THE CONSTITUTION AND THE TRUMP TRAVEL BAN

by
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Soon after President Trump took office, his administration issued a number of variations of what has become known as the "travel ban," an order that temporarily banned the entry of aliens from a number of predominantly Muslim countries. Focusing on anti-Muslim statements that Trump made during the presidential campaign, opponents of the ban and a number of lower federal courts have argued that the imposition of the travel ban violated the First Amendment. This article, which was written before the Supreme Court's decision in Trump v. Hawaii*, contends that these arguments are without merit.*

Like many actions of the Trump Administration, the Administration's efforts to limit the ability of citizens of a number of Middle Eastern nations from entering the United States have proven to be extremely controversial. Soon after taking office, President Trump issued what became known as "the travel ban," an executive order that temporarily barred the entry of nationals from seven predominantly Muslim nations.[1] Seeking to prevent the implementation of the travel ban, those who opposed the executive orderfiled challenges to the legality of the order in a number of federal courts.[2] Some of those courts quickly barred the gov-

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[1] Exec. Order No. 13,769, 82 Fed. Reg. 8977, 8978 (Jan. 27, 2017).

[2] For cases on the first travel ban, see Washington v. Trump, No. C17-0141, slip op. at 7 (W.D. Wash. Feb. 3, 2017) (granting temporary restraining order) *appeal denied*, Washington v. Trump, 847 F.3d 1151, 1156 (9th Cir. 2017) (per curiam). For cases on the second travel ban, see Hawaii v. Trump, 245 F. Supp. 3d 1227, 1230 (D.

ernment from enforcing the ban,[3] and a complicated legal struggle ensued, featuring, among other things, appeals to the Supreme Court and attempts by the Administration to revise the original order in an effort to address the issues that were cited by the lower court judges who concluded that the order could not be enforced.[4] Ultimately, the Administration was successful in persuading a majority of the justices on the Court to stay the actions of the lower courts that had prevented the implementation of the third version of the travel ban and to allow the revised ban to go into effect.[5]

This Article will focus on one specific aspect of the debate over the travel ban—the claim by opponents that the ban is unconstitutional because it violates the First Amendment. After briefly outlining the background of the travel ban and the course of the efforts to prevent its implementation, the Article will describe and analyze the First Amendment arguments that have been made by the opponents of the ban. In addition to concluding that these arguments are without merit, the Article will situate the dispute over the constitutionality of the travel ban within the controversy over the appropriateness of judicial activism more generally.

OVERVIEW

During his campaign for the presidency, Donald Trump made a variety of comments which indicated he believed that Muslims were more likely than members of other religions to pose a threat to American values and that the federal government should adopt new measures that would restrict the ability of Muslims from other countries to enter the United States. For example, on December 7, 2015, Trump called for "a total and complete shutdown of Muslims entering the United States,"[6]

Haw. 2017) (order granting motion to convert temporary restraining order to a preliminary injunction) *aff'd*, Hawaii v. Trump, 859 F.3d 741, 755–56 (9th Cir. 2017) (per curiam); Int'l Refugee Assistance Project v. Trump, 241 F. Supp. 3d 539, 565 (D. Md. 2017) *aff'd*, Int'l Refugee Assistance Project v. Trump, 857 F.3d 554, 572 (4th Cir. 2017). For cases on the third travel ban, see Hawaii v. Trump, 265 F. Supp. 3d 1140, 1145 (D. Haw. 2017) (order granting motion for temporary restraining order); Int'l Refugee Assistance Project v. Trump, 265 F. Supp. 3d 570, 583 (D. Md. 2017).

[3] *Supra* note 2.

[4] For the second ban, see Exec. Order No. 13,780, 82 Fed. Reg. 13,209 (Mar. 6, 2017) (administration attempting to revise first travel ban); Trump v. Int'l Refugee Assistance Project, 137 S. Ct. 2080 (2017) (per curiam). For the third ban, see Proclamation No. 9645, 82 Fed. Reg. 45,161 (Sept. 24, 2017) (administration attempting to revise first travel ban); Trump v. Hawaii, No. 17A550 (Dec. 4, 2017) (order granting stay of preliminary injunction); Trump v. Int'l Refugee Assistance Project, No. 17A560 (Dec. 4, 2017) (order granting stay of preliminary injunction).

[5] *See* Trump v. Hawaii, No. 17A550 (Dec. 4, 2017) (order granting stay of preliminary injunction); Trump v. Int'l Refugee Assistance Project, No. 17A560 (Dec. 4, 2017) (order granting stay of preliminary injunction).

[6] Jenna Johnson, *Trump Calls for 'Total and Complete Shutdown of Muslims Entering*

and three months later he stated that "I think Islam hates us"[7] and insisted that "[w]e can't allow people coming into this country who have this hatred of the United States . . . and of people that are not Muslim."[8] Subsequently, observing that "[p]eople were so upset when I used the word Muslim,"[9] Trump indicated that he favored restricting immigration from countries "where there's a proven history of terrorism,"[10] rather than banning the entrance of Muslims more generally.

Against this background, on January 27, 2017, Trump issued an executive order aimed at temporarily banning travel from seven predominantly Muslim countries while the U.S. government reviewed and strengthened its procedures for vetting potential entrants.[11] Observing that "[n]umerous foreign-born individuals have been convicted or implicated in terrorism-related crimes since September 11, 2001," the order barred people from Iraq, Iran, Syria, Yemen, Libya, Sudan, and Somalia from entering the U.S. for 90 days, halted the U.S. refugee resettlement program for 120 days, and indefinitely suspended the resettlement of Syrian refugees.[12] The order also contained language that would have given preference to religious minorities—such as Christians from the Middle East—once refugee resettlement resumed.[13]

The opponents of the travel ban almost immediately challenged the legality of these restrictions in federal court. On February 3, 2017, a federal district judge for the Western District of Washington issued a restraining order temporarily barring the enforcement of the executive order,[14] and two days later a three-judge panel of the United States Court of Appeals for the Ninth Circuit affirmed the issuance of the restraining or-

the United States,' WASH. POST (Dec. 7, 2015), https://www.washingtonpost.com/news/post-politics/wp/2015/12/07/do. . .down-of-muslims-entering-the-united-states/?utm_term=.bd5d72c82f93.

[7] Jenna Johnson & Abigail Hauslohner, *'I Think Islam Hates Us': A Timeline of Trump's Comments About Islam and Muslims*, WASH. POST (May 20, 2017), https://www.washingtonpost.com/news/post-politics/wp/2017/05/20/i-. . .f-trumps-comments-about-islam-and-muslims/?utm_term=.6aa7854e6b1a.

[8] Derek Hawkins, *Trump's Talk – 'Muslim Ban,' 'Islam Hates Us' – Comes Back to Bite Him in Court Again*, WASH. POST (Mar. 16, 2017), https://www.washingtonpost.com/news/morning-mix/wp/2017/03/16/trumps-talk-muslim-ban-islam-hates-us-comes-back-to-bite-him-in-court-again/? utm_term=.e0a674a516be.

[9] Johnson & Hauslohner, *supra* note 7.

[10] Philip Rucker et al., *Trump Pushes Expanded Ban on Muslims Entering the U.S.*, WASH. POST (June 13, 2016), https://www.washingtonpost.com/politics/trump-pushes-expanded-ban-on-muslims-and-other-foreigners/2016/06/13/c9988e96-317d-11e6-8ff7-7b6c1998b7a0_story.html?utm_term=.403042291881.

[11] Exec. Order No. 13,769, 82 Fed. Reg. 8977, 8978 (Jan. 27, 2017).

[12] *Id.* at 8977–79.

[13] *Id.* at 8978–79.

[14] Washington v. Trump, No. C17-0141, slip op. at 7 (W.D. Wash. Feb. 3, 2017).

der.[15] Rather than appeal this decision to the Supreme Court, on March 6, 2017, the Administration revoked the first version of the travel ban and issued a new executive order which was designed to address some of the problems that the courts had identified with the first order.[16]

The new order differed from its predecessor in a number of significant ways. The order dropped Iraq from the list of targeted countries for the travel ban; explicitly exempted legal permanent residents and those who already had a valid visa to come to the U.S.; and removed the indefinite restriction on the admission of Syrian refugees.[17] In addition, the order did not include the preference for religious minorities, but did provide that the ban could be waived on a case-by-case basis for persons who could demonstrate they met certain specified criteria.[18] Finally, unlike the first travel ban, the second order explicitly relied on a United States Department of State Country Report on Terrorism to support the claim that the issuance of the ban was justified as a means to protect national security.[19]

Despite these changes, the second version of the travel ban also met a hostile reception from the lower federal courts. District courts in both Hawaii[20] and Maryland[21] issued temporary restraining orders prohibiting the enforcement of the ban in any part of the United States, and these judgments were affirmed by the United States Courts of Appeals for the Ninth[22] and Fourth[23] Circuits, respectively. However, when these decisions were appealed to the Supreme Court, the Justices not only granted the petitions for certiorari, but also held that, pending full consideration of the merits of the appeal, the order could be enforced against "foreign nationals who lack any bona fide relationship with a person or entity in the United States."[24] Predictably, this preliminary decision sparked further litigation, as the federal government argued that the concept of a "bona fide relationship with a person or entity in the United States" should be interpreted narrowly, while the opponents of the ban and the lower courts insisted that the concept should be construed more broadly.[25]

[15] Washington v. Trump, 847 F.3d 1151, 1156 (9th Cir. 2017).

[16] Exec. Order No. 13,780, 82 Fed. Reg. 13,209 (Mar. 6, 2017).

[17] *Id.* at 13,211–14.

[18] *Id.* at 13,210, 13,213–14.

[19] *Id.* at 13,210.

[20] Hawaii v. Trump, 245 F. Supp. 3d 1227, 1239 (D. Haw. 2017).

[21] Int'l Refugee Assistance Project v. Trump, 241 F. Supp. 3d 539, 565 (D. Md. 2017).

[22] Hawaii v. Trump, 859 F.3d 741, 755–56 (9th Cir. 2017) (per curiam).

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

[24] Trump v. Int'l Refugee Assistance Project, 137 S. Ct. 2080, 2087 (2017) (per curiam).

[25] *See* Motion for Clarification at 21–26, Trump v. Hawaii, No. 16-1540 (July 13,

The saga of the travel ban took still another turn on September 24, 2017, when the Administration issued a new missive, which once again changed the nature of the limitations that were being imposed. Unlike the first two versions of the travel ban, which were characterized as executive orders, the third version was styled as a "Presidential Proclamation."[26] The proclamation purported to target travelers from nations that were either unwilling or unable to share sufficient information with the United States about their citizens, did not cooperate with the United States government on immigration matters, or were linked to terrorism.[27] Unlike the previous iterations of the ban, the third version dropped restrictions on Sudanese nationals, but continued to impose restrictions on citizens of Libya, Iran, Somalia, Syria, and Yemen, and also imposed restrictions of varying severity on individuals traveling from Chad, North Korea, and Venezuela.[28] By its terms, the third version did not apply to lawful permanent residents, dual nationals, and those holding a visa on October 18, 2017, the date the new travel ban was slated to go into effect.[29] Moreover, unlike the previous executive orders, the third travel ban did not halt the admission of refugees.[30]

Like the second travel ban, this third version allows government officials to grant discretionary waivers on a case-by-case basis.[31] The proclamation provides that, in order to receive a waiver, an applicant must demonstrate that he or she is not a security threat, that the entry of the applicant is in the national interest of the United States, and that being denied entry would cause "undue hardship."[32] Although the proclamation indicates that a waiver "may be appropriate" in certain situations, waivers are not guaranteed under any circumstances.[33]

Not surprisingly, the opponents of the travel ban once again filed legal challenges to the actions of the President. The district court judges in Hawaii[34] and Maryland,[35] who had concluded that the second travel order was illegal, were equally hostile to the Executive Proclamation and once again banned the enforcement of the terms of the proclamation either in whole or in part. However, on December 4, 2017, the Supreme Court in-

2017); Response to Motion for Clarification at 2, 17–18, Trump v. Hawaii, No. 16-1540 (July 18, 2017).

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

[27] *Id.* at 45,164.

[28] *Id.* at 45,165–66.

[29] *Id.* at 45,167–68.

[30] *Id.* at 45,168.

[31] *Id.*

[32] *Id.*

[33] *Id.*

[34] Hawaii v. Trump, 265 F. Supp. 3d 1140, 1145 (D. Haw. 2017).

[35] Int'l Refugee Assistance Project v. Trump, 265 F. Supp. 3d 570, 583 (D. Md. 2017).

tervened more decisively in support of the Trump Administration, staying the orders of the lower courts and effectively declaring that the terms of the new proclamation could be enforced pending the ultimate resolution of the legal challenges on their merits.[36]

I. THE TRAVEL BAN AND THE FIRST AMENDMENT

Despite the changes in the precise wording of the travel ban, the challenges to the legality of the actions of the Administration have continued to sound the same themes. While statutory arguments have featured prominently in the attacks on the ban,[37] the attention of the public at large has been focused primarily on the claim that the ban runs afoul of constitutional norms embodied in the First Amendment. Emphasizing statements made by President Trump during the 2016 presidential campaign, the critics argue that the order was designed to discriminate against Muslims because of their religious beliefs, and that such discrimination strikes at core values of religious liberty the Amendment was designed to protect.[38] However, these arguments face a variety of doctrinal difficulties.

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[36] Trump v. Hawaii, No. 17A550 (Dec. 4, 2017) (mem.) (granting stay of preliminary injunction); Trump v. Int'l Refugee Assistance Project, No. 17A560 (Dec. 4, 2017) (mem.) (granting stay of preliminary injunction).

[37] The statutory arguments generally focus on the interaction between two different provisions of the Immigration and Naturalization Act (INA). In issuing the travel ban, President Trump relied on the authority granted by section 212(f) of the INA, which provides:

> Whenever the President finds that the entry of any aliens or class of aliens into the United States would be detrimental to the interests of the United States, he may . . . suspend the entry of all aliens or any class of aliens . . . or impose on the entry of aliens any restrictions he may deem appropriate.
>
> INA § 212, 8 U.S.C. § 1182(f) (2012).

The challengers, by contrast, insisted that the authority granted by section 212(f) was limited by section 1152(a)(1)(A) of the statute which provides that "no person shall receive any preference or priority or be discriminated against in the issuance of an immigrant visa because of the person's . . . nationality . . . ." INA § 202(a)(1)(A), 8 U.S.C. § 1152(a)(1)(A). *Compare* Peter Margulies, *The New Travel Ban: Undermining the Immigration and Nationality Act*, LAWFARE BLOG (Sept. 25, 2017), https://www.lawfareblog.com/new-travel-ban-undermining-immigration-and-nationality-act (arguing that the third version of the travel ban violated the INA), *with* Josh Blackman, *Analysis of* IRAP v. Trump *Part III: The Concurring Opinions of Judges Thacker, Keenan, and Wynn*, LAWFARE BLOG (May 30, 2017), https://www.lawfareblog.com/analysis-irap-v-trump-part-iii-concurring-opinions-judges-thacker-keenan-and-wynn (defending legality of the travel ban).

[38] *See U.S. Supreme Court Revival on Trump Travel Ban Draws Praise, Criticism*, REUTERS (June 26, 2017), https://www.reuters.com/article/us-usa-court-immigration-instant-view/u-s-supreme-court-revival-on-trump-travel-ban-draws-praise-criticism-idUSKBN19H26H.

A. The Plenary Power Doctrine

At the outset, any effort to have the federal courts invalidate the travel orders must contend with what is generally known as the plenary power doctrine. While the roots of this doctrine are typically traced to a number of cases decided in the late nineteenth and early twentieth centuries,[39] the discussions of the travel orders themselves have most often focused on the Court's 1972 decision in *Kleindienst v. Mandel*.[40] In *Kleindienst*, the Court was called upon to review the decision to deny a visa to Ernest E. Mandel, a Belgian national who described himself as "a revolutionary Marxist."[41] The relevant statute prohibited generally the grant of visas to those who "advocate the economic, international, and governmental doctrines of world communism," but at the same time empowered the Attorney General to waive this prohibition at his discretion.[42] However, citing what was described as "flagrant abuse" by Mandel of earlier waivers, the Attorney General refused to allow him to reenter the country.[43] This refusal was challenged by a group who argued that the exclusion violated their First Amendment rights by denying them the opportunity to "hear, speak, and debate" Mandel.[44] With three Justices dissenting, the Court rejected the constitutional challenge and concluded the denial of the visa had been lawful.[45]

Speaking for the majority, Justice Harry A. Blackmun emphasized the deference that has traditionally been accorded to other branches of government on decisions related to the exclusion and deportation of aliens.[46] While conceding that the First Amendment rights of those challenging the denial of the visa were implicated by the decision to exclude Mandel, Blackmun also observed that the power to exclude aliens was "inherent in sovereignty, necessary for maintaining normal international

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[39] The 1889 decision in the *Chinese Exclusion Case*, 130 U.S. 581 (1889), is often cited as the origin of the plenary power doctrine. *See, e.g.*, LUCY E. SALYER, LAWS HARSH AS TIGERS: CHINESE IMMIGRANTS AND THE SHAPING OF MODERN IMMIGRATION LAW 22–23 (1995); Sarah H. Cleveland, *Powers Inherent in Sovereignty: Indians, Aliens, Territories, and the Nineteenth Century Origins of Plenary Power over Foreign Affairs*, 81 TEX. L. REV. 1, 124–34 (2002); Hiroshi Motomura, *Immigration Law After a Century of Plenary Power: Phantom Constitutional Norms and Statutory Interpretation*, 100 YALE L.J. 545, 550–52 (1990); Peter H. Schuck, *The Transformation of Immigration Law*, 84 COLUM. L. REV. 1, 14–18 (1984). *But see* STEPHEN H. LEGOMSKY, IMMIGRATION AND THE JUDICIARY: LAW AND POLITICS IN BRITAIN AND AMERICA 194–95 (1987) (viewing the decision in *Nishimura Ekiu v. United States*, 142 U.S. 651 (1892), as the source of the doctrine).

[40] Kleindienst v. Mandel, 408 U.S. 753 (1972).

[41] *Id.* at 756.

[42] *Id.* at 755–57.

[43] *Id.* at 759.

[44] *Id.* at 762.

[45] *Id.* at 770.

[46] *Id.* at 765.

relations and defending the country against foreign encroachments and dangers [and was] a power to be exercised exclusively by the political branches of government,"[47] and that "[t]he Court without exception has sustained Congress' 'plenary power to make rules for the admission of aliens and to exclude those who possess those characteristics which Congress has forbidden.'"[48] Against this background, Blackmun declared that "when the Executive exercises [the power to exclude an alien] on the basis of a facially legitimate and *bona fide* reason, the courts will neither look behind the exercise of that discretion, nor test it by balancing its justification against the First Amendment interests of those who seek personal communication with the applicant."[49]

In *Kleindienst* itself, the focus on a "facially legitimate and *bona fide* reason" reflected a commitment to judicial deference in immigration cases.[50] Moreover, the national security concerns to which the order itself refers plainly qualify as "legitimate and *bona fide*" reasons. Nonetheless, the critics of the travel orders contend that the application of the *Kleindienst* standards does not preclude the judiciary from conducting a more searching inquiry into the actual purposes for the promulgation of the orders.[51]

In making this claim, the challengers seek to derive support from the language of Justice Anthony Kennedy's concurring opinion in *Kerry v. Din*.[52] Noting that the *Din* opinion implicitly suggests that "an affirmative showing of bad faith" might provide judges with the justification necessary to "look behind" the expressed reason for the exclusion of an alien,[53] they argue that the Trump campaign statements provide the kind of evidence necessary to support such a showing.[54] Thus, those challenging the travel orders argue that the courts should view the travel orders as an enactment that penalized a group of people because of their religious beliefs.[55]

However, arguments such as these ignore the fundamental difference between the issues presented by the travel ban and those which gave rise to the reference to legitimate and *bona fide* reasons in *Kleindienst* and

[47] *Id.* (quoting Brief for Appellants at 20).

[48] *Id.* at 766 (quoting Boutilier v. Immigration and Naturalization Service, 387 U.S 118, 123 (1967)).

[49] *Id.* at 770.

[50] *Id.* (emphasis added).

[51] *See* Garrett Epps, *With the Travel Ban, Federal Courts Face a New Legal Issue*, THE ATLANTIC (Mar. 21, 2017), https://www.theatlantic.com/politics/archive/2017/03/with-the-travel-ban-federal-courts-face-a-new-legal-issue/520200/.

[52] Kerry v. Din, 135 S. Ct. 2128, 2139–41 (2015).

[53] Brief for Respondents at 50, Trump v. Hawaii, No. 17A550 (Oct. 24, 2017) (mem.).

[54] *Id.*

[55] *Id.* at 47–60.

Din. Both *Kleindienst* and *Din* arose from challenges to decisions made by federal officials to deny entry to individual aliens based upon the consideration of factors that were unique to the situations of those individuals. In *Kleindienst*, the question was whether the Attorney General had violated the Constitution by refusing to grant a waiver to a statutory provision that barred Mandel from entering the country,[56] while in *Din* the question was whether the Constitution required a consular official to provide a detailed explanation for his conclusion that an application for a visa should be denied because the applicant had engaged in "terrorist activities."[57] By contrast, in the travel ban cases, the courts are being asked to overturn a decision that is designed to prevent or delay the entry of an entire class of aliens.

In the cases where class-based distinctions on immigration have been challenged, the Supreme Court has uniformly refused to impose *any* constitutional restrictions on the authority of the other branches of the federal government to adopt such measures. As Justice Felix Frankfurter noted in 1954, "Policies pertaining to the entry of aliens and their right to remain here are peculiarly concerned with the political conduct of government."[58] While conceding that "[i]n the enforcement of these policies, the Executive Branch of the Government must respect the procedural safeguards of due process,"[59] Frankfurter also declared that "[the idea that] the formulation of these policies is entrusted exclusively to [the political branches] has become about as firmly embedded in the legislative and judicial tissues of our body politic as any aspect of our government."[60] The majority expressly reaffirmed its support for this principle in *Kleindienst*,[61] and even those who argued that Mandel himself should be admitted conceded that "Congress could enact a blanket prohibition against entry of all aliens falling into the class defined by [the relevant provisions of the INA], and that First Amendment rights could not override that decision."[62]

By contrast, six years later, the Court was confronted with a frontal assault on the exclusion of a different class of aliens in *Fiallo v. Bell*.[63] In *Fiallo*, the Court was called upon to consider the constitutionality of the distinctions drawn by the provisions of the INA that granted preferential immigration status to the noncitizen children of many American citizens, as well as the noncitizen parents of many classes of children who were

[56] *Kleindienst*, 408 U.S. 753, 754 (1972).

[57] *Din*, 135 S. Ct. at 2133.

[58] Galvan v. Press, 347 U.S. 522, 531 (1954).

[59] *Id.*

[60] *Id.*

[61] *Kleindienst*, 408 U.S. at 767.

[62] *Id.* (citing Brief for Appellees at 16).

[63] Fiallo v. Bell, 430 U.S. 787 (1977).

themselves citizens.[64] However, the INA did not grant such a preference to either the biological children born out of wedlock to American fathers or the fathers of American citizens who were born out of wedlock.[65] In rejecting the constitutional challenge to the exclusion, the majority opinion reaffirmed the need for judicial deference on immigration matters in the strongest possible terms, declaring that "the decision [to exclude any class of aliens is] one 'solely for the responsibility of the Congress and wholly outside the power of this Court to control.'"[66]

Obviously, application of this standard of review (or lack thereof) would require the rejection of the constitutional challenges to the travel bans. Moreover, in one very important respect, the case for enhanced judicial scrutiny of the travel bans is significantly less compelling than that which underlay the challenges in *Kleindienst* and *Fiallo*. Both *Kleindienst* and *Fiallo* involved decisions which, *on their face*, were based on criteria that called for enhanced scrutiny in other contexts. In *Kleindienst*, the decision to exclude rested on the kind of viewpoint discrimination that is generally found to violate the First Amendment. Similarly, by their terms, the distinctions drawn by the provisions at issue in *Fiallo* discriminated against both citizens and their excluded relatives on the basis of both gender and legitimacy—two types of classifications which, by 1977, were subjected to enhanced judicial scrutiny in cases involving domestic issues.[67] In these contexts, the conclusion that the courts should not intervene in cases where the government asserts a "facially legitimate and *bona fide* reason" for its actions aptly reflects a general preference for judicial deference on immigration.

By contrast, the critics of the travel bans do not and could not contend that the stated purpose of the bans—the protection of national security—would have been constitutionally suspect in other contexts.[68] Instead, they contend that the courts should be empowered to look beyond the stated reason in order to ensure that the government was not moti-

[64] *Id.* at 788–91.

[65] *Id.*

[66] *Id.* at 799 (quoting Harisiades v. Shaughnessy, 342 U.S. 580, 597 (1952) (Frankfurter, J., concurring)).

[67] *See, e.g.*, Craig v. Boren, 429 U.S. 190, 197 (1976) (gender-based classifications subject to intermediate level scrutiny); Weber v. Aetna Cas. & Surety Co., 406 U.S. 164, 165 (1972) (striking down classification based on legitimacy).

[68] In theory, one might also argue that the travel bans were unconstitutional because they discriminated between prospective entrants on the basis of national origin—a type of classification that is generally subject to strict scrutiny in cases arising in a purely domestic context. *See, e.g.*, Clark v. Jeter, 486 U.S. 456, 461 (1988). However, no doubt cognizant of the fact that a ban on national origin discrimination would destabilize the entire structure of immigration law, the constitutional arguments made by the critics of the travel ban do not focus on this aspect of the actions of the Trump Administration.

vated by an illegitimate purpose.[69] Thus, rather than reflecting the view that courts should defer to the decisions of political branches on immigration-related issues, this use of the *Kleindienst* formulation in fact envisions far more intrusive judicial review of the decisions dealing with these issues that are made by other branches of government.

In short, the claim that the travel ban should be found unconstitutional based on evidence of the subjective intentions of President Trump is inconsistent with the basic premises that are embodied in the plenary power doctrine itself. Moreover, the difficulties posed by cases such as *Fiallo* are not the only doctrinal problems facing those who argue that the travel ban is unconstitutional. In order to fully understand the magnitude of these difficulties, one must focus on the precise nature of the First Amendment arguments that have been made by the critics of the travel ban.

B. The Travel Ban and the First Amendment

In the abstract, one might have expected the opponents of the travel ban to couch their First Amendment arguments in terms of the Free Exercise Clause. To illustrate this point, consider a hypothetical statute which would deny United States passports to all American citizens whose first name is "Mohammed." Assume further that the report accompanying the statute asserted that the statutory prohibition is designed to protect the security of the United States because (a) Muslim-Americans who travel abroad are more likely than other American citizens to become radicalized, and (b) the vast majority of people named Mohammed are in fact Muslims.

Most people would probably agree that such a statute would be unconstitutional. At the same time, few would rely on the Establishment Clause as the basis for a constitutional challenge to the statute. Instead, challengers would almost certainly assert that the statute violated either the free exercise rights of people named Mohammed or that the statute denied the same people equal protection of the law by intentionally discriminating against them on the basis of their presumed religion.

The constitutional issues involved in the litigation over the legality of the travel ban are in many ways analogous to those that would face the courts if they were called upon to assess the constitutionality of the hypothetical passport statute. In both cases, the challenged enactment is neutral on its face (at least with respect to religion) and in fact will negatively impact some non-Muslims as well as Muslims. In addition, as in the travel ban cases, the courts would be urged to rely on extrinsic evidence to conclude that support for the passport statute was motivated by religious an-

[69] *See* Noah Feldman, *Court's Message to Trump: We Won't Back Down*, BLOOMBERG (Feb. 9, 2017), https://www.bloomberg.com/view/articles/2017-02-10/court-s-clear-message-to-trump-we-won-t-back-down.

imus toward individuals of the Muslim faith. However, for constitutional purposes, the travel ban differs from the passport limitation in at least one critical respect. While the denial of passports would discriminate between different classes of American citizens on the basis of religion, the travel ban prevents the entry only of noncitizens who are currently outside of the borders of the United States.[70] This point is crucial because the Supreme Court has *never* allowed noncitizens who were not subject to the territorial jurisdiction of the United States government to claim the protections of the Bill of Rights.[71]

C. The First Amendment and the Rights of Aliens Located in Other Countries

The basic principles governing the constitutional status of aliens who are not under the jurisdiction of the government of the United States were established by the decision in *United States ex. rel. Turner v. Williams*.[72] *Turner* began as a challenge to the deportation of John Turner, an English labor organizer who came to the United States in October, 1903, to visit his family and give a series of lectures.[73] After giving his first speech in New York, Turner was arrested and brought before a board of special inquiry appointed by the local immigration commissioner.[74] The board ordered him deported pursuant to a 1903 statute that prohibited anarchists from entering the United States.[75] Turner challenged the deportation order, alleging that the order violated both his due process rights and his right to free speech under the First Amendment.[76]

The Court unanimously rejected Turner's arguments and upheld the deportation order.[77] In his opinion for the Court, Chief Justice Melville W. Fuller acknowledged that "[i]t is, of course, true that if an alien is not permitted to enter this country, or, having entered contrary to law, is expelled, he is in fact cut off from worshipping or speaking or publishing or petitioning in the country . . . ."[78] But at the same time, Fuller also insisted that "[this inability] is merely because of [the] exclusion [of the alien] therefrom,"[79] and asserted that "[an alien] does not become one of the people to whom these things are secured by our Constitution by an

[70] Proclamation No. 9645, 82 Fed. Reg. 45,161, 45167 (Sept. 24, 2017).

[71] *See infra* Part III.

[72] United States *ex. rel.* Turner v. Williams, 194 U.S. 279 (1904).

[73] *Id.* at 280–81.

[74] *Id.* at 281.

[75] *Id.*

[76] The factual background of *Turner* is described in detail in Salyer, *supra* note 39, at 140–43.

[77] *Turner*, 194 U.S. at 294–95.

[78] *Id.* at 292.

[79] *Id.*

attempt to enter forbidden by law."[80] The opinion declared that "[t]o appeal to the Constitution is to concede that this is a land governed by that supreme law," and concluded that "as under [the Constitution] the power to exclude has been determined to exist, those who are excluded cannot assert the rights in general obtaining in a land to which they do not belong as citizens or otherwise."[81]

The same point was reiterated in *Kleindienst v. Mandel*. Citing *Turner* with approval, the majority opinion in that case stated flatly that "as an unadmitted and nonresident alien," the person who was excluded "had no constitutional right of entry to this country as a nonimmigrant or otherwise."[82] The requirement of a "facially legitimate and *bona fide* reason" was implicitly imposed only because the exclusion of the alien in that case was found to implicate the First Amendment rights of citizens who wished to hear and discuss the views of the person who was excluded.

In 1990, the Court once again concluded that the Bill of Rights did not protect nonresident aliens in *United States v. Verdugo-Urquidez*.[83] *Verdugo-Urquidez* did not involve an attempt by a nonresident alien to obtain permission to enter the United States. Instead, the case arose from a dispute over the admission of evidence in the trial of a Mexican national who had been charged with a variety of narcotics-related violations.[84] The evidence had been seized in Mexico by agents of the United States Drug Enforcement Agency who were working in concert with representatives of the Mexican government.[85] The defendant argued that the evidence should be suppressed because it had been seized without a warrant in violation of the Fourth Amendment.[86] In concluding that the evidence could be admitted at the criminal trial, the majority opinion in *Verdugo-Urquidez* explicitly analogized the case to *Turner* and declared that "'the people' protected by the [First and Fourth Amendments] . . . refers to a class of persons who are part of a national community or who have otherwise developed sufficient connection with this country to be considered part of that community."[87]

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[80] *Id.*

[81] *Id.*

[82] Kleindienst v. Mandel, 408 U.S. 753, 762 (1972).

[83] United States v. Verdugo-Urquidez, 494 U.S. 259, 271 (1990).

[84] *Id.* at 262–63.

[85] *Id.*

[86] *Id.* at 263.

[87] *Id.* at 265. Some commentators have suggested that this pronouncement lacks the force of binding law. These commentators note that the vote of Justice Anthony Kennedy was necessary to create a majority in support of the opinion of Chief Justice Rehnquist in *Verdugo-Urquidez* and that Kennedy filed a separate opinion in that case, *id.* at 274–78 (Kennedy, J., concurring), which appeared to suggest that, under some circumstances, noncitizens located outside of the United States could claim the protections of the Bill of Rights. *See, e.g.*, Gerald L. Neuman, *The Extraterritorial*

Those challenging the travel ban must somehow distinguish their claims from those which underlay *Turner* and *Verdugo-Urquidez*. In making their arguments, the challengers at times rely on the Supreme Court's 2008 decision in *Boumediene v. Bush*.[88] In *Boumediene*, the Court was faced with petitions for *habeas corpus* that had been filed by a number of aliens who had been designated as "enemy combatants" after being captured in other countries by the armed forces of the United States, and subsequently detained at the United States Naval Station located in Guantanamo Bay, Cuba.[89] Only two years earlier, Congress had passed the Military Commissions Act (MCA), a statute that explicitly barred the federal courts from exercising jurisdiction over *habeas* petitions filed by detainees such as the petitioners.[90] However, the petitioners contended that the statute was unconstitutional because it ran afoul of Article I, Section 9 of the Constitution (the Suspension Clause), which bars the suspension of the writ of *habeas corpus* except in cases of rebellion or invasion.[91] In response, citing *Verdugo-Urquidez* and other cases, the government argued that the petitioners could not claim the protection of the Suspension Clause because they were not citizens and the Guantanamo Bay facility was located outside the territorial limits of the United States.[92]

Speaking through Justice Anthony Kennedy, the Supreme Court re-

Constitution After Boumediene v. Bush, 82 SO. CAL. L. REV. 259, 290 (2009) (referring to opinion as expressing views of a "plurality"); D. Carolina Núñez, *Inside the Border, Outside the Law: Undocumented Immigrants and the Fourth Amendment*, 85 SO. CAL. L. REV. 85, 88 (2011) (referring to the opinion of the Court as a "plurality opinion").

These commentators vastly overstate the legal significance of the comments made in Kennedy's opinion. By explicitly choosing to join the opinion issued on behalf of the Court by Chief Justice Rehnquist, Kennedy was in effect voting to give that opinion the force of binding law. If Kennedy had not wished to have some part of the Rehnquist opinion to have the force of law, he had the option of concurring only in the result, as he would later do in *Parents Involved in Community Schools v. Seattle School District No. 1*, 551 U.S. 701, 782 (2007) (Kennedy, J., concurring in part and concurring in the judgment). For these purposes, the question of whether Kennedy in fact agreed with the approach outlined in the Rehnquist opinion is simply irrelevant. *Cf.* Gertz v. Robert Welch, Inc., 418 U.S. 323, 353–54 (1974) (Blackmun, J., concurring) (choosing to vote to create majority notwithstanding explicit disagreement with approach of the majority opinion).

[88] Boumediene v. Bush, 553 U.S. 723 (2008). For examples of the use of *Boumediene* by critics of the travel ban, see Pamela Falk, *See You in Court: Trump's Travel Ban Fight May Turn Out to Be His Guantanamo*, THE HILL (Feb. 10, 2017), http://thehill.com/blogs/pundits-blog/the-administration/318879-see-you-in-court-trumps-travel-ban-fight-may-turn-out; Jonathan Hafetz, *Why Courts Appear Willing to Reject Trump's Travel Ban Order*, JUST SECURITY (Feb. 6, 2017), https://www.justsecurity.org/37388/courts-reject-trumps-travel-ban-order/.

[89] *Boumediene*, 553 U.S. at 732.

[90] 28 U.S.C. § 2241(e) (2006).

[91] *Boumediene*, 553 U.S. at 743.

[92] *Id.* at 739.

jected this argument and held that the aliens detained at the Guantanamo naval facility could invoke the protections of the Suspension Clause.[93] While acknowledging that, by the terms of the lease that gave the United States the right to occupy Guantanamo Bay, the nation of Cuba retained "ultimate sovereignty" over the territory on which the naval station was located,[94] Kennedy rejected the claim that the right of aliens to invoke the Suspension Clause was limited by the concept of "*de jure* sovereignty."[95] Instead, he asserted:

> [A]t least three factors are relevant in determining the reach of the Suspension Clause: (1) the citizenship and status of the detainee and the adequacy of the process through which that status determination was made; (2) the nature of the sites where apprehension and then detention took place; and (3) the practical obstacles inherent in resolving the prisoner's entitlement to the writ.[96]

Noting that "[i]n every practical sense Guantanamo is not abroad; it is within the constant jurisdiction of the United States" and that "the United States is, for all practical purposes, answerable to no other sovereign for its acts on the base,"[97] Kennedy concluded that the MCA was unconstitutional.

Considered out of context, the functional analysis that underlay the decision in *Boumediene* might in the abstract be viewed as leaving open the possibility that the Constitution may be interpreted to extend free exercise rights to nonresident aliens seeking admission to the country. However, the *Boumediene* Court did not purport to overrule *Verdugo-Urquidez*,[98] and *Turner* was not even mentioned in the majority opinion. Moreover, the issue that was at the core of the dispute in *Boumediene* was fundamentally different from that which underlay both *Verdugo-Urquidez* and *Turner*. While in the earlier cases the question was whether aliens who were not within the territorial jurisdiction of the United States government could nonetheless claim the protection of the Bill of Rights, the *Boumediene* Court focused primarily on the issue of whether the territorial reach of the Bill of Rights extended to areas over which the federal government could not assert sovereignty but were nonetheless under the control of that government.

Moreover, the principles that underlay *Verdugo-Urquidez* and *Turner* were entirely consistent with the fundamental nature of the Constitution

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[93] *Id.* at 798.

[94] *Id.* at 765.

[95] *Id.* at 770–71.

[96] *Id.* at 766.

[97] *Id.* at 769–70.

[98] In his majority opinion in *Boumediene*, Kennedy asserts that his concurring opinion in *Verdugo Urquidez* "appli[ed] the 'impracticable and anomalous' extraterritoriality test in the Fourth Amendment context." *Id.* at 760.

itself. Neither the delegates who gathered in Philadelphia in 1787 nor those who were selected to participate in the state ratification conventions were driven by a perceived need to resolve problems faced by people in the world at large. Instead, the supporters of the new Constitution shared the conviction that the institutions established by the Articles of Confederation lacked at least some of the characteristics necessary to protect their common and separate interests. The agreement that was reached at the Philadelphia Convention and ultimately ratified by all of the state conventions was designed to address that problem by creating a new federal government with far greater powers than those which had been granted to the Continental Congress in 1777. Conversely, the addition of the Bill of Rights was designed to limit the potential threat which the newly-strengthened federal government might pose to the interests of the individual states and their respective citizenries—a project that was entirely consistent with the Preamble's assertion that the Constitution was designed to "secure the blessings of liberty to [the drafters and ratifiers] and their posterity."[99]

By contrast, the extension of the protections of the Bill of Rights to nonresident aliens would do nothing to advance this project. Instead, a rejection of the principles embodied in *Verdugo-Urquidez* and *Turner* would actually have the potential to impede the ability of the federal government to perform some of the functions for which it was created. Inevitably, the interests of the citizens of the United States and those of nonresident aliens will at times come into conflict. In those situations, the federal government is the body that represents the American populace and is charged with the task of advancing the policy preferences of that populace. If nonresident aliens were deemed to be protected by the Bill of Rights, the options available to the federal government would thereby be limited, and this loss of flexibility would at times prevent the government from taking the actions best calculated to address the concerns of the communities that the Constitution was designed to protect.

In any event, the opponents of the travel ban have clearly been cognizant of the difficulties that *Verdugo-Urquidez* and *Turner* would pose for any arguments based on the Free Exercise Clause of the First Amendment or the equal protection component of the Fifth Amendment. Rather than relying on either of these provisions, those challenging the constitutionality of the travel ban have most often contended that, because the executive actions were motivated by anti-Muslim animus, the exclusion of potential entrants from the designated countries runs afoul of the First Amendment prohibition on laws "respecting an establishment

[99] *See generally* MICHAEL J. KLARMAN, THE FRAMERS' COUP: THE MAKING OF THE UNITED STATES CONSTITUTION 126–256, 397–595 (2016) (providing a comprehensive discussion of the drafting and ratification of both the Constitution and the Bill of Rights).

of religion."[100] They contend that actions based on religious animus violate the Establishment Clause as well as the Free Exercise Clause.[101] In addition, they insist that the Establishment Clause should be viewed as a structural limitation on federal action rather than a guarantee of individual rights, and that therefore, notwithstanding decisions such as *Turner* and *Verdugo-Urquidez*, the Clause limits the power of the federal government to exclude nonresident aliens.[102] However, the Establishment Clause argument faces insuperable doctrinal difficulties.

II. THE TRAVEL BAN AND THE ESTABLISHMENT CLAUSE

Any plausible evaluation of the Establishment Clause challenges to the travel order must begin with an understanding of the historical context that provided the backdrop for the adoption of the Clause itself. At the time that the First Amendment was drafted and ratified, the concept of "establishment of religion" was generally understood to describe a special relationship between the government and one or more religious organizations. The precise nature of the relationship might have been defined by government control over the doctrines, structure, and personnel of the established church; use of the state church for public functions; limitation of political participation to members of the established church; public financial support for the church; mandatory attendance at religious services in the state church; and/or a prohibition on attendance in other churches.[103] But while the specifics of the relationship varied from state to state, all of the relevant parties understood that the concept of establishment was based on the theory that one or more religious organizations was entitled to special treatment from the relevant state government. Similarly, in the 1971 decision in *Lemon v. Kurtzman*, Chief Justice Warren E. Burger identified the "three main evils against which the Establishment Clause was intended to afford protection" as "sponsorship, financial support, and active involvement of the sovereign in religious activity."[104] This understanding provided the backdrop for the creation of the modern approach to Establishment Clause analysis in *Lemon*, where the majority opinion asserted that, in order to survive an Establishment

[100] *See, e.g.*, Brief for Plaintiffs-Appellees at 12, Hawaii v. Trump, 2017 WL 5343014 (9th Cir. 2017) (No. 17-17168).

[101] *See, e.g.*, *id.* at 54.

[102] *See, e.g.*, Brief for Amici Curiae Constitutional Law Scholars in Support of Respondents at 3, Trump v. Hawaii, No. 16-1540 (Oct. 24, 2017) (mem).

[103] The elements of the concept of establishment of religion during the founding period are described in detail in Michael W. McConnell, *Establishment and Disestablishment at the Founding, Part I: Establishment of Religion*, 44 WM. & MARY L. REV. 2105, 2110 (2003).

[104] Lemon v. Kurtzman, 403 U.S. 602, 612 (1971) (quoting Walz v. Tax Comm'n, 397 U.S. 664, 668 (1970)).

Clause challenge, "[first, a] statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster 'an excessive government entanglement with religion.'"[105]

Almost all of the cases in which the Court has actually found that government action violated the Establishment Clause have reflected a similar understanding of the nature of the evils that the Clause was designed to address. For example, *Lemon* and its progeny involved situations in which the government was in fact providing financial support to religious institutions, while in cases such as *McCreary County v. American Civil Liberties Union*,[106] and *Santa Fe Independent School District v. Doe*,[107] the Court found that the government had in effect given its official imprimatur to the doctrines espoused by particular religious groups. *In Larkin v. Grendel's Den, Inc.*[108] and *Board of Education of Kiryas Joel Village School District v. Grumet*,[109] on the other hand, the Court concluded that the local officials had unconstitutionally delegated government power to religious authorities. Thus, whatever one thinks of the results in these cases, each of the government actions that were at issue could plausibly be associated with the concepts of "sponsorship, financial support, [or] active involvement of the sovereign in religious activity."

The issues presented by the travel order are quite different. No one can plausibly claim that restrictions imposed by the order were designed to advance any particular set of religious beliefs, or lack thereof. Moreover, the order does not envision the establishment of a relationship between the government and any religious organization. Nonetheless, despite the fact that on its face the travel order makes no explicit reference to any religious belief or group, the critics of the order argue that it nonetheless runs afoul of the Establishment Clause because the issuance of the order was animated by anti-Muslim bias.[110]

Admittedly, there is language in some of the Court's Establishment Clause opinions that might be taken to suggest that any statute which is intended to discriminate against a specific religious group would run afoul of the Clause, whether or not the language of the statute was neutral on its face. However, as the majority opinion observed in *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*,[111] the Court has never relied on the Establishment Clause to invalidate a facially neutral statute based on

[105] *Id.* at 612–13 (citing Board of Educ. v. Allen, 392 U.S. 236, 243 (1968) and quoting Walz v. Tax Comm'n, 397 U.S. at 674).

[106] McCreary County v. ACLU, 545 U.S. 844, 850–51 (2005).

[107] Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 317 (2000).

[108] Larkin v. Grendel's Den, Inc., 459 U.S. 116, 127 (1982).

[109] Bd. of Educ. of Kiryas Joel Vill. Sch. Dist. v. Grumet, 512 U.S. 687, 690 (1994).

[110] *See supra* note 100.

[111] Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 531–32 (1993).

a finding of animus. Instead, such claims have uniformly been evaluated by reference to the requirements of the Free Exercise Clause.[112]

The 1982 decision in *Larson v. Valente*[113] is the only case in which the Court has relied on the Establishment Clause to strike down a state law that singled out a small number of religious organizations for unfavorable treatment. In *Larson*, the Court was faced with a constitutional challenge to a provision of the Minnesota Charitable Solicitations Act, which provided that only those religious organizations that receive more than half of their total contributions from members or affiliated organizations would be exempt from the registration and reporting requirements of the Act.[114] The legislative history of the statute revealed that the law was designed to make the reporting requirement applicable to "religious organizations which are soliciting on the street and soliciting by direct mail, but who are not substantial religious institutions in . . . [Minnesota],"[115] and that the measure had been amended to ensure that reporting requirements would not be applied to the Catholic Church.[116] Against this background, asserting that "when we are presented with a state law granting a denominational preference, our precedents demand that we treat the law as suspect and that we apply strict scrutiny," the majority concluded that the Minnesota statute ran afoul of the Establishment Clause because the state had failed to demonstrate that the classification was necessary to serve a compelling governmental interest.[117]

The issues that the Court faced in *Larson* were admittedly similar in some respects to those presented by the challenges to the travel ban. In both cases, the government action at issue had established a classification that left the interests of the vast majority of mainstream religious groups untouched but created significant difficulties for a small number of other religions. However, even leaving aside the special considerations related specifically to the status of nonresident aliens and the regulation of immigration, the issues that were presented in *Larson* differed from those raised by the travel ban in at least one crucial respect. While the Minnesota law focused on religious *institutions*—the traditional focus of the Establishment Clause—those challenging the travel ban argue that the exclusion of potential entrants from other countries was based on a desire to discriminate against *individuals* based on their religious beliefs—the core concern of the Free Exercise Clause.

Moreover, any effort to read a generalized prohibition against reli-

[112] *Id.* at 532.

[113] Larson v. Valente, 456 U.S. 228, 230 (1982).

[114] *Id.*

[115] *Id.* at 254 (quoting Transcript of Legislative Discussions of § 309.5151(b), as set forth in Declaration of Charles C. Hunter).

[116] *Id.*

[117] *Id.* at 246, 255.

gious animus against individuals based on their religious beliefs into the Establishment Clause creates an insoluble problem for those seeking to deploy the Clause against the travel ban. Those who argue that the travel ban is unconstitutional contend that the Establishment Clause argument is not subject to the strictures of *Verdugo-Urquidez* and *Turner* because the clause itself is a "structural" limitation on the power of the federal government rather than a guarantee of individual rights.[118] But whatever one might say about the other aspects of Establishment Clause jurisprudence, the contention that the Clause prohibits the federal government from acting against people on the basis of religious animus cannot plausibly be characterized as anything other than a claim of individual right. Thus, even if the Establishment Clause is properly viewed as protecting residents generally against government action based on religious animus, under existing law nonresident aliens could not claim similar protection from the actions of the federal government.

In short, the travel ban does not run afoul of any of the principles established by the decisions of the Supreme Court dealing with the scope of the First Amendment. Of course, the Court itself might conceivably change those principles if it considers the merits of the constitutional challenges to the actions of the Trump Administration. But in the absence of such changes, the lower court decisions that temporarily prevented the implementation of the ban on First Amendment grounds were simply indefensible.

III. CONCLUSION

In almost any other era, the treatment of the Trump Administration's travel ban by the lower federal courts would have been considered truly extraordinary. Prior to the issuance of the travel ban, the Supreme Court had *never* held that a substantive limitation on the entrance of noncitizens into the United States violated the Constitution; had *never* held that aliens who were outside the jurisdiction of the federal government could claim the protections of the Bill of Rights; and had *never* held that discrimination against individuals (as opposed to institutions) because of their religious beliefs violated the Establishment Clause rather than the Free Exercise Clause. Nonetheless, with the strong support of the community of progressive constitutional scholars, a variety of federal judges have come to the conclusion that the actions of the Trump Administration were unconstitutional and enjoined the enforcement of the various iterations of the travel ban.

The decisions against the travel ban reflect the influence of forces whose significance transcends the narrow context of immigration law. The lower court rulings in the travel ban cases are nothing more than re-

[118] *See supra* note 102.

cent examples of a more general trend that has seen federal judges increasingly reject the concept of judicial deference and instead intervene in the kind of disputes that had until recently been viewed as the exclusive province of the other branches of government. This trend cuts across political lines. While at one point many conservatives purported to reject what they described as judicial activism,[119] conservatives have more recently become as likely as their progressive counterparts to call on the federal courts to take action against policies that conservatives find abhorrent.[120] Thus, for example, some conservative commentators argued that the courts should have invoked the requirement that the President "take Care that the laws be faithfully executed" against the DACA and DAPA policies on deportation adopted by the Obama Administration, notwithstanding the fact that no presidential action has ever been held to violate the Take Care Clause.[121]

A reinvigoration of the concept of deference would be particularly welcome in cases dealing with issues such as those raised by the travel ban. As decisions such as *Turner* and *Verdugo-Urquidez* have correctly observed, the Constitution was simply not designed to provide protection for aliens who are not under the jurisdiction of the government of the United States.[122] Moreover, the kinds of restrictions imposed by the travel ban are inextricably linked to decisions related to foreign policy more generally, an area in which, as the Court has observed, "the President alone has the power to speak or listen as a representative of the nation."[123] Of course, in taking action to restrict immigration, the decisions made by the President must respect the rules that have been established by Congress. But so long as the actions of the President are consistent with those rules, the judiciary should not intervene.

IV. AFTERWORD

Shortly before this Article was published, the Supreme Court rejected the challenge to the constitutionality of the travel ban in *Trump v.*

[119] *See, e.g.*, J. Harvie Wilkinson, III, *Of Guns, Abortions, and the Unraveling Rule of Law*, 95 VA. L. REV. 253, 274 (2009).

[120] *See, e.g.*, Shelby County v. Holder, 133 S. Ct. 2612, 2631 (2013) (invalidating preclearance requirement of Voting Rights Act); Citizens United v. Fed. Elections Comm'n, 558 U.S. 310, 372 (2010) (invalidating restrictions on corporate expenditures in political campaigns); District of Columbia v. Heller, 554 U.S. 570, 636 (2008) (invalidating gun control statute). *See generally* Nelson Lund & David B. Kopel, *Unraveling Judicial Restraint: Guns, Abortion, and the Faux Conservatism of J. Harvie Wilkinson III*, 25 J. L. & POL. 1, 2 (2009) (arguing conservatives should embrace judicial activism in some circumstances).

[121] *See, e.g.*, Josh Blackman, *The Constitutionality of DAPA Part II: Faithfully Executing the Law*, 19 TEX. REV. L. & POL. 213, 284 (2015).

[122] *See supra* Part III.

[123] United States v. Curtis-Wright Export Corp., 299 U.S. 304, 319 (1936).

Hawaii.[124] Speaking for the majority, Chief Justice John Roberts asserted 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'"[125] and that the fact that President Trump had made anti-Muslim statements during the 2016 campaign had not altered this basic principle. Moreover, Chief Justice Roberts insisted that the argument for judicial deference "'has particular force'" in admission and immigration cases that overlap with "'the area of national security.'"[126] Against this background, the majority observed that "[a] conventional application of [the standard established in *Kleindeinst v. Mandel*], asking only whether the policy is facially legitimate and justified, would put an end to our inquiry."[127] In addition, however, the majority concluded that, even if subjected to the rational basis test, the travel ban would survive constitutional scrutiny because the government had set forth a "sufficient national security justification" for the imposition of the ban.[128]

Because none of the plaintiffs in the specific case before the Court were residents of other countries seeking admission to the United States, Chief Justice Roberts did not focus on the question of whether such nonresidents could claim the protections of the Bill of Rights under any circumstances. Nonetheless one point emerges clearly from *Trump v. Hawaii*. The majority unmistakably endorsed the view that, in almost all cases, decisions on the question of which noncitizens should and should not be allowed to enter the United States are best left to the political branches of the government, and that judges should rarely if ever invoke the Constitution to overturn such decisions.

[124] Trump v. Hawaii, No. 17-965, slip op. at 38–39 (June 26, 2018).

[125] *Id.* at 30 (quoting Fiallo v. Bell, 430 U.S. 787, 792 (1977)).

[126] *Id.* at 31 (quoting Kerry v. Din, 135 S. Ct. 2128, 2130 (2015) (Kennedy, J., concurring in the result)).

[127] *Id.* at 32.

[128] *Id.* at 38.