Travel Ban Correctly Upheld - The President's Role in National Security

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It's no surprise that the Supreme Court allowed Travel Ban 3.0 to remain in place, particularly given that the justices allowed Ban 2.0 to go into effect a year ago and this one last fall. This third version specifically carves out those with green cards, provides for waivers for those with special cases (family, medical emergencies, business ties, etc.), and also was tailored based on national-security considerations, to which the Court typically defers. One can disagree, as I do, with some of the policy judgments inherent in this executive action, but as a matter of law, the president – *any* president – gets a wide berth here.

The Court considered the president's statements regarding this policy but ultimately had to apply a deferential standard; given the legitimate justifications explicitly set out in the "proclamation" announcing Travel Ban 3.0, the Court could not preference campaign rhetoric and tweets over legal documents in this context. "While we of course 'do not defer to the Government's reading of the First Amendment,'" Chief Justice John Roberts's majority opinion says, citing *Holder v. Humanitarian Law Project* (2010), "the Executive's evaluation of the underlying facts is entitled to appropriate weight, particularly in the context of litigation involving 'sensitive and weighty interests of national security and foreign affairs.'"

Moreover, Congress set out a very deferential statutory regime. The majority opinion explains:

By its plain language, §1182(f) grants the President broad discretion to suspend the entry of aliens into the United States. The President lawfully exercised that discretion based on his findings—following a worldwide, multi-agency review—that entry of the covered aliens would be detrimental to the national interest. And plaintiffs' attempts to identify a conflict with other provisions in the INA, and their appeal to the statute's purposes and legislative history, fail to overcome the clear statutory language.

As the chief justice goes on to say, the dissenting justices don't even try to make a case on that score.

In short, we can and should debate this or any other aspect of the Trump administration's immigration policy, but not all political disputes can or should be resolved in the courts.

One final note: the majority opinion's penultimate page takes issue with Justice Sonia Sotomayor's invocation of *Korematsu v. United States* in her dissenting opinion:

Whatever rhetorical advantage the dissent may see in doing so, Korematsu has nothing to do with this case. The forcible relocation of U. S. citizens to concentration camps, solely and explicitly on the basis of race, is objectively unlawful and outside the scope of Presidential authority. But it is wholly inapt to liken that morally repugnant order to a facially neutral policy denying certain foreign nationals the privilege of admission.

Most importantly, "*Korematsu* was gravely wrong the day it was decided, has been overruled in the court of history, and—to be clear—'has no place in law under the Constitution.'" (citing Justice Robert Jackson's dissent). This isn't technically an overrule because that question wasn't presented, but I would still advise lawyers not to cite *Korematsu* as good law in their briefing.

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