

## **Overview of *Trump v. Hawaii* (2018)**

*Trump v. Hawaii* was a major 2018 Supreme Court decision that addressed President Trump's so-called "Muslim Ban," an executive order that barred entry into the United States of all foreign nationals from six Muslim-majority countries, as well as two others. Writing for a narrow 5-4 majority, Chief Justice Roberts found that the ban was constitutional, arguing that it neither exceeded the executive power of the Presidency nor violated the First Amendment. Justice Breyer issued a dissent examining the Proclamation's system of waivers and exemptions. In her more dissent, Justice Sotomayor rebuffed Roberts' argument, connecting then-candidate Trump's Islamophobic rhetoric to the ensuing travel ban and suggesting parallels to the Japanese internment cases. While the ban only lasted for four years, its impact was enormous; families were separated, dreams were crushed, and perhaps most disturbingly, the Court set a dangerous legal precedent.

## **Facts of the Case**

During the 2016 presidential election, then-candidate Donald Trump pledged to his supporters that, if elected president, he would issue a complete ban on all Muslims entering the United States. To be more specific, on December 7, 2015, Trump issued a statement "calling for a total and complete shutdown of Muslims entering the United States." This formal promise was accompanied by a litany of Islamophobic comments over the course of Trump's campaign.

Following his election to the presidency, Donald Trump sought to enact a ban of this design. On January 27, 2017, President Trump signed Executive Order No. 13,769 (EO-1), which identified seven countries with terrorism-related risks and banned all entry of foreign nationals from those countries. That ban was struck down by courts (Travel Ban 1). Then, Travel Ban 1 was soon replaced with Travel Ban 2 (Executive Order No. 13,780), which temporarily limited the ban to six of the original seven countries. Travel Ban 2 was then struck down as illegal.

In the ensuing months, President Trump instructed the Department of Homeland Security to conduct a comprehensive, worldwide review and determine from which countries foreign nationals posed terrorist-related threats. In its final report, DHS concluded that foreign nationals from eight countries — Chad, Iran, Somalia, Libya, North Korea, Syria, Venezuela, and Yemen — posed a public safety threat. The Acting Secretary of Homeland Security thus recommended to the President that he ban entry of foreign nationals from these eight countries. President Trump accepted the recommendation, and issued what is known as Proclamation No. 9645, or Travel Ban 3. That is the case that went to the Supreme Court.

Three American citizens with family in these countries sued the Trump administration, as did the state of Hawaii. While the questions before the Court were numerous, two were of particular

importance. First, did the president even have the statutory authority to issue the Proclamation? And second, did the Proclamation violate the Establishment Clause of the Constitution?

## **The Majority Opinion (Chief Justice Roberts)**

*Chief Justice Roberts addresses each question before the Court head-on. The Proclamation, he writes, did not exceed the President's statutory authority due to the Immigration and Nationality Act (INA), which gives the executive broad powers over the entry of non-citizens. With respect to the First Amendment, Roberts notes that the Proclamation makes no reference to religion and is thus anything but discriminatory. Finally, Roberts rejects any equivalency between his opinion and *Korematsu*, taking the opportunity to officially overturn the egregious 1944 decision that allowed for the wartime internment of Japanese Americans.*

- I. Roberts begins with the INA. The language of this statute, Roberts explains, gives the President “broad discretion” to limit the entry of foreign nationals, and as a result, any argument that the Proclamation exceeded President Trump’s authority is inapplicable.
- II. Roberts also pushes back against the argument that the Proclamation violates the First Amendment. While candidate Trump may have peddled in Islamophobic rhetoric, his presidential Proclamation is grounded in national security interests: “The Proclamation is expressly premised on legitimate purposes: preventing entry of nationals who cannot be adequately vetted and inducing other nations to improve their practices. The text says nothing about religion. Plaintiffs and the dissent nonetheless emphasize that five of the seven nations currently included in the Proclamation have Muslim-majority populations. Yet that fact alone does not support an inference of religious hostility, given that the policy covers just 8% of the world’s Muslim population...”
- III. Roberts concludes with the following thoughts on *Korematsu*: “It is wholly inapt to liken that morally repugnant order to a facially neutral policy denying certain foreign nationals the privilege of admission... The dissent’s reference to *Korematsu*, however, affords this Court the opportunity to make express what is already obvious: *Korematsu* was gravely wrong the day it was decided,” and is thus overturned.

## **The Dissents (Justices Breyer and Sotomayor)**

*Justice Breyer argues that the Proclamation would be permissible if its system of exemptions and waivers had been properly employed; however, this is clearly not the case, rendering the Proclamation unconstitutional. As for Justice Sotomayor’s dissent, she details Donald Trump’s long history of Islamophobic statements, arguing that the current Proclamation is but a continuation of his anti-Muslim sentiment. What’s more, Justice Sotomayor draws a link between*

*the Court's opinion and the infamous Korematsu decision, a damning indictment that frames the Majority Opinion as a terrible stain on the Court's legacy.*

- I. In his dissent, Justice Breyer rigorously analyzes the Proclamation's system of exemptions and waivers: "On the one hand, if the Government is applying the exemption and waiver provisions as written, then its argument for the Proclamation's lawfulness is strengthened... On the other hand, if the Government is *not* applying the system of exemptions and waivers that the Proclamation contains, then its argument becomes significantly weaker." But the evidence before the Court, Breyer writes, clearly "supports the second possibility," leaving him with no choice but to dissent.
- II. Justice Sotomayor opens her dissent with a sweeping attack that is, in many ways, emblematic of her broader argument: "The United States is a Nation built upon the promise of religious liberty. Our Founders honored that core promise by embedding the principle of religious neutrality in the First Amendment. The Court's decision today fails to safeguard that fundamental principle." Sotomayor believes that the facts speak for themselves, proving that the Proclamation "was driven primarily by anti-Muslim animus." This violates the First Amendment, so the proclamation is unconstitutional.
- III. Equally powerful is the parallel Justice Sotomayor draws between the Court's decision and *Korematsu*. "Today's holding," she writes, "is all the more troubling given the stark parallels between the reasoning of this case and that of *Korematsu v. United States*... By blindly accepting the Government's misguided invitation to sanction a discriminatory policy motivated by animosity toward a disfavored group, all in the name of a superficial claim of national security, the Court redeploys the same dangerous logic underlying *Korematsu* and merely replaces one "gravely wrong" decision with another."

## **Ramifications of the Decision**

On his very first day as President, Joe Biden rescinded Proclamation No. 9645, officially ending President Trump's travel ban. Unfortunately, the damage had already been done. By the end of the Trump Presidency, five additional countries had been added to the list, expanding the reach of the travel ban to thirteen countries. And for many, the ban was nothing short of catastrophic, separating parents from their children, preventing relatives from mourning the deaths of loved ones, and shattering the would-be-dreams of many immigrants for a better and brighter future. In fact, medical professionals documented increases in trauma and stress as a result of the ban.

In the legal world, the decision was also disastrous, uprooting some of America's most fundamental principles. Indeed, the Court's ruling seemed to suggest that any future executive order — no matter how egregious — would be legally permissible so long as it was presented as

facially neutral. In other words, discrimination is legal *so long as it doesn't appear to be discriminatory at face-value*. The decision may have been a win for the Trump Administration, but it was a loss for this country and the Constitution.