THE TRAVEL BAN CASES: A TALE OF TWO GOVERNMENTS

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ABSTRACT

One of the first official acts of the Trump Administration was the issuance of an Executive Order banning nationals of seven Muslim-majority nations from entry into the United States. This triggered a cascade of litigation, as judges at all levels of the United States federal court system, including the Supreme Court, opined on the travel ban amidst a contentious and ideologically charged debate over immigration, national security and an unconventional President. This article examines the travel ban cases from a socio-legal perspective, drawing from the qualitative methodology of narrative. It tells the social story embedded in the legal story of judges engaged in a spirited, public discourse over the country's foundational values and governing norms to justify and explain their

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decisions. Understanding methods of constructing adversarial tales illuminates the role of ideology and values in the judicial decision-making process, and sheds light on how the judiciary is responding to the Trump administration's willingness to challenge and stretch existing norms and laws.

INTRODUCTION

One of the first official acts of the Trump Administration was the issuance of an Executive Order banning nationals of seven Muslim-majority nations from entry into the United States in the name of national security.[1] This triggered a cascade of litigation, with advocates using the judicial system as a potential bulwark against executive actions. The United States Supreme Court had the final word and upheld the travel ban on both statutory and constitutional grounds, contrary to all but one of the lower district courts.[2]

Over an eighteen-month period, from January 2017 until June 2018, thirty-seven judges, including nine Supreme Court justices, opined on the legality of the travel ban.[3] This occurred amidst a contentious and ideologically charged public debate dominated by President Trump's incendiary anti-Muslim rhetoric.[4] The travel ban cases reflect a particularly heady stew of ideological differences, implicating both immigration and national security. The United States has a long and fitful history regarding immigration, with dueling narratives at its heart.[5] Americans view immigrants as building or destroying the country, from within or from outside, and have targeted Muslims from foreign countries since the post-9/11 "War on Terror."[6]

The judiciary went beyond its purpose of deciding the legality of the ban. The judges also engaged in a spirited, public discourse over foundational values and governing norms, including: whether America welcomes or excludes immigrants, the proper balance of power between the President and Congress regarding national security and immigration, and how to consider the President's norm-breaking behavior.

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

[2] This Executive Order goes by many names, including its official name and various public iterations such as the "Muslim ban." When not using the official name or its abbreviation, I chose the most common public usage, the "travel ban" or its shortened version, the "ban." Washington v. Trump, 847 F.3d 1151 (9th Cir. 2017); Louhghalam v. Trump, 230 F. Supp. 3d 26 (D. Mass. 2017); Aziz v. Trump, 234 F. Supp. 3d 724 (E.D. Va. 2017); Washington v. Trump, No. C17-0141JLR, 2017 WL 462040 (W.D. Wash. Feb. 3, 2017).

[3] *See Washington v. Trump*, 847 F.3d; *Louhghalam*, 230 F. Supp. 3d; *Aziz*, 234 F. Supp. 3d; *Washington v. Trump*, 2017 WL.

[4] *See* Table 2.

[5] Paul Brickner & Meghan Hanson, *The American Dreamers: Racial Prejudices and Discrimination as Seen through the History of American Immigration Law*, 26 T. JEFFERSON L. REV. 203 (2004).

[6] *Id.*

Traditional legal analysis and quantitative measurement of outcomes fail to capture the influence of ideologies and cultural beliefs on judicial decision-making.[7] This aspect of legal opinions is the province of storytelling and narrative. As Amsterdam and Bruner explain in their seminal study, *Minding the Law*, the law is "awash in storytelling" and "judges and lawyers must inevitably rely upon culturally shaped processes of categorizing, storytelling, and persuasion in going about their business."[8] Similarly, as Theda Skocpol observes, the Court is a "profoundly rhetorical institution . . . affected by moral understandings deeply embedded in political discourse." [9]

In short, judicial opinions are a form of social, cultural and political dialogue. Judges construct narratives to support particular legal outcomes, especially when contentious public issues are at stake. Thus, one may read such decisions on two levels. First, they present a legal story or a doctrinal analysis of the legal principles governing a specific dispute.[10] Second, they tell a social story that draws from facts about relevant actors and events to create a narrative, which justifies the legal result.[11]

To uncover the social story, this article examines the travel ban cases from a socio-legal perspective, drawing from the qualitative methodology of narrative. This approach examines the social stories embedded in these cases and explores how competing narratives led to different outcomes. Understanding the construction of such adversarial tales can "illuminate the judicial decision-making process" and the influence of ideologies.[12] It can also shed light on the

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[7] ANTHONY AMSTERDAM & JEROME BRUNER, MINDING THE LAW 7 (2000).

[8] *Id.* at 110.

[9] THEDA SKOCPOL, SOCIAL POLICY IN THE UNITED STATES: FUTURE POSSIBILITIES IN THE HISTORICAL PERSPECTIVE 128 (1995).

[10] AMSTERDAM & BRUNER, *supra* note 7.

[11] Simon Stern, *Narrative in the Legal Text: Judicial Opinion and their Narratives*, *in* NARRATIVE AND METAPHOR IN THE LAW 121 (Michael Hanne & Robert Weisberg eds., 2018).

[12] Steven D. Jamar, *Everything Old is New Again: An Essay Review of Anthony G. Amsterdam & Jerome Bruner, Minding the Law* 22 PACE L. REV. 155, 160 (2001). The law and judicial decision-making are traditionally viewed as neutral and objective enterprises. Often referred to as legal positivism, this traditional view rejects the notion that values and ideology play any role in the law. Brian Z. Tamanaha, *Socio-Legal Positivism and a General Jurisprudence* 21 OXFORD J. LEGAL STUD. (2001). A contrary view is that neutral decisions are aspirational and subjectivity is as much a part of judging as objective legal principles. A substantial, long-standing body of research finds that judicial decision-making reflects both contemporary moral understandings and judges' own ideologies. *See* GLENDON SCHUBERT, THE JUDICIAL MIND: THE ATTITUDES AND IDEOLOGIES OF SUPREME COURT JUSTICES 1946–1963 (1965); JEFFREY A. SEGAL & HAROLD J. SPAETH, THE SUPREME COURT AND THE ATTITUDINAL MODEL (1993); CASS R. SUNSTEIN, DAVID SCHKADE, LISA M. ELLMAN & ANDRES SAWICKI, ARE JUDGES POLITICAL?: AN EMPIRICAL ANALYSIS OF THE FEDERAL JUDICIARY (2006); Frank B. Cross & Emerson H. Tiller, *The Three Faces of Federalism: An Empirical Assessment of Supreme Court Federalism Jurisprudence* 73 S. CAL. L. REV. 741

judiciary's response to what former federal Judge Nancy Gertner calls the "Time of Trump."[13]

METHODOLOGY

Narrative research analyzes how people interpret, understand, and represent the world around them.[14] Its vehicle is spoken or written stories that describe a lived experience, contested event, or human plight.[15] A court decision is a particular type of story in which judges have reconciled or reinterpreted competing narratives offered by plaintiffs and defendants. To structure their story, judges make a series of narrative and rhetorical choices. For example, they emphasize certain facts over others and interpret legal principles and precedents in different ways. Ultimately, they must knit the facts and law together to provide a coherent and persuasive rationale for the outcome. The travel ban cases present a rich opportunity to explore judicial story telling in decision-making.

This study draws from a subset of cases challenging the Trump Administration's three successive iterations of the ban. To locate these cases, I used a database maintained by The Civil Rights Litigation Clearinghouse at the University of Michigan Law School, which identifies, tracks, and collects data on many civil rights issues, such as the travel ban.[16] This database includes

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(2000); James L. Gibson, *Judge's Role Orientations, Attitudes, and Decisions: An Interactive Model* 72 AM. POL. SCI. REV. 911 (1978); Francine S. Romero, *The Supreme Court and the Protection of Minority Rights: An Empirical Examination of Racial Discrimination Cases*, 34 LAW & SOC'Y REV. 291 (2000); Jeffery A. Segal & Albert D. Cover, *Ideological Values and the Votes of U.S. Supreme Court Justices* 83 AM. POL. SCI. REV. 557 (1989); Jeffery A. Segal, *Predicting Supreme Court Cases Probabilistically: The Search and Seizure Cases,* 1962–1984 78 AM. POL. SCI. REV. 891 (1984). These studies use a common empirical approach that links judges' political affiliation and other markers of ideological identity with case outcomes. As an example, Segal and Spaeth's 1993 analysis of United States Supreme Court decisions since 1953 concludes that the political affiliation of judges as either liberals or conservatives more accurately indicates case outcomes than facts or legal principles. Sunstein, Schkade, Ellman, and Sawicki's more recent, nuanced study of appellate courts found that Republican and Democrat appellate justices agree more often than they disagree and are influenced by their colleagues, regardless of political affiliation. However, in hot button cases or when the law is especially unclear, this influence wanes and ideological associations become predictive of outcomes.

[13] Nancy Gertner, *The "Lower" Federal Courts: Judging in a Time of Trump*, 93 IND. L.J. 83 (2018). For an early view of the judicial response to the Trump Administration.

[14] CATHERINE K. RIESSMAN, NARRATIVE METHODS FOR THE HUMAN SCIENCES (2008).

[15] *Id.*

[16] University of Mich. Law School, *Civil Rights Challenges to Trump Refugee/Visa Order*, CIVIL LITIGATION CLEARING HOUSE, https://www.clearinghouse.net/results.php?saveRef=pl&search=source%7Cgeneral%3BspecialCollection%7C44%3Borderby%7CfilingYear%3B ..[https://www.clearinghouse.net/results.php?searchSpecialCollection=44].

thirty-four cases filed between January and December 2017 challenging the travel ban.[17] The plaintiffs in these cases ranged from individuals directly affected by the ban requesting habeas corpus relief, to advocacy and religious organizations or state actors requesting wider relief on behalf of a class of people.[18] I did not analyze cases that did not result in a court decision on the merits of the case, either because they were settled, withdrawn, or adjourned pending resoultion of other cases. I also reviewed the pleadings and memoranda filed in the primary case *Trump v. Hawaii* and the text of the two Executive Orders, and the Proclamation related to the travel ban.[19]

The final sample includes eleven court opinions—six from district courts, four from appellate courts, and one from the Supreme Court.[20] As noted above, nine of these eleven courts ruled against the ban, with the exception of one district court and the Supreme Court.[21] Overall, thirty-seven judges had an opportunity to opine on the travel ban, with twenty-three voting to overturn it, and fourteen to uphold it.[22]

To analyze narratives, one may choose to identify themes across a group of stories, use a story-telling approach to examine the features of a story (i.e. plot, characters, and genre), or use a literary approach.[23] This study involves a group of stories—court decisions crafted by individual judges, including minority and dissenting views—that are most suitable to the first approach. More specifically, this study uses thematic analysis as a "method for identifying, analyzing, and reporting patterns (themes) within data."[24] This approach identifies themes

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[17] *Id.*

[18] *Id.*

[19] Trump v. Hawaii, 138 S. Ct. 2392 (2018); Exec. Order No. 13780, 82 Fed. Reg. 13,209 (Mar. 6, 2017); Exec. Order No. 13769, 82 Fed. Reg. 8977 (Jan. 27, 2017).

[20] *See* Table 1.

[21] *See id.*

[22] In federal appeals courts—a court that reviews district court decisions—multiple judges preside over a case and decisions often take the form of both a majority and dissenting opinion, which are all included in the judge tallies. Several judges heard multiple versions of the ban, but the study counts their decisions only once. In a Ninth Circuit case, the federal government filed a motion to reconsider a district court decision to enjoin enforcement of EO-2 en banc, which allowed each of the court's appellate judges to rule on the motion, rather than a panel. Washington v. Trump, 847 F.3d 1151 (9th Cir. 2017). Although the Ninth Circuit denied the motion, five dissenters took the unusual step of issuing a substantive opinion on the travel ban, which this analysis includes in the final tally of judges. *Id.* The final tally of opinions does not include the reconsiderations, because the majority already opined on the issue in a separate opinion.

[23] JOHN W. CRESWELL, QUALITATIVE INQUIRY & RESEARCH DESIGN: CHOOSING AMONG FIVE APPROACHES 72 (3rd ed. 2013); Donald E. Polkinghorne, *Narrative Configuration in Qualitative Analysis*, 8 INT'L J. QUALITATIVE STUD. EDUC. 5 (1995).

[24] Virginia Braun & Victoria Clarke, *Using Thematic Analysis in Psychology*, 3 QUALITATIVE RESEARCH IN PSYCHOLOGY 77, 79, 101 (2006).

across cases, including differences and similarities in how judges framed the facts of cases, characterized certain events, and described major actors.[25] I also analyze the judges' oratorical language using a "micro linguistic approach and probing for the meaning of words, phrases, and larger units of discourse."[26] I discuss in greater depth those cases that exemplify common themes and patterns that were key to the overall litigation, including the Supreme Court's decision in *Trump v. Hawaii*.[27]

BACKGROUND AND CONTEXT

On December 7, 2015, then-Presidential-candidate Donald Trump issued a formal statement "calling for a total and complete shutdown of Muslims entering the United States."[28] Throughout his campaign, Trump continued to advocate for the ban and on January 27, 2017, in the first week of his Presidency, issued Executive Order 13769 ("EO-1") entitled "Protecting the Nation from Foreign Terrorist Entry into the United States."[29] As the basis of EO-1, Trump cited the terrorist attacks of September 11, 2001 and the threat of terrorism, generally.[30] EO-1 made several changes to immigration policy, including suspending the entry of nationals from seven countries—Iraq, Iran, Libya, Somalia, Sudan, Syria, and Yemen[31]—capping the number of accepted refugees at 50,000, suspending the entry of Syrian refugees indefinitely,[32] and suspending the United States Refugee Admissions program for 120 days,[33] subject to case-by-case exemptions.[34] Upon resumption of refugee admissions, EO-1 allowed the Secretary of State to prioritize refugee claims based on religious persecution, where a refugee's religion is the minority in their country of nationality.[35]

During this suspension period, EO-1 required the Secretary of State, the Secretary of Homeland Security, and the Director of National Intelligence to evaluate the United States' visa, admission, and refugee programs, in order to present a list to the President of countries whose foreign nationals would be

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[25] *Id.*

[26] JOHN W. CRESWELL & CHERYL N. POTH, QUALITATIVE INQUIRY & RESEARCH DESIGN 73 (4th ed. 2018).

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

[28] Press Release, Donald J. Trump, U.S. President, Statement on Preventing Muslim Immigration (Dec. 7, 2015) https://www.donaldjtrump.com/press-releases/donaldj.-trump-statement-on-preventing-muslim-immigration.

[29] Exec. Order No. 13769, 82 Fed. Reg. 8977 (Jan. 27, 2017).

[30] *Id.*

[31] *Id.* § (3)(c).

[32] *Id.* § (5)(c).

[33] *Id.* § (5)(a).

[34] *Id.* § (3)(g).

[35] *Id.* § (5)(b).

prohibited from entering the United States.[36] EO-1 described the suspension period as necessary to "temporarily reduce investigative burdens on relevant agencies during the review period . . . to ensure the proper review and maximum utilization of available resources for the screening of foreign nationals, and to ensure that adequate standards are established to prevent infiltration by foreign terrorists and criminals."[37] It also allowed the Secretaries of State and Homeland Security to issue visas to otherwise-excluded nationals on a case-by-case basis if doing so is in the national interest.[38]

The effects of EO-1 were immediate and widespread, resulting in the cancellation of visas and stranding travelers from the listed countries. [39] Within three days, lawsuits began demanding emergency relief in the form of a Temporary Restraining Order (TRO) making EO-1 unenforceable.[40] Plaintiffs cited a panoply of constitutional provisions and statutory law to support their cases.[41] In this first round of litigation, courts relied primarily on the First Amendment's Establishment Clause, which prohibits the government from favoring or disfavoring one religion over another. [42] At the center of the First Amendment claims were President Trump's public statements made through Twitter, media outlets, and political rallies that displayed anti-Muslim animus.[43] Overall, three lower federal courts and the Ninth Circuit issued decisions on EO-1.[44] With the exception of the District Court of Massachusetts, these courts ruled against the enforcement of EO-1.[45]

On March 6, 2017, six weeks after he issued EO-1 and several court losses later, President Trump replaced EO-1 with a second Executive Order.[46] EO-2 bore the same title as EO-1 and reinstated the travel ban for citizens of Iran,

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[36] *Id.* §§ (3)(a)–(b).

[37] *Id.* § (3)(c).

[38] *Id.* § (3)(g).

[39] Peter Baker, *Travelers Stranded and Protests Swell Over Trump Order*, N.Y. TIMES, Jan. 29, 2017, https://www.nytimes.com/2017/01/29/us/politics/white-house-official-in-reversal-says-green-card-holders-wont-be-barred.html.

[40] Aziz v. Trump, 234 F. Supp. 3d 724 (E.D. Va. 2017); Washington v. Trump, No. C17-0141JLR, 2017 WL 462040 (W.D. Wash. Feb. 3, 2017).

[41] Other laws cited included the Administrative Procedure Act, 5 U.S.C. § § 55–559 (1994); the Fourteenth Amendment Due Process, U.S. Const. amend. XIV, § 2, Equal Protection Clauses, U.S. Const. amend. XIV, § 3, and The Religious Freedom Restoration Act 42 U.S.C. § 2000bb (1993).

[42] Washington v. Trump, 847 F.3d 1151 (9th Cir. 2017); Louhghalam v. Trump, 230 F. Supp. 3d 26 (D. Mass. 2017); *Aziz*, 234 F. Supp. 3d.

[43] *See* Table 2.

[44] *Washington v. Trump*, 847 F.3d; *Louhghalam*, 230 F. Supp. 3d; *Aziz*, 234 F. Supp. 3d; *Washington v. Trump*, 2017 WL 462040 (order granting temporary restraining order).

[45] *Compare Washington v. Trump*, 847 F.3d at 1169, *Aziz*, 234 F. Supp. 3d at 724, *and Washington v. Trump*, 2017 WL 462040 at *3, *with Louhghalam*, 230 F. Supp. 3d at 38.

[46] Exec. Order No. 13780, 82 Fed. Reg. 13,209 (Mar. 6, 2017).

Libya, Somalia, Sudan, Syria, and Yemen,[47] but removed Iraq from the list.[48] EO-2 continued suspension of the United States Refugee Admissions program and maintained the 50,000-refugee cap.[49] It clarified that the ban only applied to individuals outside the United States without a valid visa prior to the effective date of EO-2,[50] and did not apply to Lawful Permanent Residents (LPRs), dual citizens traveling with a passport issued by a country not on the banned list, nor asylees or refugees already admitted to the United States.[51] Further, it eliminated the minority religion preference, specifically disavowing that any religious animus motivated EO-2.[52]

EO-2 expressed detailed national security concerns. Referencing United States government documents and statistics, it described certain countries at issue, the number of persons from those countries convicted of terrorism-related crimes in the United States, and the number of refugees currently investigated for counterterrorism.[53] EO-2 described those countries as either "a state sponsor of terrorism ...[or] significantly compromised by terrorist organizations, or contain[ing] active conflict zones."[54] With national security concerns at the foundation of EO-2, the ban asserted that the listed countries were unable or unwilling to cooperate fully with the visa or refugee-vetting process, heightening the risk that individuals from these countries were "terrorist operatives or sympathizers."[55] EO-2 directed the Secretary of Homeland Security, in consultation with the Secretary of State and the Director of National Intelligence, to conduct a "worldwide review" of additional information required from each country to ensure that visa applicants were not a threat to national security.[56]

Overall, two district courts and two circuit courts—the Fourth and Ninth Circuits—issued decisions on EO- 2.[57] All four courts ruled that EO-2 violated either the Establishment Clause or the Immigration and Nationality Act (INA).[58] In their decisions, judges relied on President Trump's public comments about

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[47] *Id.* § (2)(c).

[48] *Id.* § (1)(g).

[49] *Id.* §§ (6) (a)–(b).

[50] *Id.* § (3)(a).

[51] *Id.* § (3)(b).

[52] *Id.* § (1)(b)(4).

[53] *Id.* § (1)(e).

[54] *Id.* § (1) (d).

[55] *Id.* § (1)(d).

[56] *Id.* § (2)(a).

[57] Int'l Refugee Assistance Project v. Trump, 857 F.3d 554 (4th Cir. 2017); Hawaii v. Trump, 859 F.3d. 741 (9th Cir. 2017); Hawaii v. Trump, 241 F. Supp. 3d 1119 (D. Haw. 2017) (order granting temporary restraining order); Int'l Refugee Assistance Project v. Trump, 241 F. Supp. 3d 539 (D. Md. 2017).

[58] *See* Table 1.

the connections between EO-1 and EO-2 and statements portraying Muslims and the Muslim religion in a negative light, linked to terrorism.[59]

On September 24, 2017, President Trump replaced EO-2 with Proclamation No. 9645 ("Proclamation"), which differed in several respects from EO-1 and EO-2, including a new title: "Enhancing Vetting Capabilities and Processes for Detecting Attempted Entry Into the United States by Terrorists or Other Public-Safety Threats." [60] The Proclamation applied to eight countries,[61] five of which—Iran, Iraq, Lybia, Syria and Yemen—were included in EO-1 and EO-2.[62] The Proclamation banned three new countries—Chad, North Korea, and Venezuela[63]—and eliminated two—Somalia and Sudan.[64] Unlike the previous EOs, the Proclamation does not have a time limit. Rather it contains significant, indefinite restrictions on immigration from the designated countries, with the exception of Iraq.[65]

The countries were selected based on the world-wide review, conducted pursuant to EO-2 by the Department of Homeland Security, the State Department, and the Attorney General.[66] After reviewing the immigration and vetting procedures of foreign countries, restrictions were placed on seven countries based on their distinct circumstances.[67] For example, only certain government officials and their family members were restricted from entry from Venezuela,[68] while all nationals were suspended from entry from Iran, Syria, and North Korea.[69] Due to its relationship with the United States, no restrictions were placed on Iraq.[70] Overall, the restrictions did not apply to LPRs and foreign nationals who had been granted asylum or who were admitted to travel to the United States before the effective date of the Proclamation.[71] The Proclamation also provided for case-by-case waivers based on undue-hardship, where a foreign national's entry is in the national interest, and it would not pose a threat to public safety.[72] Finally, the proclamation directed DHS to reassess the entry restrictions on a continuing basis and to report to the President every 180 days.[73]

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[59] *See* Table 2.

[60] Proclamation No. 9645, 82 Fed. Reg. 45161 (Sept. 24, 2017).

[61] *Id.* § (1)(g).

[62] *Id.* § (2)

[63] *Id.*

[64] *Id.*

[65] *Id.* § (1)(h)(ii).

[66] *Id.* § (1)(c).

[67] *Id.* § (2)

[68] *Id.* § (2)(f).

[69] *Id.* § (2)(b), (d), (e).

[70] *Id.* § (1)(g).

[71] *Id.* § (3)(b).

[72] *Id.* § (3)(c).

[73] *Id.* § (4)(a).

Three courts, including the District Court of Maryland, the Ninth Circuit and the Supreme Court, ruled on the Proclamation.[74] The District Court and the Ninth Circuit relied on the Immigration and Nationality Act (INA) in overturning the ban.[75] The Supreme Court upheld the ban under both the INA and the Establishment Clause with four justices dissenting.[76]

Overall, reading from the same legal script of the Constitution, case law and statutes, the Supreme Court came to a different conclusion than all but one of the lower courts who issued decisions on the travel ban.[77] The difference in outcome is best captured through a narrative analysis, or the stories embedded in these various court decisions, which justified their legal outcome. I divide this narrative analysis into two parts based on the primary legal categories used to decide the cases: INA and the First Amendment (the Establishment Clause). For each, I begin with the lower federal courts, where the story began, and conclude in the Supreme Court, where the story ended. To provide the legal context for this analysis, I also conduct a brief doctrinal analysis of how the courts applied the relevant statutory and constitutional provisions.

I. THE STATUTORY CLAIM

The Immigration and Nationality Act (INA) is the main federal statute that regulates immigration to the United States.[78] Section 1182(f) of the Act, passed in 1952, grants the President the power to suspend the entry of all, or a class of, aliens "whenever the President finds that the entry of any aliens or of any class of aliens into the United States would be detrimental to the interests of the United States . . . for such period as he shall deem necessary" (hereafter the "suspension provision").[79] Section 1152 (a), passed in 1965, prohibits discrimination in the issuance of visas based on "race, sex, nationality, place of birth, or place of residence" (hereafter the "non-discrimination" provision").[80] The challengers

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[74] Trump v. Hawaii, 138 S. Ct. 2392 (2018); Hawaii v. Trump, 878 F. 3d. 662 (9th Cir. 2017); Int'l Refugee Assistance Project v. Trump, 265 F. Supp. 3d 570 (D. Md. 2017). During the course of the litigation, and before deciding the final case, the Supreme Court issued a per curium order on June 26, 2017 narrowing the lower court injunctions against the ban by limiting it to "foreign nationals who have a credible claim of a bona fide relationship with a person or entity in the United States." Trump v. Int'l Refugee Assistance Project, 137 S. Ct. 2080, 2088 (2017).

[75] Both lower courts were repeat players, having decided earlier cases. The Ninth Circuit panel decided Washington v. Trump, 847 F. 3d 1151 (9th Cir. 2017), based on EO-2. The District Court judge decided Int'l Refugee Assistance Project v. Trump, 265 F. Supp. 3d 570 (D. Md. 2017), also based on EO-2.

[76] *See* Table 1.

[77] *Id.*

[78] Immigration and Nationality Act of 1952, Pub. L. No. 82-414, 66 Stat. 163 (hereafter "INA")

[79] *Id.* § 1182 (f) (codified as amended at 4 U.S.C. §§ 101-1414) (2013)).

[80] *Id.* §§ 1152 (a), 1182 (f).

of the travel ban contended that the non-discrimination provision set limits on the suspension provision, preventing the President from suspending entry based on nationality.[81] Of the lower courts that ruled on this statutory claim, all found that the travel ban violated the INA.[82] The Supreme Court found that it did not.[83]

A. *Against the Ban: The Disrupter*

There are well-established principles of statutory construction to resolve conflicting provisions.[84] These include relying on the plain meaning of a statute's words, holding that a more specific provision governs over a general one, and holding that a later-enacted section controls over a conflicting earlier one.[85] Congressional intent is also considered relevant.[86] Notwithstanding these rules there is ample room for interpretation and hence disagreement over the meaning of words and the interplay between different sections of the law.

In its legal analysis, the Ninth Circuit twice found that the travel ban violated the provisions of the INA.[87] They relied on the "last in time rule," noting that the non-discrimination provision was enacted in 1965, while the suspension provision was passed earlier in 1952.[88] Moreover, the non-discrimination provision was more specific, and hence set a limitation on the suspension provision.[89] Thus, while the President was allowed to suspend the entry of certain aliens, he could not do so based on nationality.[90]

In its textual analysis, the Ninth Circuit did not distinguish between the issuance of immigrant visas (the words used in the non-discrimination provision), and barring entry (the words used in the suspension provision).[91] It rejected the argument that a plain reading of the statute dictated that the non-

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[81] *Id.* § 1152(a).

[82] *Id.* Two courts—the District Court of Maryland in *Int'l Refugee Assistance Project v. Trump*, 265 F. Supp. 3d 570 (2017), and the Ninth Circuit appellate court, in *Hawaii v. Trump*, 878 F.3d 662 (2017)—issued two decisions each on the statutory claim, first based on EO-2, and then the Proclamation. Because *Hawaii v. Trump* was the case addressed by the Supreme Court and had the most expansive discussion of the statutory claims, including the appellate court's two opinions, that case is the centerpiece of the narrative analysis on the statutory claim.

[83] *See* Trump v. Hawaii, 138 S. Ct. 2392, 2423 (2018) (the majority upholding the ban included Justices Roberts, Thomas, Gorsuch, Alito, and Kennedy).

[84] *Statutory Construction*, BOUVIER LAW DICTIONARY (2012).

[85] *Id.*

[86] *Id.*

[87] *Hawaii v. Trump*, 878 F.3d at 678; Hawaii v. Trump, 859 F.3d 741, 782 (9th Cir. 2017),

[88] *Hawaii v. Trump*, 878 F.3d 662, 778 (9th Cir. 2017).

[89] *Id.*

[90] *Id.* at 778 [hereafter *Hawaii 2*]; Hawaii v. Trump, 878 F.3d 662, 678 (9th Cir. 2017) [hereafter *Hawaii 1*].

[91] *Hawaii 2* at 778.

discrimination provision was not operative, because the government was not denying visas.[92] According to the Court, such a reading would allow the President to circumvent the anti-discrimination provision, by permitting visas to be issued but then denying entry.[93] As the Court put it, in their decision on EO-2, "Congress could not have intended to prohibit discrimination at the embassy, but permit it at the airport gate."[94]

The Ninth Circuit's legal analysis gave the Court substantial room to rein in the President. As it did so, it constructed a narrative that transmogrified him from a statesman to a disrupter of the governmental order.[95] The opening sentence of its opinion on the Proclamation signaled the metamorphosis:

> For the third time, we are called upon to assess the legality of the President's efforts to bar over 150 million nationals of six designated countries from entering the United States or being issued immigrant visas that they would ordinarily be qualified to receive.[96]

The Court's reference to "over 150 million nationals," shifted the focus to the consequences of the ban and its extraordinary scope.[97] The use of the word "nationals," rather than "aliens" or even "foreign nationals," minimized the "us versus them" dichotomy embedded in immigration discourse; we are all nationals of some place or another.[98] The culprit is not some vague entity, such as the "government," or the "administration," but the President himself, who has made continued "efforts"—three in all—to bar those who would otherwise be admitted to the United States.[99] The fact that those nationals "would ordinarily be qualified" suggests a disruption of the steady state of how things were before.[100]

Having cast the President as the transgressor, the Ninth Circuit's narrative task was to establish the power to reign him in, and to level the playing field among the three branches of government. To accomplish this, it made ample use of the founding principles and sacred texts of America's democracy, elevating the dispute beyond a simple disagreement over statutory interpretation, to one that struck at the very foundation of government.[101]

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[92] *Id.*

[93] *Id.* at 777.

[94] *Id.* at 778.

[95] *See Hawaii 1* at 672 (setting the tone of the narrative as to paint the President as a disrupter of order).

[96] *Id.*

[97] *Id.*

[98] *See, e.g., id.* at 673.

[99] *See, e.g., id.* at 680 (indicating the opinion will be analyzing whether or not the President's action were legal).

[100] *Id.*

[101] *Id.*

Thus, to establish its own power to judge the President's actions, in its opinion on EO-2, the Court reached back to 1803 to cite the seminal case establishing the principle of judicial review of executive actions—*Marbury v. Madison* (1803).[102] As the Court explained, "We do not abdicate the judicial role, and we affirm our obligation "to say what the law is" in this case."[103] Similarly, it depicted the President as a usurper of the Congress's power over immigration, noting the latter was rooted in the Constitution.[104] To minimize the President's power over immigration and national security, it depicted the President as only one player among many.[105] As the Court put it in its decision on EO-2, "Immigration, even for the President, is not a one-person show," and that under the Constitution, "the power to make immigration law is entrusted to Congress."[106] As explained in its second decision, while Congress can delegate its power to the Executive, the latter cannot "indefinitely nullify Congress's considered judgments on matters of immigration."[107] The President is thus not operating on his own turf, but Congress—and they can alter the playing field.

According to the Ninth Circuit, not even national security shielded the President from scrutiny.[108] "National security," it said, "is not a 'talismanic incantation' that, once invoked, can support any and all exercise of executive power under [the suspension provision]."[109] This time invoking "liberty," as a foundational principle, the Court noted, that in times of peril, the separation of powers could not be abrogated because the "Constitution's structure requires a stability which transcends the convenience of the moment," and was crafted in recognition that "[c]oncentration of power in the hands of a single branch is a threat to liberty."[110]

In yet another appeal to the country's foundational values, it also summoned America's most sacred text—the Declaration of Independence—to illustrate the gravity of the President's wrongdoing, noting that it listed "obstructing the Laws for Naturalization of Foreigners" and "refusing to pass [laws] to encourage their migrations hither" as among the acts of "absolute Tyranny" of "the present King of Great Britain."[111]

Having opened the door to greater scrutiny by dispelling any notion of unbridled executive power, the Ninth Circuit depicted the Proclamation as a vast

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[102] *Hawaii v. Trump*, 878 F.3d 662, 768 (9th Cir. 2017) (*Hawaii 2*); Marbury v. Madison, 5 U.S. 137 (1803).

[103] *Hawaii 2* at 768.

[104] *Id.*

[105] *Id.* at 755.

[106] *Id.* at 755, 769.

[107] *Hawaii 2* at 685.

[108] Hawaii v. Trump, 878 F.3d 662, 694 (9th 2017) (*Hawaii 1*).

[109] *Id.*

[110] *Hawaii 1* at 691.

[111] *Id.* at 698.

overreach of Executive power, at the expense of the Congress.[112] Through the INA, Congress had already enacted a scheme for restricting entry of terrorists, including the Visa Waiver Program, whose criteria replicated many of the Proclamations' criteria for vetting immigrants.[113] Rather than banning all immigration from certain countries, the Visa Waiver Program attempted to "facilitate more travel," while still considering the terrorism and security concerns covered by the Proclamation.[114] As the Court stated in its decision on EO-2, "There is no finding that present vetting standards are inadequate, and no finding that absent the improved vetting procedures there likely will be harm to our national interests."[115] In short, the Executive cannot, "with one stroke of its pen," "override" Congress's statutory scheme for addressing the same concerns.[116]

Thus, the Ninth Circuit depicted the Proclamation as a grave instance of executive overreach, unsettling the balance of powers, and acting outside the bounds of the regular and routine.[117] It buttressed this depiction by describing the Proclamation as, "unprecedented in its scope, purpose, and breadth" and a historical aberration.[118] Out of the forty-three orders issued before it, "forty-two targeted only government officials or aliens who engaged in specific conduct and their associates or relatives."[119] As the Court put it, "by suspending entry of a class of 150 million potentially admissible aliens, the Proclamation sweeps broader than any past entry suspension and indefinitely nullifies existing immigration law as to multiple countries."[120]

Moreover, not only was the President disrupting existing and effective procedures for vetting immigrants, he was also adding an unprecedented element—nationality.[121] The Ninth Circuit noted that "the Proclamation does not tie the nationals of the designated countries to terrorist organizations. For the second time, the Proclamation makes no finding that nationality *alone* renders entry of this broad class of individuals a heightened security risk, or that current screening processes are inadequate."[122] It also invoked the ghost of *Korematsu*, an infamous Supreme Court case which allowed the detention of American citizens of Japanese ancestry during World War II, and which is

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[112] *See id.*

[113] *See* Immigration and Nationality Act of 1952, Pub. L. No. 82-414, 66 Stat. 163.

[114] *Id.*

[115] *Hawaii v. Trump*, 878 F.3d 662, 771 (9th Cir. 2017) (*Hawaii 2*).

[116] *Id.*; Hawaii v. Trump, 878 F.3d 662, 687 (9th 2017) (*Hawaii 1*).

[117] *Hawaii 1* at 692.

[118] *Hawaii 2* at 690.

[119] *Id.* at 688.

[120] *Id.* at 690.

[121] *Id.* at 693–694.

[122] *Id.*

widely considered as a stain on the country.[123] By bringing nationality to the fore, the Ninth Circuit rendered more visible the discriminatory evolution of the travel ban, and its emphasis on Muslim nationals.[124]

In short, the Ninth Circuit's statutory deconstruction of the travel ban is a story about a usurper, who used his power to overturn the existing institutional order, and the values that underlay it. [125] No protective sheen envelopes the President's actions, and it is within the province of the judiciary to restore the balance of power between the branches and ameliorate the harm.

B. *The Supreme Court Majority: Government as Usual*

In contrast to the Ninth Circuit, the Supreme Court Majority cast the President as the central player in matters of immigration and national security.[126] While it conceded that the Constitution gives Congress, not the President, power over immigration, it portrayed Congress as voluntarily and willingly ceding that power, with few, if any, caveats.[127] As it explained in its legal analysis, the suspension clause:

> exudes deference to the president in every clause. It entrusts to the President the decisions whether and when to suspend entry ("[w]henever [he] finds that the entry" of aliens "would be detrimental" to the national interest); whose entry to suspend ("all aliens or any class of aliens"); for how long ("for such period as he shall deem necessary"); and on what conditions ("any restrictions he may deem to be appropriate")."[128]

The Majority did not find a conflict between the suspension and non-discrimination provision, and hence the President could suspend "aliens" based on their nationality.[129] As the Majority explained, on its face the non-discrimination provision applied only to immigrant visas, while the suspension provision applied to the entry of immigrants or non-immigrants alike.[130] Admissibility and visa issuance were depicted as two separate steps.[131] According to the words of the statute itself, one can be granted a visa, but still be denied admission, "if upon arrival an immigration officer determines that the applicant is 'inadmissible under this chapter, or any other provision of law'—

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[123] Hawaii v. Trump, 878 F.3d 662, 700 (9th 2017) (*Hawaii I*) (citing Korematsu v. United States, 323 U.S. 214, 215 (1944)).

[124] *See id.* (explaining the Proclamation's immense impact on Muslim nationals).

[125] *Id.* at 673 (where the Court concludes that the Proclamation exceeds Presidential authority).

[126] Trump v. Hawaii, 138 S. Ct. 2392, 2414 (2018).

[127] *Id.* at 2408.

[128] *Id.*

[129] *Id.* at 2414.

[130] *Id.*

[131] *Id.*

including [the suspension provision]."[132] In short, the suspension and non-discrimination provision, "operate in different spheres," as is "apparent from the text."[133]

The Majority's legal interpretation of the statute gave the President ample room to ban immigrants, as he saw fit.[134] The travel ban case arrived at the Court with a long trail of litigation and publicity through three iterations of the ban, and with twenty-eight judges weighing in before it did—most of whom had adopted the public framing of the case as a story of Presidential religious animus and executive overreaching.[135] Thus, the Majority's challenge was to construct a counter narrative that portrayed the Proclamation and its predecessors, as a story of government as usual, with the President exercising his statutory powers in a customary, orderly, and methodical manner to protect the country.[136]

1. Setting the Stage

The beginning pages of an opinion function as a framing device. They orient the reader to the court's view of the story, often through a selective presentation of the facts and description of the dispute. It is the first reveal, foreshadowing how a court will decide, and leading the reader down a specific path. In its opening pages, the Majority swiftly shifted the public narrative, transforming the dispute from a story of anti-Muslim animus to one of governing and bureaucratic procedures, and of presidential powers duly executed.[137]

Taking a cue from the title of the Proclamation—"Enhancing Vetting Capabilities and Processes for Detecting Attempted Entry Into the United States by Terrorists or Other Public-Safety Threats"—the Majority's introductory sentence emphasized the "vetting process" foreign nationals must go through "to ensure that they satisfy the numerous requirements for admission."[138] The Majority also emphasized the President's power under the INA to restrict nationals, whose entry, "would be detrimental to the interests of the United States."[139] His conclusion is that "entry restrictions" were necessary because some countries do not share "adequate information" about their nationals, or "that otherwise present national security risks."[140] There was no mention that the foreign nationals or countries were primarily Majority-Muslim.

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[132] *Id.*

[133] *Id.*

[134] *Id.*

[135] *See id.* at 2404 (providing procedural history).

[136] *See, e.g., id.* at 2408 (holding the President lawfully executed his discretion and the Plaintiff's attempt to say otherwise, fails).

[137] *Id.* at 2403.

[138] *Id.*

[139] *Id.* at 2403 (citing INA § 1152(a)(1)(A)).

[140] *Id.*

In beginning with an invocation of the President's statutory authority, as delegated by Congress, the Majority set the stage to view the President's actions through the lens of normalcy.[141] We are not dealing with a novel and unprecedented situation, but a conventional and well-established use of Executive power. Phrases such as "vetting process," and "numerous requirements for admission," and references to information-gathering are similarly evoking a narrative of routine bureaucratic processing.[142] "Vetting" rather than banning people suggests a regular and even fair process that can just as likely result in admitting someone as excluding them.[143] The emphasis on vetting practices and information-sharing also depicts the Proclamation not as a new, unprecedented, and norm-breaking policy, but as an improvement on present practices, and hence well within the bounds of what governments and Presidents do. In short, it reframes the Muslim ban of public discourse to a more conventional and less controversial executive action.[144]

In its opening description of the dispute, the Majority avoided linking national security concerns with Muslims as a group.[145] Instead, the source of the national security threat was ascribed to "foreign nationals" and "countries that do not share adequate information," thus distancing the Proclamation from charges of religious bias.[146] The remedy was described as "restrictions" on entry, thus suggesting a less than total exclusion.[147] In short, the Proclamation was portrayed as well-within the scope of routine governmental operations, with an added overlay of a compelling purpose—protecting the country from harm against foreign nationals we do not have enough information about, and who may be terrorists.[148]

The Majority's recounting of the Proclamation's predecessors, EO-1 and EO-2, was similarly recast as a story about vetting foreign nationals, not banning them.[149] In the Majority's accounting, the world-wide review of countries to

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[141] *See id.*

[142] *Id.*

[143] *See id.*

[144] *See, e.g., id.* at 2421 (moving away from "religious hostility" by using statistics, while ignoring the realities of the situation).

[145] *See id.* at 2403.

[146] *Id.*

[147] *Id.*

[148] *See id.* at 2402 (explaining that EO-1 was enacted targeting States that have been known to be a "sponsor of terrorism, has been significantly compromised by terrorist organizations, or contains active conflict zones" and thus eluding to the fact that these restrictions are necessary for the same purpose).

[149] *See id.* at 2412 (depicting the Proclamation as a provision that "vests authority in the President to impose additional limitations on entry beyond the grounds for exclusion set forth in the INA—including in response to circumstances that might affect the vetting system or other "interests of the United States." The ambiguity of "interests of the U.S." leaves room for the President to ban foreign nationals while casting the story as about vetting, not banning).

improve vetting procedures occupied center stage from the start.[150] Its description of EO-1 started with the statement that, "EO–1 directed the Secretary of Homeland Security to conduct a review to examine the adequacy of information provided by foreign governments about their nationals seeking to enter the United States."[151] Similarly, it introduced EO-2 as "again direct[ing] a worldwide review."[152] Likewise, the Proclamation was introduced by stating that "On September 24, 2017, after completion of the worldwide review, the President issued the Proclamation before us."[153] The most controversial provision of EOs 1 and 2—the suspension of immigrants from the designated countries—was thus depicted as a means to an end, (better vetting procedures) rather than the central focus.[154]

The Majority also brought various government actors and departments on stage, including the Department of Homeland Security, the State Department, various intelligence agencies, Cabinet officials, and the Acting Secretary of Homeland Security.[155] The President primarily entered the stage at the end and "after consulting with multiple Cabinet members and other officials," adopted the Acting Secretaries' recommendations (of the designated countries) and issued the Proclamation.[156] Government actors' assessments and recommendations, in the Majority's telling, always prefaced any Presidential decisions.[157]

2. Government as Usual

After setting out the facts, the Majority's statutory analysis expanded upon the theme of "government as usual," while also quelling the most incendiary aspects of the plaintiffs' narrative—that the Proclamation was a ban on Muslims driven by the religious animus of a single man, President Donald Trump.[158] It did this by creating a narrative that erased the individuality of both the person who created the ban—President Trump—and those affected by it, individual Muslim nationals.[159]

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[150] *See id.* at 2404 (casting the problem as one to do with maintaining safety from foreign countries).

[151] *Id.* at 2403.

[152] *Id.* at 2404.

[153] *Id.*

[154] *See id.* at 2414 (rejecting plaintiff's argument about the suspension provision).

[155] *See, e.g., id.* at 2404, 2405, and 2420 (referencing Department of Homeland Security, the State Department and the Cabinet).

[156] *Id.* at 2405.

[157] *See id.* at 2407 (outlining an extensive review process prior to the President adopting a decision).

[158] *See id.* at 2406 (laying the facts and the procedural history of the case).

[159] *See id.* at 2421 (finding for the legitimacy of the Proclamation).

Thus, in the Majority's story, the main character was a disembodied government, not the individuals who constituted it.[160] Throughout its statutory analysis, the Majority opinion maintained the linguistic tone of officialdom, speaking in the language of government and laws.[161] Government actors were defined and described by their official roles, not their surnames, and specific actions were attributed to government institutions—i.e. "the administration" or "Congress"—rather than named individuals.[162] In this way, the person and personality of Donald Trump was left out of the story and he is cast solely as the President, thus imbuing him with an aura of solemnity and seriousness, accurately or not.[163]

In a similar vein, the Majority's statutory analysis relied on formal government documents—in this case, the Proclamation—as the official and only version of the story.[164] The Majority described the Proclamation as "more detailed than any prior" order issued by any President under the suspension provision, "thoroughly describing the process, agency evaluations, and recommendations underlying the President's chosen restrictions."[165] Its length was offered as evidence of its heft—twelve pages contrasted with a past Proclamation that was one sentence long (President Clinton's order suspending entry of Sudanese government officials and armed forces) and another that was five sentences long (President Reagan's order curtailing the illegal immigration of undocumented aliens in the southeastern United States).[166]

The Majority took the Proclamation at its word, infusing it with an almost biblical aura, as a virtually irrefutable record of the purpose, and intent of the ban.[167] It did not scrutinize this third and final version for inconsistencies, question the genuineness, or test it against Donald Trump's public words. The contentious history of the ban's previous iterations was also erased. By reducing EO-1 and EO-2 as simply and similarly focused on a "world-wide review," in its recitation of the facts, the Majority divorced the Proclamation from its

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[160] *See id.* at 2404, 2406, and 2407.

[161] *See, e.g., id.* at 2404, 2406, 2407 (majority citing to statutory language, laws, and proclamations).

[162] *See, e.g., id.* at 2403 (using "Secretary of Homeland Security," not her name), *id.* at 2405 (using "multiple cabinet members," rather than naming them).

[163] *See, e.g., id.* at 2406, 2407, and 2409 (referring to Trump as "the President" when explaining Congress' delegation of power, expressing "the President's" broad discretion to suspend the entry of aliens and concluding "the proclamation does not exceed any textual limit of the President's authority").

[164] *See id.* at 2421 (prefacing each paragraph with "the Proclamation" in order to make their argument).

[165] *Id.* at 2409.

[166] *Id.*

[167] *See id.* at 2421 (emphasizing their support for the Proclamation by holding "we cannot substitute our own assessment for the Executive's predictive judgments on such matters, all of which 'are delicate, complex, and involve large elements of prophecy'").

previous iterations and the controversies surrounding them.[168] In sum, as the most recent bureaucratically produced document, the Proclamation was presented as sacrosanct and untainted by previous versions. It was an act of government, not of individuals, giving it a protective sheen of orderliness and officialdom, unsullied by the public storms and words surrounding it.

The Majority also wrote the vast number of individuals affected by the ban, including their Muslim identities, out of the story, as it did in its initial description of the dispute.[169] Thus, the people and countries affected were described as "nationals of certain high-risk countries"[170] or "nations presenting heightened security concerns,"[171] thus obscuring the fact that the Proclamation affected predominantly Muslim-Majority countries and people. In a similar vein, the Majority erased the personhood of foreign nationals by repeatedly referring to Foreign Nationals as "aliens," a term that nonetheless invokes images of a threatening and unfamiliar mass of people, rather than of distinct individuals.[172] Likewise, no distinction was made between individual nationals and the acts of their government.[173] As the Majority explained, "Presidents have repeatedly suspended entry, not because the covered nationals themselves engaged in harmful acts, but rather to retaliate for conduct by their governments that conflicted with U. S. foreign policy interests."[174] Thus, from a government point of view, nationality-based distinctions were not only appropriate, but business as usual.

The Majority also constructed a protective barrier around the President by invoking the spectra of national security to justify its refusal to look behind the words of the Proclamation.[175] To scrutinize the Executive too closely was "inconsistent with the broad statutory text [of the suspension provision] and the deference traditionally accorded the President in this sphere."[176] Moreover, when acting to protect the nation in foreign affairs, the President was not expected to come to definitive conclusions.[177] As the Majority explained, "when

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[168] *See id.* at 2404 (discussing the "world-wide review").

[169] *Id.* at 2411.

[170] *Id.*

[171] *Id.* at 2412.

[172] *See, e.g., id.* at 2410, 2413, and 2418 (Discussing Congress' solutions regarding dealing with "aliens" seeking entry from countries that have not shared information with the U.S, discussing how the entry of "aliens" would be detrimental to the United States and explaining how the Plaintiff's goal to "invalidate a national security directive regulating the entry of aliens abroad").

[173] *See id.* at 2413.

[174] *Id.*

[175] *See, e.g., id.* at 2421 (explaining "there is persuasive evidence that the entry suspension has a legitimate grounding in national security concerns, quite apart from any religious hostility, we must accept that independent justification").

[176] *Id.* at 2401.

[177] *Id.* at 2409.

the President adopts "a preventive measure . . . in the context of international affairs and national security," he is "not required to conclusively link all of the pieces in the puzzle before [courts] grant weight to [his] empirical conclusions."[178]

The talisman of national security served another purpose as well; it allowed the Majority to invoke the harms that may occur if the President's power was curtailed. According to the Majority, a statutory interpretation that placed nationality-based limits on the President's suspension provision could lead to disaster.[179] It would prevent him "from suspend[ing] entry from particular foreign states in response to an epidemic confined to a single region, or a verified terrorist threat involving nationals of a specific foreign nation, or even if the United States were on the brink of war."[180] By invoking potential catastrophic harms— epidemics, wars and terrorism, and ignoring present harms (the real-world consequences of the ban and its effects on ordinary citizens, individual states, and residents of other countries), the Majority depicted the danger as questioning the President too much, rather than too little.[181]

In sum, the Majority depicted the Proclamation as an artifact of governing and not a product of a single actor—Donald Trump—and his prejudices.[182] Its reliance on official words and the bureaucratization of governmental processes and procedures invoked a sense of regularity, of bureaucratic action duly executed.[183] The Proclamation was the product of a deliberative process designed to improve government processes, not disrupt them, and hence well within the scope of presidential power.[184] It is a story of presidential powers exercised with restraint and reason, in collaboration with the other branches of government, and in line with past presidential practices and actions. This stood in sharp contrast to the Ninth Circuit, who depicted Donald Trump and his actions as unprecedented and irregular.[185]

II. THE ESTABLISHMENT CLAUSE

Throughout the litigation, starting with EO-1, a violation of the Establishment Clause was the most common legal path for overturning the ban.[186] Only two

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[178] *Id.*

[179] *Id.* at 2414.

[180] *Id.* at 2415.

[181] *See id.* at 2415.

[182] *See, e.g., id.* at 2404, 2406, and 2407 (demonstrating how the majority frames their argument on governing rather than on Trump's actions).

[183] *Id.* at 2404.

[184] *See id.* at 2415.

[185] *See, e.g., Hawaii v. Trump*, 878 F.3d 662, 779 (9th Cir. 2017) (*Hawaii 2*); Hawaii v. Trump, 878 F.3d 662, 690 (9th 2017) (*Hawaii 1*).

[186] *See Hawaii 2* at 779; *Hawaii 1* at 690.

courts—a district court in a brief opinion[187] and the United States Supreme Court in *Trump v. Hawaii*—held that it did not.[188] The Supreme Court decision was split 5-4, with four of the dissenting justices indicating they would have found a violation of the Establishment Clause.[189]

The Establishment Clause prohibits government action that favors one religion over another, or discriminates against a particular religion.[190] A key Supreme Court case, *Kleindienst v. Mandel*, protects a President's discretionary actions in the immigration context as long as they are based on a "facially legitimate and bona fide reason."[191] Practically, this standard sets a high bar for scrutinizing a President's actions, as it suggests that as long as a legitimate purpose could be found the action would pass muster, even if religious animus played some role.[192]

However, Establishment Clause cases are typically scrutinized under the "Lemon Test" which requires the government to show, among other things, that the challenged action has a *primarily* secular legislative purpose.[193] That secular purpose, according to another key Supreme Court case, *McCreary v. ACLU*, must be "genuine, not a sham, and not merely secondary to a religious objective."[194] It could be discerned by applying the "objective observer" test

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[187] Louhghalam v. Trump, 230 F. Supp. 3d 26, 34 (D. Mass. 2017).

[188] Trump v. Hawaii, 138 U.S. 2392, 2423 (2018).

[189] *See id.* at 2429–48 (Including Justice Sotomayor, joined by Justice Ginsburg, Justice Breyer, and Justice Kagan. Arguing that the case should be remanded to determine whether the waiver program demonstrated evidence of religious animus in its application, but that overall there was enough evidence to find antireligious bias).

[190] U.S. CONST. amend. I.; *see* County of Allegheny v. ACLU, 492 U.S. 573, 602 (1989) (enjoining the display of a crèche when concluding it violated the Establishment Clause of the First Amendment by "endorsing the Christian doctrine").

[191] *Kleindienst v. Mandel* involved the denial of a non-immigrant visa to a Belgian citizen and revolutionary Marxist to speak at an academic conference. 408 U.S. 753, 770 (1972). At the time, the INA barred "aliens" who advocated for communism. *Id.* The American professors who invited him sued, alleging the denial of Mandel's visa violated their First Amendment rights to hear him speak. *Id.* The Court upheld the denial of the non-immigrant visa based on the grounds that Mandel had violated the terms of his visa during prior visits. *Id.*

[192] *Mandel*, 408 U.S. 753.

[193] The "Lemon Test" was enunciated by the Court in the case of *Lemon v. Kurtzman*, 403 U.S. 602 (1971). The Court invalidated a state law which allowed state funds to be used for salaries and instructional materials used in private, mostly religious, schools. *Id.* It contains three parts, but only the first part was at issue in the travel ban cases.

[194] *McCreary v. ACLU* involved a successful challenge to the display of framed copies of the Ten Commandants in courthouses and public schools as a violation of the Establishment Clause. 545 U.S. 844, 864–85 (2005). Like the travel ban cases, there were three iterations of the display, in response to lawsuits claiming the display was primarily religious and that there was no secular motive. *Id.* This required the Court to delve into the motivation for the display, relying on range of statements by government officials over time. *Id.* In the travel

which would draw from both the text of the policy, the historical context, and the events leading up to it.[195] This test favored the plaintiffs because it invited scrutiny of the President's statements for signs of religious animus, and it treated all of the EOs and the Proclamation as chapters in a single story.

A. *A Tale of Morality*

Those courts or justices who found a violation of the Establishment Clause chose the legal path—the "objective observer" test—that invited the most scrutiny of the President's many tweets and public statements.[196] In these courts' collective narratives, one can hear echoes of Hans Christian Anderson's fable, "The Emperor's New Clothes."[197] In that tale, a vain emperor commissions a wardrobe that is promised to be invisible to those who are incompetent and stupid.[198] His subjects, including his trusted aides, continually compliment him on his new clothes, when in fact he is naked—the clothes are a mirage.[199] A young child pierces the façade, and soon everyone knows that the Emperor has no clothes.[200] But the Emperor and his aides continue on, pretending that he is still clothed in splendor.[201]

In the travel ban story, it is the lower courts and the dissenters on the Supreme Court who pierce the mirage, by their insistence on seeing the man behind the title of President, while the Supreme Court Majority plays the role of the unseeing and unquestioning aides. Thus, as described next, these courts constructed narratives whose moral coda was readily apparent, sometimes from the first sentence of their opinions.

1. "The Promise of Religious Liberty"

Establishment Clause cases inevitably trigger America's foundational myths about religious liberty. The courts were not subtle about asserting these values. An example comes in the following Fourth Circuit opinion. The opening paragraph makes a stirring defense of the rule of law and the Constitution as a bulwark against religious intolerance in its decision invalidating EO-2:

> The question for this Court, distilled to its essential form, is whether the Constitution remains "a law for rulers and people, equally in war and in peace." And if so, whether it protects Plaintiffs' right to challenge an

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ban cases, both sides drew from language from the case to either extend or limit what statements could be considered.

[195] *Id.*

[196] *Id.*; *see* Table 1.

[197] H.C. Anderson, 'The Emperor's New Clothes' in *Fairy Tales Told For Children* (1841).

[198] *Id.*

[199] *Id.*

[200] *Id.*

[201] *Id.*

> Executive Order that in text speaks with vague words of national security, but in context drips with religious intolerance, animus, and discrimination. Surely the Establishment Clause of the First Amendment yet stands as an untiring sentinel for the protection of one of our most cherished founding principles—that government shall not establish any religious orthodoxy, or favor or disfavor one religion over another. Congress granted the President broad power to deny entry to aliens, but that power is not absolute. It cannot go unchecked when, as here, the President wields it through an executive edict that stands to cause irreparable harm to individuals across this nation.[202]

Using language more oratorical than legal, the Constitution is depicted as a sacred text—"a law for rulers and people, equally in war and peace."[203] Phrases such as "untiring sentinel" and "one of our most cherished founding principles" elevate the dispute to mythic proportions; what's at stake is the soul of the country, which is being disrupted by the President and harming people "across the nation."[204] The "vague words of national security" contained in EO-2, "which "in context drips with religious intolerance, animus and discrimination" casts suspicion on the national security rationale, which in any event pales against the harm caused by religious animus.[205]

Consider also the opening paragraph in Justice Sotomayor's dissent:

> The United States of America is a Nation built upon the promise of religious liberty. Our Founders honored that core promise by embedding the principle of religious neutrality in the First Amendment. The Court's decision today fails to safeguard that fundamental principle. It leaves undisturbed a policy first advertised openly and unequivocally as a "total and complete shutdown of Muslims entering the United States" because the policy now masquerades behind a façade of national-security concerns. But this repackaging does little to cleanse Presidential Proclamation No. 9645 of the appearance of discrimination that the President's words have created. Based on the evidence in the record, a reasonable observer would conclude that the Proclamation was motivated by anti-Muslim animus. That alone suffices to show that plaintiffs are likely to succeed on the merits of their Establishment Clause claim. The Majority holds otherwise by ignoring the facts, misconstruing our legal precedent, and turning a blind eye to the pain and suffering the Proclamation inflicts upon countless families and individuals, many of whom are United States citizens.[206]

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[202] Int'l Refugee Assistance Project v. Trump, 857 F.3d 554, 572 (4th Cir. 2017) (citations omitted).

[203] *Id.*

[204] *Id.*

[205] *Id.*

[206] Trump v. Hawaii, 138 S. Ct. 2392, 2433 (2018) (Sotomayor, J., dissenting).

In contrast to the Majority's opinion described below, the story begins not with the legal document—The Proclamation—but with a paean to religious liberty as enshrined in the Constitution, which the Majority is accused of jeopardizing.[207] It identifies the President as the transgressor of this revered value through his transparently anti-Muslim rhetoric that began even before he became President.[208] The words "masquerade," "repackaging," and "facade" suggest Presidential duplicitousness and falseness.[209] The charge that the Proclamation's repackaging did little to "cleanse" the President's discriminatory words suggests a stain on the country that must be removed.[210] That stain is both legally wrong—"ignoring the facts [and] misconstruing our legal precedent"—and morally wrong by "turning a blind eye to the pain and suffering the Proclamation inflicts upon countless families and individuals, many of whom are United States citizens."[211] The inclusion of the latter suffuses the story with a human and even patriotic element—underlining that this is not just about distant and abstract government policies, but about the harm being done to actual people and the country's own citizens.

2. All Words Matter

The courts and justices that ruled against the ban made Trump's words, rather than the words of the Proclamation, the story's opening act. Their timeline included his campaign statements, beginning with candidate Trump's promise of "a total and complete shutdown of Muslims."[212] This starting point was crucial because it generated a continuous story of religious animus as the Muslim ban of the campaign morphed into the first, then second Executive Orders and ultimately the new and improved Proclamation.

The courts' deconstruction of Trump's many statements on media and social media were portrayed as a common sense and straightforward application of *McCreary*'s "objective observer" test.[213] The Fourth Circuit opinion on EO-2, after noting that the *McCreary* Court admonished against conducting a "judicial psychoanalysis of a drafter's heart of heart" said it did not have "to probe anyone's heart of hearts to discover the purpose of EO-2, for President Trump and his aides have explained it on numerous occasions and in no uncertain terms."[214] Or as the Fourth Circuit also put it, while referencing literary noble

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[207] *Id.*

[208] *See id.*

[209] *Id.*

[210] *Id.*

[211] *Id.* at 2433.

[212] Press Release, Trump-Pence, Donald J. Trump Statement on Preventing Muslim Immigration (Dec. 7, 2015), https://www.donaldjtrump.com/press-releases/donaldj.-trump-statement-on-preventing-muslim-immigration.

[213] McCreary v. ACLU, 545 U.S. 844, 864–85 (2005).

[214] Int'l Refugee Assistance Program v. Trump, 857 F.3d 554, 593, 595 (4th Cir. 2017).

Jonathan Swift, "[w]e cannot shut our eyes to such evidence when it stares us in the face, for 'there's none so blind as they that won't see.'"[215] Similarly, the Hawaii District Court in its opinion on EO-2 said no digging into the "veiled psyche" and "secret motives" was required, there [was nothing] "veiled" or "secret" in the way Trump and his aides expressed their motives.[216]

The third and final iteration of the ban, which came six months after EO-2, contained a more detailed national security rationale, a more finely tuned process for selecting countries, and included two non-Majority-Muslim countries.[217] Standing alone, and based on its words alone, the Proclamation arguably made an impressive case for legitimacy. The judicial opinions that found the Proclamation violated the Establishment Clause countered this assumption by tethering the three iterations of the ban together and wrapping them in an unbroken stream of anti-Muslim comments. In short, by casting the Proclamation as the third act in a single play, they created a narrative of illegitimacy that no rewrites could erase.

The Maryland District Court spent considerable narrative space reviewing the earlier EOs and interweaving them with Trump's public statements.[218] It opened its narrative with EO-1, cataloguing all its flaws, and reiterating its earlier findings that there was a "convincing case" that the purpose of EO-1 was "to accomplish, as nearly as possible, President Trump's promised Muslim ban" through a policy of restricting entry of nationals of predominantly Muslim countries deemed to be dangerous territory.[219] It then tied EO-1 and EO-2 together by referencing public statements by the Trump administration that portrayed EO-2 as essentially the same as EO-1and concluding that, despite EO-2's modifications, these statements "continued to provide a convincing case that the purpose of EO-2 remains the realization of the long-envisioned Muslim ban."[220] This extended introduction to the Proclamation allowed the Court to create a seamless narrative, both in time and evidence, that cast a pall over the Proclamation.

The Maryland District Court then catalogued a rash of anti-Muslim tweets and other statements by the President, noting that "[e]ven while interagency consultation regarding the travel ban took place behind closed doors, another conversation continued in the public eye."[221] Elaborating on this theme, the Court stated that "while Defendants assert that the Proclamation's travel ban was arrived at through the routine operations of the government bureaucracy, the public was witness to a different genealogy, one in which the President—

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[215] *Id.* at 599.

[216] Hawaii v. Trump. 241 F. Supp. 3d 1119, 1136–37 (D. Haw. 2017).

[217] Proclamation No. 9645, 82 FR 45161 (Sep. 24, 2017).

[218] Int'l Refugee Assistance Program v. Trump, 265 F. Supp. 3d 570 (D. Md. 2017).

[219] *Id.* at 620.

[220] *Id.* at 621.

[221] *Id.* at 627.

speaking 'straight to the American people,' announced his intention to go back to and get even tougher than in EO-1 and EO-2."[222] It portrayed its reliance on the President's statements as the only sensible thing to do, noting that "[t]he reasonable observer using a 'head with common sense' would rely on the statements of the President to discern the purpose of a Presidential Proclamation."[223]

Justice Sotomayor, in her dissent, echoed this approach, providing one of the most detailed accounts of the President's words.[224] She first chided the Majority for only "briefly recount[ing] a few of the statements and background events," noting that this "highly abridged account does not tell even half of the story," and that "[t]he full record paints a far more harrowing picture."[225] Justice Sotomayor then documented Trump's public statements in several pages of highly detailed text, from his initial proposal in December 7, 2015 "calling for a total and complete shutdown of Muslims entering the United States" through to November 29th, 2017 when he retweeted three anti-Muslim videos.[226] According to Justice Sotomayor, this rash of words easily satisfied a finding of religious animus based on the "objective observer" test, and encompassed the Proclamation, which was described as an unsuccessful attempt to "launder [it] of its discriminatory taint."[227] As she further explained:

> Ultimately, what began as a policy explicitly "calling for a total and complete shutdown of Muslims entering the United States" has since morphed into a "Proclamation" putatively based on national-security concerns. But this new window dressing cannot conceal an unassailable fact: the words of the President and his advisers create the strong perception that the Proclamation is contaminated by impermissible discriminatory animus against Islam and its followers . . . In short, "no matter how many officials affix their names to it, the Proclamation rests on a rotten foundation."[228]

In sum, the courts who ruled against the ban based on the Establishment Clause constructed a narrative where a putative story of serious-minded government officials acting to protect the nation was replaced by a one man show, where the loose-lipped protagonist was repeatedly revealed as motivated by anti-Muslim animus at every twist and turn. However, the issuance of the Proclamation, a far more detailed and officious-sounding document than EO-1 and EO-2, created an additional narrative challenge for the Maryland District

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[222] *Id.* at 628 (citations omitted).

[223] *Id.*

[224] Trump v. Hawaii, 138 S. Ct. 2392, 2435 (2018) (Sotomayor, J., dissenting).

[225] *Id.*

[226] *Id.* at 2435–2438.

[227] *Id.* at 2439.

[228] *Id.* at 2440, 2443.

Court (and the Supreme Court dissenters) who ruled on the Proclamation based on the Establishment Clause.[229]

How they surmounted this challenge is described next.

3. Deconstructing the Proclamation

Having cast a pall on the Proclamation based on Trump's public words, the Maryland District Court and Justice Sotomayor opened up a narrative space to deconstruct the words of the Proclamation itself.[230] They refused to take these official words at face value, instead subjecting them to searching inquiry.[231] Through this inquiry they built a narrative of duplicity and evasion, suggesting that the Proclamation was designed to paper over Trump's public words of religious animus and render the illegitimate legitimate.

The District Court thus began by noting that the Proclamation was little different than its tainted predecessors despite its enhanced language and greater detail, observing that "the underlying architecture of the prior Executive Orders and the Proclamation is fundamentally the same" with each targeting immigrants of multiple Majority-Muslim countries based on terrorism concerns, and utilizing "world-wide reviews" with similar criteria.[232] As the Court explained, "this substantial overlap . . . undermines the characterization of the Proclamation's determination to impose a travel ban as the product of an independent evaluation unconnected to the earlier, tainted travel bans, and further suggests that many of the results may have been pre-ordained."[233]

Both the District Court, and Justice Sotomayor's dissent in the Supreme Court case, painted a dark portrait of a government engaged in subterfuge.[234] Both depicted the inclusion of two non-Majority-Muslim nations—Venezuela and North Korea—in the Proclamation as a ruse. The District Court described it as a "'litigating position' rather than an earnest effort to 'cast off' the prior 'unmistakable' objective," noting that the North Korea ban "affect[ed] fewer than 100 people," while the Venezuela ban applied only to government officials, together affecting "only a fraction of one percent of all those affected by the Proclamation."[235] Likewise, Justice Sotomayor suggested their inclusion was "so the Executive Branch could evade criticism or legal consequences for the

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[229] Trump v. Hawaii 138 S. Ct. 2392, 2435 (2018) (Sotomayor, J., dissenting); Int'l Refugee Assistance Program v. Trump, 265 F. Supp. 3d 570 (D. Md. 2017).

[230] Trump v. Hawaii, 138 S. Ct. at 2435–36; *see generally* Int'l Refugee Assistance Program, 265 F. Supp. 3d at 570.

[231] *See* Trump v. Hawaii, 138 S. Ct. at 2435–36; Int'l Refugee Assistance Program, 265 F. Supp. 3d at 585–88.

[232] Int'l Refugee Assistance Program, 265 F. Supp. 3d at 624.

[233] *Id.* at 625.

[234] *See* Trump v. Hawaii, 138 S. Ct. 2392, 2433 (2018) (Sotomayor, J., dissenting); Int'l Refugee Assistance Project v. Trump, 265 F. Supp. 3d 570 (D. Md. 2017).

[235] *Int'l Refugee Assistance Project*, 265 F. Supp. 3d at 623.

Proclamation's otherwise clear targeting of Muslims."[236] Other so-called improvements, including the waiver program, were also depicted as suspect.[237] For example, Justice Sotomayor noted that "waivers under the Proclamation are vanishingly rare."[238]

Similarly, both opinions cast doubt on the world-wide review, depicting it as a government stealth operation because it was not part of the record.[239] According to Justice Sotomayor, the lack of public release, even in a redacted form, "empower[ed] the president to hide behind an administrative review process."[240] Both opinions also challenged the review's thoroughness, with the Supreme Court dissent noting that the final report was only a "mere 17 pages" even though it purported to analyze the vetting procedures of hundreds of countries.[241] Justice Sotomayor questioned the legitimacy of the government officials who conducted it, noting one such official, who she referred to by name rather than his official title, as having made "several suspect public statements about Islam."[242]

Finally, suspicion of the motives of current governmental actors was evident in both the District Court and Justice Sotomayor's indications of which voices they found credible. Specifically, they drew upon a group of *former* national security officials who described the Proclamation as unprecedented and something that would harm, rather than protect, national security.[243] In short, past government officials were more informed than present ones, whose actions were suspect and riddled with contradictions and illusions. The officiously worded Proclamation was, in essence, a sham perpetrated by government officials, egged on by their leader, to obscure its true purpose.

B. *The Supreme Court Majority: What Words Count*

While the lower federal courts and Justice Sotomayor made Trump's words the center of their analysis under the Establishment Clause, the legal challenge for the Supreme Court Majority, which did not find a violation of the Clause, was to minimize these words.[244] In contrast to the statutory analysis, however, the Establishment Clause claim made it more difficult for the Majority to do this. As the Majority itself recognized, "[t]he heart of plaintiff's case" was "a series

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[236] *Trump v. Hawaii*, 138 S. Ct. at 2442.

[237] *See, e.g.*, *id.* at 2445.

[238] *Id.*

[239] *See Trump v. Hawaii*, 138 S. Ct. at 2442–43; *Int'l Refugee Assistance Project*, 265 F. Supp. 3d at 622–25.

[240] Trump v. Hawaii, 138 S. Ct. 2392, 2443 (2018).

[241] *Id.*

[242] *Id.*

[243] *Id.* at 2444–45; Int'l Refugee Assistance Program v. Trump 265 F. Supp. 3d 570, 626 (D. Md. 2017).

[244] *See Trump v. Hawaii*, 138 S. Ct. at 2403–23.

of statements by the President and his advisers casting doubt on the official objective of the Proclamation."[245] Faced with the irrefutable evidence of religious animus contained in the President's statements, and the expectation that a First Amendment analysis by its very nature requires scrutiny of such words, the Majority, in essence, expunged these words from their analysis through two tracks: one legal and one a rhetorical sleight of hand, when it seemingly considered the President's words, but then removed them from their narrative.[246]

In its legal analysis, the Majority first framed the case as a legal outlier, noting that "[t]he case before us differs in numerous respects from the conventional Establishment Clause claim. Unlike the typical suit involving religious displays or school prayer, plaintiffs seek to invalidate a national security directive regulating the entry of aliens abroad."[247] It then applied the *Mandel* test, using the rational basis standard, which gave it the most room to ignore the President's words.[248]

The Majority then performed a rhetorical feint, acknowledging the President's words and even chastising him, but then excising them from its analysis.[249] In the first several pages of its holding on the Establishment Clause, the Majority quoted verbatim a representative sample of Trump's anti-Muslim statements, both as a candidate and through the various iterations of the ban.[250] It followed this with a lengthy, but seemingly digressive, passage extolling past presidents who used "their extraordinary power to speak to his fellow citizens and on their behalf" and the use of that power "to espouse the principles of religious freedom and tolerance on which the nation was founded."[251] It quoted examples of the lofty rhetoric offered by American leaders that spanned virtually the entire life of the republic, from George Washington to George W. Bush.[252] In a foreshadowing of what was to come, it then warned the reader of the high bar those sentiments set: "Yet it cannot be denied that the Federal Government and the Presidents who have carried its laws into effect have—from the Nation's earliest days—performed unevenly in living up to those inspiring words."[253]

This passage served several narrative purposes. It assured the reader that the Majority was well aware of the President's statements, and condemned them,

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[245] *Id.* at 2417.

[246] *Id.* at 2418.

[247] *Id.* at 2418.

[248] *Id.* at 2420. The rational basis test—the lowest level of scrutiny—requires that the challenged law be rationally related to a legitimate government interest. Williamson v. Lee Optical of Oklahoma Inc., 348 U.S. 483 (1955).

[249] *See* Trump v. Hawaii, 138 S. Ct. 2392, 2417 (2018).

[250] *Id.*

[251] *Id.* at 2417–18.

[252] *Id.* at 2418.

[253] *Id.* at 2418.

even sending the President a message that such rhetoric is beneath the office of the Presidency. At the same time, it also imparted a sheen of normalcy to the Trump Presidency, suggesting that it is inevitable our leaders will fall short of our aspirations, as they have in the past.[254] It implies this is not unprecedented, as the plaintiffs suggest, but inescapable: this leader may not be perfect, but neither were others.

As it did with its statutory analysis, the Majority cast itself as hesitant to judge those leaders, especially when it came to immigration and national security.[255] As the Majority put it, "[f]or more than a century, this Court has recognized that the admission and exclusion of foreign nationals is a "fundamental sovereign attribute exercised by the Government's political departments largely immune from judicial control."[256] Thus, as described above, it applied the rational basis test, which the Majority itself described as exceedingly weak: "It should come as no surprise that the Court hardly ever strikes down a policy as illegitimate under rational basis scrutiny."[257]

The Majority also depicted itself as magnanimous in choosing this test, and in considering Trump's statements. It noted that "a conventional application of *Mandel*, asking only whether the policy is facially legitimate and bona fide, would put an end to our review."[258] However, because "the Government has suggested that it may be appropriate here for the inquiry to extend beyond the facial neutrality of the order . . . For our purposes today, we assume that we may look behind the face of the Proclamation to the extent of applying rational basis review."[259] This, the Majority said, would allow it to "consider plaintiff's extrinsic evidence."[260]

In a key passage that signaled a shift in plot line, the Majority then separated the office of the presidency from the words of the man who held it, signaling the former would be its actual guiding star:

> Plaintiffs argue that this President's words strike at fundamental standards of respect and tolerance, in violation of our constitutional tradition. But the issue before us is not whether to denounce the statements. It is instead the significance of those statements in reviewing a Presidential directive, neutral on its face, addressing a matter within the core of executive responsibility. In doing so, *we must consider not only the statements of a particular President, but also the authority of the Presidency itself.* [261] (emphasis supplied)

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[254] *See id.* at 2417–18.

[255] *Id.* at 2418.

[256] *Id.*

[257] *Id.* at 2420.

[258] *Id.*

[259] *Id.*

[260] *Id.*

[261] *Id.* at 2401–02.

While this and the other passages cited above suggest that the Majority would consider *both* "the statements" and a President's inherent powers, the Majority focused exclusively on the latter.[262] Like a character who is introduced at the beginning of a play never to return again, the Majority made no further mention of Trump's statements and did not include those statements in its analysis. As with its statutory analysis, it looked only to the Proclamation and official executive actions to determine that the Proclamation met the rational basis standard.[263] As the Majority explained, all that is needed is a showing that the Proclamation "has a legitimate grounding in national security concerns, quite apart from any religious hostility, we must accept that independent justification."[264] Unless the Proclamation was "inexplicable by anything but animus," the Proclamation must stand.[265] In other words, religious animus takes a back seat to national security, unless it can be shown that it was the sole and only reason for the policy.

Whereas plaintiffs asserted that national security was a pretext for discriminating against Muslims, the Majority identified national security as the driving force behind the Proclamation.[266] Its evidence was simple and straightforward: the words of the Proclamation itself, which were "neutral on its face, addressing a matter within the core of executive responsibility" and which "is expressly premised on legitimate purposes: preventing entry of nationals who cannot be adequately vetted and inducing other nations to improve their practices."[267] As the Majority further explained, "the text says nothing about religion."[268] The Majority also treated the Proclamation as a stand-alone document, untwining it from its predecessors by simply ignoring the latter.

The Proclamation, according to the Majority, treated Muslims fairly.[269] As it explained, it covered only 8% of the world's Muslims, and, after the word wide review, exempted Iraq, making it "difficult to see how exempting one of the largest predominantly Muslim countries in the region from coverage under the Proclamation can be cited as evidence of animus toward Muslims."[270] Moreover, the Proclamation allowed many of the Muslims from the designated countries to enter the United States on non-immigrant visas, or through the waiver program; the latter very similar to one provided for by President Carter during the Iran hostage crisis.[271] Notably, the Majority explicitly rejected any

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[262] *Id.* at 2418.

[263] *Id.* at 2421.

[264] *Id.*

[265] *Id.*

[266] *See id.* at 2421.

[267] *Id.*

[268] *Id.* at 2402, 2421.

[269] *See id.* at 2421.

[270] *Id.*

[271] *Id.* at 2422–23.

evidence that the waiver program was not working, a potential sign of religious animus.[272] Thus, as with its statutory analysis, the Majority treated official words as inviolable, with no need to look behind the curtain.

In sum, whereas the lower courts and Supreme Court dissenters saw a deeply flawed leader motivated by religious animus, the Majority saw the office of the Presidency rather than the man who occupied it. Following the same narrative path as its statutory analysis, the Majority replaced "@realDonaldTrump" (the twitter handle from which his many statements were disseminated) with the stock character of a President, a reified presence who, by default, is entitled to deference and the assumption of regularity. Bureaucratically produced documents—the official words of government—were also entitled to deference, and taken at face value.[273] In this way, the Majority's narrative preserved the power and status of the Presidency, no matter the actions or words of its present occupant.

DISCUSSION

From the perspective of narrative, the travel ban cases provided a surfeit of compelling plot lines and characters, of grand themes and foundational myths. They pitted national security against religious freedom, open borders versus closed ones, and executive prerogative versus judicial intervention. They also echoed long-standing controversies over the proper balance of power between the three branches of government, especially when it came to national security and immigration. Complicating this fray, though, was a novel dilemma: How should the judiciary respond to a game-changing President who often did not conform to conventional norms and customs of governing, in words and in deeds? How, if at all, should the judiciary consider this?

Which legal road a particular court chose inevitably led to a different result, as one path protected the President and the other exposed him. On one track, the Majority's route, was the engine of government running as it always had with the President duly exercising his Constitutional and legislative delegated authority, in customary, ordered, and methodical ways.[274] This road rendered his words and disruptive persona invisible. On the other track was a runaway train, with a man named Donald Trump at the helm, driving above the speed limit and upsetting the regular order. This road was paved with religious animus, with Trump's words and unconventional actions strewn across the track.[275] In short, while the Majority cloaked the President in the armor of government, the

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[272] *Id.* at 2423.

[273] *See id.* at 2418–23.

[274] *See id.*

[275] *See* Table 2.

lower federal courts unsheathed him, portraying the President as a loose cannon trampling over long held revered values.[276]

Context in judicial decision-making has always mattered, including political context.[277] As described above, Sunstein, Schkade, Ellman, and Sawicki found that it is the controversial cases where ideology and partisanship are likely to play a more prominent role, so it is not surprising that the travel ban cases exemplified this.[278] On the campaign trail, the travel ban was an ideological and political flash point. [279] By head count, Republican-appointed judges were more likely to uphold the ban and Democratic-appointed judges to overturn it.[280] Of the fourteen judges (including the Supreme Court justices) who voted to uphold the ban, all were appointed by a Republican President.[281] Of the twenty-three judges who voted to overturn it, twenty-one were appointed by a Democratic President.[282]

The story each judge chose to tell—both the legal and the social—illuminates how ideology infiltrates judicial decisions. While legal and social stories are inevitably intertwined, the social story is usually depicted as a vehicle for justifying or explaining the legal outcome of a case. But for both sides in the travel ban cases, it appeared that decisions were influenced by ideological commitments. The judges who overturned the ban filled the many pages of their decisions with grand themes exhorting the nation's founding principles and sacred texts, and which at times read more like sermons and paeans to immigration, diversity and religious tolerance than legal opinions.[283] They also challenged the power and authority of a very unconventional president. The legal choices they made—a test for the Establishment Clause that allowed the President's words in, and a statutory interpretation that curbed the President's power—gave them the path to decisively overturn the ban.[284]

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[276] *Compare* Trump v. Hawaii, 138 S. Ct. 2392 (2018), *with* Int'l Refugee Assistance Project v. Trump, 265 F. Supp. 3d (D. Md. 2017), *and* Aziz v. Trump, 234 F. Supp. 3d 724 (E.D. Va. 2017).

[277] Larry DiMatteo, *Reason and Context: A Dual Track Theory of Interpretation*, 109 PENN ST. L. REV. 109 (2004); Trinyan Mariano, *Legal Realism and the Rhetoric of Judicial Neutrality: Richard Wright's Challenge to American Jurisprudence*, 1 BRIT. J. OF AM. LEGAL STUD. 467–516 (2012); Martha Minow & Elizabeth Spelman, *In Context*, 63 S. CAL. L. REV. 1597 (1990).

[278] Sunstein, Schkade, Ellman & Sawicki, *supra* note 12.

[279] Jenna Johnson, *Trump Calls for 'Total and Complete Shutdown of Muslims Entering the United States'*, WASH. POST (Dec. 7, 2015), https://www.washingtonpost.com/news/post-politics/wp/2015/12/07/donald-trump-calls-for-total-and-complete-shutdown-of-muslims-entering-the-united-states/?noredirect=on.

[280] *See* Table 1.

[281] *See id.*

[282] *See id.*

[283] *See, e.g.*, Hawaii v. Trump, 878 F.3d 662, 698 (9th 2017) (*Hawaii I*).

[284] *See, e.g.*, Aziz v. Trump, 234 F. Supp. 3d 724, 733–37 (E.D. Va. 2017).

The Majority's decision likewise appeared driven by a desire for a specific outcome. For the most part, it avoided the flowing rhetoric and drama that characterized the decisions overturning the ban, delivering a bland, stilted, and officious-sounding monologue about the workings of government and the powers of the Presidency that obfuscated the actions and words of the main protagonist. As a Supreme Court decision, especially on such a contentious issue, it was surprisingly thin, going out of its way to leave the most salacious parts—Trump's many anti-Muslim statements—out of its narrative, while pretending to do otherwise. Only by separating the man from his utterances, Trump's personal views from his presidential prerogatives and power, was the Majority able to find a legal path to upholding the ban.

In the public sphere, there is a robust debate about the health of America's democracy, including its basic institutional functions, norms and values, and increasing polarization and hyper-partisanship.[285] The judiciary plays a key role in mediating these disputes. The travel ban cases suggest that, right or left, courts do not operate above the fray, removed from the political discourse of the day and that ideology and partisanship will continue to play a role. This is especially significant when considering the role of the Supreme Court in the United States as the final arbiter of many of these disputes. As Devins and Baum observe in their empirical study of the ideological composition of the Supreme Court, the contemporary Court is the first to be divided sharply along partisan lines, reflecting the "polarization in government and in the broader political elite," but with a sharp turn to the right that is not reflective of dominant views.[286] The travel ban cases provide a distinctive case study of this dynamic, and serve as a cautionary tale.

As the first act of the Trump Administration to be challenged in court, the travel ban cases thus also provide a glimpse, beyond a simple tally of wins and losses, of how the courts are responding in the "time of Trump."[287] As Judge Gertner has observed, in the past the lower federal courts were more likely to "duck, avoid, or evade" politically tinged cases implicating civil rights and other contentious political issues, especially when "the system is working" and such disputes could be resolved through "the political process."[288] While it is too soon to write the history of this era, the travel ban cases and others[289] suggest

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[285] STEVEN LEVITSKY & DANIEL ZIBLATT, HOW DEMOCRACIES DIE (2018); CASS R. SUNSTEIN, CAN IT HAPPEN HERE?: AUTHORITARIANISM IN AMERICA (Cass R. Sustein ed., 2018).

[286] Neal Devins & Lawrence Baum, *Split Definitive: How Party Polarization Turned the Supreme Court into a Partisan Court*, 1 SUP. CT. REV. 301, 308 (2016). While a similar dynamic is occurring in the appointment process for lower court federal judges, the effect is more diffused both because of the sheer number of justices and the higher rates of turn-over.

[287] Gertner, *supra* note 13.

[288] *Id.* at 86, 89.

[289] By one estimate, as of March 19, 2019, the Trump administration has lost at least 63 times in federal court over the past two years. Fred Barbash & Deanna Paul, *The Real Reason*

that the federal courts are poised to play a more muscular role, while it is the Supreme Court that may be more likely to "duck, avoid, or evade."[290]

the Trump Administration is Constantly Losing in Court, WASH. POST (Mar. 19, 2019, 12:05 PM) https://www.washingtonpost.com/world/national-security/the-real-reason-president-trump-is-constantly-losing-in-court/2019/03/19/f5ffb056-33a8-11e9-af5bb51b7ff322e9_story.html. For examples of the federal courts intervention in the area of immigration reversing the Administration's policies, including on sanctuary cities and the Temporary Protected Status program, see Univ. Mich. Law Sch., *Civil Rights Litigation Clearing House*, UNIV. MICH. LAW SCH. (last visited Nov. 23, 2019), https://www.clearinghouse.net; *see also* Institute for Policy Integrity (2019), noting that only 3 of 44 legal challenges to regulatory roll backs between July 3, 2017 and August 6, 2019 were upheld by the courts. Intitute for Policy Integrity, *Roundup: Trump-Era Agency Policy in the Courts*, N.Y.U. SCH. OF LAW (last updated Nov. 1, 2019), https://policyintegrity.org/documents/Deregulation_Roundup.pdf.

[290] Gertner, *supra* note 13, at 86.

APPENDIX

Table 1. Case Summaries

EO-1	Judge Majority	Judge Dissent	Violation First Amendment	Violation INA	Other
Washington v. Trump, No. C17-0141JLR, 2017 WL 462040 (W.D. Wash. Feb. 3, 2017)	James L. Robart (*Bush II*, 2004)				No extended discussion
Aziz v. Trump, 234 F. Supp. 3d 724 (E.D. Va. 2017)	Leonie M. Brinkema (*Clinton*, 1993)		Yes	n/a*	
Louhghalam v. Trump, 230 F. Supp. 3d 26 (D. Mass. 2017)	Nathaniel M. Gortman (*Bush I*, 1992)		No	n/a	
Washington v. Trump, 847 F.3d 1151 (9th Cir. 2017)	William C. Canby (*Carter*, 1980) Richard R. Clifton (*Bush II*, 2002) Michelle Friedland (*Obama*, 2014)				Due Process
Washington v. Trump, 853 F.3d 933 (9th Cir. 2017) Denial of	(see above entry)	Alex Kozinski (*Reagan*,1985) Jay C. Bybee (*Bush II*, 2003)	No	No	

* n/a means that the court did not address this claim.

reconsideration en banc **		Consuelo M. Callahan (*Bush II*, 2003) Carlos T. Bea (*Bush II*, 2003) Sandra Ikuta (*Bush II*, 2006)			
EO-2	Judge Majority	Judge Dissent	Violation First Amendment	Violation INA	Other
IRAP v. Trump, 265 F. Supp. 3d 570 (D. Md. 2017)	Theodore D. Chuang (*Obama*, 2014)		Yes	Yes	
Hawaii v. Trump, 245 F. Supp. 3d 1227 (D. Haw. 2017)	Derrick C. Watson (*Obama*, 2013)		Yes	n/a	
IRAP v. Trump, 857 F.3d 554 (4th Cir. 2017)	Robert L. Gregory (Clinton, 2001). Diana Gribbon Motz (*Clinton*, 1994) Robert B. King (*Clinton*, 1998) James A. Wynn	Paul V. Niemeyer (*Bush I*, 1990) Dennis W. Shedd (*Bush II*, 2008) G. Steven Agee (*Bush II*, 2008)	Yes	n/a	

** *See* Washington v. Trump, 853 F.3d 933 (9th Cir. 2017).

	(*Obama*, 2010) Albert Diaz (*Obama*, 2010) Henry F. Floyd (*Obama*, 2011) Pamela A. Harris (*Obama*, 2014) Barbara Milano-Keenan (*Obama*, 2010) Stephanie D. Thacker (*Obama*, 2012)				
EO-2	Judge Majority	Judge Dissent	Violation First Amendment	Violation INA	Other
Hawaii v. Trump, 878 F.3d 662 (9th Cir. 2017)	Michael D. Hawkins (*Clinton*, 1994) Ronald M. Gould (*Clinton*, 1999) Ricard A. Paez (*Clinton*, 2000)		n/a	Yes	
Proclamation					

IRAP v. Trump, 265 F. Supp. 3d 570 (D. Md. 2017)	Theodore D. Chang (repeat)		n/a	Yes	
Proclamation	Judge Majority	Judge Dissent	Violation First Amendment	Violation INA	Other
Hawaii v. Trump, 878 F.3d 662 (9th Cir. 2017)	Michael D. Hawkins Ronald M. Gould Ricard A. Paez (repeat)		n/a	Yes	
Trump v. Hawaii, 138 S. Ct. 2392 (2018)	Anthony Kennedy (*Reagan*, 1988) Clarence Thomas (*Bush II*, 1991) Samuel A. Alito, Jr. (*Bush II*, 2006) John G. Roberts (*Bush II*, 2005) Neil Gorsuch (*Trump*, 2017) Stephen Breyer	Stephen Breyer (*Clinton*, 1994) Ruth Bader Ginsberg (*Clinton*, 1993) Sonia Sotomayor (*Obama*, 2009) Elena Kagan (*Obama*, 2010)	No	No	

	(*Clinton*, 1994) Ruth Bader Ginsberg (*Clinton*, 1993) Sonia Sotomayor (*Obama*, 2009) Elena Kagan (*Obama*, 2010)				

Table 2: Chronological Selected Public Statements on Muslims and the Travel Ban

Donald J. Trump is calling for a total and complete shutdown of Muslims entering the United States until our country's representatives can figure out what is going on. Press Release, Trump-Pence Campaign, Donald J. Trump Statement on Preventing Muslim Immigration (Dec. 7, 2015), https://www.donaldjtrump.com/press-releases/donald-j.-trump-statement-on-preventing-muslim-immigration.
The day after his press release, when asked how border officials might implement his plan, Mr. Trump explained: "They would say, 'are you Muslim?'" The commentator further questioned: "And if they said yes, they would not be allowed in the country?" Mr. Trump responded, "That's correct." MSNBC, *Donald Trump On Muslim Travel Ban, Obama And 2016*, YOUTUBE (Dec. 8, 2015) https://www.youtube.com/watch?v=5I3E3-U-1jc.
"I think Islam hates us" and that Muslims have "tremendous hatred" and "unbelievable hatred." "we can't allow people coming into this country who have this hatred of the United States" and denied that a distinction could be made between "radical Islam" and "Islam itself." Theodore Schleifer, *Donald Trump: 'I think Islam hates us'*, CNN (Mar. 10, 2016, 5:56 PM), http://www.cnn.com/2016/03/09/politics/donald-trump-islam-hates-us/.
So General Pershing, tough, tough guy . . . . And they catch 50 terrorists in the Philippines . . . And as you know, swine, pig, a big problem for them, big problem. He took two pigs, they chopped them open. Took the bullets that were going to go and shoot these men. Took the bullets, the 50 bullets, dropped them in the pigs, swished them around, so there was blood all over those bullets. . . . They put the bullets into the rifles. And they shot 49 men. . . . I'm just saying, if we're going to win, we're going to win or let's not play the game and let's not be a country any more. They put the bullets in the rifles and they shot 49 of the 50 men. Dead. Boom. So it was a pig-infested bullet in

each one. . . For 28 years, there was no terrorism. . . . We have to do what we have to do. We have to clean it out. These are people that have horrible thoughts. These are people that have visions that you wouldn't believe NBC6 Miami Tracking Irma, FULL SPEECH: *Donald Trump rally in Dayton, OH 3-12-2016*, YOUTUBE (Mar. 12, 2016), https://www.youtube.com/watch?v=-9KOAHf4GCw (minutes to 42:45 to 46:45).
Mr. Trump explained that he would not back down from pursuing his "temporary ban on Muslim immigration," equating being Muslims with being a radical terrorist. He stated, "You are going to have to watch and are going to have to see. I have done a lot of things that nobody thought I could do." *Face the Nation transcripts June 5, 2016: Trump*, CBS NEWS (June 5, 2016, 12:57 PM) http://www.cbsnews.com/news/face-the-nation-transcripts-june-5-2016-trump/.
Upon reading the title of EO-1, "Protecting the Nation from Foreign Terrorist Entry into the United States," he added, "We all know what that means"—an obvious reference to his well-known pledge to prevent Muslims from entering the country *Trump Signs Executive Orders at Pentagon*, ABC NEWS (Jan. 27, 2017), http://abcnews.go.com/Politics/video/trump-signs-executive-orders-pentagon45099173.
Do you know if you were a Christian in Syria it was impossible, at least very tough to get into the United States? If you were a Muslim you could come in, but if you were a Christian, it was almost impossible and the reason that was so unfair, everybody was persecuted in all fairness, but they were chopping off the heads of everybody but more so the Christians. And I thought it was very, very unfair. So we are going to help them." David Brody, *President Trump says Persecuted Christians will be Given Priority as Refugees*, THE BRODY FILE (Jan. 27, 2017), https://www1.cbn.com/thebrodyfile/archive/2017/01/27/brody-file-exclusive-president-trump-says-persecuted-christians-will-be-given-priority-as-refugees.
The President's senior advisor, Stephen Miller, stated that EO-2 would be designed to achieve "the same basic policy outcome" as the first order and to address only "very technical issues." *Trump Advisor says New Travel Ban will have 'Same Basic Policy Outcome,'* FOX NEWS (Feb 21, 2017), https://www.foxnews.com/politics/trump-adviser-says-new-travel-ban-will-have-same-basic-policy-outcome.
Mr. Trump stated that EO-2 was a "watered down version of the first order," "I think we ought to go back to the first one and go all the way, which is what I wanted to do in the first place!" CNN, *Trump Rails Against Court Ruling Blocking Travel Ban*, FOX4 (Mar. 15, 2017), https://www.fox4now.com/news/national/trump-rails-against-court-ruling-blocking-travel-ban.
People, the lawyers and the courts can call it whatever they want, but I am calling it what we need and what it is, a TRAVEL BAN !

Twitter, 6/5/2017, Donald J. Trump (@realDonaldTrump), TWITTER (June 5, 2017, 3:25 AM), https://twitter.com/realdonaldtrump/status/871674214356484096?lang=en.
Mr. Trump re-tweeted three anti-Muslim videos initially tweeted by a British political party whose mission is to oppose and destroy Islam, among other religions Peter Baker and Eileen Sullivan, *Trump Shares Inflammatory Anti-Muslim Videos, and Britain's Leaders Condemn Them*, N.Y. TIMES, (Nov. 29, 2017), https://www.nytimes.com/2017/11/29/us/politics/trump-anti-muslim-videos-jayda-fransen.html.