adequate time to separate the loyal from the disloyal.²⁰⁴ Since the Court held that strict scrutiny applied in *Korematsu*, it should have applied to *Trump v. Hawaii* as well.²⁰⁵ Doing so now reveals the racial animus involved in the exclusion order.

C. The Travel Bans Do Not Survive Strict Scrutiny

Courts apply strict scrutiny when a government action infringes on a fundamental right or discriminates based on a "suspect classification," including race and religion.²⁰⁶ In these cases, courts should uphold the government's action only if it is narrowly tailored to serve a compelling state interest.²⁰⁷ Narrow tailoring requires that an action not be overinclusive or underinclusive.²⁰⁸ Government action is overinclusive if it "disadvantages

201. *Id.* at 513-517.

202. If they had, they would already be banned from the country per the INA's section 1182(f).

203. Alex Nowrasteh, *New Government Terrorism Report Provides Little Useful Information*, CATO INSTITUTE (Jan. 16, 2018) (finding that American citizens were responsible for 78% of deaths in terrorism attacks on U.S. soil).

204. *Korematsu*, 323 U.S. at 219 ("It was because we could not reject the finding of the military authorities that it was impossible to bring about an immediate segregation of the disloyal from the loyal that we sustained the validity of the curfew order as applying to the whole group.").

205. *Id.* at 216.

206. Richard H. Fallon, Jr., *Strict Judicial Scrutiny*, 53 UCLA L. REV. 1267, 1269 (2007).

207. *Id.* at 1316.

208. Adam Winkler, *Fatal in Theory and Strict in Fact: An Empirical Analysis of Strict Scrutiny in the Federal Courts*, 59 VAND. L. REV. 793, 802-06 (2006).

some people who do not . . . threaten the state's interest."²⁰⁹ The *Korematsu* Court readily admitted that "most" of the relocated Japanese "were loyal to [the United States]."²¹⁰ So it was overinclusive; it treated loyal Americans as harshly as the disloyal. Government action is underinclusive when it "fails to regulate activities that pose" the same threat to the purported interest as the regulated conduct.²¹¹ On this point, *Korematsu* fails by its own logic. The nation was also at war with Germany and Italy during World War II. Revealingly, the government did not relocate either Germans or Italians, and conducted "investigations and hearings to separate the loyal from the disloyal" among them.²¹² This is important because such fact-finding might have proven that Japanese Americans were loyal, yet they were denied that opportunity because of a supposed military imperative.²¹³ From the government's logic, that imperative existed with respect to Germans and Italians as well. Those groups were not denied the opportunity to prove their loyalty. Therefore, the relocation order was both underinclusive and overinclusive.²¹⁴ Similarly, the travel bans present no evidence of a real national security threat or that those barred from entry are detrimental to the United States. As the next section will show, the order is both overinclusive and underinclusive, revealing that the claimed national security interests are shams exposing anti-Muslim sentiments.²¹⁵ When analyzed this way, campaign statements are not needed. Rather, the text and structure of the order are enough to reveal the constitutional violations.

I now apply strict scrutiny to the orders in *Trump v. Hawaii*. The compelling state interest is stated in the titles of the respective orders. For example, EO-1 is aimed to "[p]rotect[] the Nation from Foreign Terrorist Entry into the United States."²¹⁶ In the abstract, protecting the country from foreign terrorism is a compelling interest; however, narrow tailoring requires that the order precisely achieves its specific goal in a manner least restrictive to civil liberties.²¹⁷ As previously discussed, a reviewing court should inquire into whether the orders were overinclusive or underinclusive.²¹⁸ The bans are not narrowly tailored. They are overinclusive as they offer no

209. George P. Choundas, *Neither Equal Nor Protected: The Invisible Law of Equal Protection, The Legal Invisibility of Its Gender-Based Victims*, 44 EMORY L.J. 1069 (1995).

210. *Korematsu*, 323 U.S. at 219.

211. Fallon, *supra* note 189, at 1328.

212. *Korematsu*, 323 U.S. at 241 (Murphy, J. dissenting).

213. *Id.* at 241.

214. *Id.* at 241.

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

216. See EO-1, *supra* note 32.

217. *Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493 (1989). That prong requires that there is a precise "fit" or "exact connection" between the government objective and the means chosen to achieve those objectives. Winkler, *supra* note 191, at 802-06.

218. Winkler, *supra* note 191, 802-806.

guidance as to how consular officers should conduct case-by-case assessments to grant visa waivers, allowing the administration to deny visas to Muslim applicants, even those that satisfied the administration's security terms.²¹⁹ Justice Stephen Breyer, in his Dissenting Opinion, illustrates the orders' overinclusive-ness, highlighting the fact that "[w]hile more than 15,000 Syrian refugees arrived in the United States in 2016, only 13 have arrived since January 2018."²²⁰ This suggests that the administration's waiver system is excluding applicants for religious reasons; even as the administration "claim[s] that the Proclamation rests on security needs . . . it is excluding Muslims who satisfy the Proclamation's own terms."²²¹ An order justified by national security that excludes those who do not affect national security is by definition overinclusive. Although the order does not facially contain these consequences, it is being applied in a way which does—and should therefore be reviewed in a way reflecting that.

The travel ban orders are simultaneously underinclusive. They omit countries that remain hotbeds for terrorist activity, such as Iraq and Afghanistan, while including two non-Muslim countries, Venezuela and North Korea, which do not in any way prevent foreign terrorists from entering the United States.²²² Furthermore, North Korea does not willingly allow citizens to travel outside of its borders, and there were already sanctions in place restricting the entry of North Korean nationals to the United States.²²³ The inclusion of Venezuela and North Korea appears to be pretextual, "if not entirely symbolic."²²⁴ A ban on the entry of Martians would be just as necessary. Moreover, the ban on Venezuelans only applies to a "handful of Venezuelan government officials and their immediate family members," presumably for political reasons.²²⁵ Therefore, "the President's inclusion of North Korea and Venezuela does little to mitigate the anti-Muslim animus that permeates the Proclamation."²²⁶ Furthermore, including Chad on the suspension list is puzzling, since "[t]he number of Chadian refugees allowed into the U.S. in the 2017 fiscal year was seven, according

219. *Trump*, 138 U.S. at 2431-33.

220. *Id.* at 2431.

221. *Trump*, 138 U.S. at 2430 ("How could the Government successfully claim that the Proclamation rests on security needs if it is excluding Muslims who satisfy the Proclamation's own terms? At the same time, 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.").

222. *Id.* at 2442 (Sotomayor, J., dissenting).

223. *Id.*

224. *Id.*

225. *Trump*, 138 U.S. at 2431-33.

226. *Id.*

to a State Department database.”²²⁷ Since there were so few Chadians entering the country as it is, prohibiting their further entry seems unlikely to affect national security at all. More likely, the administration included them to add a country outside of the Middle East to the exclusion list, thus further obscuring the order’s anti-Muslim bias. Think back to *McCreary*, and the dilution of their religious motive with secular documents. If the ban on Muslims is the President’s liquor, he attempts to dilute it with the inclusion of North Korea, Venezuela, and Chad. Simply put, the means do not fit the end.

Conclusion

Under Section 1182(f), *Trump v. Hawaii* grants unfettered discretion to Presidents to impose suspensions of entry of foreign nationals into the United States.²²⁸ Therefore, Congress must reassert itself in immigration policy. For instance, Congress may require the President to notify it before he imposes other travel bans. Congress can amend Section 1182(f) in its yearly National Defense Authorization Act (“NDAA”). It may also require congressional approval of such bans after a period of time. This is not a novel idea. Congress did this previously, by requiring the President to notify it 30 days before he transferred a detainee from Guantanamo Bay to another country.²²⁹ It went further and banned construction of any detention facility in the United States for Guantanamo Bay detainees.²³⁰ The President might be inclined to sign an act with such restrictions, because the NDAA allocates over 700 billion dollars to the United States Department of Defense annually.²³¹

227. Krishadev Calamur, *Why Was Chad Included in the New Travel Ban? The Country Is A Key U.S. Counterterrorism Ally*, THE ATLANTIC (Sept. 26, 2017).

228. *Trump*, 138 U.S. at 2408 (“By its plain language, §1182(f) grants the President *broad discretion* to suspend the entry of aliens into the United States . . . By its terms, §1182(f) *exudes deference* to the President in every clause.”) (emphasis added).

229. National Defense Authorization Act for Fiscal Year 2014, 10 U.S.C. § 3744 § 1035(d) (2014) (“The Secretary of Defense shall notify the appropriate committees of Congress of a determination of the Secretary under subsection (a) or (b) *not later than 30 days before the transfer or release of the individual under such subsection.*”) (emphasis added).

230. 10 U.S.C. § 1033(a) (“No amounts authorized to be appropriated or otherwise made available to the Department of Defense may be used during the period beginning on the date of the enactment of this Act and ending on December 31, 2014, to construct or modify any facility in the United States, its territories, or possessions to house any individual detained at Guantanamo . . .”).

231. See FY 2020 NATIONAL DEFENSE AUTHORIZATION ACT EXECUTIVE SUMMARY, <https://www.armed-services.senate.gov/imo/media/doc/FY%202020%20NDAA%20Executive%20Summary.pdf> (last visited Oct. 27, 2019) (“The NDAA supports a total of \$750 billion in fiscal year 2020 funding for national defense, in line with the budget request . . .”). While President Obama expressed constitutional reservations about the notification requirement, he still signed the bill into law: “[T]he Congress has enacted unwarranted and burdensome restrictions that have impeded my ability to transfer detainees from Guantanamo Section 1035 does not, however, eliminate all of the unwarranted limitations on foreign transfers and, in certain circumstances, would violate constitutional separation of powers principles.” Press Release, Statement by the President on H.R.

If the President places himself in a standoff with Congress over these restrictions, like the historic 35-day government shut down, then Congress should consider radical measures.²³² *Trump v. Hawaii* presents serious consequences. The President now can impose any restriction as a requirement for entry in this country.²³³ Those restrictions are limitless, and could conceivably include bans, detentions, interviews, and even interrogations.²³⁴ Since this President stated that he would use torture during interrogations of suspected terrorists, he can evoke Section 1182(f) to accomplish illegal and unconstitutional goals.²³⁵ He has already done so. The travel bans arguably committed several constitutional violations: (1) Oath, (2) Nobility, (3) Bill of Attainder, (4) Corruption of Blood, (5) Establishment and (6) Free Exercise Clauses.²³⁶ There were possible Due Process and Equal Protection arguments available to plaintiffs too.²³⁷ There were, depending on the strength of these arguments, eight possible constitutional grounds to make claims against the President. The solution is neither easy nor politically desirable.

The normal means to check a President is two-fold: the ballot box and legislative oversight.²³⁸ The voters can punish either the President or his

3304 (Dec. 26 2013), <https://obamawhitehouse.archives.gov/the-press-office/2013/12/26/state-ment-president-hr-3304>.

232. *Government Shutdown 2019*, POLITICO, <https://www.politico.com/latest-news-updates/government-shutdown-2019> (last visited Oct. 27, 2019).

233. There are no textual limitations on the restrictions the President can impose on immigrant entry into the Nation: “Whenever the President finds that the entry of any aliens . . . would be detrimental to the [national interests], he may . . . impose on the entry of aliens *any restrictions* he may deem to be appropriate.” 8 U.S.C. § 1182(f).

234. *Trump*, 138 S. Ct. at 2408 (“[Section] 1182(f) vests the President with ‘ample power’ to impose entry restrictions in addition to those elsewhere enumerated in the INA.”).

235. ‘*I’d Bring Back A Hell Of A Lot Worse Than Waterboarding*’ – *Trump At Debates*, RT (Feb. 7, 2016, 10:07 AM), <https://www.rt.com/usa/331629-trump-debates-waterboarding-republi-can/> (“I’ll tell you what, in the Middle East, we have people chopping the heads off Christians. We have people chopping the heads off many other people. We have things that we have never seen before, as a group . . . I would bring back waterboarding and I’d bring back a hell of a lot worse than waterboarding.”).

236. U.S. CONST. article II, § 1, cl. 8: (“I do solemnly swear (or affirm) that I will faithfully execute the Office of President of the United States, and will to the best of my Ability, preserve, protect and defend the Constitution of the United States.”); *Adarand Constructors v. Peña*, 515 U.S. 200, 239 (1995) (Scalia, J. concurring) (arguing that government sponsored racial discrimination violates the Nobility, Attainder, and No Corruption of Blood Clauses); perhaps, similar arguments can be made against government sponsored religious discrimination using these Clauses. *See, e.g., McCreary*, 545 U.S. 844 (2005) (finding that government litigation positions do not erase its religious purpose); *Santeria* (identifying a religious gerrymander).

237. *Romer*, 517 U.S. 620, 632 (1996) (striking down government action inspired by animus); *Obergefell*, 135 S. Ct. 2584 (2015) (finding that the Fourteenth Amendments protects an individual’s dignity under the law).

238. *See* Robert Longley, *Congressional Oversight and the U.S. Government*, THOUGHTCO (May 25, 2019), <https://www.thoughtco.com/congressional-oversight-4177013>; Tom Murse, *One-Term US Presidents, List of Incumbent U.S. Presidents Denied Re-Election*, THOUGHTCO (July 3,

party at the polls, but this opportunity only occurs every two or four years, leaving plenty of time for executive abuse.²³⁹ Constitutional checks, however, should prevent this malfeasance. But when the Court interprets executive discretion to such an extent that it untethers him from the Constitution itself, then normal political checks, even judicial review, may no longer be effective against a rogue President. *Trump v. Hawaii*'s submission to President Trump's unconstitutional conduct can destroy the Republic, and give ultimate power to the very sort of demagogue which the Founders feared. This is no time for slow deliberation. In these circumstances, Congress may have to consider a nuclear option.

As of this writing, it is doing so against President Trump—albeit for different reasons. In addition to their potential Articles of Impeachment, the United States House of Representatives should pass the following article:

Impeaching, President of the United States for high crimes and misdemeanors, in violation of his constitutional oath to faithfully execute the Office of President of the United States and, to the best of his ability, preserve, protect, and defend the Constitution of the United States, and in violation of his constitutional duty to take care that the laws be faithfully executed, enforced policies upon religious minorities that violated the Establishment and Free Exercise Clauses and statutes enacted to stop them.²⁴⁰

The article will not pass the Senate.²⁴¹ The Senate has never removed a President from office.²⁴² But impeachment would make a statement that is not a dog whistle, but a blowhorn.

2019), <https://www.thoughtco.com/one-term-us-presidents-3322257> (“There have been nearly a dozen one-term presidents who ran for second terms but were denied by voters, but only three one-term presidents since World War II. The most recent one-term president who lost his re-election bid was George H.W. Bush, a Republican who lost to Democrat Bill Clinton in 1992.”).

239. Niall McCarthy, *Historically, The President's Party Performs Poorly In The Midterms*, FORBES (Oct. 9, 2018), <https://www.forbes.com/sites/niallmccarthy/2018/10/09/historically-the-presidents-party-performs-poorly-in-the-midterms-infographic/#4620e3ca6732> (“Since 1946, the average midterm loss for the president's party is 25 seats.”).

240. See *Approved Articles Impeaching William Jefferson Clinton, President of the United States, for High Crimes and Misdemeanors*, WASH. POST (Dec. 20, 1998), <https://www.washingtonpost.com/wp-srv/politics/special/clinton/stories/articles122098.htm>

241. While the Democratic Party controls the U.S. House of Representatives, President Trump's party—the Republican Party—controls the Senate. Thus, his removal from office is nearly impossible. *Senate Election Results 2018*, CNN, <https://www.cnn.com/election/2018/results>.

242. Tara Law, *What to Know About the U.S. Presidents Who've Been Impeached*, TIME (May 13, 2019), <https://time.com/5552679/impeached-presidents/> (“Impeaching an American President is rare. It's only happened twice in American history—to Presidents Andrew Johnson and Bill Clinton—and neither of those times resulted in a president being removed from office.”).
