**Constitutional Law I**

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**Spring 2022**

**Supplemental Reading #3 (*Trump v. Hawaii*)**

**SUPREME COURT OF THE UNITED STATES**

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**DONALD J. TRUMP, PRESIDENT OF THE UNITED STATES, et al., PETITIONERS *v.* HAWAII, et al.**

**on writ of certiorari to the United States Court of Appeals for the Ninth Circuit**

**No. 17–965**

**Decided June 26, 2018[[1]](#footnote-1)**

CHIEF JUSTICE ROBERTS delivered the opinion of the Court [joined by Justices Kennedy, Thomas, Alito and Gorsuch].

Under the Immigration and Nationality Act, foreign nationals seeking entry into the United States undergo a vetting process to ensure that they satisfy the numerous requirements for admission. The Act also vests the President with authority to restrict the entry of aliens when- ever he finds that their entry “would be detrimental to the interests of the United States.” 8 U. S. C. §1182(f). Relying on that delegation, the President concluded that it was necessary to impose entry restrictions on nationals of countries that do not share adequate information for an informed entry determination, or that otherwise present national security risks. Presidential Proclamation No. 9645, 82 Fed. Reg. 45161 (2017) (Proclamation). The plaintiffs in this litigation, respondents here, challenged the application of those entry restrictions to certain aliens abroad. We now decide whether the President had authority under the Act to issue the Proclamation, and whether the entry policy violates the Establishment Clause of the First Amendment.

I

[A lengthy statement of facts is omitted.]

B

Plaintiffs in this case are the State of Hawaii, three individuals …, and the Muslim Association of Hawaii. The State operates the University of Hawaii system, which recruits students and faculty from the designated countries. The three individual plaintiffs are U.S. citizens or lawful permanent residents who have relatives from Iran, Syria, and Yemen applying for immigrant or nonimmigrant visas. The Association is a nonprofit organization that operates a mosque in Hawaii.

Plaintiffs challenged the Proclamation—except as applied to North Korea and Venezuela—on several grounds. As relevant here, they argued that the Proclamation contravenes provisions in the [Act].. Plaintiffs further claimed that the Proclamation violates the Establishment Clause of the First Amendment, because it was motivated not by concerns pertaining to national security but by animus toward Islam.

The District Court granted a nationwide preliminary injunction barring enforcement of the entry restrictions. …

The Court of Appeals affirmed. The court first held that the Proclamation exceeds the President’s authority under §1182(f )… The court did not reach plaintiffs’ Establishment Clause claim.

We granted certiorari. 583 U. S. \_\_\_ (2018).

II

[The Court first held the case was justiciable.]

III

The INA establishes numerous grounds on which an alien abroad may be inadmissible to the United States and ineligible for a visa. See, *e.g.,* 8 U. S. C. §§1182(a)(1) (health-related grounds), (a)(2) (criminal history), (a)(3)(B) (terrorist activities), (a)(3)(C) (foreign policy grounds). Congress has also delegated to the President authority to suspend or restrict the entry of aliens in certain circumstances. The principal source of that authority, §1182(f ), enables the President to “suspend the entry of all aliens or any class of aliens” whenever he “finds” that their entry “would be detrimental to the interests of the United States.”

…

By its plain language, §1182(f ) grants the President broad discretion to suspend the entry of aliens into the United States. The President lawfully exercised that discretion based on his findings—following a worldwide, multi-agency review—that entry of the covered aliens would be detrimental to the national interest. And plaintiffs’ attempts to identify a conflict with other provisions in the INA, and their appeal to the statute’s purposes and legislative history, fail to overcome the clear statutory language.

A

The text of §1182(f ) states:

“Whenever the President finds that the entry of any aliens or of any class of aliens into the United States would be detrimental to the interests of the United States, he may by proclamation, and for such period as he shall deem necessary, suspend the entry of all aliens or any class of aliens as immigrants or nonimmigrants, or impose on the entry of aliens any restrictions he may deem to be appropriate.”

By its terms, §1182(f ) exudes deference to the President in every clause. It entrusts to the President the decisions whether and when to suspend entry (“[w]henever [he] finds that the entry” of aliens “would be detrimental” to the national interest); whose entry to suspend (“all 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”). ...

The Proclamation falls well within this comprehensive delegation. The sole prerequisite set forth in §1182(f ) is that the President “find[ ]” that the entry of the covered aliens “would be detrimental to the interests of the United States.” The President has undoubtedly fulfilled that requirement here. He first ordered DHS and other agencies to conduct a comprehensive evaluation of every single country’s compliance with the information and risk assessment baseline. The President then issued a Proclamation setting forth extensive findings describing how deficiencies in the practices of select foreign governments—several of which are state sponsors of terrorism—deprive the Government of “sufficient information to assess the risks [those countries’ nationals] pose to the United States.” Proclamation §1(h)(i). Based on that review, the President found that it was in the national interest to restrict entry of aliens who could not be vetted with adequate information—both to protect national security and public safety, and to induce improvement by their home countries. …

[Plaintiffs’] … arguments are grounded on the premise that §1182(f ) not only requires the President to *make* a finding that entry “would be detrimental to the interests of the United States,” but also to explain that finding with sufficient detail to enable judicial review. That premise is questionable… But even assuming that some form of review is appropriate, plaintiffs’ attacks on the sufficiency of the President’s findings cannot be sustained. The 12-page Proclamation—which thoroughly describes the process, agency evaluations, and recommendations underlying the President’s chosen restrictions—is more detailed than any prior order a President has issued under §1182(f ). Contrast Presidential Proclamation No. 6958, 3 CFR 133 (1996) (President Clinton) (explaining in one sentence why suspending entry of members of the Sudanese government and armed forces “is in the foreign policy interests of the United States”); Presidential Proclamation No. 4865, 3 CFR 50–51 (1981) (President Reagan) (explaining in five sentences why measures to curtail “the continuing illegal migration by sea of large numbers of undocumented aliens into the southeastern United States” are “necessary”).

Moreover, plaintiffs’ request for a searching inquiry into the persuasiveness of the President’s justifications is inconsistent with the broad statutory text and the deference traditionally accorded the President in this sphere. Whether the President’s chosen method of addressing perceived risks is justified from a policy perspective is irrelevant to the scope of his authority. And when 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.” *Holder v. Humanitarian Law Project*, 561 U.S. 1, 35 (2010).  ….

[The Court rejected various other statutory arguments by the Plaintiffs.]

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The Proclamation is squarely within the scope of Presidential authority under the INA. Indeed, neither dissent even attempts any serious argument to the contrary, despite the fact that plaintiffs’ primary contention below and in their briefing before this Court was that the Proclamation violated the statute.

IV

A

[The Court first held that the plaintiffs had standing to bring their constitutional claim.]

B

The First Amendment provides, in part, that “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.” Our cases recognize that “[t]he clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another.” *Larson* v. *Valente*, 456 U. S. 228, 244 (1982). Plaintiffs believe that the Proclamation violates this prohibition by singling out Muslims for disfavored treatment. The entry suspension, they contend, operates as a “religious gerrymander,” in part because most of the countries covered by the Proclamation have Muslim-majority populations. And in their view, deviations from the information-sharing baseline criteria suggest that the results of the multi-agency review were “foreordained.” Relying on Establishment Clause precedents concerning laws and policies applied domestically, plaintiffs allege that the primary purpose of the Proclamation was religious animus and that the President’s stated concerns about vetting protocols and national security were but pretexts for discriminating against Muslims.

At the heart of plaintiffs’ case is a series of statements by the President and his advisers casting doubt on the official objective of the Proclamation. For example, while a candidate on the campaign trail, the President published a “Statement on Preventing Muslim Immigration” that called for a “total and complete shutdown of Muslims entering the United States until our country’s representatives can figure out what is going on.” That statement remained on his campaign website until May 2017.  Then-candidate Trump also stated that “Islam hates us” and asserted that the United States was “having problems with Muslims coming into the country.”  Shortly after being elected, when asked whether violence in Europe had affected his plans to “ban Muslim immigration,” the President replied, “You know my plans. All along, I’ve been proven to be right.”

One week after his inauguration, the President issued EO–1. In a television interview, one of the President’s campaign advisers explained that when the President “first announced it, he said, ‘Muslim ban.’ He called me up. He said, ‘Put a commission together. Show me the right way to do it legally.’” The adviser said he assembled a group of Members of Congress and lawyers that “focused on, instead of religion, danger. . . . [The order] is based on places where there [is] substantial evidence that people are sending terrorists into our country.”

Plaintiffs also note that … thePresident expressed regret that his prior order had been “watered down” and called for a “much tougher version” of his “Travel Ban.” Shortly before the release of the Proclamation, he stated that the “travel ban . . . should be far larger, tougher, and more specific,” but “stupidly that would not be politically correct.”  More recently, on November 29, 2017, the President retweeted links to three anti-Muslim propaganda videos. In response to questions about those videos, the President’s deputy press secretary denied that the President thinks Muslims are a threat to the United States, explaining that “the President has been talking about these security issues for years now, from the campaign trail to the White House” and “has addressed these issues with the travel order that he issued earlier this year and the companion proclamation.”

…[T]he 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.

… Plaintiffs … ask the Court to probe the sincerity of the stated justifications for the policy by reference to extrinsic statements—many of which were made before the President took the oath of office. These various aspects of plaintiffs’ challenge inform our standard of review.

C

For more than a century, this Court has recognized that the admission and exclusion of foreign nationals is a “fundamental sovereign attribute exercised by the Government’s political departments largely immune from judicial control.” *Fiallo* v. *Bell*, 430 U.S. 787, 792 (1977); see *Harisiades* v. *Shaughnessy*, 342 U.S. 580, 588–589 (1952) (“[A]ny policy toward aliens is vitally and intricately interwoven with contemporaneous policies in regard to the conduct of foreign relations [and] the war power.”). Because decisions in these matters may implicate “relations with foreign powers,” or involve “classifications defined in the light of changing political and economic circumstances,” such judgments “are frequently of a character more appropriate to either the Legislature or the Executive.” *Mathews* v. *Diaz*, 426 U.S. 67, 81 (1976).

…

The upshot of our cases in this context is clear: “Any rule of constitutional law that would inhibit the flexibility” of the President “to respond to changing world conditions should be adopted only with the greatest caution,” and our inquiry into matters of entry and national security is highly constrained. *Mathews*, 426 U.S., at 81–82. We need not define the precise contours of that inquiry in this case… For our purposes today, we assume that we may look behind the face of the Proclamation to the extent of applying rational basis review. That standard of review considers whether the entry policy is plausibly related to the Government’s stated objective to protect the country and improve vetting processes. As a result, we may consider plaintiffs’ extrinsic evidence, but will uphold the policy so long as it can reasonably be understood to result from a justification independent of unconstitutional grounds.

D

Given the standard of review, it should come as no surprise that the Court hardly ever strikes down a policy as illegitimate under rational basis scrutiny. On the few occasions where we have done so, a common thread has been that the laws at issue lack any purpose other than a “bare . . . desire to harm a politically unpopular group.” *Department of Agriculture* v. *Moreno*, 413 U. S. 528, 534 (1973).…

The Proclamation does not fit this pattern. It cannot be said that it is impossible to “discern a relationship to legitimate state interests” or that the policy is “inexplicable by anything but animus.” Indeed, the dissent can only attempt to argue otherwise by refusing to apply anything resembling rational basis review. But because 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.

The Proclamation is expressly premised on legitimate purposes: preventing entry of nationals who cannot be adequately vetted and inducing other nations to improve their practices. The text says nothing about religion. Plaintiffs and the dissent nonetheless emphasize that five of the seven nations currently included in the Proclamation have Muslim-majority populations. Yet that fact alone does not support an inference of religious hostility, given that the policy covers just 8% of the world’s Muslim population and is limited to countries that were previously designated by Congress or prior administrations as posing national security risks. …

The Proclamation, moreover, reflects the results of a worldwide review process undertaken by multiple Cabinet officials and their agencies. Plaintiffs seek to discredit the findings of the review, pointing to deviations from the review’s baseline criteria resulting in the inclusion of Somalia and omission of Iraq. But as the Proclamation explains, in each case the determinations were justified by the distinct conditions in each country. Although Somalia generally satisfies the information-sharing component of the baseline criteria, it “stands apart . . . in the degree to which [it] lacks command and control of its territory.” Proclamation §2(h)(i). As for Iraq, the Secretary of Homeland Security determined that entry restrictions were not warranted in light of the close cooperative relationship between the U. S. and Iraqi Governments and the country’s key role in combating terrorism in the region. §1(g). It is, in any event, 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.

The dissent likewise doubts the thoroughness of the multi-agency review because a recent Freedom of Information Act request shows that the final DHS report was a mere 17 pages. Yet a simple page count offers little insight into the actual substance of the final report, much less predecisional materials underlying it.

More fundamentally, plaintiffs and the dissent challenge the entry suspension based on their perception of its effectiveness and wisdom. They suggest that the policy is overbroad and does little to serve national security interests. But 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.” *Chicago & Southern Air Lines, Inc.* v. *Waterman S. S. Corp.*, 333 U. S. 103, 111 (1948); … While we of course “do not defer to the Government’s reading of the First Amendment,” the Executive’s evaluation of the underlying facts is entitled to appropriate weight, particularly in the context of litigation involving “sensitive and weighty interests of national security and foreign affairs.” *Humanitarian Law Project*, 561 U.S., at 33–34.

…

Finally, the dissent invokes *Korematsu* v. *United States*, 323 U.S. 214 (1944). Whatever rhetorical advantage the dissent may see in doing so, *Korematsu*has nothing to do with this case. The forcible relocation of U. S. citizens to concentration camps, solely and explicitly on the basis of race, is objectively unlawful and outside the scope of Presidential authority. But it is wholly inapt to liken that morally repugnant order to a facially neutral policy denying certain foreign nationals the privilege of admission. The entry suspension is an act that is well within executive authority and could have been taken by any other President—the only question is evaluating the actions of this particular President in promulgating an otherwise valid Proclamation.

The dissent’s reference to *Korematsu*, however, affords this Court the opportunity to make express what is already obvious: *Korematsu*was gravely wrong the day it was decided, has been overruled in the court of history, and—to be clear—“has no place in law under the Constitution.” 323 U. S., at 248 (Jackson, J., dissenting).

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

V

Because plaintiffs have not shown that they are likely to succeed on the merits of their claims, we reverse the grant of the preliminary injunction as an abuse of discretion.  The case now returns to the lower courts for such further proceedings as may be appropriate. Our disposition of the case makes it unnecessary to consider the propriety of the nationwide scope of the injunction issued by the District Court.

The judgment of the Court of Appeals is reversed, and the case is remanded for further proceedings consistent with this opinion. …

[A concurring opinion of Justice Thomas is omitted.]

JUSTICE KENNEDY, concurring.

I join the Court’s opinion in full.

There may be some common ground between the opinions in this case, in that the Court does acknowledge that in some instances, governmental action may be subject to judicial review to determine whether or not it is “inexplicable by anything but animus,” Romer v. Evans, 517 U. S. 620, 632 (1996), which in this case would be animosity to a religion. Whether judicial proceedings may properly continue in this case, in light of the substantial deference that is and must be accorded to the Executive in the conduct of foreign affairs, and in light of today’s decision, is a matter to be addressed in the first instance on remand. And even if further proceedings are permitted, it would be necessary to determine that any discovery and other preliminary matters would not themselves intrude on the foreign affairs power of the Executive.

In all events, it is appropriate to make this further observation. There are numerous instances in which the statements and actions of Government officials are not subject to judicial scrutiny or intervention. That does not mean those officials are free to disregard the Constitution and the rights it proclaims and protects. The oath that all officials take to adhere to the Constitution is not confined to those spheres in which the Judiciary can correct or even comment upon what those officials say or do. Indeed, the very fact that an official may have broad discretion, discretion free from judicial scrutiny, makes it all the more imperative for him or her to adhere to the Constitution and to its meaning and its promise. …

JUSTICE SOTOMAYOR, with whom JUSTICE GINSBURG joins, dissenting.

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

I

…

A

The Establishment Clause forbids government policies “respecting an establishment of religion.” U. S. Const., Amdt. 1. The “clearest command” of the Establishment Clause is that the Government cannot favor or disfavor one religion over another. …

… To determine whether plaintiffs have proved an Establishment Clause violation, the Court asks whether a reasonable observer would view the government action as enacted for the purpose of disfavoring a religion. …

B

1

Although the majority briefly recounts a few of the statements and background events that form the basis of plaintiffs’ constitutional challenge, that highly abridged account does not tell even half of the story. The full record paints a far more harrowing picture, from which a reasonable observer would readily conclude that the Proclamation was motivated by hostility and animus toward the Muslim faith.

During his Presidential campaign, then-candidate Donald Trump pledged that, if elected, he would ban Muslims from entering the United States. Specifically, on December 7, 2015, he issued a formal statement “calling for a total and complete shutdown of Muslims entering the United States.” That statement, which remained on his campaign website until May 2017 (several months into his Presidency), read in full:

“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. According to Pew Research, among others, there is great hatred towards Americans by large segments of the Muslim population. Most recently, a poll from the Center for Security Policy released data showing ‘25% of those polled agreed that violence against Americans here in the United States is justified as a part of the global jihad’ and 51% of those polled ‘agreed that Muslims in America should have the choice of being governed according to Shariah.’ Shariah authorizes such atrocities as murder against nonbelievers who won’t convert, beheadings and more unthinkable acts that pose great harm to Americans, especially women.

“Mr. Trum[p] stated, ‘Without looking at the various polling data, it is obvious to anybody the hatred is beyond comprehension. Where this hatred comes from and why we will have to determine. Until we are able to determine and understand this problem and the dangerous threat it poses, our country cannot be the victims of the horrendous attacks by people that believe only in Jihad, and have no sense of reason or respect of human life. If I win the election for President, we are going to Make America Great Again.’—Donald J. Trump.”

On December 8, 2015, Trump justified his proposal during a television interview by noting that President Franklin D. Roosevelt “did the same thing” with respect to the internment of Japanese Americans during World War II.  In January 2016, during a Republican primary debate, Trump was asked whether he wanted to “rethink [his] position” on “banning Muslims from entering the country.”  He answered, “No.”  A month later, at a rally in South Carolina, Trump told an apocryphal story about United States General John J. Pershing killing a large group of Muslim insurgents in the Philippines with bullets dipped in pigs’ blood in the early 1900’s.  In March 2016, he expressed his belief that “Islam hates us. . . . [W]e can’t allow people coming into this country who have this hatred of the United States . . . [a]nd of people that are not Muslim.”  That same month, Trump asserted that “[w]e’re having problems with the Muslims, and we’re having problems with Muslims coming into the country.”  He therefore called for surveillance of mosques in the United States, blaming terrorist attacks on Muslims’ lack of “assimilation” and their commitment to “sharia law.”  A day later, he opined that Muslims “do not respect us at all” and “don’t respect a lot of the things that are happening throughout not only our country, but they don’t respect other things.”

As Trump’s presidential campaign progressed, he began to describe his policy proposal in slightly different terms. In June 2016, for instance, he characterized the policy proposal as a suspension of immigration from countries “where there’s a proven history of terrorism.”  He also described the proposal as rooted in the need to stop “importing radical Islamic terrorism to the West through a failed immigration system.”  Asked in July 2016 whether he was “pull[ing] back from” his pledged Muslim ban, Trump responded, “I actually don’t think it’s a rollback. In fact, you could say it’s an expansion.”  He then explained that he used different terminology because “[p]eople were so upset when [he] used the word Muslim.”

A month before the 2016 election, Trump reiterated that his proposed “Muslim ban” had “morphed into a[n] extreme vetting from certain areas of the world.” . Then, on December 21, 2016, President-elect Trump was asked whether he would “rethink” his previous “plans to create a Muslim registry or ban Muslim immigration.” He replied: “You know my plans. All along, I’ve proven to be right.”

On January 27, 2017, one week after taking office, President Trump signed Executive Order No. 13769, 82 Fed. Reg. 8977 (2017) (EO–1), entitled “Protecting the Nation From Foreign Terrorist Entry Into the United States.” As he signed it, President Trump read the title, looked up, and said “We all know what that means.” …

While litigation … was ongoing, President Trump repeatedly made statements alluding to a desire to keep Muslims out of the country. … And in June 2017, the President stated on Twitter that the Justice Department had submitted a “watered down, politically correct version” of the “original Travel Ban” “to S[upreme] C[ourt].” The President went on to tweet: “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!”  He added: “That’s right, we need a TRAVEL BAN for certain DANGEROUS countries, not some politically correct term that won’t help us protect our people!”  Then, on August 17, 2017, President Trump issued yet another tweet about Islam, once more referencing the story about General Pershing’s massacre of Muslims in the Philippines: “Study what General Pershing . . . did to terrorists when caught. There was no more Radical Islamic Terror for 35 years!”

In September 2017, President Trump tweeted that “[t]he travel ban into the United States should be far larger, tougher and more specific—but stupidly, that would not be politically correct!” … On November 29, 2017, President Trump “retweeted” three anti-Muslim videos, entitled “Muslim Destroys a Statue of Virgin Mary!”, “Islamist mob pushes teenage boy off roof and beats him to death!”, and “Muslim migrant beats up Dutch boy on crutches!” Those videos were initially tweeted by a British political party whose mission is to oppose “all alien and destructive politic[al] or religious doctrines, including . . . Islam.”  When asked about these videos, the White House Deputy Press Secretary connected them to the Proclamation, responding that the “President has been talking about these security issues for years now, from the campaign trail to the White House” and “has addressed these issues with the travel order that he issued earlier this year and the companion proclamation.”

2

As the majority correctly notes, “the issue before us is not whether to denounce” these offensive statements.  Rather, the dispositive and narrow question here is whether a reasonable observer, presented with all “openly available data,” the text and “historical context” of the Proclamation, and the “specific sequence of events” leading to it, would conclude that the primary purpose of the Proclamation is to disfavor Islam and its adherents by excluding them from the country. The answer is unquestionably yes.

Taking all the relevant evidence together, a reasonable observer would conclude that the Proclamation was driven primarily by anti-Muslim animus, rather than by the Government’s asserted national-security justifications. Even before being sworn into office, then-candidate Trump stated that “Islam hates us,”, warned that “[w]e’re having problems with the Muslims, and we’re having problems with Muslims coming into the country,” promised to enact a “total and complete shutdown of Muslims entering the United States,”  and instructed one of his advisers to find a “lega[l]” way to enact a Muslim ban. The President continued to make similar statements well after his inauguration, as detailed above.

Moreover, despite several opportunities to do so, President Trump has never disavowed any of his prior statements about Islam. Instead, he has continued to make remarks that a reasonable observer would view as an unrelenting attack on the Muslim religion and its followers. Given President Trump’s failure to correct the reasonable perception of his apparent hostility toward the Islamic faith, it is unsurprising that the President’s lawyers have, at every step in the lower courts, failed in their attempts to launder the Proclamation of its discriminatory taint. …

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.

II

Rather than defend the President’s problematic statements, the Government urges this Court to set them aside and defer to the President on issues related to immigration and national security. The majority accepts that invitation and incorrectly applies a watered-down legal standard in an effort to short circuit plaintiffs’ Establishment Clause claim.

…

But even under rational-basis review, the Proclamation must fall. That is so because the Proclamation is divorced from any factual context from which we could discern a relationship to legitimate state interests, and its sheer breadth is so discontinuous with the reasons offered for it that the policy is inexplicable by anything but animus. … The President’s statements, which the majority utterly fails to address in its legal analysis, strongly support the conclusion that the Proclamation was issued to express hostility toward Muslims and exclude them from the country. Given the overwhelming record evidence of anti-Muslim animus, it sim ply cannot be said that the Proclamation has a legitimate basis. …

The majority insists that the Proclamation furthers two interrelated national-security interests: “preventing entry of nationals who cannot be adequately vetted and inducing other nations to improve their practices.”  But the Court offers insufficient support for its view “that the entry suspension has a legitimate grounding in [those] national security concerns, quite apart from any religious hostility.”  Indeed, even a cursory review of the Government’s asserted national-security rationale reveals that the Proclamation is nothing more than a religious gerrymander.

…

IV

…

Today’s holding is all the more troubling given the stark parallels between the reasoning of this case and that of Korematsu v. United States, 323 U.S. 214 (1944).  In Korematsu, the Court gave a pass to an odious, gravely injurious racial classification authorized by an executive order. As here, the Government invoked an ill-defined national-security threat to justify an exclusionary policy of sweeping proportion. As here, the exclusion order was rooted in dangerous stereotypes about, inter alia, a particular group’s supposed inability to assimilate and desire to harm the United States. As here, the Government was unwilling to reveal its own intelligence agencies’ views of the alleged security concerns to the very citizens it purported to protect. And as here, there was strong evidence that impermissible hostility and animus motivated the Government’s policy.

Although a majority of the Court in Korematsu was willing to uphold the Government’s actions based on a barren invocation of national security, dissenting Justices warned of that decision’s harm to our constitutional fabric. Justice Murphy recognized that there is a need for great deference to the Executive Branch in the context of national security, but cautioned that “it is essential that there be definite limits to [the government’s] discretion,” as “[i]ndividuals must not be left impoverished of their constitutional rights on a plea of military necessity that has neither substance nor support.” Justice Jackson lamented that the Court’s decision upholding the Government’s policy would prove to be “a far more subtle blow to liberty than the promulgation of the order itself,” for although the executive order was not likely to be long lasting, the Court’s willingness to tolerate it would endure.

In the intervening years since Korematsu, our Nation has done much to leave its sordid legacy behind. Today, the Court takes the important step of finally overruling Korematsu, denouncing it as “gravely wrong the day it was decided.”  This formal repudiation of a shameful precedent is laudable and long overdue. But it does not make the majority’s decision here acceptable or right. By blindly accepting the Government’s misguided invitation to sanction a discriminatory policy motivated by animosity toward a disfavored group, all in the name of a superficial claim of national security, the Court redeploys the same dangerous logic underlying Korematsu and merely replaces one “gravely wrong” decision with another.

Our Constitution demands, and our country deserves, a Judiciary willing to hold the coordinate branches to account when they defy our most sacred legal commitments. Because the Court’s decision today has failed in that respect, with profound regret, I dissent.

[A dissenting opinion of Justice Breyer, joined by Justice Kagan, is omitted.]

1. This opinion has been edited for purposes of space and readability. Deletions are indicated by ellipses; alterations are indicated by square brackets. Material deletions are accompanied by explanatory notes. Citations and footnotes have generally been shortened or omitted without notation. [↑](#footnote-ref-1)