

2019

President Trump's Travel Ban: Boundaries Between Congressional, Presidential, and Judicial Powers on Immigration

Ivaylo S. Pavlov

Follow this and additional works at: https://scholarship.shu.edu/student_scholarship



Part of the [Law Commons](#)

Recommended Citation

Pavlov, Ivaylo S., "President Trump's Travel Ban: Boundaries Between Congressional, Presidential, and Judicial Powers on Immigration" (2019). *Law School Student Scholarship*. 977.
https://scholarship.shu.edu/student_scholarship/977

PRESIDENT TRUMP'S TRAVEL BAN: BOUNDARIES BETWEEN
CONGRESSIONAL, PRESIDENTIAL, AND JUDICIAL POWERS ON
IMMIGRATION

*Student: Ivaylo S. Pavlov**

Professor: Jonathan Hafetz

This Article argues that President Trump's executive orders on barring immigration from certain countries are legitimate exercise of his constitutional and statutory authority over immigration.

The Article does not opine on the policy outcome of the orders or whether they are moral or just. Rather, the purpose of the Article is to determine whether President Trump has legal authority to restrict immigration considering the discrimination challenges his executive orders have faced. Finally, the Article makes a prediction that the U.S. Supreme Court will uphold the travel restrictions when it issues its final opinion in June of 2018. The Court will likely side with the administration, accepting arguments that the latest version of the ban is a result of national security concerns and a valid exercise of the President's executive power.

* 3LE student at Seton Hall University School of Law.

INTRODUCTION

- I. PRESIDENT TRUMP’S TRAVEL BAN
 - A. *First Version*
 - B. *Second Version*
 - C. *Third Version*

- II. BOUNDARIES OF CONGRESSIONAL AND PRESIDENTIAL POWERS ON IMMIGRATION
 - A. *Power of Congress*
 - B. *Power of the President and Authorization by Congress*

- III. THE JUDICIAL RESTRAINT ON THE TRAVEL BAN
 - A. *Washington State Decision and Ninth Circuit Decision*
 - B. *Hawaii Decision*
 - C. *Maryland Decision*
 - D. *The Fourth Circuit Decision*
 - E. *The U.S. Supreme Court*

- IV. CONCLUSION

INTRODUCTION

Donald Trump was inaugurated as the 45th President of the United States on January 20, 2017, succeeding Barack Obama. One of his campaign promises was to restrict immigration from certain countries with ties to terrorism.¹ One week after stepping into office, Trump signed an executive order² to suspend admission into the U.S. of nationals of seven Muslim-majority countries. The President’s position is that the restrictions would make the country safer as “numerous foreign-born individuals have

¹ On Oct. 22, 2016, Donald Trump issued what he called his “Contract with the American Voter.” This was a specific plan of action that would guide his administration, starting from the first day, and listed 60 promises. Available at: <https://assets.donaldjtrump.com/landings/contract/O-TRU-102316-Contractv02.pdf>

² Executive Order 13769.

been convicted or implicated in terrorism-related crimes since September 11, 2001.”³ Mr. Trump asserted that the suspensions would “reduce investigative burdens on relevant agencies”⁴ and would “ensure that adequate standards are established to prevent infiltration by foreign terrorists or criminals.”⁵

This first order did not provide guidance as to visitors with permanent resident (i.e. green cards) and dual nationals. It led to chaotic stays at foreign airports; government agencies implementing the order were not provided timely instructions of how to implement the order, which led to further confusion.⁶ Human rights advocates, immigration lawyers, and travelers gathered at U.S. and foreign airports in the hours and days after the order. Customs and Border Protection agents were initially unsure if the ban applies to permanent residents. Travel delays followed. Critics of the President’s action quickly alleged that the restriction is based on anti-Muslim animus, since all seven countries banned were Muslim-majority countries.⁷ After the first order was challenged in federal courts, the President revoked it and replaced it with a second version.⁸ A third order was issued as a proclamation entitled “Enhancing Vetting Capabilities and Processes for Detecting Attempted Entry into the United States by Terrorists or other Public Safety Threats.”⁹

³ *Id.* at Sec. 1.

⁴ *Id.* at Sec. 3(c).

⁵ *Id.*

⁶ Matt Stevens, *First Travel Ban Order Left Officials Confused, Documents Show*, The New York Times, October 2, 2017, available at <https://www.nytimes.com/2017/10/02/us/trump-travel-ban.html>

⁷ Erwin Chemerinsky, *Trump’s Travel Ban is Still Illegal. The Supreme Court Should Slap it Down*, *The Sacramento Bee*, February 8, 2018, available at <http://www.sacbee.com/opinion/california-forum/article197217549.html#storylink=cpy>

⁸ Executive Order 13780.

⁹ Presidential Proclamation, available at <https://www.whitehouse.gov/the-pressoffice/2017/09/24/enhancing-vetting-capabilities-and-processes-detecting-attemptedentry>.

This Article discusses the legal authority of the President and Congress to restrict immigration, in particular the three versions of Trump’s travel ban. The Article also describes the legal challenges the President’s immigration orders have faced. As the travel restriction has made its way to the Supreme Court, the Article analyzes the temporary order in a pending case issued by the highest court on December 4, 2017, and the oral arguments heard on April 25, 2018, to make a prediction that the Court will uphold the executive order when it delivers its final opinion in June.

I. PRESIDENT TRUMP’S TRAVEL BAN

President Trump’s travel ban, both in the original version, and the two revisions, were issued after the president’s acting homeland security secretary recommended adopting entry restrictions on countries which posed national security risks.

A. First Version

On January 27, 2017, President Trump issued the first version of the Travel Ban as an executive order.¹⁰ It suspended entry into the United States for 90 days by individuals from seven predominantly Muslim countries: Iraq, Iran, Libya, Somalia, Sudan, Syria and Yemen.¹¹

The order provided that “in order to protect Americans, the United States must ensure that those admitted to this country do not bear hostile attitudes toward it and its

¹⁰ Executive Order 13769, 82 Fed. Reg. 8977 (January 27, 2017), available at <https://www.whitehouse.gov/presidential-actions/executive-order-protecting-nation-foreign-terrorist-entry-united-states/>

¹¹ *Id.* at Sec. 3(c).

founding principles.”¹² It added that “the United States cannot, and should not, admit those who do not support the Constitution, or those who would place violent ideologies over American law.”¹³ As policy justification, the order provided that its purpose is to “to protect its citizens from foreign nationals who intend to commit terrorist attacks in the United States and to prevent the admission of foreign nationals who intend to exploit United States immigration laws for malevolent purposes.”¹⁴ It also ordered the Secretary of State to suspend the U.S. Refugee Admissions Program (“USRAP”) for 120 days.¹⁵ After the 120 day period, “the Secretary of State shall resume USRAP admissions only for nationals of countries for which the Secretary of State, the Secretary of Homeland Security, and the Director of National Intelligence have jointly determined that such additional procedures are adequate to ensure the security and welfare of the United States.”¹⁶ Hence, the order effectively deferred admission of all refugees to the United States for 120 days, with a permanent suspension for all Syrian refugees.¹⁷

The order provided for a limited case-by-case exemption, giving the Secretaries of State and Homeland Security to jointly determine whether to admit individuals in the U.S. The exemption applies to “persons from religious minorities in their country of nationality facing religious persecution, when admitting the person would enable the United States to conform its conduct to a preexisting international agreement, or when the person is already in transit and denying admission would cause undue hardship and it would not pose a risk to the security or welfare of the United States.”¹⁸

¹² *Id.* at Sec. 1.

¹³ *Id.*

¹⁴ *Id.* at Sec. 2.

¹⁵ *Id.* at Sec. 5.

¹⁶ *Id.*

¹⁷ *Id.* at Sec. 5(c).

¹⁸ *Id.* at Sec. 5(e).

The Travel Ban was quickly challenged in courts as critics asserted it is discriminatory on the basis of religion.¹⁹

B. Second Version

On March 6, 2017, President Trump replaced the first version of the Ban with issuing Executive Order 13780.²⁰ This second version ban was more narrowly tailored version of the first: it did not apply to lawful permanent residents²¹ and dual nationals,²² as long as the individuals were using their non-banned passports.²³ In addition, it no longer included Iraq as a banned country²⁴ and eliminated the permanent nature of the ban for Syrian refugees.²⁵ Travelers who already had visas for travel to the United States were also exempt from the Ban.²⁶

As justification for the ban, the second version cited a U.S. Department of State Report on Terrorism by the Attorney General, Jeff Sessions, who reported to the President that “more than 300 persons who entered the United States as refugees are currently the subjects of counterterrorism investigations by the FBI.”²⁷

The second order explicitly stated security concerns with regards to each country listed in the order. Iran was referred to as a “state sponsor of terrorism since 1984” and

¹⁹ *See supra* III, “The Judicial Restraint on the Travel Ban”

²⁰ Executive Order 13780, 82 Fed. Reg. 13209 (Mar. 6, 2017), available at <https://www.federalregister.gov/documents/2017/03/09/2017-04837/protecting-thenation-from-foreign-terrorist-entry-into-the-united-states>.

²¹ Executive Order 13780 at sec. 3(b).

²² *Id.*

²³ *Id.*

²⁴ *Id.* at Sec. 1(f)-(g).

²⁵ *Id.* at Sec. 6(a).

²⁶ *Id.*

²⁷ *Id.* at Sec. 1(e), (h).

noted for its “continues to support various terrorist groups, including Hezbollah, Hamas, and terrorist groups in Iraq,” and “support for al-Qaida.”²⁸ Libya was described as “an active combat zone, with hostilities between the internationally recognized government and its rivals.”²⁹ “In many parts of the country, security and law enforcement functions are provided by armed militias rather than state institutions.”³⁰ “Violent extremist groups, including the Islamic State of Iraq and Syria (ISIS), have exploited these conditions to expand their presence in the country.”³¹ Somalia was referred to as “terrorist safe haven.”³² Sudan was designated as “a state sponsor of terrorism since 1993.”³³ Syria was described as “engaged in an ongoing military conflict against ISIS and others for control of portions of the country”³⁴ Yemen was listed as “the site of an ongoing conflict between the incumbent government and the Houthi-led opposition.”³⁵ “Both ISIS and a second group, al-Qaida in the Arabian Peninsula, have exploited this conflict to expand their presence in Yemen and to carry out hundreds of attacks.”³⁶ Finally, Iraq was presented as a “special case,” as the “the close cooperative relationship between the United States and the democratically elected Iraqi government, the strong United States diplomatic presence in Iraq, the significant presence of United States forces in Iraq, and Iraq’s commitment to combat ISIS justify different treatment for Iraq.”³⁷

²⁸ *Id.* at Sec. 1(e)(i).

²⁹ *Id.* at Sec. 1(e)(ii).

³⁰ *Id.*

³¹ *Id.*

³² *Id.* at Sec. 1(e)(iii).

³³ *Id.* at Sec. 1(e)(iv).

³⁴ *Id.* at Sec. 1(e)(v).

³⁵ *Id.* at Sec. 1(e)(vi).

³⁶ *Id.*

³⁷ *Id.*

The second version of the ban also faced legal challenges, including appeals to the Ninth and the Fourth Circuit Courts of Appeals,³⁸ and was later replaced with a third version.

C. Third Version

The third version of the Travel Ban was issued on September 24, 2017, as a formal proclamation entitled “Enhancing Vetting Capabilities and Processes for Detecting Attempted Entry into the United States by Terrorists or other Public Safety Threats.”³⁹ In this proclamation, President Trump invoked his authority under 8 U.S.C. § 1182(f) to place new restrictions on travel to the United States. National security concerns as the justification for the latest version of the ban. More narrowed version than the previous Ban, the third version exempts not only permanent residents, temporary visa holders, and dual nationals, but also refugee and people with asylum status.⁴⁰

The seven countries whose citizens were banned from admission in the U.S were Chad, Iran, Libya, North Korea, Syria, Venezuela⁴¹, and Yemen.⁴² The Ban also provided that nationals of Somalia would no longer be allowed to apply for permanent resident status.⁴³ The reason was that the country has “significant identity-management deficiencies.”⁴⁴ Venezuela was listed as an “uncooperative in verifying whether its

³⁸ These decisions are discussed in III, The Judicial Restraint on the Travel Ban

³⁹ Presidential Proclamation, available at <https://www.whitehouse.gov/the-pressoffice/2017/09/24/enhancing-vetting-capabilities-and-processes-detecting-attemptedentry>.

⁴⁰ *Id.* at Sec. 3.

⁴¹ For Venezuela, only certain government officials were banned from visiting the U.S.

⁴² *Id.* at Sec. 2.

⁴³ *Id.*

⁴⁴ *Id.* at Sec. 2(h)(i).

citizens pose national security or public-safety threats.”⁴⁵ The order distinguished between entry of immigrants (who can eventually become permanent residents) and non-immigrants (who are only temporary visitors). Exempted from the third ban were lawful permanent residents, dual nationals, and those holding valid U.S. visas on October 18, 2017, when the new travel ban took effect. Unlike the previous two versions, the third travel ban did not include a ban on refugee admissions.

Similar to the prior two versions, the policy and purpose of the ban was “to protect its citizens from terrorist attacks and other public-safety threats.”⁴⁶

The third version of the ban is not time-limited and therefore could potentially be indefinite. It took effect on September 24, 2017, for individuals who lack a bona fide relationship to the United States and on October 18, 2017 for all others.⁴⁷

II. BOUNDARIES OF CONGRESSIONAL AND PRESIDENTIAL POWER ON IMMIGRATION

The travel ban escalated discussions about the extent President’s power on immigration and whether Mr. Trump’s executive orders are a result of a religion-based, anti-Muslim discrimination. On one hand, the President’s supporters suggest that immigration from certain countries pose national security risks (such as terrorism). They point out that the ban excludes the vast majority of the Muslim population of the world: there are approximately fifty predominantly Muslim countries in the world, and only five of them are listed in the latest version of the travel ban, which is approximately eight

⁴⁵ *Id.* at Sec 2(f)(i).

⁴⁶ *Id.* at Sec. 1(a).

⁴⁷ *Id.* at Sec. 7.

percent of the world's Muslim population. Further, the president's supporters point out that if the true goal of the travel ban was to restrict Muslims from entering the U.S., other Islamic countries, such as Turkey and Saudi Arabia, would also be on the list. Consequently, the President's supporters believe that the travel ban should not and cannot be viewed as a policy specifically targeting Muslims.

On the other hand, critics of the President's anti-immigration policy point out that the fact that the order doesn't cover all or most Muslim countries doesn't mean that it is not discriminatory. The predominantly Muslim countries listed in the ban, they suggest, have Muslim populations of 90 to 99 percent. In addition, they point out that not one terrorist act in the United States has been directly linked to these countries. Consequently, the President's critics believe that immigration from these countries does not pose a valid security threat. Opponents of the ban cite Trump's calls for a "total and complete shutdown of Muslims entering the United States" and his tweeting of anti-Muslim videos⁴⁸ as proof of the President is in fact a proponent of anti-Muslim policies. Consequently, Trump's critics argue that the true purpose of the ban is religion-based anti-Muslim discrimination, which should be subjected to strict scrutiny and struck down as unconstitutional.

These opposing views have revived the discussion of immigration powers and limits of the government. In general, with regards to immigration law, Congress, under the Plenary Power Doctrine, has the power to enact immigration laws, subject to oversight by the judicial branch. The executive branch's role is to enforce the immigration laws passed by Congress.

⁴⁸ The videos Mr. Trump retweeted were titled: "Muslim migrant beats up Dutch boy on crutches," "Muslim Destroys a Statue of Virgin Mary," and "Islamist mob pushes teenage boy off roof and beats him to death!", available at

A. *Power of Congress*

The U.S. Constitution provides that the legislative branch has the power to “establish a uniform Rule of Naturalization.”⁴⁹ Under this Naturalization clause Congress is responsible for writing the laws that determine the process of how non-citizens become naturalized citizens of the United States.⁵⁰ Consequently, the Constitution, on its face, prevents the individual states from imposing their own naturalization laws, by expressly granting this power to the federal legislative branch. However, the Naturalization Clause concerns decisions about granting citizenship rather than immigration powers generally.

The federal government enforces immigration law via U.S. Immigration and Customs Enforcement (“ICE”). ICE is a U.S. federal government law enforcement agency under the jurisdiction of the Department of Homeland Security with two major divisions: Homeland Security Investigations and Enforcement and Removal Operations. Despite its enforcing powers, the federal government has also relied on state and local authorities to enforcement immigration laws. For example, federal officials must rely on local police to enforce federal immigration laws. Hence, there is an inherent conflict between federal immigration law enforcement and corresponding intervening forces at the state and local level. This conflict has been recently emphasized after Trump’s administration filed a lawsuit against California’s so-called sanctuary laws,⁵¹ calling them

⁴⁹ U.S. Const. art. I, § 8, cl. 4.

⁵⁰ For an overview of U.S. legal authority over immigration policy, *See* Jennifer Chacon, *Who is Responsible for Immigration Policy*, American Bar Association, 2014, available at https://www.americanbar.org/publications/insights_on_law_and_society/14/spring-2014/who-is-responsible-for-u-s--immigration-policy-.html

⁵¹ Katie Benner and Jennifer Medina, *Trump Administration Sue California Over Immigration Laws*, *The New York Times*, March 6, 2018.

unconstitutional and asking the court to block them. The complaint was filed in the U.S. District Court for the Eastern District of California, on March 6, 2018.⁵²

The Migration and Importation Clause of the Constitution has also been considered a potential grant of power to Congress.⁵³ It provides that "The Migration or Importation of such Persons as any of the States now existing shall think proper to admit, shall not be prohibited by the Congress prior to the year one thousand eight hundred and eight...."⁵⁴ The explicit reference to year 1808 could be interpreted to imply that after 1808, Congress would have power over migration and importation. However, the mainstream interpretation of this language is that the year in the clause was simply intended to bar any attempts by Congress to stop slavery prior to 1808.⁵⁵

The War Power, found in Article I, § 8, clause 11, could also be interpreted as a potential constitutional grant of federal power over immigration. It gives Congress the authority to "declare war." This congressional power has been interpreted to authorize the exclusion and expulsion of enemy aliens.⁵⁶

B. Power of the President and Authorization by Congress

"The exclusion of aliens is a fundamental act of sovereignty ... inherent in the executive power," the Supreme Court ruled in 1950.⁵⁷ Two years later, in 1952, Congress

⁵² The complaint is available at <https://assets.documentcloud.org/documents/4403892/Justice-Dept-s-Suit-Against-California.pdf>

⁵³ U.S. Const. art. I, § 9, cl. 1.

⁵⁴ *Id.*

⁵⁵ See. David Weissbrodt and Laura Danielson, "*The Source and Scope of the Federal Power to Regulate Immigration and Naturalization*," University of Minnesota, Human Right Library, available at: <http://hrlibrary.umn.edu/immigrationlaw/chapter2.html>

⁵⁶ For example, in the Alien and Sedition Acts of 1798, Congress granted this power to President John Adams. The Supreme Court later upheld the constitutionality of such provisions. See *Ludecke v. Watkins*, 335 U.S. 160, 68 S. Ct. 1429 (1948).

⁵⁷ *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 542, 70 S. Ct. 309, 312 (1950).

enacted Immigration and Nationality Act of 1965. One of the statutes of this act, 8 U.S.C. §1187(a)(12), provides the following:

“Whenever the President finds that the entry of any aliens or of any class of aliens into the United States would be detrimental to the interests of the United States, he may by proclamation, and for such period as he shall deem necessary, suspend the entry of all aliens or any class of aliens as immigrants or nonimmigrants, or impose on the entry of aliens any restrictions he may deem to be appropriate.”⁵⁸

Considering the very broad language in the statute (“as he shall deem necessary,” “entry of any class aliens”) some legal experts⁵⁹ believe that the President would generally prevail a challenge involving national security and foreign citizens entering the country.⁶⁰ But with Trump’s Travel Ban, in combination with his campaign promises to ban Muslims from entering the country and similar tweets⁶¹, questions arise whether the true purpose of the Ban is to discriminate against the Muslim religion. Such discrimination would be subject to strict scrutiny,⁶² and almost certainly rejected by the courts. Further, another statute⁶³ enacted by Congress in 1965 specifically prohibits “any preference or priority [...] against in issuance of an immigrant visa because of the person’s race, sex, nationality, place of birth, or place of residence.”⁶⁴ However, a

⁵⁸ Immigration and Nationality Act of 1965, 8 U.S. Code § 1182(f).

⁵⁹ See Alan Dershowitz, “*Why the Supreme Court Will Uphold Trump’s Travel Ban*”, The Hill, March 16, 2017, available at: <http://thehill.com/blogs/pundits-blog/immigration/324336-to-block-trumps-ban-hawaii-judge-uses-psychoanalysis-not-legal>

⁶⁰ <http://www.latimes.com/politics/la-na-pol-travel-ban-legal-analysis-20170206-story.html>

⁶¹ <https://twitter.com/realDonaldTrump>

⁶² The notion of “levels of judicial scrutiny,” including strict scrutiny, was introduced in Footnote 4 of the U.S. Supreme Court decision in *United States v. Carolene Products Co.*, 304 U.S. 144 (1938).

⁶³ 8 U.S.C. 1151(a)(1)(A).

⁶⁴ *Id.*

potential weakness of this statute is that it concerns issuing immigrant visas, not specifically entry into the U.S.

Current federal immigration law does give the president broad power to “suspend the entry of all aliens or any class of aliens,”⁶⁵ but another part of the same law forbids discrimination “because of the person’s race, sex, nationality, place of birth or place of residence,”⁶⁶ but only “in the issuance of an immigrant visa.”⁶⁷ The Trump administration argues that the power to bar entry, the subject of the first law, is broader than the limits on issuing visas.⁶⁸

In 1952, the Supreme Court rejected President Harry Truman’s assertion that he had the authority to seize steel mills during the Korean War.⁶⁹ Justice Robert Jackson’s famous concurring opinion set out a framework for balancing between presidential and congressional power. Justice Jackson wrote that “the President has the most power when he acts with congressional authorization,”⁷⁰ and an “intermediate amount” when Congress is silent. The president’s power is at its “lowest ebb,”⁷¹ Justice Jackson wrote, when Congress has forbidden a particular action. Truman’s actions fell into the third category, Justice Jackson wrote. Following the rationale from *Youngstown*, Mr. Trump’s actions are in accordance with an explicit congressional authorization of 8 U.S.C. § 1182(f), and therefore are a legitimate exercise of the President’s power over immigration.

⁶⁵ 8 U.S. Code § 1182, *discussed supra*.

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ Adam Liptak, “*The President Has Much Power Over Immigration, but How Much?*”, The New York Times, February 5, 2017, available at: <https://www.nytimes.com/2017/02/05/us/politics/trump-immigration-law.html>

⁶⁹ *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 72 S. Ct. 863 (1952).

⁷⁰ *Id.* at 637, 638.

⁷¹ *Id.*

In *Chae Chan Ping v United States*,⁷² also known as the Chinese Exclusion case, the Supreme Court ruled that “to preserve its independence, and give security against foreign aggression and encroachment, is the highest duty of every nation, and to attain these ends nearly all other considerations are to be subordinated. It matters not in what form such aggression and encroachment come, whether from the foreign nation acting in its national character, or from vast hordes of its people crowding upon us.”⁷³ The Court concluded that

“the government [...] is clothed with authority to determine the occasion on which the powers shall be called forth; and its determinations [...] are necessarily conclusive upon all its departments and officers. Therefore, the government of the United States, though its legislative department, considers the presence of foreigners of a different race in this country, who will not assimilate with us, to be dangerous to its peace and security, their exclusion is not to be stayed because at the time there are not actual hostilities with the nation of which the foreigners are subjects.”⁷⁴

Chae Chan Ping, despite the fact that has not been explicitly overruled, is vulnerable to challenges as it was decided pre-*Brown v Board of Education*,⁷⁵ the case which revived the Equal Protection Clause of the Fourteenth Amendment of the Constitution, overruling *Plessy v. Ferguson*.⁷⁶

An additional challenge the critics of the travel ban may face in court is the territorial application of the U.S. constitution. Under the traditional understanding, the Constitution does not extent to non-citizens outside the U.S., only to U.S. citizen within

⁷² *Chae Chan Ping v. United States*, 130 U.S. 581 (1889).

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ *Brown v. Board of Education of Topeka*, 347 U.S. 483 (1958).

⁷⁶ *Plessy v. Ferguson*, 163 U.S. 537 (1886).

the U.S. As Harvard Professor Alan Dershowitz put it, “the family in Yemen who has never been to the United States, has no connections, simply has no rights under the Constitution and has no ability to challenge this.”⁷⁷ “I think that's what the court will eventually hold,” the professor suggested. However, the challengers of the ban are often in the United States and whose relatives are seeking to enter the country. In these instances territoriality or standing would not be an issue. In addition, in *Boumediene v. Bush*,⁷⁸ the Supreme Court held that Habeas Corpus Suspension Clause (and therefore possibly other constitutional provisions) apply to non-citizens in Guantanamo Bay, Cuba, as the government exercises special control over that territory. It remains to be seen whether the upcoming Supreme Court ruling on the travel ban will address this territorial issue, but based on the scope of certiorari granted, this is unlikely.⁷⁹

III. THE JUDICIAL RESTRAINT ON THE “TRAVEL BAN”

A. *Washington State Decision and Ninth Circuit Decision*

On January 30, 2017, the State of Washington filed the first lawsuit against the initial Travel Ban.⁸⁰ A federal Judge⁸¹ issued a preliminary injunction against the Ban.⁸²

The injunction concluded that “the circumstances brought before it today are such that it

⁷⁷ Alan Dershowitz “*On SCOTUS and Travel Ban: A 'Nuanced, Calibrated' Approach*” ,available at: <https://www.newsmax.com/newsmax-tv/alan-dershowitz-scotus-travel-ban/2017/06/30/id/799269/>

⁷⁸ *Boumediene v. Bush*, 553 U.S. 723 (2008).

⁷⁹ The court granted certiorari on the three particular questions: (1) whether the ban violates immigration law and the Establishment Clause of the Constitution, (2) whether it is impermissibly overbroad, and (3) whether it is a lawful exercise of the president’s authority to suspend entry of aliens abroad.

⁸⁰ Complaint, *Washington v. Trump* (No. 2:17-cv-00141-JLR), available at <https://www.clearinghouse.net/chDocs/public/IM-WA-0029-0001.pdf>.

⁸¹ Judge James L. Robart. Unhappy with the injunction, President Trump called Mr. Robert, a George W. Bush appointee, “this so-called Judge.”

⁸² Temporary Restraining Order, *Washington v. Trump* (No. 2:17-cv-00141-JLR), available at <https://www.clearinghouse.net/chDocs/public/IM-WA-0029-0005.pdf>.

must intervene to fulfil its constitutional role in our tripart government.” The Court of Appeals for the Ninth Circuit later upheld the decision,⁸³ citing violations of the Due Process and Establishment clauses of the Constitution.⁸⁴ Under the Due Process Clause, the government shall not deprive any person of “life liberty or property without due process of law.”⁸⁵ In this context procedural due process means that the government must provide constitutionally adequate procedures when depriving individuals from of life, liberty, or property. On the other hand, the Establishment Clause provides that “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.”⁸⁶ The Ninth Circuit did not decide the case on the merits, but rather held that the government cannot overturn the restraint until the case proceeded to a full consideration of the issues. After the decision, the President’s administration did not appeal to the Supreme Court. It revoked the first version of the ban and replaced it with the second version on March 6, 2017. The President’s second ban explicitly referred to the Ninth Circuit decision:

“In light of the Ninth Circuit’s observation that the political branches are better suited to determine the appropriate scope of any suspensions than are the courts, and in order to avoid spending additional time pursuing litigation, I am revoking Executive Order 13769 and replacing it with this order, which expressly excludes from the suspensions categories of aliens that have prompted judicial concerns and which clarifies or refines the approach to certain other issues or categories of affected aliens.”⁸⁷

⁸³ *Washington v. Trump* (No. 2:17-cv-00141-JLR), available at <https://cdn.ca9.uscourts.gov/datastore/opinions/2017/02/09/17-35105.pdf>

⁸⁴ *Id.*

⁸⁵ U.S. CONST. Amend V.

⁸⁶ U.S. CONST. Amend I.

⁸⁷ Executive Order 13780, Sec. (i)

B. Hawaii Decision

Only a day before the third travel ban took effect, on October 17, 2017, a federal judge in Hawaii issued a nationwide order freezing most of it. In a 43-page opinion, U.S. District Judge Derrick Watson referred to the President’s own comments and those of his close advisers as evidence that his order was meant to discriminate against Muslims and declared there was a “strong likelihood of success” that those suing would prove the directive violated the Constitution. Hawaii’s attorney general, Douglas Chin, said after the ruling that “this is the third time Hawaii has gone to court to stop President Trump from issuing a travel ban that discriminates against people based on their nation of origin or religion” and called the decision “another victory for the rule of law.”⁸⁸

On the other hand, Trump’s administration quickly denounced the judge’s order, defending the ban and asserting that it was issued after an “extensive worldwide security review”⁸⁹ by Homeland Security officials. Mr. Trump also asserted that the Hawaii’s temporary restraining order “makes us look weak,”⁹⁰ and called the ban a “watered down version of the first one,”⁹¹ noting he preferred the original version, which did not exempt green card and visa holders.

Judge Watson found that the government’s policy rationale for prohibiting people from the seven countries in the order from entering the United States — to improve

⁸⁸ Judge Temporarily Halts New Version of Trump’s Travel Ban, The New York Times, October 17, 2017, available at <https://www.nytimes.com/2017/10/17/us/trump-travel-ban-blocked.html>

⁸⁹ Site

⁹⁰ This statement was made during a rally in Tennessee on March 15, 2017. At the same event Mr. Trump asked sarcastically the audience “You don’t think this was done by a judge for political reasons? No?”

⁹¹ *Id.*

national security —had failed to show a connection between people’s nationality and the threat they pose.

“The categorical restrictions on entire populations of men, women, and children, based upon nationality, are a poor fit for the issues regarding the sharing of ‘public-safety and terrorism-related information’ that the president identifies,” the judge wrote.⁹² On the other hand, Judge Watson indicated that dangerous people of other nationalities could fall outside the scope of the ban, concluding that that the executive order was “simultaneously overbroad and underinclusive.”⁹³

Finally, the opinion pointed out the inconsistent treatment of the carve-outs for certain categories of people in the ban, such as Iranian students.

C. Maryland Decision

Only a day after the Hawaii decision, on October 18, 2017, a second federal judge stuck down the third version of Trump’s Travel Ban. In the Federal District Court in Greenbelt, MD., Judge Theodore Chuang found that the president’s ban was suspect on both statutory and constitutional grounds, and granting an injunction for an indefinite period of time.⁹⁴

The opinion quoted extensively from the president’s statements and Twitter postings, including his calls for “a complete and total shutdown of Muslims entering the United States,” and “a Muslim ban.”

⁹² *State of Hawaii and Ismail Elshikh v Donald Trump*, CV. NO. 17-00050 DKW-KSC.

⁹³ *Id.*

⁹⁴ Richard Perez-Pena, “*Second Federal Judge Strikes Down Trump’s New Travel Ban*”, The New York Times, Oct. 18, 2017, available at: <https://www.nytimes.com/2017/10/18/us/travel-ban-blocked.html>

The Trump administration had previously insisted that the travel bans were motivated by security concerns, not religious animus. During his campaign for the Presidency, both Trump and Vice President Pence has asserted that by saying “Muslim ban” they meant in geographical terms (i.e. location), not the religion.⁹⁵ On a trip to Scotland in August of 2016, Mr. Trump insisted that his campaign proposes to ban immigration from certain countries are referring only to regions with ties to “Islamic terror.”⁹⁶ However, the Maryland court found otherwise. While it acknowledged that the third version of the ban differs in scope from the previous two, the changes were not sufficient to show the motive behind it has changed.

Judge Chuang’s opinion concluded that the plaintiffs were likely to succeed at trial in arguing that the order violated the First Amendment’s prohibition on the government favoring or disfavoring any religion.

D. The Fourth Circuit Decision

In *International Refugee Assistance Project v. Trump*,⁹⁷ the Fourth Circuit ruled that the second version of the travel ban likely violates the Establishment Clause.⁹⁸ The Court relied on the Plenary Power doctrine, which provides that Congress and the President have very broad powers over admissions of foreign nationals into the United States, especially those who are not lawful permanent residents. The court’s ruling stated that “Congress granted the President broad power to deny entry to aliens, but that power

⁹⁵ Ashley Parker, *Mike Pence hints at Trump’s Muslim Ban Extending to Other Religions*, The New York Times, August 10, 2016.

⁹⁶ *Id.*

⁹⁷ *International Refugee Assistance Project v. Trump*, 857 F. 3d 554 (4th Cir. 2017).

⁹⁸ *Id.* at 594-601.

is not absolute,”⁹⁹ but rather subject to “facially legitimate and bona fide standard of review.”¹⁰⁰ The second version of the ban did not pass the bona fide test because, according to the court, was not issued in good faith¹⁰¹ due to evidence of religious discrimination. Hence, the court ruled that the ban does not survive Plenary Power scrutiny.

Following the Fourth Circuit decision, the U.S. Attorney General Jeff Sessions announced that the Justice Department would ask the Supreme Court to review the decision. On June 1, 2017, The Trump administration formally filed its appeal for the cancellation of the restraining order, and requested that the Supreme Court allow the order to go into effect while the court looks at its ultimate legality later in the year. On June 26, 2017, in an unsigned *per curiam* decision, the Supreme Court stayed the lower court’s decision, but did not clarify on what constitutes a bona fide relationship. Justices Thomas, Alito, and Gorsuch partially dissented, asserting that the lower courts’ entire injunctions against the executive order should be stayed.¹⁰²

E. The U.S. Supreme Court

On December 4, 2017, the Supreme Court issued a temporary “order in a pending case”¹⁰³ to allow enforcement of the third version of the travel ban. This order allows enforcement of the ban until legal challenges proceed. It vacated the decision under

⁹⁹ *Id.* at 572.

¹⁰⁰ *Id.* at 588-590.

¹⁰¹ *Id.* at 590-591.

¹⁰² Miriam Jordan, *With Three Words, Supreme Court Opens a World of Uncertainty for Refugees*, *The New York Times*, June 28, 2017.

¹⁰³ Available at https://www.supremecourt.gov/orders/courtorders/120417zr_4gd5.pdf

appeal from the Ninth Circuit Court of Appeals, so that earlier decision cannot be used as precedent. Only two justices – Ginsburg and Sotomayor – dissented and did not sign off on the pending order. This preliminary order was welcomed by the Trump administration. Attorney General Jeff Sessions issued a formal statement calling the order “a substantial victory for the safety and security of the American people.” He added that administration is heartened that a clear majority of the justices “allowed the president’s lawful proclamation protecting our country’s national security to go into full effect.” A spokesman for the White House, added that “We are not surprised by today’s Supreme Court decision,” calling the ruling “lawful and essential to protecting our homeland.”¹⁰⁴

The Supreme Court is currently reviewing a challenge to the third version of the travel ban.¹⁰⁵ The court granted certiorari on the questions whether the ban violates immigration law, the Establishment Clause of the Constitution, whether it is impermissibly overbroad, and whether it is a lawful exercise of the president’s authority to suspend entry of aliens abroad. A distinguished constitutional law professor called the case the “most important on the Supreme Court’s docket this year.”¹⁰⁶

On February 23, 2018, the Supreme Court announced that it would hear oral arguments concerning the legality of the third version of the travel ban on April 25, which is the last argument day of the term. At this point the justices are expected to issue a decision in late June, two months after the oral arguments. Once the decision comes out, it may also reveal their views on presidential power and immigration relevant to other issues pending in the lower courts, such as President Trump’s repeal of the

¹⁰⁴ “*Supreme Court Allows Trump Travel Ban to Take Effect*”, The New York Times, December 4, 2017, available at: <https://www.nytimes.com/2017/12/04/us/politics/trump-travel-ban-supreme-court.html>

¹⁰⁵ *Trump v. Hawaii*, No. 17-965.

¹⁰⁶ Erwin Chemerinsky, *The Travel Ban and the Supreme Court*, The ABA Journal, April 2, 2018.

Deferred Action for Childhood Arrivals program (“DACA”) and the challenges to President’s threatening to withhold federal funds from cities and states that do not cooperate with immigration officials. In any instance, the preliminary decision that the Supreme Court issued back in December, temporarily enforcing the ban, may indicate that the final ruling will also uphold the ban.

On April 25, 2018, in the latest development in the case, the Supreme Court heard both sides’ oral arguments.¹⁰⁷ The case was argued for the Trump administration by Noel Francisco, the solicitor general, and for the state of Hawaii by Neal Katyal, the former acting solicitor general under President Barack Obama. An interesting issue discussed during the arguments was whether Trump’s statements during his campaign for presidency should be taken into consideration when assessing his actions. Since the President has made many anti-Muslim comments before the inauguration, are all future policies that he may implement against Muslim or Islam deemed discriminatory and therefore subject to legal challenges? Chief Justice John Robert specifically raised this question during the oral arguments. In response, Mr. Francisco urged the justices to ignore Mr. Trump’s campaign statements, arguing that the oath of office transformed the President and his views. Mr. Francisco argued that “the president has made crystal clear [...] that he had no intention of imposing the Muslim ban. He has made crystal clear that Muslims in this country are great Americans and there are many, many Muslim countries who love this country and he has praised Islam as one of the great countries of the world.”¹⁰⁸

¹⁰⁷ The one-hour audio of the oral arguments before the Supreme Court is available at https://www.supremecourt.gov/oral_arguments/audio/2017/17-965

¹⁰⁸ *Id.*

On the other hand, for the state of Hawaii, Mr. Katyal pointed out to the justices that that “if you accept this order, you’re giving the president a power no president in 100 years has exercised, an executive proclamation that countermands Congress’s policy judgments. He has zero examples to say that when Congress has stepped into the space and solved the exact problem that the president can then come in and say: No, I want a different solution.”¹⁰⁹

The oral arguments touched on the issue of how much deference is owed a president who harbors animus for what may be an otherwise legitimate policy justification? Justice Elena Kagan asked the following question during the arguments:

“So let’s say in some future time, a president gets elected who is a vehement anti-Semite and says all kinds of denigrating comments about Jews and provokes a lot of resentment and hatred over the course of a campaign and in his presidency and, in the course of that, asks his staff or his cabinet members to issue recommendations so that he can issue a proclamation of this kind, and they dot all the i’s and they cross all the t’s. And what emerges — and, again, in the context of this virulent anti-Semitism — what emerges is a proclamation that says no one shall enter from Israel.”¹¹⁰

Drawing a line between President’s personal beliefs and the advice of his cabinet, Mr. Francisco answered that “if his cabinet were to actually come to him and say, Mr. President, there is honestly a national security risk here and you have to act, I think then the president would be allowed to follow that advice even if in his private heart of hearts, he also harbored animus.”¹¹¹

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ *Id.*

IV. CONCLUSION

President Trump's Travel Ban has evolved from the first to the third version, but it still remains to be seen whether the highest court would uphold it or strike it down as an anti-Muslim discrimination. The Author believes that, in line with the preliminary decision issued by the Supreme Court in December 2017, the justices will decide to uphold the third version of the travel restriction, with a 7-2 decision, Justices Ginsburg and Sotomayor dissenting. This prediction is also based on the oral arguments before the Supreme Court on April 25, 2018, where the conservative majority of justices appeared to be leaning towards allowing the travel ban. For example, Justice Alito pointed out that the population of the predominantly Muslim countries on the list make up only eight percent of the world's Muslim population, and therefore the ban, if intended to be an anti-Muslim measure, did not do a very good job of excluding Muslims. Justice Kennedy appeared skeptical that courts had a role to play in second-guessing the president's national security determinations. Chief Justice Roberts asked if Mr. Trump was forever disabled from issuing immigration orders and pointed out that the President could immunize his travel ban by disavowing his earlier statement about banning Muslims. Justice Breyer noted that both Presidents Ronald Reagan and Jimmy Carter had issued proclamations similar to Trump's, and unless the Trump proclamation was materially different, then he did not see how Trump could not lawfully follow suit. Mr. Francisco agreed, pointing out that waivers and case-by-case review are set out in the text of the current proclamation at the heart of the case. Justice Thomas did not speak during the

arguments, but he is likely to side with the other conservative justices. Overall, the statements made by the judges during the oral arguments on April 25 suggest that the decision will be to uphold the travel restriction.

Nonetheless, the outcome is far from certain. Justice Sonia Sotomayor pointed out that the latest version of the ban was a result of a security report prepared by the President's administration which has not been made public. Justice Ruth Bader Ginsburg has also critiqued the President in the past.¹¹² Considering that both Justices Ginsburg and Sotomayor did not sign on the December pending order which temporarily allowed enforcement of the ban, it is expected that that they would not support a decision in favor of the administration. Whether other justices will join them remains to be seen.

Based on the granted certiorari, the decision, expected to be delivered I the last week of June, will specifically rule on three issues: (1) the Establishment Clause analysis of the travel ban, (2) whether the restriction is impermissibly overbroad, and (3) whether it constitutes an executive overreach. The decision may be narrowly tailored, leaving some questions discussed in this Article unanswered.

It would be interesting to see if the highest court will make its final determination based on the power of the presidency in the abstract, or rather address the power of this particular President, Donald Trump, who arrived in office having made anti-Muslim statements constantly throughout his campaign for office. If it is the former, the court will

¹¹² During Mr. Trump's campaign, Justice Ruth Bader Ginsburg has said that she "can't imagine what the country would be . . . with Donald Trump as our president." She also emphasized in a CNN interview that "He [Trump] is a faker." Some legal commentators have found these statements concerning in the context of the travel ban case, in which one of the issues is whether the President delivered his executive order in good faith as a measure to improve the country's national security or else as an anti-Muslim animus. On June 26, 2017, fifty-eight House Republicans sent Ginsburg a letter calling for her recusal because of her comments before the election, arguing that her impartiality might reasonably be questioned. On July 14, 2016, she has apologized for her remarks, saying in a brief issued by the Supreme Court that "Judges should avoid commenting on a candidate for public office," and that her remarks were "ill advised", concluding that "In the future I will be more circumspect."

likely uphold the travel ban. If it is the latter, the outcome becomes more uncertain as the ban will face discrimination-based constitutional challenges.

The Supreme Court's final decision will have greater implications on other immigration law issues, such as the Deferred Action for Childhood Arrivals ("DACA") and whether the President can intervene in conflict between the federal government and the state and local authorities with regards to deporting illegal immigrants. The case has accumulated a lot of media attention and the will be followed closely in the upcoming months.