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The ”National Security” Justification of Donald Trump’s Muslim Ban

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Bachelor's thesis

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Abstract page

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In U.S. Supreme Court cases regarding constitutional questions, the Court must balance between government interests and individual rights. Sometimes the government interest is so compelling that the limitation of an individual right is justified. The purpose of the study is to find out if national security is a government interest that can be strategically taken advantage of to justify acts with illegitimate intentions.

The research material mainly consists of the U.S. Supreme Court decision *Trump v. Hawaii* (2018) as well as legal literature related to the case. The material was collected from the HeinOnline database by searching first for a case related to Donald Trump and then for legal scholars’ analysis on the case. The research method was to search the *Trump v. Hawaii* case for legal arguments related to national security as a government interest. The aim was, with the help of legal literature, to draw my own conclusions on the validity of these national security arguments.

I came to the conclusion that *Trump v. Hawaii* is evidence of the fact that the national security justification can be taken advantage of strategically. Future research should focus on finding a way to remove the opportunity to misuse the national security justification. At the same time, the solution should not undermine the importance of national security as a compelling government interest.

Key words: U.S. Supreme Court, Donald Trump, national security

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Yhdysvaltain korkeimman oikeuden on perustuslaillisia kysymyksiä koskevissa asioissa tasapainoiltava valtion päämäärien ja yksilön oikeuksien välillä. Joskus valtion päämäärää pidetään niin tärkeänä asiana, että yksilön oikeuden rajoittaminen on perusteltua tämän päämäärän saavuttamiseksi. Tämän tutkimuksen tarkoituksena on selvittää, onko kansallinen turvallisuus sellainen valtion päämäärä, jota voidaan käyttää strategisesti hyväksi laittomia tarkoituksia sisältävien toimien oikeuttamiseksi.

Tutkimusaineisto koostuu pääsääntöisesti Yhdysvaltain korkeimman oikeuden ratkaisusta *Trump v. Hawaii* (2018) ja siihen liittyvästä amerikkalaisesta oikeuskirjallisuudesta. Aineisto on kerätty HeinOnline -palvelusta etsimällä ensin Donald Trumpiin liittyvää oikeustapausta ja sitten tähän tapaukseen liittyvää oikeustieteilijöiden analyysia. Tutkimusmenetelmänä oli etsiä *Trump v. Hawaii* -tapauksesta oikeudellisia argumentteja, jotka liittyvät kansalliseen turvallisuuteen valtion päämääränä. Tarkoituksena oli oikeuskirjallisuuteen tukeutuen tehdä omia päätelmiä näiden kansalliseen turvallisuuteen liittyvien argumenttien pätevyydestä.

Tutkimuksen perusteella *Trump v. Hawaii* -tapaus on todiste siitä, että kansallista turvallisuutta voidaan käyttää hyväksi laittomia tarkoituksia sisältävien toimien oikeuttamiseksi. Tulevassa tutkimuksessa tulee keskittyä siihen, että löydetään keino poistaa mahdollisuus käyttää kansallista turvallisuutta koskevaa perustelua väärin. Samalla ratkaisu ei saisi heikentää kansallisen turvallisuuden merkitystä yhtenä valtion tärkeimpänä päämääränä.

Asiasanat: Yhdysvaltain korkein oikeus, Donald Trump, kansallinen turvallisuus

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1 Introduction

In U.S. Supreme Court cases regarding constitutional questions, the Court must balance between government interests and individual rights. Sometimes the government interest is so compelling that the limitation of an individual right is justified. In the United States as well as every other country in the world, a major government interest is national security. As a result, individual rights limitations happen often on the grounds of national security. During the COVID-19 pandemic, national security was an essential reason for lockdowns and restricting travel. National security also justifies the imprisonment of criminals. Even looking at my personal life, I noticed that the Finnish government had me spend a year of my life in military service, on the account of national security. However, in these examples there appears to be a legitimate purpose behind the government policy.

In 2022 The President of Russia, Vladimir Putin started a war in Ukraine and justified the attack by stating that NATO has expanded too much and thus it is a matter of Russia's national security. Many rightfully think that his actual interest in occupying Ukraine is some sort of desire to conquer a country that was once a part of the Soviet Union. Putin's use of national security as an excuse for conquest got me wondering, is national security a government interest that can be taken advantage of to justify acts with illegitimate intentions? I will explore this question by analyzing a U.S. Supreme Court landmark decision from 2018 involving another controversial (former) leader of a superpower, Donald Trump.

Trump v. Hawaii, 585 U. S. __ (2018) (Slip opinion) is a Supreme Court case involving presidential powers, religion, and the entry of foreigners.[1] The opinion of the Court is written by Chief Justice John Roberts, and it is joined by Justices Anthony Kennedy, Clarence Thomas, Samuel Alito and Neil Gorsuch. Justices Kennedy and Thomas also wrote concurring opinions. Justice Sonia Sotomayer wrote a dissenting opinion that was joined by Justice Ruth Bader Ginsburg, and Justice Stephen Breyer wrote a dissenting opinion that was joined by Justice Elena Kagan.[2]

Let me provide a synopsis of my research paper. I will first provide a glance at my research materials and explain the way I have conducted my analysis. After that, I will present the results of my analysis through the following elements: I will first explain in section 3 about

[1] *Trump v. Hawaii* (Syllabus), at 1-5.
[2] *Trump v. Hawaii* (Syllabus), at 5.

President Donald Trump's travel ban, and in section 4, what *Trump v. Hawaii* was about and how the case was related to the Establishment Clause of the First Amendment. Then I will move on to section 5, to discuss the Court's application of a legal principle involving facial neutrality. In section 6, I will discuss the level of judicial scrutiny applied by the Court, and in section 7, I will compare the case to a landmark Supreme Court decision involving discrimination during the Second World War. In the concluding section 8, I will reflect back on what was said in the previous sections and present the most important results of my analysis. I will also ask where does all of this leave us: what could be the next problem to study. Finally, I will try to figure out how my work sheds light on what seems to be happening in the U.S.A. right now.

2 Research Materials and Methods

I found my material by searching for a meaningful Supreme Court decision related to Donald Trump during his time as the U.S. President in the years 2017-2021. I selected *Trump v. Hawaii* because I wanted to examine the legality of one of Trump's many controversial policies. The material was collected from the HeinOnline database by searching first for a case related to Donald Trump and then for legal scholars' analysis on the case. I chose specifically materials that would explain the subject matter and provide diverse views on the issue. My primary materials were the opinion of the Court and the "principal" [3] dissenting opinion written by Justice Sotomayer. As supplementary materials I used legal literature as well as the following Supreme Court cases: *Korematsu v. United States*, 323 U. S. 214 (1944) and *Kleindeinst v. Mandel*, 408 U. S. 753 (1972).

For the purposes of this paper, I chose to do case argumentation analysis on *Trump v. Hawaii*. More specifically, the method was to search the *Trump v. Hawaii* case for legal arguments related to national security as a government interest. I especially looked at the way "national security" was used in argumentation between the majority opinion written by Chief Justice Roberts and the dissenting opinion written by Justice Sotomayer. The aim was, with the help of legal literature, to draw my own conclusions on the validity of these national security arguments.

[3] *Trump v. Hawaii* (Opinion of the Court), at 31.

3 President Trump's Travel Ban

Shortly after becoming President of the United States in 2017, Donald Trump implemented Executive Order 13769, Protecting the Nation From Foreign Terrorist Entry Into the United States. The Executive Order prohibited foreign nationals from Iran, Iraq, Libya, Somalia, Sudan, Syria, and Yemen from entering the United States for a period of 90 days on the basis that these countries presented increased dangers of terrorism. The order also instructed the Secretary of Homeland Security to carry out an assessment to determine the sufficiency of data supplied by foreign countries regarding their citizens who are attempting to enter the country. However, in lower courts the District Court for the Western District of Washington issued a temporary restraining order on the travel ban, and the Court of Appeals for the Ninth Circuit upheld the restraining order.[4]

As a result of the legal complications in lower courts, Trump invalidated Executive Order 13679 and issued Executive Order 13780, Protecting the Nation From Foreign Terrorist Entry Into the United States. This Executive Order once more mandated a global assessment regarding information provided by foreign governments and temporarily limited the entry of nationals of Iran, Libya, Somalia, Sudan, Syria, and Yemen. Again, the restriction was justified by the necessity to reduce the likelihood of dangerous people getting in the country without sufficient screening. According to the order these nations were chosen since each country "is a state sponsor of terrorism, has been significantly compromised by terrorist organizations, or contains active conflict zones." The travel ban was to remain in place for 90 days, while the global assessment was being completed. This time around, preliminary injunctions on the travel ban's enforcement were issued by the District Courts for the Districts of Maryland and Hawaii, and the Courts of Appeals for the Fourth Circuit and the Ninth Circuit upheld the injunctions. However, the Supreme Court allowed the travel ban to take effect by granting certiorari and stopping the injunctions. The 90-day travel limitations of Executive Order 13780 expired before the Court could evaluate its lawfulness.[5]

Trump then implemented the final version of the travel ban, Proclamation 9645, Enhancing Vetting Capabilities and Processes for Detecting Attempted Entry Into the United States by Terrorists or Other Public-Safety Threats. The Proclamation aimed to enhance screening

[4] *Trump v. Hawaii* (Opinion of the Court), at 2.
[5] *Trump v. Hawaii* (Opinion of the Court), at 2-3.

processes by recognizing persistent gaps in the data required to determine whether citizens of specific nations pose "public safety threats". In order to achieve this goal, Proclamation 9645 restricted entrance for citizens of eight foreign countries whose mechanisms for maintaining and exchanging data about their citizens were determined insufficient by Trump. The Proclamation explained the process by which foreign governments were chosen for inclusion in light of the global assessment carried out in accordance with Executive Order 13780. In order to verify the identity of people requesting entry into the United States and assess whether they pose a security risk, the Department of Homeland Security established a "baseline" for the data that must be obtained from foreign governments. The Department of Homeland Security categorised 31 countries as "at risk" of falling short of the baseline, and 16 countries as having inadequate "information-sharing practices" and posing national security risks. The State Department then launched a 50-day diplomatic campaign to persuade the countries to better their processes, and many nations gave the Department of Homeland Security sample travel documents and agreed to exchange information on "known or suspected terrorists".[6]

The Acting Secretary of Homeland Security determined Chad, Iran, Iraq, Libya, North Korea, Syria, Venezuela, and Yemen as still having inadequate information-sharing practices and posing national security risks. The Acting Secretary suggested that the President apply admission limitations on "certain nationals" of these countries, as well as Somalia since its "identity-management deficiencies" and "significant terrorist presence" justified additional limitations. On the other hand, the Acting Secretary determined that restrictions on Iraq were unnecessary considering Iraq's dedication to fighting ISIS and the tight communication between the U.S. and Iraq. The Acting Secretary's proposals were accepted by President Trump, who then signed the Proclamation. Trump emphasised that these limitations would be the "most likely to encourage cooperation" and "protect the United States until such time as improvements occur".[7]

A variety of limitations were placed by the Proclamation, with the specifics depending on the "distinct circumstances" in the eight countries. Iran, North Korea, and Syria were classified as countries "that do not cooperate with the United States in identifying security risks", and the Proclamation prohibited the admission of all citizens of these countires apart from Iranians

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[6] *Trump v. Hawaii* (Opinion of the Court), at 3-4.
[7] *Trump v. Hawaii* (Opinion of the Court), at 4-5.

requesting nonimmigrant student and exchange visitor visas. Chad, Libya and Yemen were classified as "countries that have information-sharing deficiencies but are nonetheless valuable counterterrorism partners", and the Proclamation prohibited the admission of citizens of these countries requesting immigrant visas and nonimmigrant business or tourist visas. Regarding Somalia, the Proclamation prohibited the admission of citizens requesting immigrant visas and mandated "additional scrutiny" of citizens requesting nonimmigrant visas. Finally, Venezuela was classified as a country that "refuses to cooperate in information sharing but for which alternative means are available to identify its nationals", and the Proclamation prohibited only the admission of "certain government officials and their family members on nonimmigrant business or tourist visas".[8]

The Proclamation did not apply to legal permanent residents or foreign nationals who had been given asylum. Additionally, it allowed for waivers on an individual basis in situations when a foreign national shows "undue hardship" and proves that entering the country will not endanger public safety. The Proclamation also instructed the Department of Homeland Security to nofity the President every 180 days on its ongoing assesment of whether the admission limitations should be maintained or changed. Following the first of these review periods, Trump eased limitations on Chad's nationals after concluding that Chad had adequately modified its information-sharing policies.[9]

[8] *Trump v. Hawaii* (Opinion of the Court), at 5-6.
[9] *Trump v. Hawaii* (Opinion of the Court), at 6.

4 *Trump v. Hawaii* (2018) and the Establishment Clause

Proclamation 9645 set the stage for *Trump v. Hawaii*, 585 U. S. __ (2018) (Slip opinion), where the Supreme Court "upheld President Trump's travel ban in its entirety".[10] After "eighteen months of political and legal battling over travel restrictions", the Court handed the Trump administration a nearly perfect legal triumph.[11] *Trump v. Hawaii* (2018) involved the Establishment Clause of the First Amendment.[12] According to the Establishment Clause, Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof. The function of the Establishment Clause is to prohibit the government from "favoring or disfavoring" one particular "religious denomination".[13] During his run for presidency and even before that, Trump quite literally promised to discriminate against Muslims seeking into the country.[14] Following his election, Trump signed Executive Order 13769, Executive Order 13780, and finally Proclamation 9645 that "fulfilled his promise" to exclude Muslims. The travel ban did not technically "single out" Muslims.[15] However, the ban "effectively" prohibited the entry of Muslims into the United States.[16]

The plaintiffs in *Trump v. Hawaii* were the State of Hawaii ("operates the University of Hawaii System, which recruits students and faculty from the designated countries"), the Muslim Association of Hawaii ("a nonprofit organization that operates a mosque in Hawaii"), and three individuals ("U.S. citizens or lawful permanent residents" with "relatives from Iran, Syria, and Yemen applying for immigrant or nonimmigrant visas").[17] The plaintiffs claimed that Trump's travel ban violated the Establishment Clause since the main objective of the ban was "religious animus" and Trump's "concerns about vetting protocols and national security were but pretexts for discriminating against Muslims". The plaintiffs' main evidence of discrimination were anti-Muslim statements made by Trump before he was elected.[18]

During his campaign, Trump made no secret of his goal to prohibit Muslims from entering the country.[19] For instance in 2015, after a terrorist shooting in San Bernardino, California, he

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[10] *Blackman*, 2019, at 139.
[11] *Spiro*, 2019, at 112.
[12] *Trump v. Hawaii* (Opinion of the Court), at 1.
[13] *Trump v Hawaii* (Opinion of the Court) at 26; *Trump v Hawaii* (Dissenting Opinion, Sotomayer) at 2.
[14] *Trump v. Hawaii* (Opinion of the Court), at 27.
[15] *Casto*, 2020, at 354.
[16] *Erskine*, 2021, at 228.
[17] *Trump v. Hawaii* (Opinion of the Court), at 6-7.
[18] *Trump v Hawaii* (Opinion of the Court) at 27.
[19] *Owsley,* 2020, at 608.

demanded a "total and complete shutdown of Muslims entering the United States".[20] Trump stated in 2011 that there is a "Muslim problem" in the United States, and a month later he restated that the hatred instilled in the Koran is the reason for the problem. While running for office, a person in the audience challenged Trump, claiming that President Obama is a Muslim. Instead of correcting the individual, Trump said that his administration would investigate the possibility of eliminating Muslims.[21]

Apart from prohibiting Muslims from entering the country, in 2015 Trump suggested on several occasions that mosques ought to be shut down. Following the terrorist strikes in Paris, he made it clear that he also desired mosques to be monitored. He reaffirmed his support for such monitoring in June 2016, following a terrorist assault in a mosque in Orlando, carried out by an American-born Muslim. He stated that "we have to be very strong in terms of looking a mosques". In 2016, Trump said on multiple occasions that "Muslims in New Jersey cheered after the World Trade Center collapsed on September 11, 2001". Despite the fact that he has mentioned these celebrations on several occasions, this assertion has consistently been disputed.[22] Trump has also announced that "Islam hates us"[23] and told his lawyer to "find a legal way to enact a Muslim ban".[24] Trump continued his anti-Muslim animus also after being elected president,[25] "and once even retweeted anti-Muslim propaganda videos while sitting as president".[26]

In *Trump v. Hawaii*, The Supreme Court ruled that the travel ban did not breach the Establishment Clause and affirmed the constitutionality of the ban.[27] Trump's "bias-tainted characterizations of the travel restrictions" could have served as a "fact-bound" justification for the Court to uphold the Establishment Clause claim.[28] Trump's remarks and tweets demonstrating a distaste for Muslims obviously "reveal a policy intending to disparage foreign nationals on the basis of their religion".[29] However, the Court examined this "extrinsic evidence", but decided that the evidence was not enough to "tip the balance in the case".[30] A

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[20] *Owsley*, 2020, at 608; *Trump v Hawaii* (Dissenting Opinion, Sotomayer) at 11.
[21] *Owsley*, 2020, at 608-609.
[22] *Owsley*, 2020, at 609-610.
[23] *Owsley*, 2020, at 610.
[24] *Trump v Hawaii* (Dissenting Opinion, Sotomayer) at 11.
[25] *Trump v Hawaii* (Dissenting Opinion, Sotomayer) at 11.
[26] *Schaad*, 2019, at 268.
[27] *Trump v. Hawaii* (Opinion of the Court), at 38.
[28] *Spiro*, 2019, at 113.
[29] *Mallamas*, 2020, at 139.
[30] *Blackman*, 2019, at 143.

huge factor in the Court's decision was the government's main argument that the travel ban is a matter of national security. The Court "set up a dangerous precedent in this decision" since *Trump v. Hawaii* "gives free-reign to the Executive to close off borders on a pretext of even absolute discrimination with essentially no judicial check."[31]

[31] *Schaad*, 2019, at 282.

5 Facially Legitimate Policy

Chief Justice Roberts writes in the opinion of the Court that Trump's travel ban is "expressly premised" on national security, which is a legitimate purpose. "The text says nothing about religion".[32] Justice Roberts notes that in previous cases where the denial of a foreign national's admission "allegedly burdens the constitutional rights of a U.S. citizen", the Court has examined the Executive's action only in a limited way. Roberts applies the principle established in *Kleindeinst v. Mandel*, 408 U. S. 753 (1972), where the Court stated it will not "look behind" the Executive's action and reviewed only "whether the Executive gave a facially legitimate and bona fide (in good faith) reason for its action".[33] Justice Roberts mentions "numerous precedents"[34] to point out that the limited judicial review applied in *Mandel* "applies to any constitutional claim, concerning the entry of foreign nationals".[35]

On the other hand, Justice Sotomayer writes in her dissenting opinion that numerous precedents diminish the relevance of facial legitimacy "in the Establishment Clause context".[36] In her opinion, *Mandel* should not be applied inter alia since it "involved a constitutional challenge…to exclude a single foreign national under a specific statutory ground of inadmissibility", and Trump's travel ban has an effect on "millions of individuals on a categorical basis.".[37] In Sotomayer's view Establishment Clause jurisprudence [38] should be applied instead, and with this she means the reasonable observer inquiry [39] where 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".[40] To determine what a reasonable observer would decide the Court has previously taken into account "the text of the government policy" as in *Mandel*, but also "any available evidence" regarding the intention of the policy, including remarks that "the decisionmaker" has made.[41]

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[32] *Trump v Hawaii* (Opinion of the Court) at 34.
[33] *Trump v Hawaii* (Opinion of the Court) at 30.
[34] *Trump v Hawaii* (Opinion of the Court) at 30-32.
[35] *Trump v Hawaii* (Opinion of the Court) at 32, Note 5.
[36] *Trump v Hawaii* (Dissenting Opinion, Sotomayer) at 14, Note 5.
[37] *Trump v Hawaii* (Dissenting Opinion, Sotomayer) at 14, Note 5.
[38] *Trump v Hawaii* (Dissenting Opinion, Sotomayer) at 15, Note 6.
[39] *Trump v Hawaii* (Dissenting Opinion, Sotomayer) at 16, Note 6.
[40] *Trump v Hawaii* (Dissenting Opinion, Sotomayer) at 3.
[41] *Trump v Hawaii* (Dissenting Opinion, Sotomayer) at 3-4.

If Trump's anti-Muslim statements are taken into consideration, "a reasonable observer would conclude", obviously, that the intention behind Trump's travel ban was "anti-Muslim animus" instead of national security.[42] At the same time, the travel ban probably seems legitimate, if *Mandel* is applied and facial legitimacy is all that is required. At face value, the travel ban might look like its actual purpose is national security due to the fact, that officially the travel ban was based on Trump's "findings – following a worldwide, multi-agency review – that entry of the covered aliens would be detrimental to the national interest".[43] Without awareness of Trump's statements, it is significantly harder to argue that the ban was motivated by animus towards Muslims. Therefore, the confrontation between *Mandel* and the reasonable observer inquiry is probably the most crucial factor of the entire case.

Justice Roberts does a lot of hiding behind the national security excuse by stating, that the reasonable observer inquiry cannot be applied to cases involving "immigration policies, diplomatic sanctions, and military actions", and that Justice Sotomayer "can cite no authority" for a less limited judicial review "in the national security and foreign affairs" context.[44] Justice Sotomayer defends the "the importation of Establishment Clause jurisprudence" "in the national security and foreign affairs context" by saying that "just because the Court has not confronted the precise situation at hand" does not mean that the reasonable observer inquiry should not be applied.[45]

Regarding *Mandel*, I find it interesting that there exists precedent which basically says that the actual intention of the President's order is irrelevant, when the President states that the matter is related to national security. In situations related to constitutional rights, the President should have to prove to some degree that his intentions are legitimate. The application of *Kleindienst v. Mandel* effectively forces individuals to trust the President to keep from violating their constitutional rights. The President should not be above the law, especially not the Constitution. A fundamental reason for individual rights is to protect individuals against the government, and it should be the courts who make the judgement. *Kleindienst v. Mandel* enables the government to make any kind of decisions it wants if it only finds some sort of connection to national security.

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[42] *Trump v Hawaii* Dissenting Opinion, Sotomayer) at 10-11.
[43] *Trump v. Hawaii* (Opinion of the Court), at 10.
[44] *Trump v. Hawaii* (Opinion of the Court), at 32-33, Note 5.
[45] *Trump v Hawaii* (Dissenting Opinion, Sotomayer) at 15, Note 6.

According to Professor Mark Tushnet from Harvard Law School the "facial neutrality" in *Trump v. Hawaii* is used "as an absolute screen to shield badly motivated actions from anything but the most minimal scrutiny". Tushnet says that the majority opinion differs greatly from similar cases, in which "facially neutral statutes can be invalidated if they result from discriminatory animus".[46] Professor Shalini Ray from the University of Alabama School of Law noted that "the Court stopped at facial legitimacy and considered whether any facts on record supported the stated justification". Since the Government's "multiagency worldwide review of vetting protocols" was a fact on record supporting the national security justification, the Court decided to ignore "smoking gun evidence of animus", meaning Trump's anti-Muslim statements.[47]

Chief Justice Roberts writes in the opinion of the Court that "a conventional application of *Mandel*, asking only whether the policy is facially legitimate and bona fide, would put an end to our review". Despite the decision to apply *Mandel*, the majority decided to still "look behind the face" of the travel ban since the government proposed "that it may be appropriate here for the inquiry to extend beyond the facial neutrality of the order".[48]

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[46] *Tushnet*, 2018, at 2.
[47] *Ray*, 2021, at 781.
[48] *Trump v. Hawaii* (Opinion of the Court), at 32.

6 Rational Basis Review

The Court decided to examine the intentions of the travel ban but only "to the extent of applying rational basis review", meaning that thing to be considered was "whether the entry policy is plausibly related to the Government's stated objective to protect the country and improve vetting processes". According to Justice Roberts, the Court could take into account Trump's statements, "but will uphold the policy so long as it can reasonably be understood to result from a justification independent of unconstitutional grounds."[49] On the contrary, Justice Sotomayer finds the use of rational basis review "perplexing, given that in other Establishment Clause cases, including those involving claims of religious animus or discrimination, this Court has applied a more stringent standard of review". Sotomayer states that the Court does not have any "explanation or precedential support" for the use of rational basis review.[50]

The Court's decision of neglecting the application of strict scrutiny or even the intermediate level of scrutiny has been greatly critized among legal scholars. Professor Khiara M. Bridges from UC Berkeley School of Law says that the Court deciced that "express articulations of Islamophobia do not warrant heightened scrutiny" but instead warrants "only a slight peeling back of the facial neutrality of the order".[51] Amy Erskine writes in the Rutgers Journal of Law & Religion that "every law student learns their first year in their Constitutional Law class that cases involving religious animus or discrimination warrant a stricter standard of review", and that the travel ban "would undoubtedly be unconstitutional" under the application of "the stricter level of scrutiny".[52] In California Law Review, Zainab Ramehi writes that there was "ample evidence" of "discriminatory intent", and this should "shift the Court's inquiry out of rational basis review and trigger a heightened level of scrutiny". Ramahi notes that the majority applied "its weak standard of review without contending with the President's blatantly discriminatory statements."[53] Professor Michael Klarman from Harvard Law School perceives it as "one of the most well-established principles" that a "government action that is

[49] *Trump v. Hawaii* (Opinion of the Court), at 32.
[50] *Trump v Hawaii* (Dissenting Opinion, Sotomayer) at 15.
[51] *Bridges*, 2022, at 114-115.
[52] *Erskine*, 2021, at 244.
[53] *Ramahi*, 2020, at 583-584.

facially neutral but motivated by discriminatory racial or religious animus, respectively, is subject to strict scrutiny and presumptive invalidation".[54]

To me it sounds astonishing that the Court was able to use rational basis review without applying any precedent to back up this decision. However, the reason is probably once more the national security excuse. Paul Taske writes in the Immigration and Human Rights Law Review that "foreign affairs receive the most extreme form of deference possible—perhaps not even rising to the level of a rational basis standard". [55] My opinion is that, since the government suggested it, the Court made this kind of decision that if they "must" look at the intention of the travel ban, they are going to do it in the smallest way possible. The Court used rational basis review on the basis that in their minds they should not have actually looked behind the facial neutrality of the travel ban at all. In a way the Court tried to make their decision look better by taking a slight peek at Trump's intentions but not in a proper manner.

According to Justice Roberts, "the Court hardly ever strikes down a policy as illegitimate under rational basis scrutiny" and in those situations the only intention of the policy in question has been a "bare . . . desire to harm a politically unpopular group".[56] Roberts says that the travel ban "does not fit this pattern" since "there is persuasive evidence that the entry suspension has a legitimate grounding in national security concerns, quite apart from any religious hostility."[57] In Justice Sotomayer's opinion, the travel ban is illegitimate "even under rational-basis review" since Trump's statements "strongly support the conclusion" that the intention of the travel ban was to "express hostility toward Muslims and exclude them from the country". Sotomayer says that "given the overwhelming record evidence of anti-Muslim animus, it simply cannot be said that (the travel ban) has a legitimate basis".[58]

In my opinion, rational basis review is such a loose standard for this situation, that the travel ban survives it. It cannot be proven that the policy has no other intention than a desire to harm Muslims. I would not consider the government's multi-agency national security review to be "persuasive" evidence for a legitimate grounding, as Justice Roberts does. On the other hand,

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[54] *Klarman*, 2020, at 220.
[55] *Taske*, 2019, at 14.
[56] *Trump v. Hawaii* (Opinion of the Court), at 33.
[57] *Trump v. Hawaii* (Opinion of the Court), at 33-34.
[58] *Trump v Hawaii* (Dissenting Opinion, Sotomayer) at 16.

the evidence is persuasive enough to prove that animus against Muslims is not the sole reason for the ban, even though it probably is the main reason.

Justice Roberts concludes that the travel ban is permitted since "the government has set forth a sufficient national security justification to survive rational basis review". An important thing to notice is that the majority decided to "express no view on the soundness of the policy".[59] According to Professor Christopher Lund from Wayne State University Law School, "Chief Justice Roberts studiously avoided any firm conclusion about whether the President's travel ban was motivated by discriminatory animus", and "instead, the Court…ended up avoiding the whole question".[60] To me it seems obvious, that the Court did not dare to express any view on the soundness of the policy, since it would have made the ruling look less convincing. The opinion of the Court would have looked too questionable, if the majority Justices had explicitly viewed Trump's travel ban as a discriminative policy, and still allowed it.

[59] *Trump v. Hawaii* (Opinion of the Court), at 38.
[60] *Lund*, 2022, at 1554.

7 *Korematsu v. United States* (1944)

At the time of the Second World War, says the Cleveland-based litigator Richaed A. Dean, "there was deep concern about Japanese and German citizens living within the United States". In the western states, "all persons of Japanese descent were deemed to represent risks sufficient to warrant negative treatment along racial lines" and an exclusion of Japanese descent people was adopted in the western states by executive orders.[61] *Korematsu* v. *United States*, 323 U. S. 214 (1944) was a Supreme Court case involving a Japanese descent, U.S. citizen named Mr. Korematsu, who violated one of the exclusion orders simply by being in California.[62] The Supreme Court ruled that the exclusion order was constitutional.[63]

Korematsu v. United States is undoubtedly similar to *Trump v. Hawaii* in the sense that the case involves the constitutionality of an executive order that excludes certain types of people. In the dissenting opinion of *Trump v. Hawaii*, Justice Sotomayer finds that "in holding that the First Amendment gives way to an executive policy that a reasonable observer would view as motivated by animus against Muslims" the Court "repeats tragic mistakes of the past".[64] Sotomayer states that both in *Korematsu v. United States* and the case at bar, 1) "the government invoked an ill-defined national-security threat to justify an exclusionary policy of sweeping proportion", 2) "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", and 3) "there was strong evidence that impermissible hostility and animus motivated the Government's policy".[65]

In *Korematsu v. United States* dissenting Justices were concerned about the Court doing "harm to our constitutional fabric" by the "willingness to uphold the Government's actions based on a barren invocation of national security".[66] Justice Murphy found that "it is essential that there be definite limits to (the government's) discretion," since "individuals must not be left impoverished of their constitutional rights on a plea of military necessity that has neither substance nor support".[67]

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[61] *Dean*, 2019, at 176-177.
[62] *Dean*, 2019, at 178.
[63] *Korematsu v. United States*, (Opinion of the Court) at 219.
[64] *Trump v Hawaii* (Dissenting Opinion, Sotomayer) at 25.
[65] *Trump v Hawaii* (Dissenting Opinion, Sotomayer) at 26-27.
[66] *Trump v Hawaii* (Dissenting Opinion, Sotomayer) at 27.
[67] *Trump v. Hawaii* (Dissenting Opinion, Sotomayer) at 27.

In the *Trump v. Hawaii* opinion of the Court, Justice Roberts views Justice Sotomayer's mentioning of *Korematsu v. United States* only as an attempt to get a "rhetorical advantage" and states that "*Korematsu* has nothing to do with this case. In Roberts' view, "the forcible relocation of U. S. citizens…solely and explicitly on the basis of race, is objectively unlawful and outside the scope of Presidential authority". Justice Roberts does not agree with Justice Sotomayer on the comparison to *Korematsu v. United States* stating that "it is wholly inapt to liken that morally repugnant order to a facially neutral policy denying certain foreign nationals the privilege of admission" and that "the entry suspension is an act that is well within executive authority and could have been taken by any other President".[68]

The Court explicitly overrules *Korematsu v. United States* and finds that "*Korematsu* was gravely wrong the day it was decided",[69] which Justice Sotomayer finds "long overdue" but not as a sufficient reasoning for "making the majority's decision here acceptable or right". Sotomayer views that the Court has "blindly accepted 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" and that "the Court redeploys the same dangerous logic underlying *Korematsu*".[70]

Richard Dean writing in Civil Rights Law Journal calls the wording and justification of *Korematsu* "eerily similar" to *Trump v. Hawaii*.[71] He says that "in the guise of immigration powers vested in the President, the Court upheld President Trump's (travel ban) without assessing the merits of the Establishment Clause claim", and that "similarly, *Korematsu* closed its eyes to racial discrimination."[72] Justice Black writes in the *Korematsu v. United States* opinion of the Court that "all legal restrictions which curtail the civil rights of a single racial group are immediately suspect", and that "courts must subject (these restrictions) to the most rigid scrutiny."[73] In Richard Dean's view "Justice Black then remarkably concluded that this was war and therefore no racial prejudice existed."[74] Similarly in *Trump v. Hawaii*, Justice Roberts states that "The President of the United States possesses an extraordinary power to speak to his fellow citizens on their behalf".[75] However, soon after this statement he

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[68] *Trump v. Hawaii* (Opinion of the Court), at 38.
[69] *Trump v. Hawaii* (Opinion of the Court), at 38.
[70] *Trump v Hawaii* (Dissenting Opinion, Sotomayer) at 28.
[71] *Dean*, 2019, at 176.
[72] *Dean*, 2019, at 189.
[73] *Korematsu v. United States* (Opinion of the Court) at 216.
[74] *Dean*, 2019, at 183.
[75] *Trump v. Hawaii* (Opinion of the Court), at 28.

continues with **"**unlike the typical suit involving religious displays or school prayer, plaintiffs seek to invalidate a national security directive regulating the entry of aliens abroad" and brings up that the travel ban "is facially neutral toward religion".[76]

The majority Justices in *Korematsu v. United States* try to soften their controversial decision with this comment that courts must subject the restrictions to the most rigid scrutiny, and the majority in *Trump v. Hawaii* does the same with this mentioning of the President's statements extraordinary power. In my opinion, the Justices do not really fool anyone by doing this. These comments rather show that the Justices have guilty conscience, resulting from the fact that they should have upheld constitutional rights.

[76] *Trump v. Hawaii* (Opinion of the Court), at 29.

8 Conclusion

National security is obviously a compelling government interest. Thus it is understandable that the leaders of most countries consider it so important. However, I have come to the conclusion that *Trump v. Hawaii* is evidence of the fact that the national security justification can be taken advantage of strategically. Donald Trump became President of the United States and started his efforts to issue a travel ban discriminating against Muslims. After numerous legal battles, he succeeded with Proclamation 9645, and travel was restricted from citizens of countries such as Iran, Libya, Syria and Yemen. The travel ban was challenged by asserting that it violates the Establishment Clause of the First Amendment. The Supreme Court referenced Trump's anti-Muslim statements, viewed the statements as insufficient evidence for the Establishment Clause claim, and hid behind the national security argument.

Trump v. Hawaii really comes down to the confrontation between the facial legitimacy principal from *Kleindienst v. Mandel* and traditional Establishment Clause jurisprudence meaning the reasonable observer inquiry. If facial legitimacy is all that is required, then the travel ban probably looks legitimate. On the other hand, if Trump's statements can be taken into consideration, the travel ban is definitely grounded on illegitimate intentions. The principle established in *Mandel* gives the President a dangerous amount of power considering that it renders the President's actual intention meaningless. The President should somehow have to prove that his intentions are legitimate or otherwise he is above the Constitution in matters that have even the slightest connection to national security.

After applying *Mandel*, the Court applied rational basis review without any precedential support, which has been critized by many legal scholars. I view that the Court had already decided that the travel ban is acceptable, and thus tried to make their decision look better by taking a slight peek at Trump's intentions but not in a proper manner. Regarding the outcome of applying rational basis review, I found rational basis review to be such a loose standard for this situation, that the travel ban survives it.

It is hard to argue against Justice Sotomayer's statement that the majority in *Trump v. Hawaii* redeploy the logic of the majority in *Korematsu v. United States*. She points out that in both cases there was an exclusion order involving dangerous stereotypes, and strong evidence of animus motivating the Government's policy. However, I found the most significant similarity

to be the majority Justices' comments that were meant to soften the constitutionally controversial decision.

Finally, I will touch on how my work sheds light on what seems to be happening in the U.S.A. right now. Donald Trump is running for President once more, and there is a good chance that he will be elected again. Trump is known for proposing controversial policies like the Muslim ban, and will probably try to implement more of them in the case that he is re-elected. With the help of the *Trump v. Hawaii* opinion of the Court, it is likely that his lawyers will then try to take advantage of the national security justification, and probably succeed too. In my mind, future research should focus on finding a way to remove the opportunity to misuse the national security justification. At the same time, the solution should not undermine the importance of national security as a compelling government interest.