TRUMP v. HAWAII: BRINGING THE POLITICAL BRANCHES' POWER BACK INTO EQUILIBRIUM OVER IMMIGRATION

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I. INTRODUCTION

The effectiveness of our political system is dependent on adherence to the principle of separation of powers which is now threatened by the broad deference given to the President by the Supreme Court in Trump v. Hawaii.1 Additionally, the United States is a nation of immigrants that prides itself on the acceptance of people from different cultures and was built on the principle of religious neutrality. The Trump Administration, in issuing Proclamation No. 96452 (hereinafter “the Proclamation”)—which is an overbroad travel ban on seven countries—and the Supreme Court in upholding it, has abandoned these founding principles. Moreover, the effectuation of the Proclamation has spurred current and potential ramifications that negatively affect individuals and American society prompting the need for immediate immigration reform. It is the moral and political responsibility of Congress to limit the President’s exclusion power over immigration policy.

Part I of this Comment presents the statute behind the Proclamation’s promulgation, and the doctrines and case law that surround the Separation of Powers argument. Part II provides an overview of Trump, including background information on the Proclamation. Part III(A) contends that the Proclamation exacerbates the problems it was allegedly intended to fix and causes significant irreversible harm, making it unnecessary and disadvantageous. Part III(B) asserts that the Trump decision violates separation of powers by allowing the executive to have an almost unhindered ability to restrict entry into the United States, contrary to what Congress intended. Part III(C) proposes an amendment to help bring the political branches back into equilibrium over immigration law. Part III(D) shows the benefits of the proposed amendment, supporting the conclusion that Congress should enact the amendment. Part III(E) addresses the possibility that the President could declare a national emergency to circumvent the proposed amendment and how this executive action would not hold up in court. Congress should amend §1182(f) of the Immigration and Nationality Act (hereinafter “the INA”) to restrict the President’s broad power, which will bring the political branches of government into an equilibrium of power regarding immigration law and prevent similar travel bans in the future.

I. BACKGROUND

This section lays out the specific provisions of the INA that are relevant to this Comment including, §1182(f), which is how President Trump enacted the Proclamation. It explains the importance of preserving separation of powers in our

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government and acknowledges the fact that Congress may delegate limited legislative authority to the Executive Branch. Next, it explains which branches of government control immigration law pursuant to the plenary power doctrine, and the unsettled and constant tension between those branches regarding the scope of that power. Lastly, it lays out the most relevant case to the separation of powers argument, *Youngstown Sheet & Tube Co. v. Sawyer,*[^3] which provides the proper framework in analyzing separation of powers issues regarding executive action.

### A. Immigration and Nationality Act: §1182(f) and §1152(a)(1)(A)

President Trump enacted the Proclamation pursuant to §1182(f) of the INA, and the Trump plaintiffs argued that it violated another provision of the Act, §1152(a)(1)(A). Congress delegated upon the President the authority to suspend the entry of aliens under certain circumstances.[^4] Congress enacted §1182(f) of the INA which states:

> 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 appropriate.[^5]

In addition, §1152(a)(1)(A) of the INA states, “no person shall receive any preference or priority or be discriminated against in the issuance of an immigrant visa because of the person's race, sex, nationality, place of birth, or place of residence.”[^6]

### B. Separation of Powers

Adherence to a system of separation of powers is essential to our political system, justifying an amendment of §1182(f). Separation of powers is an inherent principle deeply rooted in the Constitution with the creation of the three independent branches of government: the Legislative, the Judicial, and the Executive.[^7] James Madison, stated, “[t]he accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny.”[^8] Madison also said that the “magistrate in whom the whole executive power resides cannot of himself make a law . . . nor administer justice in person.”[^9]

[^4]: *Trump*, 138 S. Ct. at 2407.
[^7]: See U.S. CONST. art. I–III.
[^9]: Id. at 601 (quoting THE FEDERALIST NO. 47, at 140 (James Madison) (Roy P. Fairfield ed., 1981)).
The Framers were clearly concerned with one branch attaining excessive power evidenced by the creation of three separate branches of government.\footnote{Id. at 600–01.} “When the legislative and executive powers are united in the same person or body . . . there can be no liberty, because apprehensions may arise lest the same monarch or senate should enact tyrannical laws to execute them in a tyrannical manner.”\footnote{Id. at 603 (quoting THE FEDERALIST NO. 47, at 141 (James Madison) (Roy P. Fairfield ed., 1981)).}

However, this separation of the three branches does not necessarily mean they are completely isolated from intruding on one another’s powers.\footnote{Id. at 601.} “The purpose of the Constitution was not only to grant power, but to keep it from getting out of hand.”\footnote{Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 640 (1952) (Jackson, J., concurring).} The system of checks and balances limits the branches’ ability to exert power over the other branches.\footnote{Id., supra note 8, at 601.} Checks and balances are essential to the effective functioning of government, which ensures individuals are protected.\footnote{Krenik, supra note 8, at 603–04.} The Judicial Branch is the branch of government that determines whether there has been a violation of separation of powers.\footnote{See Michael Fisher, Patchak v. Zinke, Separation of Powers, and the Pitfalls of Form over Substance, 13 DUKE J. CONST. L. & PUB. POL’Y SIDEBAR 85, 85 (2018).}

C. The Non-Delegation Doctrine

Congress can delegate limited authority to the President. However, when the President acts contrary to Congress’s intent surrounding the delegation, the action must be closely scrutinized by the courts. The non-delegation doctrine is used in separation of powers cases to “invalidat[e] unsupportable grants of power from one branch to another.”\footnote{See Krenik, supra note 8, at 603–04.} The doctrine establishes that Congress may not transfer its legislative power to any other branch of government, however, there is an anomaly within the Constitution to this prohibition on delegating authority.\footnote{See id. at 604.} The Necessary and Proper Clause is incongruous with the non-delegation doctrine, but it allows Congress to delegate certain limited law-making authority to the Executive Branch in cases where Congress cannot immediately or directly act to deal with the problem. Thus, the delegation must be a matter of necessity.\footnote{U.S. CONST. art. I § 8, cl. 18 (“The Congress shall have Power… To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.”). See Krenik, supra note 8, at 604.}

D. Plenary Power Doctrine and the Fight Over Such Power

The plenary power doctrine involves a constant tension between the political branches over the scope of their powers in immigration law, specifically their exclusion powers over aliens. The plenary power doctrine suggests that the Trump Court deferred to the President because the Judiciary has historically taken a “hands
off” approach to immigration issues. The Supreme Court has long recognized that immigration issues “are frequently of a character more appropriate to either the Legislature or the Executive than to the Judiciary.”20 Thus, the Legislature and the Executive have plenary or absolute power over immigration law because they are made up of elected officials that can be held accountable by their constituents and because courts “lack the institutional capacity to make political judgments.”21 In *INS v. Chadha*,22 the Supreme Court held that Congress has plenary power over substantive immigration issues including the admission and exclusion of aliens.23 While the extent of Executive Branch’s plenary power regarding immigration law is to enforce the legislation enacted by Congress, this is continually debated.24

Initially, this country did not have federal regulation of immigration, but as immigration increased, the need for a uniform immigration policy was evident, and the constitutional source for this regulatory power conferred upon Congress was found in the Commerce Clause.25 In 1889, the Court abandoned the textual authority requirement and declared Congress’s inherent power “to control the nation’s borders and exclude particular aliens from entering the country.”26 The Court inferred this notion from broad principles of national sovereignty.27 Although the Court made “general references to ‘political branches’ and ‘federal government’ the Court maintained a division of power between Congress and the President that limited the President’s involvement to the treaty power,” meaning power over immigration was dominated by Congress.28 However, it was necessary for the executive branch to enforce Congress’s policies and the Executive Branch had to stay within the limits of the legislation when excluding aliens.29

In *United States v. Curtiss-Wright Export Corp.*,30 the Court shifted towards giving the President broad power over immigration and did not subject the President to “significant judicial or legislative constraints” based on the theory that immigration is within the realm of the President’s inherent power over foreign affairs.31 In *United States ex rel. Knauff v. Shaughnessy*,32 the Court relied primarily on the *Curtiss-Wright* decision in supporting the theory that the power to exclude aliens is inherent in the Executive Branch without any textual support from the

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23 Id. at 941.
26 Id. at 230–31.
27 Id.
28 Id. at 233.
29 Id. at 234–35.
30 299 U.S. 304 (1936).
31 Lee, supra note 25, at 236–38.
Constitution. Within two years of the Knauff decision, Congress complicated the sharing of powers by providing statutory authority for this broad grant of power to the President” with the enactment of §1182(f) of the INA. Subsequent cases, including Trump, have cited to §1182(f) to support the exclusion by the President instead of basing their discussion of the President’s exclusion power on the theory of inherent presidential authority.

E. Youngstown Sheet & Tube, Co. v. Sawyer

Youngstown is a landmark case that serves as “an implicit assertion of judicial review of executive action” and one of the few cases in our jurisprudential history that restricts the President’s authority to act. In 1951, during the Korean War, steel companies and their employees could not settle their dispute over collective bargaining agreements, so the employees initiated a strike. The importance of steel to the manufacture of “war materials led the President to believe that the proposed work stoppage would immediately jeopardize our national defense and that government seizure of the steel mills was necessary in order to ensure the continued availability of steel.” In dealing with this situation, President Truman issued an executive order directing the Secretary of Commerce to seize a majority of steel mills and keep them operating. Congress was silent, although President Truman did not seek retroactive approval, and the steel companies brought suit claiming the seizure was not authorized by legislation or the Constitution.

President Truman claimed that his action constituted a national emergency, and that he was acting pursuant to his “presidential power . . . implied from the aggregate of his powers under the Constitution.” Specifically, he cited to his powers as Chief Executive and Commander-in-Chief and the fact that “he shall take Care that the Laws be faithfully executed.” The district court issued a preliminary injunction against the executive action, which the Court of Appeals stayed, and the Supreme Court granted certiorari.

The Supreme Court majority pointed out that the President’s power must stem from an action of Congress or the Constitution. In this case, there was no expressed or implied statutory authority for the President to commit such an action, so the government relied on implied constitutional power. The majority rejected this

33 Lee, supra note 25, at 239.
34 Id. at 240.
35 Id. at 241.
38 Id. at 583.
39 Id.
41 Youngstown, 343 U.S. at 582, 587 (quoting U.S. Const. art. II, § 3.).
42 Id.
43 Id. at 584.
44 Id. at 585.
45 Id. at 585, 587.
argument by finding that the Take Care Clause “refutes the idea that he is to be a lawmaker” and that it is solely the duty of Congress to deal with policy making.46 The Court affirmed the district court’s decision with the effect of invalidating President Truman’s steel seizure order.47

F. Justice Jackson’s Concurrence in Youngstown Sheet & Tube, Co. v. Sawyer

Justice Jackson’s concurrence in Youngstown has become more significant than the majority opinion and all the concurrences because it formulated the widely accepted three-tiered separation of powers framework to determine the validity of executive action.48 Justice Jackson viewed executive power as elastic in nature by stating, “[p]residential powers are not fixed but fluctuate, depending upon their disjunction or conjunction with those of Congress.”49 In the first tier of his framework, Justice Jackson stated, “[w]hen the President acts pursuant to an express or implied authorization of congress, his authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate.”50 In this situation, the president’s action receives the most deference from the Court and is only overruled if “the government itself lacks the power” because “the President represents the federal government as a unified body.”51 The second tier is the “zone of twilight” where there is congressional silence on the matter.52 In this situation, “a lack of congressional action may necessitate executive action.”53 For the third tier, which is central to this Comment, Justice Jackson stated,

> When the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb, for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter. . . . Presidential claim to a power at once so conclusive and preclusive must be scrutinized with caution, for what is at stake is the equilibrium established by our constitutional system.54

In this final tier, if the presidential action is contrary to the expressed or implied intent of Congress, the action is “given the strictest scrutiny to ensure that the will of the people, as expressed through the legislative process, is given its intended effect.”55 In this category, if the executive action is found to be contrary to congressional intent, then upholding the action is dependent on whether the

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46 Id. at 587–89.
47 Id. at 589.
49 Youngstown, 343 U.S. at 635 (Jackson, J., concurring); Turner, supra note 36, at 674.
50 Youngstown, 343 U.S. at 635 (Jackson, J., concurring).
51 Turner, supra note 36, at 674.
52 Youngstown, 343 U.S. at 637 (Jackson, J., concurring).
53 Turner, supra note 36, at 675.
54 Youngstown, 343 U.S. at 637–38 (Jackson, J., concurring).
55 James Park Taylor, Upholding Justice in the Age of Terrorism, MONTANA LAWYER, Nov. 2002, at 9; Turner, supra note 36, at 675.
Executive has expressed constitutional authority on the specific matter at issue rather than the action being based on implied powers from the text of the Constitution.\textsuperscript{56} Thus, courts “would have to reject Congress’s power to act in the disputed area” in order to uphold the executive action.\textsuperscript{57}

III. TRUMP V. HAWAII

A. Facts

The plaintiffs\textsuperscript{58} challenged President Trump’s Proclamation on statutory and constitutional grounds.\textsuperscript{59} After attaining the Presidency and pursuant to §1182(f), President Trump signed Executive Order No. 13769.\textsuperscript{60} It instructed the Secretary of Homeland Security to conduct a worldwide review of every country’s information sharing with the United States regarding its own citizens that were attempting to enter or emigrate to the United States.\textsuperscript{61} A district court barred the Proclamation. The Ninth Circuit affirmed, effectively shutting down the President’s first attempt at a travel ban.\textsuperscript{62}

For the worldwide review process, Homeland Security created nine baseline criteria grouped into three categories.\textsuperscript{63} The first category was identity management, which considered the countries’ use of electronic passports, whether they reported lost or stolen passports, and if they complied with requests for identity-related information.\textsuperscript{64} The second category was national security information, which assessed whether the country provided terrorist or criminal information upon request, provided identity document exemplars, and allowed United States government’s receipt of information about passengers and crew travelling to the United States.\textsuperscript{65} The third category were risk indicators, taking into account whether the country was a known or potential terrorist safe haven, if it participated in the visa waiver program, and if it accepted its nationals after forced repatriation.\textsuperscript{66} The process inconsistently applied five mitigating factors, which included: whether there was a cooperative relationship with the United States; whether there was a commitment to combating ISIS; whether there was a U.S. troop presence in the

\textsuperscript{56} Turner, supra note 36, at 675.
\textsuperscript{57} Id.
\textsuperscript{58} Trump v. Hawaii, 138 S. Ct. 2392, 2406 (2018) (The plaintiffs included, the State of Hawaii, the Muslim Association of Hawaii, and three individuals that are American citizens or have lawful permanent resident status with family members living in Iran, Syria and Yemen who are applying for visas to enter the U.S.).
\textsuperscript{59} Id.
\textsuperscript{60} Id. at 2403 (Suspending the entry of nationals from Iran, Iraq, Libya, Somalia, Syria, Sudan, and Yemen for ninety days due to the countries’ heightened terrorism risks).
\textsuperscript{61} Id.
\textsuperscript{62} Id.
\textsuperscript{64} Id.
\textsuperscript{65} Id.
\textsuperscript{66} Id.
country; whether there was a presence of U.S. diplomats; and whether there was an existence of alternative sources of information regarding immigration.67

President Trump then issued Executive Order No. 13780 which removed Iraq from the list of banned countries as a second attempt to suspend the affected nationals for ninety days since the first ban was shut down by the courts.68 The order cited the need to prevent potential terrorists from entering the United States that could not be adequately vetted. The order also noted that each of the listed countries “is a state sponsor of terrorism, has been significantly compromised by terrorist organizations, or contains active conflict zones.”69 Two district courts entered nationwide preliminary injunctions, both respective courts of appeals affirmed, but the Supreme Court stayed the injunctions partially, only allowing entry when an individual had a bona fide relationship with an American citizen, permanent resident, or business entity.70

After the worldwide review was completed, the Secretary of Homeland Security concluded that Chad, Iran, Iraq, Libya, North Korea, Syria, Venezuela, and Yemen failed to meet the baseline criteria and failed to improve their practices upon the United States’ request, while some other countries complied.71 The Secretary recommended that the President suspend only certain nationals and exempt Iraq because of the cooperative efforts of its government in combating ISIS.72

The President then issued the Proclamation indefinitely suspending the entry of nationals from Iran, North Korea, Syria, Venezuela, Chad, Libya, Somalia, and Yemen.73 Each country has specific restrictions based on the specific circumstances of their information-sharing practices and other risk factors.74 The Proclamation includes a case-by-case waiver system and excludes lawful permanent residents and asylum-seekers that had already been granted entry from its travel restrictions.75 Homeland Security assesses each affected country’s information-sharing practices every 180 days to determine if it should be removed.76 Essentially, the Proclamation had no detrimental effect on either North Korea or Venezuela because North Koreans are already restricted from entering the United States and the restrictions on Venezuela “only [involve] a handful of . . . government officials and their immediate family members[,]” so it does not affect the mass majority of Venezuelans.77

B. Procedural History

67 Id.
68 Trump, 138 S. Ct. at 2403–04.
69 Id. at 2404.
70 Id.
71 Id. at 2405.
72 Id.
73 Id.
74 Id.
75 Id. at 2406.
76 Id. (Chad was removed after 180 days from making improvements to their information-sharing practices).
77 Id. at 2442 (Sotomayor, J., dissenting).
The U.S. District Court for the District of Hawaii granted the plaintiffs’ motion for a nationwide preliminary injunction, which stopped the enforcement of the Proclamation. The court held that the Proclamation failed to comply with §1187(f) because the President provided insufficient support to find that the admittance of the banned nationals would be detrimental to a national interest. In addition, the Proclamation violated §1152(a)(1)(A) because it discriminated on the basis of nationality against immigrant visa applicants.

The Ninth Circuit granted a partial stay of the injunction, allowing only visa applicants who had a bona fide relationship with an American citizen to be admitted, but the Supreme Court stayed the injunction in full while the appeal was pending. The Ninth Circuit subsequently affirmed the district court’s decision, holding that the Proclamation exceeded the President’s authority under §1187(f), because the provision only authorizes temporary suspensions of foreign nationals to be employed to combat exigencies that Congress is not able to address immediately. The Ninth Circuit also stated that the Proclamation “conflicted with the INA’s finely reticulated regulatory scheme” by addressing ‘matters of immigration already passed upon by Congress.’ The court also held that the Proclamation contradicted §1152(a)(1)(A) because it discriminated on the basis of nationality in the issuance of immigrant visas. The Ninth Circuit did not assess the viability of the plaintiffs’ Establishment Clause claim.

C. Majority Opinion

Chief Justice Roberts wrote the opinion of the Court. Justices Kennedy, Thomas, Alito, and Gorsuch joined in his opinion. Initially, plaintiffs argued that the Proclamation was outside the scope of the President’s power under §1182(f). The majority concluded that the language of §1182(f) gave the President broad discretion in suspending aliens and that the President provided sufficient findings that the nationals from those countries were detrimental to the national security interest of the United States. The majority read §1182(f) in isolation and referred to a few past proclamations issued under §1182(f) to support the broad discretion of the President. The Court reasoned that the Proclamation satisfied the elements of §1182(f) because the Government provided sufficient information regarding the worldwide review process results establishing that the affected nationals were detrimental to national security interests since they could not be adequately vetted.

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78 Id. at 2406.
79 Id.
80 Id.
81 Id.
82 Id.
83 Id. at 2406–07 (quoting Trump v. Hawaii, 878 F.3d 662, 685, 690 (9th Cir. 2017)).
84 Id. at 2407.
85 Id.
86 Id. at 2402.
87 Id.
88 Id. at 2408.
89 Id.
90 Id.
based on the lack of sufficient information sharing from those countries.\textsuperscript{91} The Proclamation also encouraged the countries to improve their information-sharing practices, which the Court regarded as an interest to the United States.\textsuperscript{92} The majority noted that the plaintiff’s request to analyze the President’s reasoning behind the Proclamation conflicted with the broad deference provided by the text of §\textsuperscript{1182}(f) and was hesitant in affording it to them.\textsuperscript{93} However, the Court determined that the Proclamation was based on sufficient findings by comparing the President’s detailed twelve-page Proclamation with past proclamations under §\textsuperscript{1182}(f) that only contained five sentences at most.\textsuperscript{94} The majority then agreed with the plaintiffs that “suspend” in §\textsuperscript{1182}(f) means deferral but held the President was not required to set an end date, pointing to all former travel suspensions not containing one.\textsuperscript{95} The fact that the suspension was indefinite was permissible because its termination is linked to the triggering condition of inadequate information sharing that was to be assessed every 180 days.\textsuperscript{96} The Court then rejected the plaintiffs’ assertion that nationality is not considered a “class” and that the Proclamation was overbroad.\textsuperscript{97} The plaintiffs argued that a class “must refer to a well-defined group of individuals who share a common ‘characteristic’ apart from nationality.”\textsuperscript{98} The Court reasoned that viewing the Proclamation as overbroad assumes there is a “tailoring requirement” within §\textsuperscript{1182}(f), which does not explicitly exclude nationality from being considered a class.\textsuperscript{99}

Next, the majority rejected the plaintiffs’ structural argument involving the assertion that the President can only add to the INA and not “expressly override particular provisions of the INA.”\textsuperscript{100} Plaintiffs argued that Congress created a solution to the problem of inadequate information sharing about aliens seeking admission into the United States by placing the burden of information production on the individual.\textsuperscript{101} Additionally, Congress incentivizes information sharing by allowing quicker admission through the visa waiver program to countries that complied with information-sharing requirements.\textsuperscript{102} The majority concluded that the Proclamation actually supports these solutions by further encouraging information sharing.\textsuperscript{103} In the majority’s view, the plaintiffs failed to present any conflict between the INA and the Proclamation.\textsuperscript{104} The Proclamation did not conflict with the visa waiver program because that program granted exceptions to

\textsuperscript{91} Id. at 2408–09.
\textsuperscript{92} Id. at 2409.
\textsuperscript{93} Id.
\textsuperscript{94} Id. (quoting 8 U.S.C. § 1182(f) (2013)).
\textsuperscript{95} Id. at 2409—10.
\textsuperscript{96} Id. at 2410 (quoting 8 U.S.C. § 1182(f) (1952)).
\textsuperscript{98} Id.
\textsuperscript{99} Id. at 2410–11.
\textsuperscript{100} Id. at 2411.
\textsuperscript{101} Id.
\textsuperscript{102} Id.
\textsuperscript{103} Id.
\textsuperscript{104} Id.
countries that more than adequately complied with U.S. requirements, so the Proclamation was not affecting those countries.\textsuperscript{105}

Next, the Court dismissed the plaintiffs’ contention that the legislative history and background of §1182(f) proved that the President was limited in issuing suspension orders “only during . . . time[s] of crisis.”\textsuperscript{106} The majority pointed out that plaintiffs’ evidence actually confirmed the opposite of their assertion because Congress omitted a “national emergency standard” from §1182(f), and included the “detrimental to the interests of the United States” standard.\textsuperscript{107} The plaintiffs then provided evidence of past travel suspension orders to show that they were either confined to specific groups of individuals that engaged in harmful conduct or excluded nationalities “as a response to diplomatic emergencies.”\textsuperscript{108} The majority countered this argument by reasoning that those suspension orders on the basis of nationality were meant “to retaliate for conduct by their governments that conflicted with U.S. foreign policy interests,” which was what this Proclamation was trying to accomplish.\textsuperscript{109}

The Court also shut down the last statutory argument that the plaintiffs provided, which was that the Proclamation was in violation of §1152(a)(1)(A) based on that provision’s prohibition of discrimination on the basis of nationality, and the extension of that prohibition on §1182(f).\textsuperscript{110} The majority found that §1152(a)(1)(A) only prohibits discrimination in the issuance of visas and that there is a distinction between visa issuance and admissibility, meaning an individual must be admitted before a visa can be issued, thus, §1152(a)(1)(A) did not apply to §1182(f).\textsuperscript{111}

The Court rejected the plaintiffs’ last argument that the Proclamation violated the Establishment Clause.\textsuperscript{112} “[The] [p]laintiffs allege[d] that the primary purpose of the Proclamation was religious animus and that the President’s stated concerns about vetting protocols and national security were but pretexts for discriminating against Muslims.”\textsuperscript{113} The plaintiffs relied on a multitude of statements made by the President that proved his discrimination and hostility towards the religion of Islam.\textsuperscript{114} These statements included one titled “Statement on Preventing Muslim Immigration” urging the need for a “total and complete shutdown of Muslims entering the United States until our country’s representatives can figure out what is going on,” and the President constantly referred to the Proclamation as a “Muslim

\textsuperscript{105} Id. at 2411–12.
\textsuperscript{106} Id. at 2412.
\textsuperscript{107} Id. at 2412–13.
\textsuperscript{108} Id. at 2413.
\textsuperscript{109} Id. (However, the past suspension orders the majority relied on do not involve the suspension of all or most nationals from a country but suspended specific nationals that had engaged in certain conduct except for one by President Reagan that banned most Cubans.).
\textsuperscript{110} Id.
\textsuperscript{111} Id. at 2414.
\textsuperscript{112} Id. at 2423.
\textsuperscript{113} Id. at 2417.
\textsuperscript{114} Id.
Although the Court somewhat condemned the President for this discriminatory speech, it reverted to the broad deference afforded to him throughout history. The majority addressed the fact 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.’”

Given this judicial history, the Court wanted to extend the “deferential standard of review” in *Kleindienst v. Mandel* which would have made the Proclamation constitutional if the President presented a “‘facially legitimate and bona fide reason’ for [his] action.” However, the Court accepted the Government’s suggestion that the Proclamation be analyzed under rational basis review and looked beyond the face of the Proclamation, because the *Mandel* test was only the start of the analysis.

Under rational basis review, the Proclamation would have been constitutionally valid if “the entry policy [was] plausibly related to the Government’s stated objective to protect the country and improve vetting processes.” The Court mistakenly relied on multiple cases that applied a heightened standard of review: “rational basis with bite.” Notwithstanding this improper use of precedent, the majority analyzed the Proclamation under rational basis review and held that the executive action was rationally related to the legitimate purpose of “preventing entry of nationals who [could not] be adequately vetted and inducing other nations to improve their practices.” The majority recognized that the Proclamation did not facially discriminate against Muslims, citing to the fact that not all Muslim-dominant countries were banned, including the exemption of Iraq. Furthermore, the Proclamation’s removal of countries who improved their processes, the Proclamation’s exceptions, and the Proclamation’s waiver program supported the notion that it was not discriminating against Muslims but had a legitimate national security interest. The Court held that the Proclamation survived rational basis review and was constitutionally valid, and thus, reversed the preliminary injunction on the Proclamation, effectively enforcing the travel ban.

The Court then acknowledged the dissent’s invocation of *Korematsu v. United States* but held that it had no bearing on the case at hand because *Korematsu v. United States* is a case that involved the internment of Japanese Americans during World War II. The Court suggested that a closer look at the history of the internment program might provide insights into the current situation.

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115 Id.
116 Id. at 2417–18.
117 Id. at 2418 (quoting Fiallo v. Bell, 430 U.S. 787, 792 (1977)).
118 408 U.S. 753 (1972).
119 Trump, 138 S. Ct. at 2419 (quoting *Mandel*, 408 U.S. at 769 (holding “when the Executive exercises this power negatively 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”)).
120 Id. at 2420.
121 Id.
122 See id.
123 Id. at 2421.
124 Id.
125 Id. at 2422.
126 Id. at 2423.
127 324 U.S. 885 (1945).
involved relocating United States citizens to internment camps. However, the majority condemned *Korematsu*, stating it was “gravely wrong” and “morally repugnant” without officially overruling it, because it was not necessary to overturn *Korematsu* in order to uphold the Proclamation.

**D. Justice Kennedy’s Concurring Opinion**

Justice Kennedy’s concurrence briefly mentioned the importance of the Judiciary in not intruding on the Executive’s powers over foreign affairs, but at the same time, for government officials to abide by the Constitution.

**E. Justice Thomas’ Concurring Opinion**

Justice Thomas’ concurrence addressed other problems with the plaintiffs’ arguments that the majority did not. Justice Thomas explained one problem was that §1182(f) does not impose “any judicially enforceable limits” on the President’s already inherent power over immigration. He was centrally concerned about the increased popularity of nationwide preliminary injunctions, their “sweeping” power, and district courts’ authority to issue them.

**F. Justice Breyer’s Dissenting Opinion**

Justice Breyer’s dissent, joined by Justice Kagan, concluded that the Proclamation violated the Establishment Clause based on the implementation of its own exemptions and waiver program. Justice Breyer argued that if the Government was not abiding by the Proclamation’s exemptions and waiver program as stated, then it was more likely religious discrimination and constitutionally invalid. He concluded that there was sufficient evidence supporting the plaintiffs’ assertion that the Proclamation was based on religious animus. Justice Breyer pointed to the ungenerous amount of waivers granted to individuals even when they fit within *Trump*, 138 S. Ct. at 2423. *Id.*

128 *Trump*, 138 S. Ct. at 2423.
129 *Id.*
130 *Id.* at 2423–24 (Kennedy, J., concurring) (Justice Kennedy acknowledged that the Court can review an executive action when it is allegedly only supported by animus and noted that because an official is relatively free from judicial scrutiny it is “imperative” that they conform to the Constitution.).
131 *Id.* at 2424 (Thomas, J., concurring).
132 *Id.* (Thomas, J., concurring).
133 *Id.* at 2424–25 (Thomas, J., concurring) (Justice Thomas believed that by allowing district court judges to issue nationwide preliminary injunctions such as the one in this case, the federal court system is being eroded because they “prevent[] legal questions from percolating through the federal courts, encourag[e] forum shopping, and mak[e] every case a national emergency.” He argued that district courts are only permitted to if it is authorized by the Constitution or statute and that no expressed authority exists.).
134 *Id.* at 2433 (Breyer, J., dissenting).
135 *Id.* at 2430 (Breyer, J., dissenting).
136 *Id.* (Breyer, J., dissenting).
waiver criteria. Moreover, the restrictions were not meant to apply to refugees or asylum seekers, but in reality, relatively few have been admitted.

**G. Justice Sotomayor’s Dissenting Opinion**

Justice Sotomayor’s dissent, joined by Justice Ginsburg, concluded that the Proclamation violated the Establishment Clause. Although Justice Sotomayor agreed that the majority was correct in not applying Mandel’s narrow “facially legitimate and bona fide relationship” standard, she argued that the Court incorrectly applied rational basis review “without explanation or precedential support” to an Establishment Clause claim. Justice Sotomayor argued that this Court’s precedent regarding Establishment Clause issues applied the “reasonable observer” test, which asks “whether a reasonable observer would view the government action as enacted for the purpose of disfavoring a religion.” Historically, the Court takes into account the textual language of the government action, its actual functioning, and any other evidence to show its background including statements made by the government official who enacted it. Justice Sotomayor argued that the majority failed to properly take into account the substantial evidence of animus towards Islam, specifically, President Trump’s statements. Justice Sotomayor recounted the ample evidence of Trump’s statements in a timeline form to prove that a reasonable observer would view the Proclamation’s primary purpose as disfavoring the religion of Islam by preventing Muslims from entering the United States.

However, Justice Sotomayor also argued that the Proclamation nonetheless failed under rational basis review, reasoning that the substantial evidence of animus and the strategic inclusion of North Korea and Venezuela showed that the Proclamation did not support a legitimate state interest but was only meant to exploit Americans’ fear of Muslims and exclude Muslims from the United States. Justice Sotomayor further pointed out that Congress “has already erected a statutory scheme that fulfills the putative national-security interests the Government now puts forth to justify the Proclamation . . .” meaning that the Proclamation is unnecessary.

Justice Sotomayor ultimately determined that the plaintiffs were entitled to the relief they sought—a preliminary injunction—which required a showing of

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137 *Id.* at 2431–32 (Breyer, J., dissenting) (The Proclamation also states that there will be guidance for consular officers on how to exercise discretion regarding the visa waiver program but no guidance has been given thus far.).
138 *Id.* at 2431 (Breyer, J., dissenting).
139 *Id.* at 2433 (Sotomayor, J., dissenting).
140 *Id.* at 2441 (Sotomayor, J., dissenting).
141 *Id.* at 2434 (Sotomayor, J., dissenting).
142 *Id.* at 2434–35 (Sotomayor, J., dissenting).
143 *Id.* at 2435 (Sotomayor, J., dissenting).
144 *Id.* at 2435–40 (Sotomayor, J., dissenting).
145 *Id.* at 2442 (Sotomayor, J., dissenting).
146 *Id.* at 2444 (Sotomayor, J., dissenting).
irreparable harm if the injunction was not granted, a balance of equity tipping in
their favor, and that the injunction was in the public interest.\textsuperscript{147}

Next, Justice Sotomayor brought up similarities with \textit{Korematsu} to show that the
same flawed logic was being used here, resulting in a comparable, morally wrong
decision that permanently stains the Court.\textsuperscript{148} In both cases, the Government
“invoked an ill-defined national-security threat to justify an exclusionary policy of
sweeping proportion.”\textsuperscript{149} Both government actions were created due to fear and
hostility towards the discriminated groups of people, and the Government had
protected intelligence reports on the security concerns.\textsuperscript{150} Justice Sotomayor also
cautioned the amount of deference given to the President by the majority, touching
on Justice Murphy’s dissent in \textit{Korematsu}, “that there is a need for great deference
to the Executive Branch in the context of national security, but cautioned that ‘it is
essential that there be definite limits to [the government’s] discretion,’ as
‘[i]ndividuals must not be left impoverished of their constitutional rights on a plea
of military necessity that has neither substance nor support.’”\textsuperscript{151} Justice Jackson’s
observation in his dissent in \textit{Korematsu} also mentioned “that the Court’s decision
in upholding the Government’s policy would prove to be ‘a far more subtle blow
to liberty than the promulgation of the order itself,’ for although the executive order
was not likely to be long lasting, the Court’s willingness to tolerate it would
endure.”\textsuperscript{152}

\textbf{IV. Analysis}

\textit{A. The Proclamation is Ineffective, Unnecessary, and Detrimental}

The fact that the implementation of the Proclamation contradicts its
intended purposes and results in numerous dire consequences shows that this type
of travel ban is ineffective, unnecessary, and detrimental to the interests of the
United States, supporting the need for an amendment to § 1182(f). In reality, the
Proclamation does not promote information sharing with the United States, which
is its intended purpose, but rather results in the opposite.\textsuperscript{153} The current vetting
policies and processes of United States Immigration, as well as the support of law
enforcement and intelligence agencies, has almost completely curbed the external
threat of terrorism, and so, the indefinite banning of most individuals from certain
countries is unnecessary.\textsuperscript{154} Each individual attempting to enter the United States
with a visa already bears the difficult burden of providing sufficient information in
order to establish their admissibility, and consular officers have the discretion to

\textsuperscript{147} Id. at 2445–46 (Sotomayor, J., dissenting).
\textsuperscript{148} Id. at 2447–48 (Sotomayor, J., dissenting).
\textsuperscript{149} Id. at 2447 (Sotomayor, J., dissenting).
\textsuperscript{150} Id. (Sotomayor, J., dissenting).
\textsuperscript{151} Id. at 2447–48 (Sotomayor, J., dissenting) (quoting Korematsu v. United States, 323 U.S. 214,
234 (1944) (Murphy, J., dissenting)).
\textsuperscript{152} Id. at 2448 (Sotomayor, J., dissenting) (quoting \textit{Korematsu}, 323 U.S. at 245–46 (Jackson, J.,
dissenting)).
\textsuperscript{153} Brief for Former National Security Officials as Amici Curiae Supporting Respondents, Trump
\textsuperscript{154} See id.
deny entry. The already strict and thorough vetting system has been effectively utilized by past administrations and has been continually improved upon. The fact that no prior administration has used its § 1182(f) power to implement a similar blanket ban on immigrants proves that the Proclamation is unnecessary because the current individualized vetting system is more than sufficient in weeding out potential threats to the United States. Furthermore, the Proclamation will not encourage the affected countries to improve their information-sharing practices with the United States but will deter them from doing so, “by impairing economic and political interchange and spurring anti-American sentiment.” Some of these countries may be limited regarding the resources needed to make improvements. Also, a number of the affected countries’ governments are dealing with much more pressing internal problems such as civil war, famine, and terrorism among other issues, and thus, improving their information-sharing practices is not a priority. Therefore, there are no deficiencies in the individualized vetting system that justify the establishment of a blanket ban, nor are there any necessary and feasible improvements regarding information sharing that justify a blanket ban on those countries that do not comply with the United States’ requests.

The Proclamation does not contribute to the prevention of terrorist attacks within the United States, contrary to its intended purpose. First and foremost, no individual from any of the affected countries has committed a fatal terrorist attack in the United States in the last forty years, including the September 11th attacks. In addition, no external terrorist organization has carried out a successful terrorist attack on United States soil since September 11, 2001. This is because the United States has increased security and federal agencies’ efforts in addition to “tips from local communities, members of the public, and the widespread use of informants.” Therefore, the Proclamation is doing nothing more to prevent external terrorist attacks on the United States.

This is not to say that there is no external terrorist threat to the United States, but that the external threats are being sufficiently dealt with. And, there is a more imminent terrorist threat that is closer to home which the government should be more focused on. “Homegrown” terrorism is a greater danger to American citizens because more American citizens have successfully executed terrorist attacks in the United States than terrorists of any other nationality. In addition, “between 2001

155 Id. at *17.
156 Id.
157 Id.
158 Id. at *16–17.
159 Id. at *16.
160 Id. at *15.
161 Id. at *18.
163 Id.
and 2015, more Americans were killed by homegrown right-wing extremists than by Islamist terrorists, according to a study by New America.165 Thus, it is irrelevant where terrorists are born but why, when, where, and how they are radicalized is what really matters in figuring out how to prevent terrorism.166

Terrorism is not confined to a religion, nationality, or race but can be pursued by any individual, in any country, at any time. Due to the increased efforts, post-September 11th, to prevent terrorists from entering the United States, terrorist organizations have changed their strategies to radicalization and recruitment of lone individuals within the United States through the Internet—mainly social media—in order to successfully continue their mission of terrorizing the United States and the Western world.167

In order to combat this change of strategy, specifically regarding Muslim Americans, the federal government should be working on gaining the trust and support of Muslim-American communities so that they feel included and more invested in assisting with prevention of terrorism in their communities. However, this Proclamation coupled with Trump’s discriminatory statements does the exact opposite of that, promoting hostility towards the United States, not only domestically but also internationally.168 The travel ban, and the reasoning behind it, creates an international perception that the United States is waging war on Islam through the guise of foreign policy based on national security concerns.169 This perception undermines the trust and support of not only Muslim countries but also the trust of other allies, which impedes the military objectives of the American military.170 The success of military involvement in a foreign nation requires a close relationship between the two countries. The perception that this Proclamation creates damages those relationships, which prolongs U.S. troop presence, deters locals from aiding U.S. troops, and increases the risk of terrorist or partisan group attacks on American troops.171 Most importantly, this perception aids terrorist organizations by encouraging radicalization and recruitment, because it reinforces the narrative that the United States and the Western world are anti-Muslim.172

Online, jihadists have celebrated the Proclamation and “praised Trump as ‘the best caller to Islam,’ signaling the President’s ban would attract new believers.”173

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165 Id.
169 See id. at *6–7.
170 Id. at *13.
171 Id. at *13–27.
172 Id. at *23–27.
the minds of many Muslims, the Proclamation is viewed as an outright ban on Muslims, alienating them. This alienation could push some to such extremism that they join terrorist organizations because they feel welcomed there, unlike the United States.\textsuperscript{174} The Proclamation is a clear example of how the terrorist organizations want the Western world to react, because fear breeds hatred and hatred breeds more hatred and violence. The Proclamation is a recruitment tool for terrorist organizations because it is contributing to an endless cycle of hatred and hostility. The federal government should be encouraging or compelling social media companies to commit more resources to actively monitor their sites for terrorist propaganda and eliminate such propaganda to thwart online radicalization.

Additionally, the Proclamation is not only negatively impacting the individuals and families from the banned countries but also American citizens, educational institutions, corporations, and the United States economy. The Proclamation has caused families to become indefinitely separated, resulting in misery and distress for thousands of families, pushing at least one individual to the point of suicide.\textsuperscript{175} Within one month after the Court decided Trump, American citizen, Mahmood Salem, killed himself in his Louisiana home, because the decision prevented his wife and five children in Yemen from reuniting with him.\textsuperscript{176} Yemen is currently facing a major cholera outbreak on top of the atrocious civil war ravaging their country, and yet, immigration lawyers say that visa waivers are being automatically denied even though the Proclamation has an “undue hardship” waiver.\textsuperscript{177}

The Proclamation, even with its exceptions for some students, is also detrimental to post-secondary education because it decreases the amount of international students, faculty, and scholars from the banned countries who benefit these educational institutions and their students.\textsuperscript{178} Educational institutions invest in attracting international students, faculty, and scholars to their campuses, because they bring unique perspectives and knowledge from their home countries which “‘foster[s] [a] global understanding’” leading to “‘advances in medicine and science, progress toward equal treatment of women and religious minorities, and respect for democracy and the rule of law.’”\textsuperscript{179} These attempts to attract international academics and students “depends on U.S. immigration policies” and the Proclamation

\textsuperscript{174} Brief of Retired Generals and Admirals of the U.S. Armed Forces as Amici Curiae Supporting Respondents, \textit{supra} note 170, at *24–25.
\textsuperscript{175} See Mary Papenfuss, \textit{Yemeni-American Dies by Suicide After Trump Travel Ban Bars his Family}, \textsc{Huffington Post} (Jul. 29, 2018, 1:15 AM), https://www.huffingtonpost.com/entry/mahmood-salem-kills-self-when-family-is-barred-from-us-trip-american_us_5b5fcbf64b0de86f497a9b1.
\textsuperscript{176} \textit{Id.}
\textsuperscript{179} \textit{Id.} at *11–12.
indefinitely obstructs that process and the benefits it provides the United States and the world.\(^\text{180}\)

Moreover, it is estimated that international students added $32.8 billion to the American economy and “contributed to the creation of 400,000 American jobs in the 2015–16 academic year.”\(^\text{181}\) This estimate and other reasons discussed below show that “[i]mmigration is a key driver of the U.S. economy” and that the Proclamation is detrimental to the economy and corporations.\(^\text{182}\) Many immigrants are entrepreneurs that start businesses in the United States which create jobs, boost GDP, and spur innovation.\(^\text{183}\) Due to the prohibition on a multitude of these potential entrepreneurs, “the public’s interest in innovation is thwarted at both the state and corporate levels.”\(^\text{184}\) Furthermore, American corporations depend on a reliable and undeviating immigration system in order to properly make business decisions regarding their investments and hiring of employees.\(^\text{185}\) The Proclamation disables corporations from doing so because there is uncertainty as to additional risks and costs involved with making such decisions.\(^\text{186}\) Due to the insurmountable evidence that the Proclamation is ineffective at attaining its intended goals and is detrimental to individuals, the United States, and the world, the Proclamation is undoubtedly unnecessary.

**B. Trump v. Hawaii Decision is Contrary to Separation of Powers Principle**\(^\text{187}\)

The consequential effect that the *Trump* decision has on separation of powers justifies the need for an amendment of § 1182(f). The plenary power doctrine has been understood as the judiciary leaving immigration policy issues to the other political branches.\(^\text{188}\) However, it is still unclear how power over immigration is distributed between the executive and legislative branches.\(^\text{189}\) “[The] Court has repeatedly emphasized that ‘over no conceivable subject is the legislative power of Congress more complete than it is over’ the admission of aliens.”\(^\text{190}\) It is important to note that Congress has textual authority from the Constitution over

\(^{180}\) See id.

\(^{181}\) Id. at *16–17.


\(^{183}\) Id. at *5–8.

\(^{184}\) Id. at *8.

\(^{185}\) Id. at *8.

\(^{186}\) Id. at *8–9.

\(^{187}\) The *Trump* majority is also incorrect in its Establishment Clause analysis. It seemed to be applying rational basis review, but it only referred to three cases that are cited for rational basis with bite review, not rational basis, which the Proclamation would certainly fail under for its overly excessive under inclusiveness and over inclusiveness. A full Establishment Clause analysis is beyond the scope of this Comment.


\(^{189}\) Id. at 460, 465.

enacting immigration policy while the President does not. Specifically, Congress’s textual authority comes from both the Naturalization Clause and Commerce Clause.

The theory that the President has inherent power over exclusion of aliens should be denied. “A literal reading of [the Knauff] decision provides the President with an [inherent] authority that arguably exists independently from Congress, by enabling the President to act contrary to the ‘expressed or implied will of Congress’” which would be a violation of the third tier of Justice Jackson’s framework in Youngstown. Knauff primarily relies on Curtiss-Wright which supports the President’s immigration power on the basis of the President’s inherent power over foreign affairs which encompasses immigration. However, immigration should not be viewed as exclusively involving foreign affairs but also domestic affairs because it “significantly affect[s] individuals, businesses, and communities within the United States.” The fact that American citizens are being separated from their families by the Proclamation proves that immigration is not purely a foreign affairs issue.

Congress’s enactment of § 1182(f) within two years of Knauff would be redundant if the Executive Branch did actually have inherent power over alien exclusions. Why would the legislature delegate to the President statutory authority if the President already has the broad inherent power to exclude whomever from entering the United States? Furthermore, subsequent cases have cited to § 1182(f) instead of basing their discussion of the President’s exclusion power on the theory of inherent presidential authority. Knauff should be “reinterpreted more narrowly to stand for the idea that the President has the power to regulate alien exclusion in accordance with statutory authority . . . as a means of upholding the constitutionality of Congress’s delegation to the President.” “This narrower interpretation of inherent power can reconcile Knauff with both the immigration case law predating the decision, and the actions of Congress and the Court following the decision.” It would allow for the preservation of essential checks and balances by allowing the Judicial Branch to interpret Congress’s delegation to the Executive Branch while maintaining the Executive’s broad exclusion power through § 1182(f). The theory of inherent presidential exclusion power is dangerous to the principle of separation of powers and is inconsistent with early case law and has no textual basis in the Constitution while Congress does have textual authority over immigration.

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192 Eastman, supra note 191, at 12.
193 Lee, supra note 25, at 245.
194 Id. at 246–47.
195 Id. at 247–48.
196 Id. at 240–41.
197 Id. at 241.
198 Id. at 254.
199 Id.
200 Id.
201 See id. at 251; Eastman, supra note 191, at 10, 12.
Therefore, the President only has statutory power over immigration and must act within the scope of his delegated authority from Congress.\(^202\)

President Trump’s Proclamation is outside the scope of his delegated authority, § 1182(f). Justice Jackson’s concurrence in *Youngstown* contains the controlling framework used to assess situations such as here.\(^203\) To reiterate, Justice Jackson stated, “[w]hen the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb, for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter.”\(^204\) Looking at the legislative history, statutory context, and past practice surrounding the use of § 1182(f), it is evident that the President’s Proclamation is incompatible with congressional intent. The majority’s statutory analysis was flawed, because they only read § 1182(f) in isolation from the rest of the INA, thus overlooking the context of the President’s exclusion power.\(^205\) In 1965, Congress made two fundamental amendments to the INA.\(^206\) First, Congress “made family reunification the ‘foremost’ priority in granting immigrant visas,” and second, Congress removed national-origin quotas by enacting § 1152(a)(1)(A).\(^207\) The Proclamation surely undermines Congress’s family reunification priority evidenced by the separation of American families. The Proclamation also undermines Congress’s rejection of a national-origin quota because it is essentially reinstating that quota regarding the affected countries making it a “de facto national origin quota.”\(^208\) The Court’s narrow reading of § 1152(a)(1)(A) led the Court to conclude that the statute does not restrict the President’s power under § 1182(f). The Court reasoned that there is a distinction between admissibility and visa issuance. This conclusion misrepresents Congress’s intent when enacting the statute, which was “to prevent administrative backsliding toward the discredited quota regime.”\(^209\)

Additionally, most of the travel suspension orders enacted under § 1182(f) ban groups of individuals that have committed specific harmful acts, thus, past practice shows that bans are “carefully tailored” and within the scope of the delegated authority.\(^210\) Even the suspension orders that had almost sweeping effects on an entire country did not completely bar nationals from entering the United States because they did not prevent immigrant visa applicants from entering and included more exceptions than the Proclamation does.\(^211\) Moreover, those were based on exigent circumstances that Congress had not covered in the INA or in


\(^{203}\) See Bashor, *supra* note 48, at 628.

\(^{204}\) *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637–38 (1952) (Jackson, J., concurring).


\(^{206}\) *Id.* at 39.

\(^{207}\) *Id.*

\(^{208}\) *Id.* at 49.

\(^{209}\) *Id.* at 46.

\(^{210}\) *Id.* at 43.

\(^{211}\) *Id.* at 44–45.
response to political crises.\textsuperscript{212} For example, the \textit{Trump} majority cites the travel suspension of approximately 125,000 inadmissible Cuban nationals—25,000 of those being criminals—who were attempting to mass migrate via boat to the United States, which was facilitated by Fidel Castro and the Cuban government.\textsuperscript{213} This is a completely different situation because there was no preventative measure in place to stop these illegal Cuban immigrants from entering the United States. Contrarily, nationals of the Proclamation’s affected countries cannot easily enter the United States due to their geographic locations and can be vetted by consular officers, unlike the Cuban migrants. The majority also cited President Carter’s ban on Iranian nationals after the Iranian hostage crisis begun.\textsuperscript{214} This ban was sufficiently justified and in line with congressional intent because Iran violated international law and diplomatic immunity which could not be condoned, and Congress could not immediately act.\textsuperscript{215} Based on the legislative history and context of the INA as well as past practice, the Proclamation is not in line with congressional intent surrounding § 1182(f).\textsuperscript{216}

The Supreme Court has long been inattentive to “the scope of the President’s power over immigration policy” and separation of powers issues in this context.\textsuperscript{217} Justice Jackson cautioned, “[t]he opinions of judges . . . often suffer the infirmity of confusing the issue of a power’s validity with the cause it is invoked to promote . . . [t]he tendency is strong to emphasize transient results upon policies . . . and lose sight of enduring consequences upon the balanced power structure of our Republic.”\textsuperscript{218} The \textit{Trump} majority, apparently preoccupied by not encroaching on Presidential power and seemingly convinced that the Proclamation was made in response to a legitimate national security threat, left the Executive with excessive authority over immigration—certainly more authority than Congress intended.\textsuperscript{219} This is evidenced by the Court’s reluctance to use President Trump’s prejudicial statements to show that the Proclamation is only supported by animus, reasoning that deciding against the Proclamation “could impair the effective performance of the political branches in their roles” regarding immigration law.\textsuperscript{220} It is true that the Legislature and the Executive have plenary power over immigration law and, historically, the Supreme Court has taken a “hands-off approach” in cases where the government’s immigration policies are at issue.\textsuperscript{221} Thus, the majority’s fear of encroaching on the political branches in the realm of immigration law is not unfounded. It is a legitimate concern that by “second-guessing” the President’s rationale behind immigration policies, the Court will

\textsuperscript{212} See id. at 45.
\textsuperscript{214} Trump, 138 S. Ct. at 2415; Margulies, supra note 205, at 46.
\textsuperscript{215} See Margulies, supra note 207, at 46.
\textsuperscript{216} Id. at 36.
\textsuperscript{217} Cox & Rodriguez, supra note 188, at 460–61.
\textsuperscript{218} Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 634 (1952) (Jackson, J., concurring).
\textsuperscript{219} Margulies, supra note 205, at 1.
\textsuperscript{220} Id.
\textsuperscript{221} Feere, supra note 21.
“open the door for future judicial interventions for future presidents acting from more genuine national security concerns.”

However, the Court’s decision to not impose on the President’s power has created a more concerning problem of bolstering the President’s exclusion power over immigrants which exceeds the scope of the delegation that Congress intended. The excessive degree of judicial deference given to the President signals that the Executive will be virtually untouched by the Judicial Branch. The decision sets precedent for future executive action pursuant to § 1182(f) that potentially discriminates based on nationality or religion where the President has an essentially unfounded rationale for the ban, such as here. This is contrary to what Congress intended.

It is now the political responsibility of Congress to remedy this problem. The majority mentions that if the Court defines “class” within the context of § 1182(f), then it would be creating “an unspoken tailoring requirement found nowhere in Congress’s grant of authority.” It is time for Congress to correct this deficiency and create this tailoring requirement to work towards a balance of powers over immigration.

C. Proposed Amendment to § 1182(f) of the INA

Congress should amend § 1182(f) of the INA to state the following:

If the President finds that the entry into the United States by: a class of aliens that have collectively or individually engaged in a specified harmful conduct; a class of illegal aliens; or nationals from a country, that has recently violated diplomatic immunity or international law, that is currently and intentionally physically harming American citizens, that is at war with the United States, or is in a significant political crisis with the United States, he may by proclamation, and for a specified period of time up to a maximum period of 365 days, suspend the entry of or impose restrictions on the entry of said aliens. The President is required to provide factually supported evidence to adequately support the proclamation. All non-sensitive information pertaining to the President’s reasoning behind the proclamation is required to be publicly disseminated within seven days of the effective date of the proclamation.

D. The Value Behind the Proposed Amendment

There are multiple reasons why the proposed amendment to § 1182(f) will benefit all, including the Executive Branch. First, it leaves the President’s power largely intact but with an acceptable level of discretion in excluding aliens from the

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223 See Margulies, supra note 205, at 50.
224 See id. at 38.
225 Trump, 138 S. Ct. at 2410.
United States in situations where Congress is unable to promptly act to thwart a concrete threat. The amendment also works to protect the President’s actions under the statute by preventing legal challenges because of the transparency it requires. The level of transparency is also beneficial to the federal government because it promotes the people’s faith in the government by deterring unsupported or illegitimately supported travel suspensions.

The amendment presents Congress with the “opportunity to update public policy to reflect current norms, to correct outdated assumptions, and to address unforeseen problems.”\(^{226}\) § 1182(f) has been enacted long enough for all legitimate scenarios to have arisen and Congress can now specify every broad type of scenario where executive action is needed under the statute. There is no need to have an ambiguous statute that grants the President such broad discretion when the amendment covers all the unforeseen situations at the time of the INA’s enactment. It would be a modernization of the statute by removing this inefficiency to “better serve the purposes of government.”\(^{227}\)

In addition, the amendment is more concrete in that it contains explicitly stated situations that the President must use to back the travel suspensions, making it more efficient for courts to decide the validity of the executive action because the courts can focus on the law and “avoid political heat for controversial policy updating.”\(^{228}\) The amendment provides “more clarity, predictability, and transparency” that benefits the courts in applying the law to the facts.\(^{229}\)

There are two alternatives for Congress that will not be as successful as amending § 1182(f) of the INA. Congress, through the appropriations clause, could withhold or decrease funding to certain agencies, such as Citizenship and Immigration Services or Customs and Border Protection, to influence those agencies to not enforce the Proclamation.\(^{230}\) However, this tactic would be ill-advised because it would only exert force on the President indirectly at the expense of the executive agencies and the country’s national security. Another alternative would be to enact an amendment containing a legislative veto that requires a majority vote in both Houses without the President’s authorization to effectuate a travel suspension.\(^{231}\) However, in *INS v. Chadha*, the Court held legislative vetoes


\(^{227}\) See *id.* at 1423.

\(^{228}\) *Id.* at 1324.

\(^{229}\) See *id.* at 1414.


\(^{231}\) See Abner S. Greene, *Checks and Balances in an Era of Presidential Lawmaking*, 61 U. CHI. L. REV. 123, 193–96 (1994). A legislative veto would be a beneficial solution to restoring the balance of power between the political branches as the President continues to gain lawmaking power at the expense of Congress with inadequate checks on his lawmaking ability. However, given the current law and the text of the Constitution, it will not happen until there is widespread acceptance of legislative vetoes in limited situations where it is not considered congressional.
unconstitutional because all legislation must be authorized by the President before being enacted. Thus, the proposed amendment is the only viable solution to this separation of powers issue.

Most importantly, if Congress does not amend § 1182(f), then its inaction potentially invokes the danger of congressional acquiescence. The acquiescence doctrine involves an interpretation of a statute being sustained by the mere fact that Congress has or has not taken any subsequent action addressing the interpretation. Any future travel ban that is challenged in court will be supported by the inaction of Congress as “indicia of congressional intent” and is more likely to be upheld. Congress’s inaction after Trump acts as a ratification of President Trump’s Proclamation while essentially supporting all subsequent presidents’ similar actions pursuant to § 1182(f). The congressional approval implied from their inaction may signal to the Executive, the Judiciary, and potential plaintiffs that any executive action taken under § 1182(f) will most likely stand. Thus, congressional inaction would aid the President in sustaining excessive power over immigration policy. “[A] systematic, unbroken, executive practice, long pursued to the knowledge of the Congress and never before questioned . . . may be treated as a gloss on ‘Executive Power’ vested in the President by § 1 of Article II.” The Trump decision may appear narrow in its effect, but it has the potential to have a broad impact on future executive actions pursuant to § 1182(f). Without such an amendment, the main consequence is a detriment to Congress’s vested role of directing immigration policy in the United States.

E. Presidential Attempts to Circumvent the Proposed Amendment

One potential issue is that the President may attempt to invoke his implied emergency powers to declare a national emergency to circumvent the requirements of the amendment. The two legal sources that are viewed as granting the President national emergency powers are the Constitution and congressional delegation. The Constitution, however, contains no expressed authority regarding national emergencies. Putting aside the President’s delegated authority over national emergencies, there has been an ongoing debate over whether the President has implied authority from his enumerated powers in the Constitution to support a

overreach but an essential check on the President’s lawmaking abilities. A full discussion of this topic is beyond the scope of this Comment.

234 Id. at 28–29.
235 See id. at 28–29, n. 5.
236 Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 610–11 (1952) (Frankfurter, J., concurring).
237 See Christiansen & Eskridge, supra note 226, at 1374.
239 Edelson, supra note 40, at 7.
The enumerated powers, individually, combined, or collectively, that would be cited as implying national emergency authority are: “the President’s power as Commander-in-Chief, foreign relations, relations with Congress, and the duty to ‘take Care that the Laws be faithfully executed.’”241 The policy justification for this argument is that the President is the most capable branch of government to deal with situations that require immediate action since the legislative process is too slow and the President alone can “make [prompt] decisions and execute them without delay.”242 However, “[e]xtraordinary conditions do not create or enlarge constitutional powers nor justify the exercise of unauthorized powers.”243 The Framers expressly rejected the idea that the Executive should have exclusive emergency powers based on their experience.244 It is essential that during times of national emergency, our three-branch-system functions properly.

This proposed amendment would prevent the President from invoking his implied authority to declare a national emergency banning immigration under circumstances not spelled out in the proposed amendment. If Congress adopts the proposed amendment, the expressed will of Congress will become apparent. When courts interpret the statute while applying the third tier of Justice Jackson’s *Youngstown* framework, they will hold any such national emergency contrary to the will of Congress, and thus, invalid. For the national emergency in this circumstance to be upheld, the analysis would turn on whether the President has expressed authority over emergencies from the Constitution.245 Because there are no enumerated emergency powers conferred upon the Executive Branch, the national emergency could not be upheld.246 The President could not rely on his implied emergency powers to uphold the national emergency which has been determined by the third tier of Justice Jackson’s framework.247 Thus, presidential attempts to circumvent the proposed amendment through the use of a national emergency would fail in court.

V. CONCLUSION

“For decades, stable U.S. immigration policy has embodied the principles that we are a people descended from immigrants, that we welcome new immigrants, and that we provide a home for refugees seeking protection.”248 Even when there is a national security threat to the United States, the government has dealt with the

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242 *Id.* at 122.
243 *Id.* at 123.
244 Edelson, *supra* note 40, at 7, 12.
247 Turner, *supra* note 36, at 675 (Pointing out that the examples Justice Jackson referred to in upholding executive action and trumping Congress’s statutes under tier three of the framework depended on textual grants of power to the executive rather than implied powers.).
problem “while maintaining [the country’s] fundamental commitment to welcoming immigrants.”

The Trump Administration’s strategy against terrorism and improving information sharing with foreign countries in enacting the Proclamation is misplaced. The change in strategy of terrorist organizations from external attacks to recruiting individuals over the Internet makes it unnecessary to completely ban immigrants from entire countries in an effort to prevent terrorism and improve information sharing. The federal government should not pursue poor immigration policies where the negative consequences significantly outweigh any benefits.

The Supreme Court’s ruling in Trump constituted a judicial abandonment of its duty to keep the Executive Branch in check, essentially leaving the Presidency with excessive discretion regarding alien exclusion power. The Proclamation is contrary to the implied will of Congress, and thus, a violation of separation of powers. The amendment put forth in this Comment leaves the President with an appropriate level of discretion while providing clarity and predictability as to the law which benefits the Executive Branch in its enforcement and the Judicial Branch in its interpretation. The proposed amendment would reinforce Congress’s superior role in shaping immigration policy in this country by bringing the political branches’ power over immigration law back to equilibrium while restoring the people’s faith in this country’s founding principles.

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249 Id.