First Amendment — Establishment Clause — Judicial Review of Pretext — Trump v. Hawaii

As a candidate for President of the United States, Donald Trump "call[ed] for a total and complete shutdown of Muslims entering the United States until our country's representatives can figure out what the hell is going on."[1] One week after taking office, President Trump issued an executive order suspending the entry of nationals from seven Muslim-majority countries.[2] His objective was to "detect[] individuals with terrorist ties" and people who may "bear hostile attitudes" toward the nation's values.[3] Last Term, in *Trump v. Hawaii*[4] (the "travel ban case"), the Supreme Court rejected statutory and constitutional challenges to the third iteration of that order. The Court deviated from its usual approach to reviewing claims that a law arises from an unconstitutional motive. What remains unclear is when in the future the Court will take the same approach.

On January 27, 2017, President Trump issued Executive Order 13,769 (EO-1).[5] EO-1 directed the Secretary of Homeland Security to assess the information that foreign governments provided the United States about their nationals.[6] Pending that assessment, EO-1 suspended for ninety days the entry of nationals from Iran, Iraq, Libya, Somalia, Sudan, Syria, and Yemen.[7] Challengers to EO-1 moved for a temporary restraining order in the U.S. District Court for the Western District of Washington, claiming that EO-1 violated the Immigration and Nationality Act[8] (INA) and several constitutional provisions.[9] The court granted the motion,[10] and the Ninth Circuit affirmed.[11]

On March 6, 2017, the President replaced EO-1 with Executive Order 13,780 (EO-2).[12] EO-2 suspended the entry of nationals from the same

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[1] Jenna Johnson, *Trump Calls for "Total and Complete Shutdown of Muslims Entering the United States*," WASH. POST (Dec. 7, 2015), https://wapo.st/2uSd8oo [https://perma.cc/5EEK-BD7D]. The statement was later removed from his campaign website. Jessica Estepa, *"Preventing Muslim Immigration" Statement Disappears from Trump's Campaign Site*, USA TODAY (May 9, 2017, 6:03 AM), https://usat.ly/2puyzzM [https://perma.cc/7AJT-AF35].

[2] *See* Exec. Order No. 13,769, 82 Fed. Reg. 8977 (Jan. 27, 2017).

[3] *Id.* §§ 1, 82 Fed. Reg. at 8977.

[4] 138 S. Ct. 2392 (2018).

[5] Exec. Order No. 13,769, 82 Fed. Reg. 8977.

[6] *Id.* § 3(a–b), 82 Fed. Reg. at 8977–78.

[7] *See id.* § 3(c), 82 Fed. Reg. at 8978; Exec. Order No. 13,780 § 1(b)(i), 82 Fed. Reg. 13,209, 13,209 (Mar. 9, 2017).

[8] Pub. L. No. 96-212, 94 Stat. 102 (codified as amended in scattered sections of 8 U.S.C.).

[9] *See* Motion for Temporary Restraining Order at 4–21, Washington v. Trump, No. 17-cv-00141 (W.D. Wash. Jan. 30, 2017), ECF No. 3.

[10] Washington v. Trump, No. C17-0141, 2017 WL 462040, at *2–3 (W.D. Wash. Feb. 3, 2017).

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

[12] Exec. Order No. 13,780 § 1(i), 82 Fed. Reg. 13,209, 13,212 (Mar. 9, 2017).

countries except Iraq.[13] Challengers to EO-2 filed for a preliminary injunction in the U.S. District Courts for the Districts of Maryland and Hawaii, claiming that EO-2 violated the INA, the Establishment Clause, and equal protection.[14] The district courts granted the injunction, deciding that plaintiffs were likely to succeed on the merits, and the circuit courts affirmed in part.[15] The U.S. Supreme Court stayed the injunctions "with respect to foreign nationals who lack any bona fide relationship with a person or entity in the United States" but otherwise left it intact.[16] EO-2 expired before the Court could adjudicate the merits.[17]

On September 24, 2017, President Trump issued Proclamation No. 9,645 (EO-3),[18] the order challenged in the travel ban case.[19] EO-3 restricted the entry of nationals from eight countries — Chad, Iran, Iraq, Libya, North Korea, Syria, Venezuela, and Yemen — tailoring those restrictions depending on how each country vetted its nationals.[20] The stated objective of EO-3 was to support "foreign policy, national security, and counterterrorism" by excluding inadequately vetted foreign nationals and motivating other nations to improve their vetting practices.[21] Again, EO-3 was challenged in federal court. Plaintiffs were Hawaii, the Muslim Association of Hawaii, and three individuals.[22] Plaintiffs claimed that EO-3 prevented their affiliates from entering the United States in violation of, among other things, the INA and the Establishment Clause.[23] The U.S. District Court for the District of Hawaii entered a universal preliminary injunction, finding that plaintiffs were likely to succeed on their INA claims.[24] On appeal, the Ninth Circuit mimicked the Supreme Court's decision regarding EO-2: it stayed the injunction except as to foreigners with "a bona fide relationship with a person or entity in the United States."[25]

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[13] *Id.* § 1(f–g), 82 Fed. Reg. at 13,211–12.

[14] *See* Plaintiffs' Motion for a Preliminary Injunction and/or Temporary Restraining Order of the Executive Order & Memorandum of Law in Support Thereof at 7–16, Int'l Refugee Assistance Project v. Trump, No. 17-cv-00361 (D. Md. Mar. 14, 2017); Plaintiff's Motion for Temporary Restraining Order at 3–4, Hawai'i v. Trump, No. 17-cv-00050 (D. Haw. Feb. 3, 2017).

[15] Int'l Refugee Assistance Project v. Trump, 857 F.3d 554, 579, 606 (4th Cir. 2017) (en banc); Hawaii v. Trump, 859 F.3d 741, 760, 789 (9th Cir. 2017) (per curiam).

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

[17] *Hawaii*, 138 S. Ct. at 2404.

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

[19] *Hawaii*, 138 S. Ct. at 2404.

[20] Presidential Proclamation No. 9645 §§ 1(g), 2, 82 Fed. Reg. at 45,163, 45,165–67.

[21] *Id.* § 1(h)(i), 82 Fed. Reg. at 45,164.

[22] Hawaii v. Trump, 265 F. Supp. 3d 1140, 1148 (D. Haw. 2017).

[23] *Id.* at 1147 n.8, 1150–53.

[24] *Id.* at 1160.

[25] Hawaii v. Trump, No. 17-17168, 2017 WL 5343014, at *1 (9th Cir. Nov. 13, 2017) (quoting Trump v. Int'l Refugee Assistance Project, 137 S. Ct. 2080, 2088 (2017) (per curiam)).

The Supreme Court reversed.[26] Writing for the Court, Chief Justice Roberts[27] held that the President had not violated the INA and that plaintiffs were not likely to succeed on their claims.[28] The Court first "assum[ed] without deciding" that plaintiffs' statutory claims were justiciable.[29] It then rejected both claims.[30] Plaintiffs' first claim was that the President had exceeded his authority under § 1182(f) of the INA,[31] which defines his power to exclude foreign nationals from the United States.[32] That section, the Court said, "exudes deference to the President in every clause," allowing him to exclude foreign nationals "sole[ly]"[33] because their entry "would be detrimental to the interests of the United States."[34] The Court was skeptical that plaintiffs could even "inquir[e] into the persuasiveness of the President's justifications,"[35] given his broad authority in "international affairs and national security,"[36] but pointed to facts suggesting that the President had acted within his authority: EO-3 was "more detailed than any prior order a President has issued under § 1182(f)."[37] And EO-3 was issued after a "worldwide, multi-agency review"[38] designed to assess the "terrorism-related and public-safety risks associated with foreign nationals" from each country.[39]

Plaintiffs' second statutory claim was that EO-3 violated § 1152(a)(1)(A),[40] which prohibits discrimination "in the issuance of an immigrant visa because of . . . nationality."[41] EO-3 did discriminate on the basis of nationality.[42] But the Court distinguished between discrimination in "*admissibility* . . . and [in] *visa issuance*."[43] These are separate steps: to enter the United States, a foreign national *first* must be deemed "admissible . . . (and therefore eligible to receive a visa)" and *second* must get a visa.[44] The Court said that § 1152(a)(1)(A) only gov-

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[26] *Hawaii*, 138 S. Ct. at 2423.
[27] Chief Justice Roberts was joined by Justices Kennedy, Thomas, Alito, and Gorsuch.
[28] *Hawaii*, 138 S. Ct. at 2415, 2423.
[29] *Id.* at 2407.
[30] *Id.* at 2415.
[31] *Id.* at 2408.
[32] *See* 8 U.S.C. § 1182(f) (2012).
[33] *Hawaii*, 138 S. Ct. at 2408.
[34] *Id.* (quoting 8 U.S.C. § 1182(f)).
[35] *Id.* at 2409.
[36] *Id.* (quoting Holder v. Humanitarian Law Project, 561 U.S. 1, 35 (2010)).
[37] *Id.* (citing Presidential Proclamation No. 6958, 3 C.F.R. 133, 133 (1996); and then citing Presidential Proclamation No. 4865, 3 C.F.R. 50, 50–51 (1981)).
[38] *Id.* at 2408.
[39] Presidential Proclamation No. 9645 § 1(d), 82 Fed. Reg. 45,161, 45,163 (Sept. 24, 2017).
[40] *Hawaii*, 138 S. Ct. at 2413.
[41] 8 U.S.C. § 1152(a)(1)(A) (2012).
[42] *See* Presidential Proclamation No. 9645 § 1(h)(ii), 82 Fed. Reg. at 45,164.
[43] *Hawaii*, 138 S. Ct. at 2414 (emphases added).
[44] *Id.*

erns the second step (visa issuance), while EO-3 concerned the first (admissibility), so EO-3 did not violate § 1152(a)(1)(A).[45]

The Court then addressed plaintiffs' constitutional claim. Plaintiffs had standing because they had been "separated from certain relatives who [sought] to enter the country."[46] As to the merits, plaintiffs argued that the President, through his comments about Islam, had "cast[] doubt on the official objective" of EO-3.[47] Plaintiffs argued that EO-3 therefore violated the Establishment Clause, which prohibits the government from making any law "respecting an establishment of religion, or prohibiting the free exercise thereof."[48] The Court rejected that argument. It began by defining the relevant standard of review, drawing from *Kleindienst v. Mandel*,[49] a 1972 case in which the executive had refused a visa to a Marxist academic.[50] In *Mandel*, the Court explained that Congress had "plenary . . . power to make policies and rules for exclusion of aliens,"[51] and that by enacting the INA, Congress had delegated that power to the executive.[52] Given the scope of this power, *Mandel* had applied "a circumscribed judicial inquiry" to executive actions under the INA, asking only "whether the Executive gave a 'facially legitimate and bona fide' reason for its action."[53] The *Mandel* Court had refused to "look behind" the action for other motives.[54] The travel ban Court said that *Mandel* applied with "particular force" to matters concerning national security.[55] But the Court then departed slightly from "[a] conventional application of *Mandel*."[56] It *did* "look behind" EO-3 to consider President Trump's statements about Islam, because the "Government ha[d] suggested that it may be appropriate" to do so.[57] Even after considering those statements, however, the Court upheld EO-3, because it could "reasonably be understood to result from a justification independent of unconstitutional grounds."[58] That justification was national security.[59] Before concluding, the Court briefly confronted Justice Sotomayor's dissent. She compared the Court's decision to

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[45] *See id.*
[46] *Id.* at 2416.
[47] *Id.* at 2417.
[48] U.S. CONST. amend. I.
[49] 408 U.S. 753 (1972).
[50] *Id.* at 755–60.
[51] *Id.* at 769.
[52] *Id.* at 769–70.
[53] *Hawaii*, 138 S. Ct. at 2419 (quoting *Mandel*, 408 U.S. at 769).
[54] *Mandel*, 408 U.S. at 770.
[55] *Hawaii*, 138 S. Ct. at 2419 (quoting Kerry v. Din, 135 S. Ct. 2128, 2140 (2015) (Kennedy, J., concurring in the judgment)).
[56] *Id.* at 2420.
[57] *Id.*
[58] *Id.*
[59] *Id.* at 2421.

Korematsu v. United States,[60] which upheld the executive's internment of Japanese Americans during World War II.[61] The Court rejected that comparison, saying that while *Korematsu* was "gravely wrong the day it was decided," it "ha[d] nothing to do with" the travel ban case.[62]

Justice Kennedy concurred. He cautioned that any further litigation should not "intrude on the foreign affairs power of the Executive."[63] He added that even where the "actions of Government officials are not subject to judicial scrutiny . . . [t]hat does not mean those officials are free to disregard the Constitution and the rights it proclaims and protects."[64]

Justice Thomas also concurred. He argued that the remedy plaintiffs sought, a universal injunction, was "legally and historically dubious."[65]

Justice Breyer dissented.[66] He said that whether EO-3 was lawful depended on whether it was motivated "by religious animus against Muslims" or "sole[ly]" by national security.[67] For the answer, Justice Breyer looked to EO-3's system of exemptions and waivers and compared the text with its actual execution.[68] If that system had been applied "as written," that would indicate that EO-3 followed the INA and applied without regard to religion.[69] But Justice Breyer found evidence that the order was not applied as written: EO-3 indicated that the government would establish guidance on waivers for consular officers, but none had been provided.[70] And only "a miniscule percentage of those likely eligible" were actually granted visas.[71] Justice Breyer would therefore have preserved the injunction.[72]

Justice Sotomayor also dissented,[73] citing *McCreary v. ACLU of Kentucky*[74] to argue that the correct test for deciding plaintiffs' Establishment Clause claim was "whether a reasonable observer would view the government action as enacted for the purpose of disfavoring a religion."[75] Quoting *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*,[76] Justice Sotomayor further argued that the Court should examine "'the

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[60] 323 U.S. 214 (1944).
[61] *Hawaii*, 138 S. Ct. at 2447 (Sotomayor, J., dissenting); *see Korematsu*, 323 U.S. at 215–16, 224.
[62] *Hawaii*, 138 S. Ct. at 2423 (majority opinion).
[63] *Id.* at 2424 (Kennedy, J., concurring).
[64] *Id.*
[65] *Id.* at 2429 (Thomas, J., concurring).
[66] Justice Breyer was joined by Justice Kagan.
[67] *Hawaii*, 138 S. Ct. at 2429 (Breyer, J., dissenting).
[68] *Id.*
[69] *Id.* at 2430.
[70] *Id.* at 2431.
[71] *Id.*
[72] *Id.* at 2433.
[73] Justice Sotomayor was joined by Justice Ginsburg.
[74] 545 U.S. 844 (2005).
[75] *Hawaii*, 138 S. Ct. at 2434 (Sotomayor, J., dissenting) (citing *McCreary*, 545 U.S. at 862, 866).
[76] 508 U.S. 520 (1993).

historical background of the decision under challenge . . . including contemporaneous statements made by' the decisionmaker."[77] She said that the majority had given a "highly abridged account" of EO-3's history and President Trump's statements,[78] which should have triggered "heightened scrutiny" instead of rational basis review.[79] With a fuller view of the evidence, she said, a reasonable observer would have found EO-3 "driven primarily by anti-Muslim animus"[80] and the President's national security rationale mere "window dressing."[81] Moreover, EO-3 should not even pass rational basis review: it had a "rotten foundation,"[82] unredeemed by agency review or later revisions to the order.[83] Justice Sotomayor concluded with a comparison to *Korematsu*, stating that the majority had "merely replace[d] one 'gravely wrong' decision with another."[84]

The travel ban Court deviated from its usual approach to evaluating claims that an action arose from an unconstitutional motive. The Court explained that the travel ban case was special because it involved national security. But the Court's analysis created uncertainty as to when it will take the same approach in the future.

When evaluating a claim that an action arose from an unconstitutional motive, courts often take two steps: they examine evidence of bad motive and determine accordingly the nature of judicial review.[85] Evidence of bad motive triggers higher scrutiny; otherwise, the default is rational basis review.[86] But the travel ban Court argued that this two-step approach is limited to "laws and policies applied domestically,"[87] whereas EO-3 implicated "foreign affairs."[88] Instead, the Court determined the nature of review by looking to *Mandel*.[89] Under *Mandel*, the Court considers "only whether [a] policy is facially legitimate and bona fide" — not extrinsic evidence of the government's motive in enacting

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77 *Hawaii*, 138 S. Ct. at 2435 (Sotomayor, J., dissenting) (quoting *Lukumi*, 508 U.S. at 540).

78 *Id.*

79 *Id.* at 2441.

80 *Id.* at 2438.

81 *Id.* at 2440.

82 *Id.* at 2443 (quoting Brief of Constitutional Law Scholars as *Amici Curiae* in Support of Respondents at 7, *Hawaii*, 138 S. Ct. 2392 (No. 17-965)).

83 *Id.* at 2441–45.

84 *Id.* at 2448 (quoting *id.* at 2423 (majority opinion)).

85 *See* Richard H. Fallon, Jr., *Strict Judicial Scrutiny*, 54 UCLA L. REV. 1267, 1311 (2007) (discussing "cases in which a forbidden governmental motive functions as the trigger for applying strict judicial scrutiny"); *see also* Ashutosh Bhagwat, *Purpose Scrutiny in Constitutional Analysis*, 85 CALIF. L. REV. 297, 303–06 (1997) (arguing that "governmental action is categorized" based on how "suspicious" it is and "then subjected to an appropriate level of scrutiny," *id.* at 303).

86 Bhagwat, *supra* note 85, at 303.

87 *Hawaii*, 138 S. Ct. at 2417 (majority opinion).

88 *Id.* at 2419.

89 *See id.* at 2419–20.

it.[90] The Court's application of *Mandel* is worth highlighting for at least two reasons. First, not all the Justices agreed that *Mandel* "establish[ed] the framework for . . . claims that the Executive Branch violated the Establishment Clause by acting pursuant to an unconstitutional purpose."[91] Justice Sotomayor quoted *Kerry v. Din*,[92] a recent application of *Mandel*, for the proposition that a facial inquiry applies only *absent* "an affirmative showing of bad faith."[93] Second, the travel ban Court deviated even from *Mandel* by considering evidence beyond the facial legitimacy of EO-3. It took the unusual step of considering the President's tweets and campaign statements.[94] The Court did not deny that those statements were discriminatory,[95] but upheld EO-3 anyway because it could "reasonably be understood to result from a justification independent of unconstitutional grounds."[96] What explains this approach? According to the Court, "[u]nlike the typical suit involving religious displays or school prayer," this case was about "a national security directive regulating the entry of aliens abroad."[97] The Court's approach raises at least four questions for future cases.

First, to what extent did the Court's approach depend on the government's opinion? The travel ban Court suggested that it would not have "look[ed] behind" the face of EO-3 but for the government's concession that it "may be appropriate" to do so.[98] But this reasoning implies that the government influences the nature of judicial review. Such influence could be consequential. For example, the mere fact of judicial oversight can drive the executive to "alter, disclose, and improve [its] policies."[99] This "observer effect"[100] led the President to revise his order twice before issuing EO-3.[101] Allowing the government to decide

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[90] *Id.* at 2420.

[91] *Id.* at 2440 n.5 (Sotomayor, J., dissenting).

[92] 135 S. Ct. 2128 (2015).

[93] *Hawaii*, 138 S. Ct. at 2440 n.5 (Sotomayor, J., dissenting) (quoting *Din*, 135 S. Ct. at 2141 (Kennedy, J., concurring in the judgment)).

[94] *See id.* at 2417 (majority opinion); *id.* at 2440–41 (Sotomayor, J., dissenting).

[95] *See id.* at 2418 (majority opinion) ("Plaintiffs argue that this President's words strike at fundamental standards of respect and tolerance, in violation of our constitutional tradition. But the issue before us is not whether to denounce the statements.").

[96] *Id.* at 2420.

[97] *Id.* at 2418.

[98] *Id.* at 2420.

[99] Ashley S. Deeks, *The Observer Effect: National Security Litigation, Executive Policy Changes, and Judicial Deference*, 82 FORDHAM L. REV. 827, 834 (2013).

[100] *Id.*

[101] *See* Kate Shaw, *Statements and Standards in* Trump v. Hawaii, HARV. L. REV. BLOG (June 28, 2018), https://blog.harvardlawreview.org/statements-and-standards-in-trump-v-hawaii/ [https://perma.cc/NNR6-4H89] ("It was only after receiving a clear message that the Administration could only act to restrict immigration following a process that involved real inter-agency consultation, and where the order was predicated on some genuine national-security need identified by executive-branch officials, that the Administration produced [EO-3].").

whether it is "appropriate" to look beyond the face of its own law weakens this effect.[102]

Second, what evidence *would* have triggered higher scrutiny? Given that the Court determined the standard of review *before* considering evidence of bad motive, it is unclear what evidence, if any, would have changed that standard. On one view, some of the President's statements were "smoking gun" evidence that EO-3 arose from a desire to target foreign nationals on the basis of religion. "I think Islam hates us," he had said, "[a]nd we can't allow people coming into this country who have this hatred of the United States."[103] Unlike President Trump, parties accused of discriminatory motive usually hide it, a problem that courts have struggled to overcome. For example, in employment discrimination cases, courts apply a burden-shifting framework to adjudicate claims of improper motive.[104] Jurists and scholars have considered similar frameworks for detecting pretext in cases concerning jury selection,[105] takings,[106] and Commerce Clause challenges.[107] But these frameworks were developed for the very reason that "[t]here will seldom be 'eyewitness' testimony as to the . . . mental processes" of the alleged discriminator.[108] By contrast, President Trump's statements explicitly connected his orders to Islam. The travel ban decision thus suggests that even the strongest evidence of discriminatory motive will not trigger heightened scrutiny, as long as that evidence is extrinsic to the face of the law under challenge. So even where challengers to a law like EO-3 can persuade a court to "look behind" that law, doing so may be futile.

Third, what limits are there to the Court's national security deference? One might imagine limits on two dimensions. One dimension is how well the executive demonstrates its *expertise*. Courts give the executive "fact deference" on the assumption that the executive has superior information about national security.[109] The travel ban Court sug-

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[102] To be sure, the government's concession that the Court could "look behind" EO-3 was *against* its interests. Still, if that concession was the only reason the Court adjusted the *Mandel* analysis, the government will likely avoid such a concession in the future.

[103] Theodore Schleifer, *Donald Trump: "I Think Islam Hates Us,"* CNN (Mar. 10, 2016, 5:56 PM), https://cnn.it/2OlvKxW [https://perma.cc/3NWW-7PYC].

[104] *See* McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802–03 (1973).

[105] *See* Batson v. Kentucky, 476 U.S. 79, 93–94 (1986).

[106] Daniel B. Kelly, *Pretextual Takings*, 17 SUP. CT. ECON. REV. 173, 215–16 (2009) (surveying analogies to the *McDonnell Douglas* framework and proposing one for pretextual takings).

[107] *See* Gil Seinfeld, *The Possibility of Pretext Analysis in Commerce Clause Adjudication*, 78 NOTRE DAME L. REV. 1251, 1252 (2003) (arguing for pretext analysis in Commerce Clause challenges); *see also* Steven Menashi & Douglas H. Ginsburg, *Rational Basis with Economic Bite*, 8 N.Y.U. J.L. & LIBERTY 1055, 1069–85 (2014) (promoting "rational basis with bite," *id.* at 1069, for statutes that infringe economic liberty on seemingly pretextual grounds).

[108] U.S. Postal Serv. Bd. of Governors v. Aikens, 460 U.S. 711, 716 (1983).

[109] *See* Ganesh Sitaraman & Ingrid Wuerth, *The Normalization of Foreign Relations Law*, 128 HARV. L. REV. 1897, 1965–66 (2015) (describing this assumption).

gested that the President had met that assumption because EO-3 had undergone "worldwide, multi-agency review"[110] and was more detailed than past presidential orders on immigration.[111] But in an amicus brief, former national security officials listed several conditions underlying fact deference and concluded that "[n]one of those conditions [was] present" here.[112] The brief found it unusual that the government had "failed to come forward with . . . information evincing a security need" for its action.[113] Yet the Court signaled that it would give fact deference even where the executive's expertise is questionable.

Another dimension is the *legitimacy* of the executive's national security claim. Whereas the *expertise* question is whether the executive has better information than the courts, the *legitimacy* question is whether the government's interest is significant enough to implicate "national security." The Court highlighted several factors "support[ing] the Government's claim of a legitimate national security interest," including EO-3's system of exemptions and waivers and the fact that it did not apply to all Muslim-majority countries.[114] But the Court did not say that these factors were *necessary*. And without clear prerequisites, future courts might find virtually any national security claim "legitimate." As courts and scholars have recognized, the term "national security" is vague.[115] The Court emphasized that EO-3 implicated foreign affairs,[116] but "national security" is increasingly used to describe domestic issues such as the economy, education, energy, and healthcare.[117] President Trump himself has used national security to justify policies that toe the line between foreign and domestic affairs — for example, in expelling transgender people from the military.[118] Despite this amorphousness, the travel ban Court

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110 *Hawaii*, 138 S. Ct. at 2408.

111 *Id.* at 2409.

112 Brief of *Amici Curiae* Former National Security Officials in Support of Respondents at 5–6, *Hawaii*, 138 S. Ct. 2392 (No. 17-965).

113 *Id.* at 6.

114 *Hawaii*, 138 S. Ct. at 2422.

115 *See, e.g.*, Mitchell v. Forsyth, 472 U.S. 511, 523 (1985) ("'[N]ational security' may cover a multitude of sins . . . ."); Al-Haramain Islamic Found. v. Bush, 507 F.3d 1190, 1203 (9th Cir. 2007) ("Simply saying . . . 'national security' . . . is insufficient to support the [state secret] privilege."); Robert M. Chesney, *National Security Fact Deference*, 95 VA. L. REV. 1361, 1402 (2009) ("'[N]ational security' . . . is vague in the sense that reasonable people will disagree regarding the range of matters that fall within its scope.").

116 *Hawaii*, 138 S. Ct. at 2419.

117 Laura K. Donohue, *The Limits of National Security*, 48 AM. CRIM. L. REV. 1573, 1574 (2011); *see also* Chesney, *supra* note 115, at 1402–03.

118 *See* Press Release, White House, Statement from the Press Secretary Regarding Service by Transgender Individuals in the Military (Mar. 23, 2018), https://www.whitehouse.gov/briefings-statements/statement-press-secretary-regarding-service-transgender-individuals-military/ [https://perma.cc/EQG4-WDPD]; *see also* Harold Hongju Koh, Trump v. Hawaii*:* Korematsu*'s Ghost and National Security Masquerades*, JUST SECURITY (June 28, 2018), https://www.justsecurity.org/

did little to elucidate which national security claims, if any, would not be "legitimate" enough to earn its deference.

Fourth, and finally, how important was it to the Court that EO-3 was the third iteration of the ban? The majority and Justice Sotomayor's dissent disagreed as to whether the executive had cured EO-3 of its "rotten foundation."[119] The source of this disagreement is unclear: On one view, the breadth of the majority's deference suggests that EO-1 and EO-2 might have survived judicial review based on that deference alone. On another view, the majority might have found EO-1 or EO-2 — without the cure of EO-3 — too "rotten." At least two reasons favor the latter view. First, in *McCreary v. ACLU of Kentucky*, the Court recognized that evaluating purpose in Establishment Clause cases implies "that the same government action may be constitutional if taken in the first instance and unconstitutional if it has a sectarian heritage."[120] The Court nonetheless explained that "reasonable observers have reasonable memories, and our precedents sensibly forbid an observer 'to turn a blind eye to the context in which [the] policy arose.'"[121] To be sure, *McCreary* did "not decide that . . . past actions forever taint" an action later justified on constitutional grounds.[122] And future courts might consider *McCreary* altogether inapposite, given that it involved a religious display by a county courthouse[123] — not an immigration law passed by the federal executive. Still, even the executive is afforded less deference "when an improper motive has influenced the decisionmaking process."[124] Second, the Court relied on features of EO-3 that were absent from its predecessors, such as its system of exemptions and waivers.[125] Perhaps, then, the Court will give travel ban–style deference only where the executive has taken explicit steps to "cure" the appearance of bad motive.

The travel ban Court deviated from its usual approach to evaluating claims of unconstitutional motive. It remains unclear when the Court will take the same approach. The four questions that the travel ban case left unanswered will provide the fault lines along which courts will define its progeny.

58615/trump-v-hawaii-korematsu-ghost-national-security-masquerades/ [https://perma.cc/DQ2J-8M6L].

119 *See Hawaii*, 138 S. Ct. at 2441–45 (Sotomayor, J., dissenting).

120 545 U.S. 844, 866 n.14 (2005).

121 *Id.* at 866 (alteration in original) (quoting Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 315 (2000)).

122 *Id.* at 873–74.

123 *Id.* at 850.

124 Merrick B. Garland, *Deregulation and Judicial Review*, 98 HARV. L. REV. 505, 556 (1985) (describing constitutional review of agency action under the Administrative Procedure Act).

125 *See Hawaii*, 138 S. Ct. at 2422–23.