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Pretext, Reality, and Verisimilitude: Truth-Seeking in the Supreme Court

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PRETEXT, REALITY, AND VERISIMILITUDE: TRUTH-SEEKING IN THE SUPREME COURT

Robert N. Weiner*

ABSTRACT

The assault on truth in recent public discourse makes it especially important that judicial decisions about Executive actions reflect the world as it is. Judges should not assume some idealized reality where good faith prevails, the motives of public officials are above reproach, and administrative processes are presumptively regular. Unfortunately, however, the Supreme Court has acted on naïve or counterfactual assumptions that limit judicial review of administrative or Presidential action. Such intentional judicial blindness or suspension of justified disbelief—such lack of verisimilitude—can sow doubt regarding the Court’s candor and impartiality.

In analyzing the Court’s fealty to objective reality in its review of Executive actions, this Article focuses primarily on two Supreme Court decisions: the Travel Ban Case and the Census Case. These decisions illustrate how the mode of judicial review can influence verisimilitude. In the Travel Ban Case, the Court refused to look behind an implausible explanation of the government’s actions, a paradigm judicial departure from verisimilitude inimical to the legitimacy of the Court. The Census Case is a less direct assault on objective reality, as the Court ultimately did examine the truthfulness of the government’s justifications. But it did so in a manner that does not manifest a vital commitment to truth.

This Article will also touch upon a third case: U.S. Department of Homeland Security v. Regents of the Univ. of Cal. (the DACA Case). The DACA Case did not challenge objective reality but on the contrary insisted that agencies provide the actual reasoning behind their decisions rather than justifications they thought of later, even if those justifications were otherwise valid. The case thus reinforces the importance of candor and accuracy.

A key lesson from these cases is that to preserve its legitimacy, the Court should abandon or modify doctrines that cede judicial review of national security issues, limit consideration of pretext, decline to assess the intent of government actors, and indulge a presumption of regularity for administrative determinations. These reforms are achievable without a major overhaul of administrative law standards.

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TABLE OF CONTENTS

I.	INTRODUCTION	387
II.	THE LEGITIMACY OF THE JUDICIAL BRANCH	394
III.	THE SUPREME COURT'S SPARRING WITH VERISIMILITUDE.....	402
A.	<i>The Travel Ban Cases</i>	402
1.	President Trump's Anti-Muslim Statements	402
2.	The Travel Ban Orders	403
3.	The Supreme Court decision	406
4.	The dissents	408
5.	Effect on Legitimacy	411
B.	<i>The Census Case</i>	414
1.	The census	414
2.	The lawsuits and the record	417
3.	The district court decision	419
4.	The Supreme Court Decision—Part 1	421
5.	The Supreme Court Decision—Part 2	422
6.	The dissent.....	423
7.	Effect on the Court's legitimacy	424
C.	<i>The DACA Case</i>	430
1.	The DACA program.....	431
2.	The Supreme Court opinion.....	432
3.	Effect on the Court's legitimacy	435
IV.	REFORMING DOCTRINES OF DEFERENCE	436
A.	<i>National Security and Pretext</i>	436
B.	<i>Undue Reticence Regarding Pretext: The Reason-Giving Requirement</i>	441
1.	Reason-giving and the Travel Ban Case.	442
2.	Reason-giving and the Census Case.....	443
C.	<i>The Presumption of Regularity</i>	452
V.	CONCLUSION.....	454

“Hear now this, O foolish people, and without understanding; which have eyes, and see not; which have ears, and hear not.”¹

*Verisimilitude: the appearance of being true or real.*²

I. INTRODUCTION

United States courts should be an oasis of truth in a truth-parched landscape. The Nation has spent much of the last decade beguiled, confused, and repulsed by purveyors of “alternative facts.” These invented facts ranged from the size of the crowd at the 2016 Inauguration,³ to climate change⁴ and Covid-19,⁵ to 30,000 plus other Presidential falsehoods identified by independent fact-checkers during the Trump Administration.⁶ President Donald Trump expected Americans to credit his statements over scientific fact, objectively verifiable truth, and even their own observations. Without intended irony, he told supporters, “[j]ust remember, what you’re seeing and what you’re reading is not what’s happening,”⁷ as in, “Who ya gonna believe, me or your own eyes?”⁸

Facilitating this rise of alternative facts is the intensification of partisan identification. It has become so integral to the self-image of many individuals that they bend reality to fit their preconceptions, rather

1. *Jeremiah* 5:21.

2. *Verisimilitude*, WEBSTER’S NEW WORLD DICTIONARY OF THE AMERICAN LANGUAGE (1964).

3. See Robert Farley & Lori Robertson, *The Facts on Crowd Size*, FACTCHECK (Jan. 23, 2017), <https://www.factcheck.org/2017/01/the-facts-on-crowd-size/> [https://perma.cc/2RA7-53GV].

4. See Brandon Miller, *Fact-checking Trump’s False Claims on Climate*, CNN (June 5, 2019, 1:48 PM), <https://www.cnn.com/2019/06/05/politics/trump-fact-check-climate-change> [https://perma.cc/Q4JA-AQW5]; Rebecca Hersher & Joe Palca, *Longtime Climate Science Denier Hired at NOAA*, NPR (Sept. 12, 2020, 3:55 PM), <https://www.npr.org/2020/09/12/912301325/longtime-climate-science-denier-hired-at-noaa> [https://perma.cc/TF5N-8FAV].

5. See Christian Paz, *All the President’s Lies About the Coronavirus*, THE ATLANTIC (Nov. 2, 2020, 2:20 PM), <https://www.theatlantic.com/politics/archive/2020/11/trumps-lies-about-coronavirus/608647/> [https://perma.cc/G7GX-XGVR].

6. See Glenn Kessler, Salvador Rizzo & Meg Kelly, *Trump’s False or Misleading Claims Total 30,573 Over 4 Years*, WASH. POST (Jan. 24, 2021, 3:00 AM), <https://www.washingtonpost.com/politics/2021/01/24/trumps-false-or-misleading-claims-total-30573-over-four-years/> [https://perma.cc/L6RX-PW3C]; David Markowitz, *Trump is Lying More Than Ever: Just Look at the Data*, FORBES (May 5, 2020, 7:00 AM), <https://www.forbes.com/sites/davidmarkowitz/2020/05/05/trump-is-lying-more-than-ever-just-look-at-the-data/?sh=153d60b21e17> [https://perma.cc/7GRQ-L8VQ].

7. Mahita Gajanan, *‘What You’re Seeing . . . Is Not What’s Happening.’ People Are Comparing This Trump Quote To George Orwell* TIME (July 24, 2018), <https://time.com/5347737/trump-quote-george-orwell-vfw-speech/> [https://perma.cc/GU4X-HUXH].

8. DUCK SOUP (Paramount Pictures 1933).

than modify their views to fit the facts.⁹ In other words, Americans have violated Senator Daniel Patrick Moynihan's maxim, "[e]veryone is entitled to his own opinion, but not to his own facts."¹⁰ Partisans now do have their own facts, a phenomenon exacerbated by the fractionation of news sources according to ideology.¹¹ Viewers can pick their slant and many only pay attention to stations, websites, podcasts, Twitter feeds, or other sources they agree with.¹² The result is that some receptive audience will inevitably view the false explanation as gospel.

During this chaotic political era, judicial decisions about Executive actions should reflect the world as it is. These decisions should not assume some idealized reality where good faith prevails, the motives of public officials are above reproach, and administrative processes are presumptively regular. Unfortunately, the Supreme Court has acted on naïve or counterfactual assumptions that limit judicial review of administrative—in particular, Presidential—action.¹³

Such approaches have led the Court to blind itself to obvious facts regarding government misconduct and to reach conclusions at odds with common sense. Whatever the justifications for these disabling approaches, the facts that appear to be "true" or "real" to ordinary observers clash with the "facts" that the Court adopts or lets stand.

9. See Ezra Klein, *WHY WE'RE POLARIZED* (2020); Allison Orr Larsen, *Constitutional Law in an Age of Alternative Facts*, 93 *NYU L. REV.* 175, 192 (2018) (quoting Dan Kahan, *Fixing the Communications Failure*, 463 *NATURE* 296, 296 (2010)) ("[P]eople tend to 'endorse whichever position reinforces their connection to others with whom they share important commitments.'").

10. Public Affairs, *An American Original*, excerpted from *Daniel Patrick Moynihan, A Portrait in Letters of an American Visionary*, *VANITY FAIR* (Oct. 6, 2010); see Vicki C. Jackson, *Thayer, Holmes, Brandeis: Conceptions of Judicial Review, Factfinding, and Proportionality*, 130 *HARV. L. REV.* 2348, 2386 (2017) ("[H]yperpolarization of political life has seemingly created areas in which each 'side' has its own 'facts.'").

11. See generally Seth Flaxman, Sharad Goel & Justin M. Rao, *Filter Bubbles, Echo Chambers, and Online News Consumption*, 80 *PUB. OP. Q.* 298 (2016); Amy Mitchell et al., *Political Polarization and Media Habits*, *PEW RSCH CTR* (Oct. 21, 2014); see also Eric Berger, *When Facts Don't Matter*, 2017 *BYU L. REV.* 525, 527 (2017) ("We live in a post-factual world. Prominent political figures, including the President of the United States, regularly accuse their opponents of peddling lies. Conservatives and liberals both routinely characterize inconvenient news stories as 'fake.' Our body politic is bitterly divided, and the disagreement isn't limited just to politics and policy. We disagree about facts.") (internal citation omitted).

12. *Art of the Lie*, *THE ECONOMIST* (Sept. 10, 2016), <https://www.economist.com/news/briefing/21706498-dishonest-politics-nothing-new-manner-which-some-politicians-now-lie-and> [<https://perma.cc/FV2A-2TYV>] ("The fragmentation of news sources has created an atomized world in which lies, rumour and gossip spread with alarming speed. Lies that are widely shared online within a network, whose members trust each other more than they trust any mainstream-media source, can quickly take on the appearance of truth.")

13. See discussion *infra* notes 127–49, 220–225, 229, 138–40 (discussing Justice Breyer's dissent).

The divergence is particularly troublesome when the Supreme Court disregards or overrides factual findings of a lower court or legislature in the face of clear evidence that government officials acted dishonestly or invidiously. In these episodes of intentional judicial blindness or suspension of justified disbelief, the discrepancies between the real world and the judicial construct can sow doubt regarding the Court's candor and impartiality, not to mention its insulation from the erosion of truthfulness across the social landscape. In other words, lack of verisimilitude can undermine the Court's legitimacy.

Some defend this incongruity. In addressing the pretextual characterization of the Travel Ban in *Trump v. Hawaii* (the *Travel Ban Case*),¹⁴ Professor Josh Blackman argues that the judiciary must “focus on *legality*, even if it conflicts with *reality*.”¹⁵ But whether or not that is true of lower courts, the Supreme Court to a large extent establishes legality. It decides whether to create, invoke, abrogate, or carve out an exception to a doctrine of deference.¹⁶ The wrong choice can create an unnecessary mismatch between the real facts and those the Court accepts.

The irony is that the approaches to judicial review of Executive action causing these mismatches are designed, at least partly, to safeguard judicial legitimacy.¹⁷ Presumptions, deference, and narrow standards of review can prevent courts from appropriating authority properly delegated to the Executive Branch.¹⁸ They can avert the antagonism of the other branches of government,¹⁹ and they can steer courts away from esoteric areas that lay judges cannot readily master.²⁰ But

14. 138 S. Ct. 2392 (2018).

15. Josh Blackman, *The Travel Bans*, 2017 CATO SUP. CT. REV. 29, 30 (2018) (emphasis in original).

16. The discussion here focuses on doctrines of deference that the Court voluntarily invokes. It does not deal with jurisdictional bars to judicial action, where the Court, lacking power to act, may therefore allow an alternative reality to stand. *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 95 (1998); *Ex parte McCardle*, 74 U.S. 506, 514 (1868) (“Without jurisdiction the court cannot proceed at all in any cause.”). Subject matter jurisdiction, though perhaps manipulable, is not optional, unlike the self-inflicted doctrines of deference discussed here. Professor Blackman points out the adversarial process also distorts judicial reality. If a fact is not in the record, he notes, an appellate court cannot rely on it. Blackman, *supra* note 15, at 53. But courts can take judicial notice of noncontroversial facts outside the record. Further, as to legislative facts, the kind likely to be at issue, the Supreme Court frequently relies on amicus briefs, *see, e.g.*, Allison Orr Larsen, *The Trouble with Amicus Facts*, 100 VA. L. REV. 1757, 1774–75 (2014), or on bald assertion.

17. *See* Adrian Vermeule, *Deference and Due Process*, 129 HARV. L. REV. 1890, 1922–23 (2016) (“[J]udges should recognize — and increasingly have recognized — the possibility that their limited information, episodic perspective, and time constraints together imply that the marginal benefits of judicial intervention in procedural design may be low or even negative as the intensity of intervention increases.”).

18. *See id.*

19. *See id. passim.*

20. *See id.* at 1925.

non-jurisdictional doctrines limiting judicial review of Executive action are not sacrosanct. They should be more malleable than the truth. When, in the hands of the Supreme Court in particular, so-called legality displaces reality, the discontinuity may damage the Court's public standing.

Truthful explanations of government actions are central to both the integrity and the effectiveness of the administrative process, to the viability of judicial oversight, and to public accountability.²¹ Agencies forced to explain their decisions make better decisions.²² Courts cannot effectively review decisions if misled regarding their bases. It would be anomalous, if not inane, to allow courts to assess whether the government's explanations of its actions are arbitrary and capricious, but not whether they are true. Examining the veracity of officials' explanations of their conduct is an essential component of judicial review under the arbitrary and capricious standard, at the very least where there is reason to believe that government actors have provided false explanations.²³ Yet—unlike some lower courts, including the trial court in the *Department of Commerce v. New York*—the Supreme Court has artificially siloed review of arbitrariness from the explicit determination of veracity.²⁴

When the Supreme Court recently examined the truth of the government's claims under the Administrative Procedure Act in *Department of Commerce v. New York* (the *Census Case*),²⁵ it departed from the usual review of administrative action and instead used the rubric of pretext.²⁶ By treating the inquiry into pretext as so extraordinary, the Court both

21. See discussion *infra* notes 277–82.

22. See Martin Shapiro, *The Giving Reasons Requirement*, 1992 U. CHI. L. FORUM 179, 181 (1992) (reason-giving is a “mild self-enforcement mechanism for controlling discretion. The reason-giving administrator is likely to make more reasonable decisions than he or she otherwise might and is more subject to general public surveillance.”).

23. *E.g.*, *Motor Vehicle Mfrs. Of U.S., Inc. v. State Farm Mutual Automobile Ins. Co.*, 463 U.S. 29 (1983), requires that an agency “examine the relevant data and articulate a satisfactory explanation for its action.” *Id.* at 43. An explanation is not “satisfactory” if it is false.

24. The trial court in *New York v. Dep't of Com.* treated pretext as part of the inquiry into arbitrary and capriciousness. 351 F. Supp. at 634 (if plaintiffs' strong preliminary showing of pretext later matures into a factual finding that “fact” would be material to determining whether the [agency] acted arbitrarily” in violation of the APA (quoting *James Madison Ltd by Hecht v. Ludwig*, 82 F.3d 1085, 1096 (D.C. Cir. 1996)). Other courts have been inconsistent in differentiating the inquiry into pretext from the inquiry into arbitrary and capriciousness. See, *e.g.*, *Cowpasture River Pres. Ass'n v. Forest Serv.*, 911 F.3d 150, 176-79 (4th Cir. 2018); *Saget v. Trump*, 375 F. Supp.3d 280, 361 (E.D.N.Y. 2019) (“An agency's actions are arbitrary and capricious under the APA if they are pretextual.”).

25. *Dep't of Com. v. New York*, 139 U.S. 2551 (2019).

26. *Census Act—Review of Administrative Action—Judicial Review of Pretext—Department of Commerce v. New York*, 133 HARV. L. REV. 372 (2019) (“the Court's holding that the [Census Bureau's] action was illegitimate was based not on the arbitrary and capricious standard but on pretext.”).

underuses an important line of analysis and potentially increases its stigma when it is employed. Instead, the Court should treat pretext as a prefatory portion, or at least an integrated part, of the determination of whether a government action is arbitrary and capricious. This is especially true when—with no presumptive thumb on the scale—there is reason to doubt the veracity of the government's explanations. Further, the Court should minimize categorical exclusions from review that treat the truth as secondary to legality.

The determination of whether Executive actions are arbitrary and capricious may branch at the outset into an explicit assessment of pretext, but this does not mean that a court must follow that trail absent further evidence of falsehood. Nor does it mean that courts should regularly allow intrusive discovery beyond the administrative record into the intent of government actors. In most cases, the administrative record establishes both the basis for the agency's action and the truthfulness of its explanations. If it does not, then that fact will often justify either striking down the action or inquiring further into the reasons offered for it.²⁷

Thus for the most part, whether to allow extra-record discovery is a separate issue from whether to inquire into pretext. Evidence of pretext by itself may not justify requiring supplementation of the record. The party seeking the discovery should have to demonstrate, in addition to evidence of pretext, that 1) the administrative record is inadequate to allow evaluation of the issue, and 2) that a remand to the agency is not an appropriate response.

Contrary to the Chief Justice's concerns in the *Census Case*,²⁸ consideration of pretext does not disallow a role for political factors in Executive decision-making. Determining which real reasons are sufficient to sustain the government action is a separate question from whether the reasons offered are pretextual. The legal sufficiency of the real reasons need not be resolved to justify an inquiry into whether the explanations offered are a sham.

In analyzing the Court's fealty to objective reality in its review of Executive actions, this Article will focus primarily, but not exclusively, on two Supreme Court decisions: the *Travel Ban Case*²⁹ and the *Census*

27. The government in the *Census Case*, 139 S. Ct. 2551, under pressure from the district court, supplemented a paltry record and then stipulated to further expansion before the court ordered discovery outside the administrative record. The district court made its finding of pretext without using the extra-record discovery. *New York v. U.S. Dep't of Com.*, 351 F. Supp. 3d 502, 63 (S.D.N.Y. 2019).

28. 139 S. Ct. at 2573.

29. 138 S. Ct. 2392 (2018).

Case.³⁰ These decisions illustrate how the mode of judicial review can influence verisimilitude. In the *Travel Ban Case*, the Court refused to look behind an implausible explanation of the government's actions, a paradigm judicial departure from verisimilitude that can undermine the legitimacy of the Court. The *Census Case* is a less direct assault on objective reality, as the Court ultimately did examine the truthfulness of the government's justifications. But it did so in a manner that does not instill confidence in the vitality of its commitment to truth.

This Article will also analyze, to a lesser degree, a third case: *U.S. Department of Homeland Security v. Regents of the Univ. of Cal.* (the *DACA Case*).³¹ The *DACA Case* also illustrates the effect of judicial review on verisimilitude, but it is different from the previous two cases. For the most part, it did not challenge objective reality but on the contrary insisted that agencies provide the actual reasoning behind their decisions rather than justifications they thought of later, even if those justifications were otherwise valid. The case thus reinforces the importance of candor and accuracy.

Why focus on these cases out of many? First, the cases were particularly high profile.³² The greater attention means that the result was more likely to affect public perceptions of the Court. Second, the cases reached the Court after at least one lower court had ruled against the executive branch, striking down a major presidential program or initiative.³³ Thus, intense conflict between the executive and judicial branches was baked into the cases, heightening the drama and boosting the intensity of public opinion. Third, public opinion on the issues in the cases divided along partisan lines.³⁴ This increased the prospect that the

30. 139 S. Ct. 2551 (2019).

31. 140 S. Ct. 1891 (2020).

32. See, e.g., Jennie Matthew & Karim Lebbhour, *Trump's First Major Test as Travel Ban Uproar Spreads*, YAHOO NEWS (Jan. 27, 2017), <https://www.yahoo.com/news/trump-unrepentant-travel-ban-protests-swell-173112754.html> [https://perma.cc/GE3D-7MN3]; James Varney, *Citizenship Question for 2020 Census Sparked Online Uproar: Commerce*, WASH. TIMES (Sept. 21, 2018), <https://www.washingtontimes.com/news/2018/sep/21/citizenship-question-2020-census-sparked-online-up/> [https://perma.cc/S75Q-EPG8]; Mark Sherman, *Justices Take up High Profile Case Over Young Immigrants*, ASSOCIATED PRESS (Nov. 11, 2019), <https://apnews.com/article/ap-top-news-immigration-census-2020-us-news-us-supreme-court-6d29a43e17b24de899acb80160c72fa2> [https://perma.cc/HD2P-U4BN].

33. See, e.g., *Time Line of the Muslim Travel Ban*, ACLU OF WASH., <https://www.aclu-wa.org/pages/timeline-muslim-ban> <https://www.aclu-wa.org/pages/timeline-muslim-ban> [https://perma.cc/VN7Z-G8N2] (last visited Oct. 11, 2022); *New York v. Dep't. of Com.*, 351 F. Supp. 3d 502 (S.D.N.Y. 2019), *aff'd in part, rev'd in part and remanded sub nom. Dep't of Com. v. New York*, 204 L. Ed. 2d 978, 139 S. Ct. 2551 (2019); *Fifth Amendment- Due Process Clause - Equal Protection - Department of Homeland Security v. Regents of the University of California*, 134 HARV. L. REV. 510, 511-12 (2020).

34. See, e.g., Gregory A. Smith, *Most White Evangelicals Approve of Trump Travel Prohibition and Express Concerns About Extremism*, PEW RSCH. CTR (Feb. 27, 2017), <https://www.pewresearch.org/fact->

losing partisans would dismiss the result as political, with the lack of verisimilitude providing both ammunition and inducement to do so. And fourth, fortifying this partisan narrative, the Court itself divided based largely on the party of the President who appointed each justice, with the Chief Justice—reflecting perhaps, his institutional perspective—as the swing vote.³⁵

One might argue that these cases are *sui generis*: relics of a Trump Administration that was deliberately contrarian and disdainful of the rule of law.³⁶ But nothing about these decisions suggested that the approach they took was of limited applicability, and all presidents in recent history have pushed the boundaries of their power. In any event, it is far from clear that the Trump era is over. These cases thus illuminate issues that could have long term effects on the legitimacy of the Court.

As shown below, one key lesson from the three cases is that to preserve its legitimacy, the Court should reject, revise, or recalibrate the doctrines governing judicial review of executive branch actions to forestall results that defy reality and common sense. In particular, the Court should modify doctrines which cede judicial review of national security issues,³⁷ limit consideration of pretext,³⁸ decline to assess the

tank/2017/02/27/most-white-evangelicals-approve-of-trump-travel-prohibition-and-express-concerns-about-extremism/ [https://perma.cc/GA5Z-9KXS]. Cf. Michael Wines, *Deceased G.O.P. Strategist's Hard Drive Reveals New Details on the Census Citizenship Question*, N.Y. TIMES (May 30, 2019), <https://www.nytimes.com/2019/05/30/us/census-citizenship-question-hofeller.html> [https://perma.cc/Q3B3-T8VF]; Kathy Frankovic, *Republicans, but not the Country Overall, Would Support a Supreme Court Ruling Against DACA*, YOUNG AM. (Nov. 13, 2019), <https://today.yougov.com/topics/politics/articles-reports/2019/11/13/republicans-not-country-overall-would-support-cour> [https://perma.cc/W9WC-VKVM].

35. See Gillian E. Metzger, *The Roberts Court and Administrative Law*, 2019 SUP. CT. REV. 1, 39 (2019) (“Given that administrative law cases frequently carry high political stakes, such a stark ideological and partisan divide should be particularly troubling for those worried about the Court being seen as a politicized actor.”); Richard L. Hasen, *Polarization and the Judiciary*, 22 ANN. REV. POL. SCI. 261, 261 (2019) (“The Supreme Court . . . often divides along party and ideological lines in the most prominent and highly contested cases. Those ideological lines now overlap with party as we enter a period in which all Court liberals have been appointed by Democratic presidents and all the Court conservatives have been appointed by Republican presidents.”).

36. This factor led two scholars to suggest reducing judicial deference to actions by the Trump Administration. See Sanford Levinson & Mark A. Graber, *The Constitutional Powers of Anti-Publican Presidents: Constitutional Interpretation in a Broken Constitutional Order*, 21 CHAP. L. REV. 133, 137, 154, 166 (calling for “judicial improvisation” because Trump was so “manifestly unfit” to be President; Trump Administration should lose the presumption of regularity for anything done on racial issues); accord, Dawn Johnsen, *Judicial Deference to President Trump*, TAKE CARE BLOG (May 8, 2017), <https://takecareblog.com/blog/judicial-deference-to-president-trump>. But see Robert L. Tsai, *Manufactured Emergencies*, 129 YALE L.J. FORUM 590, 603–04 (2020) (Arguing that this Trump-specific proposal ushers in “judicial superiority,” Tsai proposes instead a burden-shifting rule whenever a challenger adduces facts suggesting pretext).

37. See Stephen I. Vladeck, *The Demise of Merits-Based Adjudication in Post-9/11 National Security Litigation*, 64 DRAKE L. REV. 1035, 1077 (2016).

intent of government actors,³⁹ and indulge a presumption of regularity for administrative determinations.⁴⁰ These reforms are achievable without a major overhaul of administrative law standards.

II. THE LEGITIMACY OF THE JUDICIAL BRANCH

Because of their supposed lack of tangible power compared to the other branches of government, the Supreme Court and lower courts have generally gained credence as authoritative arbiters of disputes between individuals, governments, and institutions. Alexander Hamilton described the Judiciary as the “least dangerous” branch because, unlike the executive and legislative branches, the Judiciary “has no influence over either the sword or the purse; no direction either of the strength or of the wealth of the society; and can take no active resolution whatever. It may truly be said to have neither FORCE nor WILL, but merely judgment; and must ultimately depend upon the aid of the executive arm even for the efficacy of its judgments.”⁴¹ The Supreme Court and constitutional scholars have often echoed this point.⁴²

This perception affects the public as well. Members of the public generally accept even judicial decisions, even when they disagree with the result,⁴³ a key token of legitimacy.⁴⁴ With this legitimacy, nine

38. Hannah M. Fletch, *Honesty in Reason: How Department of Commerce v. New York Began to Tackle the Problem of Regulatory Dishonesty*, 110 GEO. L. J. 659, 673 (2022) (“Unlike Commerce Clause or Equal Protection Clause cases, however, administrative law is much more reluctant to probe into the mindsets and subjective intentions of agency actors unless there is a ‘strong’ showing of bad faith or improper behavior.” (quoting *Citizens to Pres. Overton Park v. Volpe*, 401 U.S. 402, 420 (1971) (emphasis in original))).

39. See *United States v. O’Brien*, 391 U.S. 367, 388 (1968); see also *City of Erie v. Pap’s A. M.*, 529 U.S. 277, 279 (2000) (“[T]his Court will not strike down an otherwise constitutional statute on the basis of an alleged illicit motive.”).

40. Note, *The Presumption of Regularity in Judicial Review of the Executive Branch*, 131 HARV. L. REV. 2431 (2018).

41. The Federalist No. 78.

42. See, e.g., *Williams-Yulee v. The Florida Bar*, 135 S. Ct. 1656, 1667 (2015); *Obergefell v. Hodges*, 135 S. Ct. 2584, 2611 (2015) (Roberts, C.J., dissenting); *King v. Burwell*, 135 S. Ct. 2480, 2497 (2015) (Scalia, J., dissenting); William H. Rehnquist, *Judicial Independence*, 38 U. RICH. L. REV. 579, 595-96 (2004) (explaining that judicial independence depends “in some measure on the public’s respect for the judiciary.”); Lawrence Baum and Neal Devins, *Why the Supreme Court Cares About Elites, Not the American People*, 98 GEO. L.J. 1515, 1530 (2010) (“Lacking concrete sources of power, the Court depends on its public legitimacy.”).

43. Tara Leigh Grove, *The Supreme Court’s Legitimacy Dilemma*, 132 HARV. L. REV. 2240, 2252 and sources cited (2019) (Many scholars argue that the Court enjoys broad “diffuse support” from the public. Under this view, the public generally sees the Court as distinct from the political branches, trusts the Court to make reasonable decisions, and treats its decisions as authoritative, regardless of the ideological valence of a specific ruling.”).

Justices with no military or police power to speak of can order a President to change his policies—and make it stick.⁴⁵

Legitimacy arises from at least two principal sources. The first is necessity. As one observer notes, “The government’s support [for the Court] is acquired because the executive branch acknowledges the value of the Court’s judgment in a manner similar to a patient who recognizes a doctor’s expertise.”⁴⁶ Someone must do what courts do to maintain the social order. The lack of an effective judicial system has been an obstacle to progress in many developing countries.⁴⁷ Without well-functioning courts, businesses cannot enforce contracts or protect themselves from unfair government coercion.⁴⁸ Without a trusted judicial system, the stronger party—physically, economically, or martially—will usually prevail. The resulting reign of Hobbesian lawlessness and uncertainty is toxic to economic growth and stability, not to mention personal freedom.⁴⁹

Still, need by itself might generate little more than grudging submission rather than broad and ready acceptance of judicial rulings. The additional requisite is that the public view the courts as fair and impartial, or at least, as coming sufficiently close to that mark to make the outcome of the judicial process acceptable regardless of who wins. This perception

44. See Richard H. Fallon, Jr., *Legitimacy and the Constitution*, 118 HARV. L. REV. 1787, 1790–91, 1795 (2005) (“[An] official decision possesses legitimacy in a strong sense insofar as the relevant public regards it as justified, appropriate, or otherwise deserving of support”); STEPHEN BREYER, *THE AUTHORITY OF THE COURT AND THE PERIL OF POLITICS* 1–2 (2021) (“The Court’s power, like that of any tribunal, must depend upon the public’s willingness to respect its decisions—even those with which they disagree, and even when they believe a decision seriously mistaken. Such respect matters most when a decision of the Court strongly conflicts with the expressed views of those in other branches, most notably the president.”); James L. Gibson & Michael J. Nelson, *Change in Institutional Support for the US Supreme Court: Is the Court’s Legitimacy Imperiled by the Decisions It Makes?*, 80 PUB. OP. Q. 622, 625 (2016) (“If citizens are willing to stand by the institution even when dissatisfied with its decisions, then the institution is free to do its job as it sees fit.”).

45. James L. Gibson, Milton Lodge & Benjamin Woodson, *Losing, but Accepting: Legitimacy, Positivity Theory, and the Symbols of Judicial Authority*, 48 L. & SOC. REV. 837, 839 (2014) (“Especially since American courts are bereft of the conventional means of eliciting compliance with unpopular decisions (without the proverbial purses and swords), legitimacy is indispensable for institutions whose very job often includes thwarting the will of the majority.”); Brandon L. Bartels & Christopher D. Johnston, *On the Ideological Foundations of Supreme Court Legitimacy in the American Public*, 57 AM. J. POL. SCI. 184, 184 (2013) (“For an institution like the U.S. Supreme Court to render rulings that carry authoritative force, it must maintain a sufficient reservoir of institutional legitimacy, or diffuse support, with the American public and the other branches of government.”).

46. Or Bassok, *The Supreme Court’s New Source of Legitimacy*, 16 U. PA. J. CONST. L. 153, 159 (2013) (emphasis omitted).

47. See Press Release, The World Bank Group, *Rule of Law Central to Fighting Poverty*, News Release No. 2002/013/S (July 9, 2001) (“Empirical evidence shows a large, significant, and causal relationship between improved rule of law and income of nations....”).

48. See *id.* Arbitration is not an answer because courts are necessary to police and enforce arbitration awards.

49. *Id.*

and the resulting acceptance are in peril. The hyper-partisanship that characterizes American society makes it increasingly difficult for the Court to maintain even a patina of impartiality. The descent of the confirmation process into party-line votes on judicial nominees, the outsourcing of judicial selection to private ideological organizations, the chicanery and bitterness that have characterized the debates about prospective judges, undercut the perception of nonpartisan impartiality.⁵⁰ As Professor Gillian Metzger notes, “[c]hallenges to the Court are at new levels, pushed there by the deep political divides over the courts that were evident in the recent political battles over Justice Kavanaugh’s confirmation and Judge Merrick Garland’s failed nomination, and the resultant rightward shift of the Court’s membership.”⁵¹

Thus, although the Supreme Court remains the most respected branch of the federal government (perhaps a low threshold),⁵² a Quinnipiac University Poll reports that only 37% of registered voters have a favorable view of the Court, with 49% holding an unfavorable view and 14% offering no opinion.⁵³ This was the lowest rating since Quinnipiac began conducting a survey about the Court in 2004.⁵⁴ According to a recent Gallup Poll, the Court’s approval rating was 40% down from 49% in July. This rating was the lowest in the 20-year history of Gallup’s polling on the subject.⁵⁵

50. See Neal Devins & Lawrence Baum, *Split Definitive: How Party Polarization Turned the Supreme Court Into a Partisan Court*, 8 SUP. CT. REV. 301 (2016).

51. Gillian E. Metzger, *Considering Legitimacy*, 18 GEO. J. L. & PUB. POL’Y 353, 354 (2020).

52. According to the Pew Foundation’s poll, in 1958, 73% of Americans trusted the federal government most of the time. By 2020, the approval rate was 20%. See Pew Charitable Trust, *Americans’ Views of Government: Low trust, but Some Positive Performance Ratings*, PEW RSCH. CTR. (Sept. 14, 2020), <https://www.pewresearch.org/politics/2020/09/14/americans-views-of-government-low-trust-but-some-positive-performance-ratings/> [https://perma.cc/Q489-TV2R]; see also Jeremy N. Sheff, *Essay: I Choose, You Decide: Structural Tools for Supreme Court Legitimation*, 50 SETON HALL L. REV. 161, 162 (2019) (noting that partisanship of confirmation process dealt a serious blow to “the legitimacy of the Supreme Court as a trusted arbiter of legal and constitutional disputes of national importance.”); Ellen Knight, *Reformation of the Supreme Court: Keeping Politics Out*, 52 NEW ENGLAND L. REV. 345, 355 (2018) (“In recent history, the Court has become riddled with politics, which breeds distrust from the public.”); Madeline Fitzgerald, *Trust in the Federal Government Falls Below Majority for the First Time*, U.S. NEWS AND WORLD REPORT, (Oct. 11, 2022) (fewer than half of Americans trusted the courts, compared to 38% who trusted the legislative branch and 43% who trusted the executive branch).

53. *Job Approval for Supreme Court Drops to All-Time Low*, QUINNIPIAC POLL (Sept. 15, 2021), <https://poll.qu.edu/poll-release?releaseid-3820> [https://perma.cc/HP7S-X24P].

54. Bryan Metzger, *Just 37% of Americans Approve of the Supreme Court, an All-Time Low for the Judicial Body: Poll*, BUS. INSIDER (Sept. 15, 2021, 2:08 PM), <https://www.businessinsider.in/politics/world/news/just-37-of-americans-approve-of-the-supreme-court-an-all-time-low-for-the-judicial-body-poll/articleshow/86246564.cms> [https://perma.cc/PP8S-GKZ8].

55. Jeffrey M. Jones, *Approval of U.S. Supreme Court Down to 40%, a New Low*, GALLUP (Sept. 23, 2021), <https://news.gallup.com/poll/354908/approval-supreme-court-down-new-low.aspx> [https://perma.cc/24AN-696X]; see Hasen, *supra* note 35, at 265 (noting “unprecedented decline in public approval” of the Court from the 1970s to the present).

The public's view of the Court is leavened with a strong dose of partisanship. In certain cases—particularly cases that confront important public policies or benefit one political party—the Justices' votes almost invariably fall according to the party of the President who appointed them.⁵⁶ With the increasingly conservative cast of the Court, the partisan divide in perceptions of the Court has widened. According to Quinnipiac, by 2019 75% of Republicans and those leaning Republican had a favorable view of the Court, compared to slightly less than half of Democrats and Democratic-leaning independents.⁵⁷ This gap was the largest in twenty years.⁵⁸ Gallup reported a smaller, but still significant partisan gap, with 36% of Democrats and 45% of Republicans approving of the Court.⁵⁹ The trend was of sufficient concern to prompt Justice Breyer to write an entire book defending the legitimacy of the Court.⁶⁰

President Trump, with his transactional view of the Justice system,⁶¹ both reflected and stoked the cynicism of many Americans regarding the

56. See Metzger, *supra* note 51, at 367 (“The danger raised by [the] Court’s intensifying ideological and partisan blocs is that this running tally will become increasingly one-sided over time, causing the Court’s legitimacy to erode for the group that continuously loses.”); see also Nicholas O. Stephanopoulos, *The Anti-Carolene Court*, 2019 SUP. CT. REV. 111, 178 (“Running like a red thread through the Roberts Court’s anti-*Carolene* decisions is perceived, and actual, partisan advantage. . . . Both the Court’s intrusions into, and its abstentions from, the political process also empirically benefit the Republican Party, whose Presidents appointed a majority of the sitting Justices.”).

57. Claire Brockway & Bradley Jones, *Partisan Gap Widens in Views of the Supreme Court*, PEW RSCH. CTR. (Aug. 7, 2019), <https://www.pewresearch.org/fact-tank/2019/08/07/partisan-gap-widens-in-views-of-the-supreme-court/> [https://perma.cc/SHS9-72RY].

58. *Id.*; see Hasen, *supra* note 35.

59. Robert Barnes & Seung Min Kim, *Supreme Court Observers See Trouble Ahead as Public Approval of Justices Erodes* WASH. POST (Sept. 26, 2021), https://www.washingtonpost.com/politics/courts_law/supreme-court-public-opinion/2021/09/25/379b51ec-1c6c-11ec-bcb8-0cb135811007_story.html, [https://perma.cc/BK2R-SUCL]; Alex Swoyer, *Supreme Court Hits Lowest Approval Rating in Two Decades: Gallup Poll*, WASH. TIMES (Sept. 23, 2021), <https://m.washingtontimes.com/news/2021/sep/23/supreme-court-hits-lowest-approval-rating-two-deca/> [https://perma.cc/Y9SV-MHQM].

60. See BREYER, *supra* note 44, at 63. Justice Breyer worried that, “[I]f the public comes to see judges as merely ‘politicians in robes,’ its confidence in the courts, and in the rule of law itself, can only decline. With that, the Court’s authority can only decline, too, including its hard-won power to act as a constitutional check on the other branches.” *Id.*; see Ian Millhauser, *Kagan Warns that the Supreme Court’s Legitimacy is in Danger*, THINK PROGRESS (Sept. 17, 2018, 8:00 AM), <https://archive.thinkprogress.org/justice-kagan-warns-that-the-supreme-courts-legitimacy-is-in-danger-2de1192d5636/> [https://perma.cc/4L68-MAV6]. Perhaps reflecting concern about the erosion of the Court’s standing, Justices Comey, Thomas, and Alito all delivered speeches in September 2021 defending the Court’s nonpartisan credentials. See Ruth Marcus, *The Supreme Court’s Crisis of Legitimacy*, WASH. POST, Oct. 3, 2021, at A27; cf. Oma Seddiq, *Justices Amy Coney Barrett and Stephen Breyer Want to Convince You That the Supreme Court Isn’t Political, but Experts Say “it’s Naïve to Think People Will” Believe Them*, BUS. INSIDER (Sept. 16, 2021, 4:55 PM), <https://www.businessinsider.com/barrett-breyer-say-scotus-isnt-political-but-ignore-realities-experts-say-2021-9> [https://perma.cc/ZS3C-EV2R].

61. Chris Cillizza, *Bill Barr Knows “Exactly” What Kind of Person Donald Trump Is*, CNN (Feb. 28, 2022), <https://www.cnn.com/2022/02/28/politics/bill-barr-donald-trump-memoir/index.html> [https://perma.cc/5EXF-33U8] (“People are worthwhile to Trump only as means to his ends — as utensils. When they don’t help him get what he wants, they are useless.”).

partisanship of the judiciary, undermining the courts by attacking jurists and calling out “Obama judges” and “Trump judges.”⁶² The Chief Justice rebuked him for that characterization, admonishing that judges are not defined by the party affiliation of the President who appointed them.⁶³ Yet there was just enough substance to the President’s comments to mirror—and perhaps feed—public misgivings, even though the Court’s legitimacy is not especially fragile. Unhappiness about individual results is usually evanescent, mediated by a reservoir of legitimacy. The Court even recovered—eventually—from the direct public reaction to *Bush v. Gore*.⁶⁴ But there is a cumulative effect on that reservoir, and, cumulatively, the Court’s standing has eroded.

A. Court Legitimacy in Voting Rights Litigation

One ought not to address the prevalence and perception of partisanship in the courts without discussing one relative bright spot—the litigation after the 2020 Presidential Election. It tested the legitimacy of the courts and they performed well, with judges departing from the partisan lockstep some observers had expected. At least eighty-six judges, thirty-eight of them Republican, rejected the wild claims of the Trump-affiliated lawyers and the extraordinary, disenfranchising remedies they sought.⁶⁵ Court after court demanded evidence of misconduct and criticized the lawyers when they presented none.⁶⁶ As one Trump-appointed District Judge observed, “[t]his Court has allowed [the President] to make his case and he has lost on the merits. In his re-

62. Adam Liptak, *Chief Justice Defends Judicial Independence After Trump Attacks ‘Obama Judge’*, N.Y. TIMES (Nov. 21, 2018), www.nytimes.com/2018/11/21/us/politics/trump-chief-justice-roberts-rebuke.html.

63. *Id.* (The Chief Justice stated, “We do not have Obama judges or Trump judges, Bush judges or Clinton judges. What we have is an extraordinary group of dedicated judges doing their level best to do equal right to those appearing before them. That independent judiciary is something we should all be thankful for.”).

64. *Bush v. Gore*, 531 U.S. 98 (2000); Nate Persily, *Bush v. Gore in the American Mind*, ELECTION LAW BLOG (Dec. 12, 2010), <https://electionlawblog.org/?p=17013> [<https://perma.cc/RZ8Z-DNLR>] (“Most studies have found partisan and racial polarization in opinion toward the Court in the immediate aftermath of *Bush v. Gore* but a return to ‘normal’ by September 11th 2001 if not before.”).

65. Harriet Alexander, *Trump-Appointed Judges Among 86 Who Have So Far Dismissed Election Fraud Law Suits*, THE TELEGRAPH (Dec. 13, 2020). Most of the decisions were by lower courts, though the Supreme Court entered the fray as well. The performance at all levels reflected on the judiciary generally.

66. Rosalind S. Helderman & Elise Viebeck, *The Last Wall: How Dozens of Judges Across the Political Spectrum Rejected Trump’s Efforts to Overturn the Election*, WASH. POST (Dec. 12, 2020), https://www.washingtonpost.com/politics/judges-trump-election-lawsuits/2020/12/12/e3a57224-3a72-11eb-98c4-25dc9f4987e8_story.html [perma.cc/C4RY-KGPB].

ply brief, [the President] ‘asks that the Rule of Law be followed.’ It has been.”⁶⁷ Another Trump appointee on the U.S. Court of Appeals for the Third Circuit opined that, “[c]harges of unfairness are serious. But calling an election unfair does not make it so. Charges require specific allegations and then proof. We have neither here.”⁶⁸ Finding against the Trump forces in some sixty-one out of sixty-two rulings,⁶⁹ the courts drew praise from many observers for reality-based judging—a low, but critically important bar for congratulations.⁷⁰

Two relevant lessons emerge from the election litigation. First, the courts functioned the way the public expected them to function, as independent arbiters of the most important dispute facing the country.⁷¹ The courts could fill this role because the public, though not without its doubts, still perceived the courts as essentially neutral, or at least they respected its institutional role. Despite erosion in its standing, the Judiciary continues to have legitimacy as the forum for resolution of key legal disputes, even those with a significant political component.

But the experience regarding the post-election litigation also shows the finite reach of the courts’ legitimacy. Notwithstanding the sixty-one rulings against Trump’s position and the repeated unrequited demands by Trump-appointed judges for evidence supporting the charges of election fraud—not to mention the assurances of Trump’s Attorney General, the Director of the FBI, and the head of cybersecurity at the Department of Homeland Services—tens of millions of Americans, including 70% of Republicans, continue to believe that the election was stolen.⁷²

67. *Trump v. Wis. Elections Comm’n.*, 506 F.3d 620, 639 (E.D. Wis. 2020).

68. *Donald J. Trump for President, Inc. v. Sec’y of Pa.*, 830 Fed. App’x. 377, 381 (3d Cir. 2020).

69. Number sixty-two was a short-lived and inconsequential ruling regarding the physical arrangements for observing the counting of votes. Amy Sherman & Miriam Valverde, *Joe Biden Is Right That More than 60 of Trump’s Election Lawsuits Lacked Merit*, POLITIFACT (Jan. 8, 2021), <https://www.politifact.com/factchecks/2021/jan/08/joe-biden/joe-biden-right-more-60-trumps-election-lawsuits-1/> [https://perma.cc/P69F-5JL5].

70. William Cummings, Joey Garrison & Jim Sergeant, *Trump’s Failed Efforts to Overturn the Election: By the Numbers*, USA TODAY (Jan. 6, 2021), <https://www.usatoday.com/in-depth/news/politics/elections/2021/01/06/trumps-failed-efforts-overturn-election-numbers/4130307001/> [perma.cc/MPM9-6AMC]; see Helderman & Viebeck, *supra* note 66; BREYER, *supra* note 44, at 60 (“The present Court is often described as having a conservative majority. . . . [Yet] the Court refused to hear or decide cases grounded in the political disagreement arising out of the 2020 election between Donald Trump and Joe Biden.”).

71. Helderman & Viebeck, 66 note *supra*. Indeed, in the 2000 Presidential Election, the Supreme Court determined the winner, a verdict that the losing candidate, Al Gore, disputed but accepted as authoritative. The outcome seriously impaired the Court’s credibility and legitimacy for many years.

72. David Paleologos, *Paleologos: Voters Divided by Party in Views on Biden Legitimacy and Our Country’s Biggest Challenges*, USA TODAY (Sept. 2, 2021), <https://www.usatoday.com/story/news/nation/2021/09/02/paleologos-poll-shows-partisan-split-biden-legitimacy-more-issues-suffolk->

The second lesson is that one feature of the judicial process reinforced the courts' legitimacy in the aftermath of the election—its commitment to truth in litigation. That discipline does not bind as forcefully outside the courtroom. For example, although the Supreme Court held that the First Amendment barred prosecution of the defendant in *U.S. v. Alvarez*⁷³ for stolen valor—a false public claim that he won a military medal—it would have not protected him had he made that claim in court.⁷⁴ The oath to tell the truth, the consequences of lying, the penetrating acuity of the adversarial process, and the lawyers' duty of candor to the court make it far more likely that participants will tell the truth inside the courtroom than outside it. In the event, the lies that were endemic both to the political campaign and to the attack on the election results mostly—though not uniformly—stopped at the courthouse door. Lawyers who stood on the steps of the courthouse and publicly charged fraud in the casting and counting of ballots admitted in court that their lawsuit did not allege or could not establish fraud.⁷⁵ When lawyers did not maintain that Maginot Line, they found themselves subject to professional discipline.⁷⁶ All in all, the judiciary's role as a (last) refuge for fact-based argument contributed to the legitimacy of the courts.

It is thus particularly troubling—and in the long term, perilous—when the Supreme Court issues opinions that ignore obvious facts or defy common sense—in short, when its opinions lack verisimilitude. As Professor Metzger notes, “the Court's reasoning, and not just its re-

university/5694049001/ [perma.cc/XAN3-2MVC]; Christina Zhao, *59% of GOP Voters Saying 'Believing' Trump Won 2020 'Important' to Being a Republican*, NEWSWEEK (Sept. 12, 2021), www.newsweek.com/59-gop-voters-say-believing-trump-won-2020-important-being-republican-poll/1628281 [perma.cc/M4YE-KHUK]; Jordan Williams, *Fewer Than 50 Percent of West Virginians Think 2020 Election Was Legitimate: Poll*, THE HILL (Sept. 6, 2021), <https://thehill.com/homenews/state-watch/570976-fewer-than-50-percent-of-west-virginians-think-2020-election-was/> [perma.cc/G2RC-FF3W].

73. 567 U.S. 709 (2012).

74. See Terri R. Day, *Speak No Evil: Legal Ethics v. The First Amendment*, 32 J. LEGAL PRO. 161, 170–71 (2008).

75. Harriet Alexander, *'Your Election is a Sham': Giuliani Tells Pennsylvania 'I Know Crooks Really Well' as He Appears in Gettysburg*, THE INDEPENDENT (Nov. 25, 2020, 9:37 PM), <https://www.independent.co.uk/news/world/americas/us-election-2020/rudy-giuliani-pennsylvania-election-trump-fraud-b1761888.html> [https://perma.cc/5BLY-JS5L].

76. See, e.g., Nicole Hong, William K. Rashbaum & Ben Protess, *Court Suspends Giuliani's Law License, Citing Trump Election Lies*, N.Y. TIMES (June 24, 2021), <https://www.nytimes.com/2021/06/24/nyregion/giuliani-law-license-suspended-trump.html>; Allison Durkee, *Sydney Powell to Face Texas State Bar Investigation—Potentially Leading to Her Disbarment*, FORBES (Aug. 26, 2021, 4:55 PM), <https://www.forbes.com/sites/alisondurkee/2021/08/26/sydney-powell-to-face-texas-state-bar-investigation-potentially-leading-to-her-disbarment/?sh=50fc46411f99> [https://perma.cc/CD4A-9HZT]; Alan Feuer, *Judge Order Sanctions Against Pro-Trump Lawyers Over Election Lawsuit*, N.Y. TIMES (Aug. 25, 2021), <https://www.nytimes.com/2021/08/25/us/politics/sydney-powell-election-sanctions.html>.

sults, can affect the Court's legitimacy. . . . [P]erceptions that the Court is politicized, that the Justices are 'little more than 'politicians in robes' who engage in 'strategic, rather than sincere decision making,' do have a legitimacy-undermining effect."⁷⁷ Professor Richard Fallon states that legitimacy turns on "whether the Justices employ reasonable and consistent decision making methodologies, exhibit fidelity to legitimate prior authorities, show morally good substantive judgment in establishing law for the future, and maintain a fair distribution of political authority among courts and other institutions."⁷⁸

When decisions blink the obvious facts, it raises questions regarding the Court's own candor, which is essential to its legitimacy. As Professor Thomas Merrill observes, "[c]areful attention to fact finding is important, since the fact-finding process will nearly always be perceived by the parties as having an objective foundation in the world outside the courtroom."⁷⁹ The public is more likely to recognize a major factual mistake, in particular, an offense against common sense, than some legal errancy. Those who pay attention may get over their disappointment regarding the result in a particular case more readily than their dismay at the Court's perceived lack of candor, common sense, or fairness.⁸⁰ Although no polls or political science models have measured the effect of defects in verisimilitude, the focus on the issue in dissenting opinions, news articles, editorials, blog posts, and scholarly articles signals its importance.⁸¹

77. Metzger, *supra* note 51, at 370 (quoting James L. Gibson & Michael J. Nelson, Reconsidering Positivity Theory: What Roles Do Politicization, Ideological Disagreement, and Legal Realism Play in Shaping U.S. Supreme Court Legitimacy?, 14 J. EMPIRICAL LEGAL STUD. 592, 594–95, 598 (2017)); Berger, *supra* note 11, at 528 ("But the Justices are sometimes remarkably willing to cast seemingly vital facts aside when rendering important constitutional decisions. In some prominent cases, facts don't matter.").

78. RICHARD H. FALLON, JR., *LAW AND LEGITIMACY IN THE SUPREME COURT* 167 (2018).

79. Thomas W. Merrill, *Legitimate Interpretation—Or Legitimate Adjudication?*, 105 CORNELL L. REV. 1395, 1407 (2020); See Jackson, *supra* note 10, at 2385 ("Facts should have 'intersubjective' empirical verifiability, meaning differently situated persons can be expected to agree on 'facts' even if they have different values . . . to the extent that facts in the world exist, institutions of government ought to be expected to try to ascertain those facts impartially").

80. See Gibson & Nelson, *supra* note 45, at 626, 639 (noting critical role that perceptions of procedural fairness play in institutional assessments of the Court).

81. Studies suggest that the Justices are responsive to the elite audiences who disproportionately consume this information. Lawrence Baum & Neal Devins, *Why the Supreme Court Cares About Elites, Not the American People*, 98 GEO. L. J. 1515, 1579–80 (2010).

III. THE SUPREME COURT'S SPARRING WITH VERISIMILITUDE

A. *The Travel Ban Cases*

1. President Trump's Anti-Muslim Statements

President Trump has a long history of anti-Muslim statements. On December 7, 2015, then-candidate Trump “call[ed] for a total and complete shutdown of Muslims entering the United States.”⁸² He said on his campaign website that Muslims’ “hatred [of the United States] is beyond comprehension,” and that until we can “determine and understand this problem and the dangerous threat it poses, our country cannot be the victims of the horrendous attacks by people who believe only in Jihad, and have no sense of reason or respect of human life.”⁸³ On December 8, 2015, apparently unaware of the disrepute into which the *Korematsu* opinion has fallen, Trump defended this proposal by noting that the United States had interned Japanese-Americans during World War II.⁸⁴ In March 2016, he announced that “Islam hates us,” and that we cannot allow people into the country who hate the U.S. and non-Muslims.⁸⁵ That same month, he called for surveillance of mosques because “we’re having problems with Muslims coming into the country.”⁸⁶

Facing accusations of anti-Muslim bias, Trump changed his phrasing but not his message. His attacks began to focus on immigration from countries “where there is a proven history of terrorism.”⁸⁷ But he made clear that the change was purely linguistic because “[p]eople were so upset when [he] used the word Muslim.”⁸⁸ Just before the 2016 election, Trump stated that his Muslim ban had “morphed into [] extreme vetting from certain areas of the world.”⁸⁹ He gave a winking answer to the question whether he would rethink his “plans to create a Muslim registry or ban Muslim immigration.”⁹⁰ Meanwhile, his promise to bar

82. Trump v. Hawaii, 138 S. Ct. 2392, 2417 (2018); *id.* at 2435 (Sotomayor, J., dissenting).

83. *Id.* at 2435 (Sotomayor, J., dissenting).

84. *Id.*

85. *Id.* at 2417 (majority opinion).

86. *Id.*

87. *Id.*

88. *Id.*

89. *Id.*

90. *Id.* at 2436 (Sotomayor, J., dissenting).

Muslims from entering the United States remained on the Trump Campaign website until May 2017, four months after the Inauguration.⁹¹

2. The Travel Ban Orders

Seven days after taking office, President Trump issued an Executive Order banning entry into the United States by immigrants from seven overwhelmingly Muslim countries.⁹² The Executive Order skipped the usual internal vetting for such pronouncements, with no interagency consideration and no plan for an orderly rollout.⁹³ The ban was to last for ninety days, ostensibly until the Administration could determine whether screening procedures for those countries were sufficient to weed out potential terrorists. Further, the Order explicitly focused on religion, allowing the Christian minority in these countries to emigrate to the United States.⁹⁴

The Order produced pandemonium. Individuals with visas who were on their way to the United States were denied entry upon their arrival at U.S. airports. The chaos intensified when the Administration suggested that the Order covered permanent resident aliens in the U.S. holding green cards, and then reversed itself a week later.⁹⁵ The U.S. District Court for the Western District of Washington promptly enjoined the Administration from implementing the ban.⁹⁶

While the White House professed confidence that the Order was constitutional, their actions reflected greater skepticism. Rather than appeal the injunction, the White House withdrew the Order and issued

91. *Id.* at 2435.

92. *Islam by country*, WIKIPEDIA (The percentage of Muslims in Iran is 99.4%. Muslims are 95-98% of the population in Iraq, 97% in Libya, 99.8% in Somalia, 96% in Sudan, 97.2% in Yemen, and 86% in Syria), https://en.wikipedia.org/wiki/Islam_by_country (last visited Dec. 11, 2022).

93. See Eric Katz, *Trump Administration Pledges Better Interagency Collaboration on Revised Travel Ban*, GOV'T EXEC. (Mar. 6, 2017), <https://www.govexec.com/management/2017/03/trump-administration-promises-better-interagency-collaboration-revised-travel-ban/135924/> [<https://perma.cc/SEY9-DM4F>].

94. See Exec. Order No. 13769, 82 F.R. § 5(b) (2017).

95. Yeganeh Torbati, Jeff Mason & Mica Rosenberg, *Chaos, Anger as Trump Order Halts Some Muslim Immigrants*, REUTERS (Jan. 28, 2017), <https://www.reuters.com/article/us-usa-trump-immigration-chaos/chaos-anger-as-trump-order-halts-some-muslim-immigrants-idUSKBN15CoLD> [<https://perma.cc/RJ4V-HV78>]; Christi Parsons & Lisa Mascaro, *Amid Backlash, White House Appears to Back Down on Applying New Ban to Green Card Holders*, L.A. TIMES (Jan. 29, 2017, 4:13 PM PT), <https://www.latimes.com/politics/la-na-pol-trump-green-card-reversal-20170129-story.html> [<https://perma.cc/KG76-CDNU>].

96. *Washington v. Trump*, Temporary Restraining Order, Case No. C17-0141JLR (W.D. Wash. Feb. 3, 2017).

a new one shortly thereafter.⁹⁷ This new Order restricted entry of nationals from six of the countries covered in the first Order—Iran, Libya, Somalia, Sudan, Syria, and Yemen—ostensibly selected because each was “a state sponsor of terrorism, has been significantly compromised by terrorist organizations, or contains active conflict zones.”⁹⁸ The Order allowed case-by-case waivers of this prohibition. The Order was to be in effect for 90 days pending completion of the worldwide review mentioned in the first Order.⁹⁹

Again, the process the Administration followed in promulgating the new Order was irregular. For example, a draft report from the Department of Homeland Security prepared two weeks before issuance of the revised order stated that citizenship in a particular nation “is unlikely to be a reliable indicator of potential terrorist activity” and that citizens of countries affected by the Executive Order are “[r]arely [i]mplicated in U.S.-[b]ased [t]errorism.”¹⁰⁰ The final report, reflecting edits by political appointees, dropped those observations.¹⁰¹

In statements that undoubtedly exasperated their legal team, Trump and his advisers portrayed the changes from the first to the second Order as merely cosmetic. Rudy Giuliani, an outside adviser to President Trump, made clear that the Executive Order was a faintly camouflaged Muslim ban. Giuliani noted that Trump had been criticized for referring to a Muslim ban, and asked Giuliani to “show [him] the right way to do it legally.”¹⁰² A senior adviser to the President described the changes as “mostly minor technical differences.”¹⁰³ Trump’s Press Secretary maintained that the new Order fulfilled the President’s campaign promises (which included a ban on Muslims entering the United States).¹⁰⁴ Trump characterized the second iteration as “a watered down version of the first one,” expressed a desire to return to the

97. *Trump v. Hawaii*, 138 S. Ct. 2392, 2404 (2018).

98. *Id.*

99. *Id.*

100. *Hawaii v. Trump*, 859 F.3d 741, 759 (9th Cir. 2017).

101. *See id.*

102. Amy B. Wang, *Trump Asked for a ‘Muslim Ban,’ Giuliani Says—and Ordered a Commission to Do It ‘Legally,’* WASH. POST (Jan. 29, 2017), <https://www.washingtonpost.com/news/the-fix/wp/2017/01/29/trump-asked-for-a-muslim-ban-giuliani-says-and-ordered-a-commission-to-do-it-legally/> [<https://perma.cc/8F2U-HSHK>].

103. Matt Zapotosky, *A New Travel Ban With ‘Mostly Minor Technical Differences’? That Probably Won’t Cut It, Analysts Say,* WASH. POST (Feb. 22, 2017), https://www.washingtonpost.com/world/national-security/a-new-travel-ban-with-mostly-minor-technical-differences-that-probably-wont-cut-it-analysts-say/2017/02/22/8ae9d7e6-f918-11e6-bf01-d47f8cf9b643_story.html [<https://perma.cc/3T5M-MGMV>].

104. Katherine Faulders, *Spicer: Trump Doing Exactly What He Said He Was Going to Do,* ABC NEWS (Jan. 29, 2017), <https://abcnews.go.com/Politics/Spicer-trump/story?id=4512388> [<https://perma.cc/68QL-EQYE>].

original version, and said that Muslims had difficulty assimilating into the United States.¹⁰⁵ Later, he tweeted that the lawyers could call the Order whatever they wanted, but “I am calling it what we need and what it is, a TRAVEL BAN!”¹⁰⁶ He tweeted in September that “[t]he travel ban into the United States should be far larger, tougher and more specific—but stupidly, that would not be politically correct!”¹⁰⁷

The U.S. district courts for Hawaii and Maryland enjoined implementation of the Order, and the courts of appeal for the Ninth and Fourth Circuits affirmed. The Ninth Circuit determined that the Executive Order violated the immigration laws, and therefore the court did not need to address the Establishment Clause claim for discrimination against Muslims.¹⁰⁸ The Fourth Circuit addressed the Establishment Clause claim, finding that the Executive Order, “*drips with religious intolerance, animus, and discrimination.*”¹⁰⁹ In the Court’s view, there was “simply too much evidence that [the order] was motivated by religious animus for it to survive any measure of constitutional review.”¹¹⁰

The Administration appealed and sought a stay from the U.S. Supreme Court pending appeal. Apparently viewing the orders as overbroad but not unfounded, the Court stayed the injunctions as to all immigrants who did not have a demonstrated relationship with family members in the United States. For those who did have such a relationship, the injunctions remained in force. The Court also granted review and calendared the case for Fall 2017.¹¹¹

While the case was pending before the Supreme Court, the ninety-day term of the second order expired, and the Court vacated the lower court rulings as moot.¹¹² The Administration then issued a third iteration of the travel ban, this time labeling it a “Proclamation,” perhaps to distance it from the prior versions that had fared poorly in court.¹¹³ This

105. *Trump v. Hawaii*, 138 S. Ct. 2392, 2437 (2018).

106. Kyle Balluck, *Trump: I Am Calling It a ‘TRAVEL BAN!’*, The Hill, (June 5, 2017), <https://thehill.com/homenews/administration/336319-trump-i-am-calling-it-a-travel-ban/> [https://perma.cc/QGS7-Q9PF].

107. Nolan D. McCaskill, *Trump: Travel Ban Should Be ‘Far Larger, Tougher and More Specific’*, POLITICO (Sept. 15, 2017, 7:25 AM), <https://www.politico.com/story/2017/09/15/trump-travel-ban-tougher-242760> [https://perma.cc/YUV7-X542].

108. *Hawaii v. Trump*, 859 F.3d 741,769–82 (9th Cir. 2017), *vacated and remanded*, 138 S. Ct. 377 (2017).

109. *Int’l Refugee Assistance Project v. Trump*, 857 F.3d 554, 572 (4th Cir. 2017) (emphasis added).

110. *Id.* at 601 n.22.

111. *Id.* at 353; *Trump v. Hawaii*, 138 S. Ct. 377 (2017).

112. *Trump v. Int’l Refugee Assistance Project*, 137 S. Ct. 2080 (2017).

113. A “Proclamation” typically deals with activities of private individuals and does not have the force of law. In recent years, most have been ceremonial. Typically, an “Executive Order” is directed to federal agencies and has the force of law. Library of Congress Research Guide: *Executive*

rendering, issued after completion of the “worldwide review,” restricted the entry of nationals from eight countries that the Administration maintained had inadequate systems for managing and sharing information with the United States.¹¹⁴ This time, the ban had gone through an interagency process in which the Department of Homeland Security, in consultation with the Department of State and intelligence agencies, ostensibly assembled and evaluated the data received from foreign governments. After diplomatic efforts by the State Department to convince foreign countries to improve their monitoring of emigres, DHS concluded that eight countries—Chad, Iran, Iraq, Libya, North Korea, Syria, Venezuela, and Yemen—were deficient.¹¹⁵ On the Acting Secretary of DHS’ recommendation and after consultation with other Cabinet Members, the President removed Iraq from the list, added Somalia, and issued the Proclamation.¹¹⁶ Hawaii and Maryland sued again. The District Court for Hawaii again enjoined the ban, and the Ninth Circuit affirmed.¹¹⁷ The Supreme Court considered this Order.

3. The Supreme Court decision

Focusing first on statutory construction, the Court found that the Immigration and Naturalization Act accorded the President broad authority to “suspend the entry of all aliens or of any class of aliens’ whenever he ‘finds’ that their entry ‘would be detrimental to the interests of the United States.’”¹¹⁸ In the Court’s view, the provision “exude[d] deference to the President in every clause.”¹¹⁹ It afforded the President discretion to determine whether and when to suspend entry into the United States, whose entry to suspend, for how long, and on what conditions.¹²⁰ Inquiry into the “persuasiveness of the President’s justifications,” the Court held, was inconsistent with the text of the statute and the deference it accords.¹²¹

The Court also rejected the argument that Section 1152(a)(1)(A) of the Act barred exclusion of aliens based on several characteristics, includ-

Order, Proclamation, or Executive Memorandum, LIBR. OF CONG., guides.loc.gov/executive-orders/order-proclamation-memorandum [https://perma.cc/6LS6-JYA7] (last visited Mar. 12, 2023).

114. *Trump v. Hawaii*, 138 S. Ct. 2392, 2404 (2018).

115. *Id.* at 2405.

116. *Id.*

117. *Hawaii v. Trump*, 245 F. Supp. 3d 1227 (D. Haw. 2017), *aff’d*, 859 F.3d 741 (9th Cir. 2017).

118. *Trump v. Hawaii*, 138 S. Ct. at 2408 (quoting 8 U.S.C. § 1182(f)).

119. *Id.*

120. *Id.*

121. *Id.* at 2409.

ing “place of residence.” The Court held that this provision applies only after aliens were found to be admissible into the United States.¹²²

The Court then turned to the claim that the Travel Ban violated the Establishment Clause and the Fifth Amendment’s equal protection component because it barred Muslims from entering the United States based on their religion. The Plaintiffs alleged that the Administration’s security arguments were pretextual and that the Travel Ban in truth rested on anti-Muslim animus.¹²³

Citing *Kleindienst v. Mandel*, a First Amendment challenge to the exclusion of a Marxist scholar seeking to attend academic conferences and discussions in the United States, the Court ruled that the standard for a claim of religious discrimination regarding visa applications differed from the standard applicable to a domestic claim of discrimination.¹²⁴ All that was required to uphold the exclusion of foreign entrants was a “facially legitimate and bona fide reason,” which the Court would neither “look behind” nor balance against the “asserted constitutional interests of U.S. citizens.”¹²⁵ *Mandel’s* narrow standard of review, the Court held, had “particular force” when it overlapped with national security.¹²⁶ The President’s statements about Muslims, in the Court’s view, were largely irrelevant. The Proclamation was *facially* neutral; it did not *say* that it was excluding Muslims based on their religion.¹²⁷ Rather, it said that the exclusion turned on the ability of their home countries to assist in vetting entrants to the United States.¹²⁸ That, on its face, was a legitimate security rationale. In the Court’s view, even if the President *also* acted based on animus, the presence of a facially ade-

122. *Id.* at 2414–15.

123. As the majority opinion noted, plaintiff’s alleged specifically alleged that “the President’s stated concerns about vetting protocols and national security were but a pretext for discriminating against Muslims.” 138 S. Ct. at 2417. At least five amicus briefs described the President’s justification for the Proclamation as “pretextual.” *E.g.*, Brief for American-Arab Anti-Discrimination Committee as Amicus Curiae in Support of Respondents, *Trump v. Hawaii*, 138 S. Ct. 2392 (2018) (No. 17-965) (Mar. 30, 2018), 2018 WL 1605667 *passim*; Brief of Amicus Curiae the Japanese American Citizens League in Support of Respondents, *Trump v. Hawaii*, 138 S. Ct. 2392 (2018) (No. 17-965) 2018 WL 1605668, at *14, *20; Brief for the National Asian Pacific American Bar Association and Others as Amici Curiae Supporting Respondents, *Trump v. Hawaii*, 138 S. Ct. 2392 (2018) (No. 17-965) (Mar. 30, 2018), 2018 WL 1586435, *19, *23,; Brief of New York University as Amicus Curiae in Support of Respondents, *Trump v. Hawaii*, 138 S. Ct. 2392 (2018) (No. 17-965) (Mar. 30, 2018), 2018 WL 1605658, at *25, *32, *34; Brief of Karen Korematsu, Jay Hirabayashi, Holly Yasui, The Fred T. Korematsu Center for Law and Equality, Civil Rights Organizations, and National Bar Associations of Color as Amici Curiae in Support of Respondents, *Trump v. Hawaii*, 138 S. Ct. 2392 (2018) (No. 17-965) (Mar. 30, 2018), 2018 WL 1586445, at *20, *28.

124. *Trump v. Hawaii*, 138 S. Ct. at 2419 (citing *Kleindienst v. Mandel*, 408 U.S. 753, 770 (1972)).

125. *Id.* at 2419 (citing *Kleindienst*, 408 U.S. at 770).

126. *Id.* at 2419 (citing *Kerry v. Din*, 135 S. Ct. 2128, 2140 (2015)).

127. *Id.* at 2420.

128. *Id.* at 2421.

quate security rationale was sufficient to uphold the ban.¹²⁹ The Court therefore refused to look behind the Proclamation to assess whether the rationale was pretextual and whether the procedures were window dressing. Fully accepting the bona fides of the administrative review of the Proclamation, the Court credulously noted that it arose out of a “worldwide review process undertaken by multiple Cabinet officials and their agencies,” was subject to biannual review by multiple Cabinet officials, and provided a waiver procedure to consider individual requests to enter the country.¹³⁰ As one observer described the Court’s approach, “Instead of requiring the government to disavow the President’s animus, the Court merely determined that animus was not the sole motive for the ban because the President had later articulated a national security rationale.”¹³¹

Having accepted without inquiry the Government’s asserted purpose “to protect the country and improve vetting processes,” the Court merely had to determine whether the entry policy is “plausibly related” to that objective.¹³² But the examination of plausibility concerned only whether there was a rational relationship between the travel restrictions and the Administration’s *stated* objective, not whether the stated objective was the *real* objective.¹³³ Thus, once the President asserted a national security justification, the Court’s inquiry was effectively over, making animus actionable only when it is the sole motive for the exclusion.

4. The dissents

There were two dissents.¹³⁴ Justice Breyer, joined by Justice Kagan, penned a cautious, middle-way opinion stating that *if* the Proclamation

129. Left to its own devices, the Court would not have considered the President’s statements at all. It did so only because the government conceded that it could, and even then, only insofar as the evidence shed light on the relationship between the entry policy and the asserted objective. *Id.* (“[T]he Government has suggested that it may be appropriate here for the inquiry to extend beyond the facial neutrality of the order.”).

130. *Id.* at 2421 (Hawaii had argued that the waiver program was illusory, having granted only two waivers for entry into the United States); accord Brief for Respondents, *Trump v. Hawaii*, No. 17-695, 2018 WL 1468304, at *20.

131. Shalini Bhargava Ray, *Plenary Power and Animus in Immigration Law*, 80 OHIO ST. L.J. 13, 27 (2019).

132. *Trump v. Hawaii*, 138 S. Ct. at 2420; Blackman, *supra* note 15, at 44–45.

133. Blackman, *supra* note 15, at 30 (“[T]he government could only offer the faintest patina of a rational basis to defend the policies”).

134. There were also two additional opinions. Justice Kennedy filed a precatory concurring opinion, principally to note that the Court’s refusal to scrutinize the executive branch’s conduct did not mean the President was free to disregard the Constitution. The Executive Branch, Justice Ken-

“was significantly affected by religious animus against Muslims, it would violate the relevant statute or the First Amendment itself.”¹³⁵ Noting that the Proclamation provides for case-by-case exemptions and waivers from the Travel Ban, Justice Breyer observed that the Government’s record in granting or denying those waivers would verify or refute its claimed security rationale. In his words, if the Government granted those waivers and exemptions, it would “help make clear that the Proclamation does not deny visas to numerous Muslim individuals (from those countries) who do not pose a security threat.”¹³⁶ Conversely, if the program did not grant waivers or exemptions to individuals who plainly were not security risks, then it would be clear that the security rationale for the Travel Ban was a sham.¹³⁷

The initial returns, Justice Breyer observed, were not encouraging. DHS had promulgated no guidance to the field regarding the standards to be applied in the waiver program, and the number of waivers granted was trivial, as was the number of student and nonimmigrant visas.¹³⁸ This evidence heightened Justice Breyer’s concerns. Even so, he recognized that the Government had not had an opportunity to respond to the evidence. Therefore, he concluded, given the “need for assurance that the Proclamation does not rest upon a ‘Muslim ban,’ and the assistance in deciding the issue that answers to the ‘exemption and waiver’ questions may provide, I would send this case back to the District Court for further proceedings,” keeping the injunction in place in the interim.¹³⁹ If required to decide the case without the further litigation, he would find the evidence of antireligious bias sufficient to set the Proclamation aside.¹⁴⁰

The Chief Justice refused to look at the waiver program as a barometer of the truthfulness of the Government’s explanation. He dismissed Justice Breyer’s suggestion with the *non sequitur* that, even if assessing

nedy pleaded, has an independent duty to adhere to the Constitution. *Trump v. Hawaii*, 138 S. Ct. 2392, 2424 (2018) (Kennedy, J., concurring). Justice Thomas’s dissent focused on the ills of nationwide injunctions and argued that there was no judicially enforceable limit on the President’s authority to exclude aliens, a perplexing position for a Justice who has joined in attacks against overbroad delegation of authority by Congress. *Compare* *Trump v. Hawaii*, 138 S. Ct. at 2424–29 (Thomas, J., dissenting), *with* *Gundy v. U.S.*, 139 S. Ct. 2116, 2133 (Gorsuch, J., dissenting) (stating that the Framers understood that it would frustrate the system of checks and balances if “Congress could merely announce vague aspirations and then assign others the responsibility of adopting legislation to realize its goals”).

135. *Trump v. Hawaii*, 138 S. Ct. at 2429 (Breyer, J., dissenting).

136. *Id.* at 2430.

137. *Id.*

138. *Id.* at 2431–32.

139. *Id.* at 2433.

140. *Id.* at 2433.

the waiver program were permissible under rational basis review, Justice Breyer had conceded that the evidence was “but a piece of the picture” and did not affect the Court’s analysis.¹⁴¹ He misconstrued Justice Breyer’s opinion; Justice Breyer’s “piece of the picture” qualification referred only to the number of student visas issued under the exemption in the Proclamation for certain nonimmigrant visas, which Justice Breyer considered *along with* the more significant number of waivers requested under the Proclamation.

Justice Breyer’s proposal would have spared the Court from blinding itself to the overt animus behind the President’s conduct. It also could have lowered the temperature of the case, enmeshing the litigation in relatively bland fact-finding about the number of waivers and visas being granted and the standards being applied. It would not have denied or brushed aside the common-sense conclusions flowing from the evidence in the record.

Justice Sotomayor’s dissent, joined by Justice Ginsburg, invoked the imagery of pretext and willful blindness.¹⁴² It seethed with outrage, focusing on the Court’s refusal to acknowledge and act upon what she regarded as indisputable evidence of Trump’s religious bias.¹⁴³ She accused the Court of leaving “undisturbed a policy first advertised openly and unequivocally as a ‘total and complete shutdown of Muslims entering the United States’ because the policy now masquerades behind a façade of national-security concerns.”¹⁴⁴ “Repackaging” the ban now in a third iteration, Justice Sotomayor observed, “does little to cleanse Presidential Proclamation No. 9645 of the appearance of discrimination that the President’s words have created.”¹⁴⁵ In Justice Sotomayor’s view, the evidence in the record established animus to any reasonable observer, and the Court could hold otherwise only by “*ignoring* the facts, misconstruing our legal precedent, and *turning a blind eye* to the pain and suffering the Proclamation inflicts upon countless families and individuals, many of whom are United States citizens.”¹⁴⁶ Justice Sotomayor cataloged the President’s anti-Muslim statements in detail, concluding that, “Given the overwhelming evidence of anti-Muslim animus, it simply cannot be said that the Proclamation has a legitimate basis.”¹⁴⁷ She attacked the “majority’s apparent willingness to throw the Estab-

141. *Id.* at 2423 n.7 (majority opinion) (quoting from dissent of Breyer, J., at 2432).

142. *Id.* at 2438 (Sotomayor, J., dissenting).

143. *Id.* at 2435–38.

144. *Id.* at 2433.

145. *Id.*

146. *Id.* (emphasis added).

147. *Id.* at 2442.

ishment Clause out the window and forgo any meaningful constitutional review at the mere mention of a national-security concern.”¹⁴⁸ “Deference,” she said, “is different from unquestioning acceptance,” and the Court should not “close its eyes” to relevant information.¹⁴⁹

To the evident irritation of the Chief Justice,¹⁵⁰ Sotomayor ended by drawing multiple parallels between the *Travel Ban Case* and *Korematsu*. In her peroration, she proclaimed that, “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*.”¹⁵¹

5. Effect on Legitimacy

In the *Travel Ban Case*, the Court faced a choice not between reality and legality, but between reality and legalism.¹⁵² It chose legalism. Justice Sotomayor’s dissent zeroed in on the Court’s refusal to confront reality. Her dissent is laced with accusations referring to the majority’s “turn[ing] a blind eye,” “blindness,” being “blind to,” “unquestioned acceptance,” “closing its eyes,” and allowing a “masquerade.” In Justice Sotomayor’s view, the majority ignored the reality of religious animus against Muslims. Justice Sotomayor’s invocation of *Korematsu* left no doubt regarding her assessment of the Court’s opinion.

With one exception, opinion polls did not isolate the public’s response to the *Travel Ban* opinion.¹⁵³ But the reaction among legal elites—

148. *Id.* at 2442 n.6.

149. *Id.* (emphasis added).

150. *See id.* at 2423 (majority opinion) (“Finally, the dissent invokes *Korematsu v. United States*, 323 U. S. 214 (1944). Whatever rhetorical advantage the dissent may see in doing so, *Korematsu* has nothing to do with this case.”).

151. *Id.* at 2448 (Sotomayor, J., dissenting) (emphasis added).

152. Meriam-Webster’s Dictionary defines “legalism” as “strict, literal, or excessive conformity to the law or to a religious or moral code”. *Legalism*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/legalism> [<https://perma.cc/287Z-P4B6>] (last visited Mar. 12, 2023).

153. One poll by Quinnipiac University found that less than half of respondents approved of the decision, with an enormous partisan gap. Among Democrats, 83% disapproved, while 87% of Republicans had a favorable view. *American Voters Support Roe v. Wade 2-1, Quinnipiac University National Poll Finds; Dem Candidates Up 9 Points in U.S. House Races*, QUINNIPIAC UNIVERSITY (Jul. 2, 2018), https://poll.qu.edu/images/polling/us/us07022018_uixs04.pdf [<https://perma.cc/PBD7-66T8>]. This single, evanescent poll days after the opinion is less significant than the longer-term corrosive effects as the varying narratives of the case seeped into the public consciousness. The Court’s overall approval rating in early July 2018 after the *Travel Ban* opinion was relatively high, at 53%, but it has dropped since then to the current all-time low. And again, the partisan gap in July 2018 was wide, with only 38% of Democrats voicing approval of the Court compared to 72% of Republicans. Megan

the Court's principal audience, who have significant effect on the public perception of the Court¹⁵⁴—harshly echoed Justice Sotomayor's critique. Critic after critic sounded Justice Sotomayor's theme—the Court's blindness to reality—frequent invoking “what everyone knows,” *i.e.*, common sense. In an op-ed entitled, “A Decision That Will Live in Infamy,” Professor Noah Feldman slammed the Court for an offense against common sense, noting that the case “elevates legal formalities as a way to avoid addressing what *everyone understood* is really at issue here—namely, prejudice.”¹⁵⁵ Likewise, Professor Marty Lederman wrote that the Court's conclusion “is belied by a fundamental thing *that virtually everyone knows* (and that the Court does not deny)[.]” that the travel ban seeks to exclude Muslims to make good on Trump's campaign promise.¹⁵⁶ Conservative scholar Ilya Somin began his op-ed with the aphorism, “[t]here are none so blind as they who choose not to see.”¹⁵⁷ Professor Neil Katyal, who argued the case, referred repeatedly to the Court's “blind deference.”¹⁵⁸ Even Professor Blackman, who defended the Court's opinion, acknowledged that the Travel Ban rested on anti-Muslim animus.¹⁵⁹

Editorials also challenged the Court's willfully blind approach to the President's anti-Muslim statements. The Chicago-Sun Times editorialized that the Court “*pretended*” the Travel Ban “could not [be] rejected as

Brenan, *Supreme Court Approval Highest Since 2009*, GALLUP POLLS (July 18, 2018), <https://news.gallup.com/poll/237269/supreme-court-approval-highest-2009.aspx> [<https://perma.cc/FN5M-L55E>].

154. See generally Lawrence Baum & Neil Devins, *Why the Supreme Court Cares About Elites, Not the American People*, 98 GEO. L.J. 1515 (2010).

155. Noah Feldman, *A Decision That Will Live in Infamy*, BLOOMBERG (June 26, 2018, 12:28 PM) (emphasis added), <https://www.bloomberg.com/opinion/articles/2018-06-26/supreme-court-s-travel-ban-decision-is-a-historic-mistake> [<https://perma.cc/RV8T-R899>]. The attribution of universal recognition of the invidious purpose underlying the Travel Ban was a common theme.

156. Marty Lederman, *Contrary to Popular Belief, the Court Did Not Hold that the Travel Ban Is Lawful—Anything But*, JUST SECURITY (July 2, 2018) (emphasis added), <https://www.justsecurity.org/58807/contrary-popular-belief-court-hold-travel-ban-lawful-anything-but-which-ruling-justice-kennedys-deference-presidents-enforcement-ban-indefensible/> [<https://perma.cc/6RG5-GBCJ>]; see also Michael C. Dorf, *Silver Linings in an Otherwise Disappointing Travel Ban Ruling*, VERDICT (June 27, 2018), <https://verdict.justia.com/2018/06/27/silver-linings-in-an-otherwise-disappointing-travel-ban-ruling> [<https://perma.cc/Y52B-7HE4>] (“Everyone knows that Travel Ban 3.0 never would have come into existence but for Donald Trump's clear and repeated expressions of anti-Muslim animus.”).

157. Ilya Somin, *Donald Trump's 'Travel Ban' Is Still a 'Muslim Ban' No Matter What the Supreme Court Ruled*, USA TODAY (June 26, 2018, 4:10 PM), <https://www.usatoday.com/story/opinion/2018/06/26/supreme-court-ruling-travel-ban-ignores-religious-discrimination-column/734697002/> [<https://perma.cc/C8L3-ZCYP>].

158. Neal Kumar Katyal, *Trump v. Hawaii: How the Supreme Court Simultaneously Overturned and Revived Korematsu*, 128 YALE L. J. F. 641, 649, 651 (2019).

159. Josh Blackman, *The Travel Bans*, 2017 CATO SUP. CT. REV. 29, 58 (2017–2018) (“These egregious orders were borne, at least in part, on religious animus.”).

unconstitutionally discriminatory, no matter how many times [Trump] called it a ‘Muslim ban,’ ‘because those explicit words appear nowhere in the final version of the ban. The ban, wrote Chief Justice John Roberts, is ‘neutral on its face.’ What a specious argument.”¹⁶⁰ The Boston Globe opined that the Travel Ban, “more rightly called a Muslim ban, was upheld by the Supreme Court despite the Trump administration’s *lack of effort to disguise* its discriminatory intent.”¹⁶¹ Columnist Max Boot accused the Court of “*see[ing] no evil.*” He stated that the majority “acted as if the travel ban were a rational response to a national security threat – when, in reality, it was an attempt to codify Trump’s anti-Muslim animus into law.”¹⁶² With satirical bite, he compared the Court to Sergeant Schultz in the sitcom *Hogan’s Heroes*, who repeatedly intoned, “I see nothing! I hear nothing!”¹⁶³ The Detroit Free Press accused the Court of giving “bigotry a *fig leaf*,” by “*turn[ing] a blind eye* to both its author’s transparent bigotry and the court’s constitutional responsibility.”¹⁶⁴ David Cole, national legal director of the ACLU, opined in the Washington Post that, “Judges shouldn’t ignore *what we all know Trump’s travel ban is really about.*”¹⁶⁵

Politicians and interest groups also mirrored the theme of blindness. The Ranking Member of the House Judiciary Committee said that, “the Court willfully *turned a blind eye* to the religious animus motivating the President when he issued the travel ban and would have us *pretend that we did not hear* the President’s words when he spoke of a ‘total and complete shutdown of Muslims entering the U.S.’”¹⁶⁶ The Governor of

160. Editorial, *Supreme Court’s Travel Ban Ruling Is Sad Day for Religious Freedom*, CHI. SUN-TIMES (June 26, 2018) (emphasis added), <https://chicago.suntimes.com/2018/6/26/18390456/editorial-supreme-court-s-travel-ban-ruling-is-sad-day-for-religious-freedom> [https://perma.cc/F4EL-P86N].

161. Michael R. Jeffries, *Charlottesville Isn’t Over*, BOS. GLOBE (Aug. 9, 2018) (emphasis added), <https://www.bostonglobe.com/opinion/2018/08/08/charlottesville-isn-over> /VPtikDZNYoEgshxolqoXpO/story.html [https://perma.cc/3A3M-KQYW].

162. Max Boot, Opinion, *The Supreme Court Joins Congressional Republicans in Refusing to See Trump as He Is*, WASH. POST (June 26, 2018) (emphasis added) <https://www.washingtonpost.com/news/global-opinions/wp/2018/06/26/the-supreme-court-joins-congressional-republicans-in-refusing-to-see-trump-as-he-is/> [https://perma.cc/Q9AP-E55Z].

163. *Id.* The line was actually spoken by Colonel Klink, the German commandant of the POW camp in the show.

164. *High Court Gives Bigotry a Fig Leaf*, DETROIT FREE PRESS (June 27, 2018) 2018 WLNR 19817874 (emphasis added).

165. David Cole, *Judges Shouldn’t Ignore What We All Know Trump’s Travel Ban Is Really About*, WASH. POST (Mar. 22, 2017) (emphasis added), https://www.washingtonpost.com/opinions/judges-shouldnt-ignore-what-we-all-know-trumps-travel-ban-is-really-about/2017/03/22/4ad23ce2-of21-11e7-ab07-07d9f521f6b5_story.html [https://perma.cc/CTC5-XXKZ].

166. See Press Release, Jerrold Nadler, Congressman, House of Representatives, *Statement on Scotus Decision in Trump v. Hawaii* (June 26, 2018) (emphasis added), <https://nadler.house.gov/news/documentsingle.aspx?DocumentID=391458> [https://perma.cc/3JVR-HD2T].

Washington, a party to the case, likewise accused the Court of “*turning a blind eye* to the [P]resident’s own words and our country’s constitutional protections against discrimination.”¹⁶⁷ Senator Amy Klobuchar quoted Justice Sotomayor’s accusation that the Court was “*turning a blind eye* to pain and suffering.”

The lack of verisimilitude in the *Trump v. Hawaii* fueled claims that the Court was deliberately ignorant, subservient to the Trump Administration, and callous. The Court’s standing ultimately may recover from this hit. But the high profile of the case and the common-sense appeal of these attacks suggests a substantial risk to the Court’s legitimacy.

B. *The Census Case*

The *Census Case* presented neither national security concerns nor a constitutional claim, and the Court backed away from its refusal to look behind an executive branch decision. Nonetheless, it still treated the inquiry into pretext as an extraordinary, isolated cul-de-sac in administrative law, rather than an essential throughway in assessing the executive’s reasons for its actions. Further, the Court undertook an odd, uncritical analysis accepting the Government’s fictitious justification before ultimately “unsuspending disbelief” and deeming it pretextual.

1. The census

The case concerned the 2020 iteration of decennial litigations that have long accompanied the census. The near inevitability of lawsuits over the Census reflects the enormous political importance of the exercise.¹⁶⁸ The population counts that the Census Bureau prepares determine the allocation of not only Congressional seats among the states,

167. Jim Brunner, *Gov. Jay Inslee, Immigration-Rights Advocates Blast Supreme Court Travel Ban Ruling as ‘Abhorrent’*, THE SEATTLE TIMES (June 26, 2018, 8:50 PM) (emphasis added), <https://www.seattletimes.com/seattle-news/politics/immigrant-rights-advocates-condemn-supreme-courts-ruling-upholding-trump-travel-ban/> [https://perma.cc/NJU8-X3V3]. The Oklahoma Chapter of the Council on American-Islamic relations, too, accused the Court of “*turn[ing] a blind eye* to the Trump administration’s blatant bigotry.” *Oklahoma Group Reacts to Supreme Court Decision Supporting Ban*, OKLAHOMAN (June 27, 2018) (emphasis added), <https://www.oklahoman.com/story/news/2022/06/24/abortion-oklahoma-roe-vs-wade-decision-lawmakers-leaders-respond/7722712001/> [https://perma.cc/RR8R-MS4T].

168. See Mike Schneider, *Census Has Been Subject of Legal Wrangling for Decades*, AP NEWS (July 10, 2019), <https://apnews.com/article/d815e40c1f334973b86134287a693975> <https://apnews.com/article/d815e40c1f334973b86134287a693975> [perma.cc/2WB4-SEAW].

but also federal aid.¹⁶⁹ Accuracy is critical. The Census Bureau has an obligation to count every person to the extent possible.¹⁷⁰ They do so by mailing a questionnaire to every household, and following up with face-to-face interviews of people who do not complete and return it.¹⁷¹

The Census Bureau generally seeks to avoid partisanship, but it is not an independent agency. Rather, it resides in the Department of Commerce.¹⁷² Trump's Secretary of Commerce, Wilbur Ross, was a former businessman with no background in population statistics.¹⁷³ The statute governing the Census authorizes the Secretary not only to undertake a census of "population, housing, and matters relating to population and housing,"¹⁷⁴ but also to "obtain such other census information as necessary."¹⁷⁵ The statute further empowers the Secretary to "determine the inquiries, and the number, form, and subdivisions thereof, for the statistics, surveys, and censuses" he conducts and to acquire materials in aid of his efforts.¹⁷⁶ As the Court previously suggested, Congress delegated the Secretary "virtually unlimited discretion" in conducting the Census.¹⁷⁷

The Census Bureau's work is particularly specialized and complex. The Bureau agonizes over the questionnaire's most intricate details, subjecting each editorial change to multiple layers of vetting for months before sending it out.¹⁷⁸ The Bureau pre-tests any new question repeatedly and rigorously before adding it to the questionnaire.¹⁷⁹ Reflecting this practice, the governing statute requires the Secretary to submit a report to Congress at least three years before the census date identifying the subjects of the questions to be included on the questionnaire and to provide the questions themselves two years before.¹⁸⁰ Further,

169. *Id.*

170. *See id.*; *see also* U.S. CONST. art. I, § 2, cl. 5 (requiring "actual Enumeration" in the Decennial Census).

171. D'Vera Cohen *What to know about the 2020 Census*, PEW RSCH. CTR. (March 12, 2020), <https://www.pewresearch.org/fact-tank/2020/03/12/what-to-know-about-the-2020-census/> [perma.cc/TRF7-BJ5F].

172. *See U.S. Census Bureau*, U.S. DEPT OF COM., <https://www.commerce.gov/bureaus-and-offices/census> <https://www.commerce.gov/bureaus-and-offices/census> [perma.cc/P465-FVAX] (last visited Nov. 3, 2022).

173. *See Wilbur Ross*, U.S. DEPT OF COM., <https://2017-2021.commerce.gov/about/leadership/wilbur-ross.html> [perma.cc/65X2-UT7V] (last visited Nov. 3, 2022).

174. 13 U.S.C. §141(g).

175. *Id.* § 141(a).

176. *Id.* §§ 5, 6.

177. *Wisconsin v. City of New York*, 517 U.S. 1, 19 (1996).

178. *New York v. Dept. of Commerce*, 351 F. Supp. 3d 502, 526 (S.D.N.Y. 2019) *aff'd in part, rev'd in part and remanded sub nom.* *Dep't of Com. v. New York*, 204 L. Ed. 2d 978, 139 S. Ct. 2551 (2019).

179. *Id.* at 526–27.

180. 13 U.S.C. 141(f); *New York v. Dept. of Commerce*, 351 F. Supp. 3d at 526. Census Day for purposes of these timing issues was April 1, 2020. United States Census Bureau, *Census Day is Here*

the statute requires the Bureau to submit an additional report if new circumstances exist which necessitate that the questionnaire be modified.¹⁸¹ Thus to add new questions to the 2020 Census questionnaire, the Secretary needed to find and report to Congress any “new circumstances . . . which necessitate” the change by 2018.¹⁸²

The case arose because Secretary Ross, shortly after taking office in 2017, began agitating for a question about citizenship on the questionnaire for the 2020 Census.¹⁸³ The principal census forms had included no such inquiry since 1950 because of the Census Bureau’s concerns that the question would lower the response rates in immigrant communities by discouraging both legal and illegal immigrants from responding.¹⁸⁴ Risking such a reduction in the response rate conflicted with the Bureau’s mandate to count every person. From the outset, the Census Bureau strongly opposed including a citizenship question on the 2020 questionnaire.¹⁸⁵

The Census Bureau’s reports to Congress in 2017 and 2018 did not include a citizenship question. Presumably to show that new circumstances necessitated the question and to meet other legal requirements,¹⁸⁶ the Secretary instructed his subordinates to persuade the Department of Justice (DOJ) to request that a citizenship question be added.¹⁸⁷ They attempted to do so, fabricating for DOJ’s use the cover story that the question was needed to enforce the Voting Rights Act (VRA). DOJ rebuffed the entreaty and referred the Department of Commerce to the Department of Homeland Security. Homeland Security bounced the request back to DOJ. After substantial wrangling at the staff level, as a workaround Secretary Ross directly asked the Attorney General to ask him to include the question. The Attorney General agreed.¹⁸⁸

– *Make It Count!*” (Apr. 1, 2020), available at <https://www.census.gov/newsroom/press-releases/2020/census-day.html>.

181. 13 U.S.C. § 141(f)(3).

182. 13 U.S.C. § 141(f)(2) specifies that a report containing the questions must be filed two years before the Census, which in this case means 2018. 13 U.S.C. § (f)(3) specifies that to add questions or other information, the Secretary has to file a report identifying new circumstances. Thus, absent such a report, questions had to be set by 2018.

183. *Dep’t of Commerce v. New York*, 139 S. Ct. 2551, 2564 (2019). The evidence showed that these efforts began after Secretary Ross met with Steven Bannon, then-political adviser for President Trump. *New York v. Dep’t of Commerce*, 351 F. Supp. 3d at 548.

184. *Dep’t of Commerce v. New York*, 139 S. Ct. at 2561–62.

185. *Id.* at 2563.

186. *Id.*; see *New York v. Dep’t of Commerce*, 351 F. Supp. 3d at 551 (OMB requirements and the Federal Paperwork Act).

187. *Dep’t of Commerce v. New York*, 139 S. Ct. at 2575.

188. *Id.*

The Justice Department thereupon made the request, claiming that the information was critical to VRA enforcement.¹⁸⁹ The resulting letter did not explain how the Justice Department, without the benefit of these critical data from the 1950s on, had managed to enforce the VRA for the nearly fifty-five years of its existence. In fact, the Acting Assistant Attorney General for the Civil Rights Division, who ghost-wrote the letter, testified by deposition that citizenship data was in fact *not* necessary for enforcement of the VRA.¹⁹⁰

Having procured the desired request, Secretary Ross then overruled the strong objections of the Census Bureau and ordered that the question be added.¹⁹¹ The memo supporting this Order relied on the solicited Justice Department request, without so much as hinting at its Commerce Department parentage.¹⁹²

2. The lawsuits and the record

The ensuing lawsuits were consolidated before Judge Jesse Furman in the Southern District of New York as *New York v. Department of Commerce*. The suits claimed that the addition of the question was arbitrary and capricious under the Administrative Procedure Act, violated the Bureau's statutory and constitutional duties in implementing the Census, and reflected invidious discrimination.¹⁹³

When a government agency is sued under the Administrative Procedure Act, it must submit the "whole record" of materials on which its decision was based.¹⁹⁴ The Commerce Department initially provided an anemic administrative record that included little more than the solicited Justice Department letter asking Commerce to include the question to facilitate enforcement of the VRA, plus Census Bureau memos generated by the request, and Secretary Ross's decision memo accommodating the Justice Department.¹⁹⁵ Ross, in fact, doubled (or tripled)

189. *New York v. Dep't. of Com.*, 351 F. Supp. 3d at 567.

190. *Id.* at 568.

191. 139 S. Ct. at 2562–64.

192. *Id.* at 2575.

193. 351 F. Supp. 3d at 515.

194. 5 U.S.C. § 706 ("the court shall review the whole record or those parts of it cited by a party").

195. *Dep't of Com.*, 351 F. Supp. 3d at 530; *see id.* at 529 (the Court found that the Administrative Record did not constitute the "whole record" — namely, the "full scope of" materials that Secretary Ross had considered, whether directly, "indirectly," or "constructively."); *see also* Transcript of Oral Argument at 79–82, *Dep't of Com.*, 351 F. Supp. 3d 502 (S.D. N.Y. July 3, 2018) (No. 1:18-cv-0292) ("July 3rd Tr."). The Court also found that Plaintiffs had "made a strong preliminary or prima facie showing that they will find material beyond the Administrative Record indicative of bad faith" or pretext. 351 F. Supp. 3d at 529 (quoting July 3rd Tr. at 85).

down on this false explanation. In sworn testimony before three Congressional committees, he repeated the story that Commerce had included the citizenship question in response to the Justice Department's request for citizenship data to assist in VRA enforcement.¹⁹⁶ Indeed, he maintained that he was "responding *solely* to [the] Department of Justice's request."¹⁹⁷

In addition to being skimpy, the record the Commerce Department initially submitted left the misleading impression that the request for a citizenship question originated with the DOJ. On its own initiative, the Government supplemented the administrative record to include a one-page memo from the Secretary admitting he wanted to include a citizenship question before DOJ asked for it and that the Department of Commerce asked the DOJ to make the request.¹⁹⁸ It is reasonable to infer that the DOJ attorneys insisted on this disclosure upon entering the case.

Ross's new memorandum still claimed that the DOJ wanted "improved data about citizen voting-age population for purposes of enforcing" the VRA.¹⁹⁹ While other Census Bureau reviews, in particular the American Community Survey,²⁰⁰ collected citizenship data, Ross stated they were not adequate for multiple reasons.²⁰¹

Secretary Ross's decision memorandum purported to consider three options to obtain the data for DOJ—(1) continue to collect information in the American Community survey and develop a model to estimate citizenship at a more granular level; (2) include the citizenship question on the decennial census; or (3) use administrative records from other agencies, such as the Social Security Administration, to provide DOJ the citizenship data it ostensibly needed.²⁰² The Census Bureau recommended the third option "because the Bureau has long used administra-

196. *Dep't of Com.*, 351 F. Supp. 3d at 545. Ross also did not inform the Census Bureau about the request's origins.

197. *Id.* at 546 (emphasis in original).

198. *Id.* at 547–48.

199. *Dept. of Com. v. New York*, 139 S. Ct. 2551, 2562 (2019). The rationale was farfetched not only because the Justice Department had never claimed a need for such data to enforce the VRA, but also because the Trump Justice Department had brought no VRA cases for dilution of minority rights, and plainly was not invested in the protecting those rights.

200. The American Community Survey is "an ongoing survey that provides vital information on a yearly basis about our nation and its people. Information from the survey generates data that help determine how more than \$675 billion in federal and state funds are distributed each year." *About the American Community Survey*, U.S. CENSUS BUREAU (June 2, 2022), <https://www.census.gov/programs-surveys/acs/about.html> [<https://perma.cc/EYS4-FHVZ>].

201. *Dept. of Com.*, 139 S. Ct. at 2569–71.

202. *Id.* at 2562–63.

tive records to supplement and improve census data.”²⁰³ The Secretary rejected that option because, he stated, administrative records were missing for 10 percent of the population.²⁰⁴ Citing letters and conversations—rather than statistical studies and precedents—the Secretary found that a fourth option, reinstating the citizenship question and “further enhancing” the administrative data the Bureau had collected, would give DOJ the “most complete and accurate” citizen voting-age population data in response to its request.”²⁰⁵

The memo reported that the Secretary had “carefully considered” the possibility that a citizenship question would depress the response rate in minority populations, as the Bureau strenuously argued, but—again, without citing any analysis comparable to the Bureau’s—the Secretary rejected the Bureau’s position because the empirical evidence was supposedly limited and uncertain.²⁰⁶ The Secretary concluded that “the need for accurate citizenship data and the limited burden that the reinstatement of the citizenship question would impose outweigh fears about a potentially lower response rate.”²⁰⁷

3. The district court decision

The district court, concerned that the memo was a charade and that the record was incomplete, ordered the Government to supplement the administrative record and granted extra-record discovery, including a deposition of Secretary Ross.²⁰⁸ The Supreme Court stayed the deposition of Secretary Ross but allowed other discovery to proceed.²⁰⁹

203. *Id.* at 2563.

204. *Id.*

205. *Id.* This option was no compromise. It still included the question on the Census questionnaire despite the decrease in response rate that would likely follow.

206. *Id.*

207. The Secretary was disingenuous in minimizing fears of a lower response rate. The Trump Administration’s vocal anti-immigrant stance and the dramatically increased efforts to deport undocumented immigrants had substantially increased anxiety and distrust of the federal government in the immigrant community. See Sam Levine and Madeline Gregory, ‘A Perfect Storm: U.S. Census Imperiled by Trump Rhetoric and Growing Distrust,’ THE GUARDIAN (Jan. 22, 2020), <https://www.theguardian.com/us-news/2020/jan/22/us-census-trump-rhetoric-distrust-undercount> [https://perma.cc/8J]P-D8GV]; see also Hansi Lo Wang, *Immigration Hard-Liner Files Reveal 40-Year Bid Behind Trump’s Census Obsession*, NPR (Feb. 15, 2021), [npr.org/2021/02/15/967783477/immigration-hard-liner-files-reveal-40-year-bid-behind-trumps-census-obsession](https://www.npr.org/2021/02/15/967783477/immigration-hard-liner-files-reveal-40-year-bid-behind-trumps-census-obsession) [https://perma.cc/3USK-VZMM] (“[A] long history of distrust of the census has made many noncitizens, Latinos, Asian-Americans and other historically undercounted groups wary of telling the government their households’ citizenship status.”).

208. *Dep’t. of Com. v. New York*, 139 S. Ct. at 2564.

209. *Id.*

Based on the supplemented administrative record, the district court issued a 177-page opinion granting the Plaintiffs summary judgment on their claim under the Administrative Procedure Act. The court found that Secretary Ross had

failed to consider several important aspects of the problem; alternately ignored, cherry-picked, or badly misconstrued the evidence in the record before him; acted irrationally both in light of that evidence and his own stated decisional criteria; and failed to justify significant departures from past policies and practices—a veritable smorgasbord of classic, clear-cut APA violations.²¹⁰

In addition, the court found that Secretary Ross lied about the reasons for his action and attempted to cover up his lies by submitting a “curated and highly sanitized” administrative record²¹¹ and by excluding any records of his early discussions with other officials (including Trump political operative Steven Bannon and anti-immigration zealot Kris Kobach) regarding the citizenship question.²¹² Further, the court found Ross had initially failed to disclose that the issue arose prior to DOJ’s request.²¹³ Additionally, he had revised his explanation in a manner “plainly intended to downplay the degree to which [he] departed from the process ordinarily used to consider new questions on the census.”²¹⁴ The court also found that the Secretary had an “unalterably closed mind” on the inclusion of a citizenship question, an additional basis for determining that his actions were arbitrary and capricious.²¹⁵ In sum, the court held that the Secretary’s stated rationale for including the citizenship question was pretextual and therefore arbitrary and capricious.²¹⁶

The plaintiffs also brought an equal protection claim, alleging that the Secretary in his official capacity sought a citizenship question to invidiously discriminate against Hispanics and other immigrants by sup-

210. *New York v. United States Dep’t of Com.*, 351 F. Supp. 3d 502, 516 (S.D.N.Y. 2019).

211. *Id.* at 571.

212. *Id.* at 571–72.

213. *Id.* at 572.

214. *Id.*

215. *Id.* at 662–63.

216. *Id.* at 516 (“And finally, the evidence establishes that Secretary Ross’s stated rationale, to promote VRA enforcement was pretextual—in other words, that he announced his decision in a manner that concealed its true basis rather than explaining it, as the APA required him to do.”); *see also id.* at 660 (“Finally, and perhaps most egregiously, the evidence is clear that Secretary Ross’s rationale was pretextual. . . .”). Judge Furman made his determination of pretext as part of his assessment of arbitrary and capriciousness.

pressing their response to the Census, producing an undercount that would cause them to receive less than their fair share in the allocation of political power and federal benefits.²¹⁷ Because the Supreme Court had blocked the Plaintiffs' effort to depose the Secretary, the court found they were unable to establish the requisite intent to discriminate, and he dismissed the claim without prejudice.²¹⁸

4. The Supreme Court Decision—Part 1

Bypassing the court of appeals, the Government appealed directly to the Supreme Court. The Court, mindful of the Bureau's need to complete the census by the end of 2020, accepted and expedited review.²¹⁹ The Court issued a fractured decision in June 2019 with shifting majorities on different issues. First, the Court assessed whether the conduct was arbitrary and capricious, and then treated the pretext inquiry as a separate issue.

The Chief Justice, joined by Justices Alito, Thomas, Gorsuch, and Kavanaugh, first adopted an approach akin to that in the *Travel Ban Case*, appearing to accept at face value the Government's explanation that it had included the citizenship question to assist the DOJ in voting rights cases. Citing *Motor Vehicle Mfrs. Ass'n v. State Farm Mutual Ins. Co.*, the Court found that the agency's obligation was to "examine the relevant data and articulate a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.'"²²⁰ The Court then applied a particularly insipid rationality standard. The statute, the Court said, vested the Secretary with discretion regarding what to include in the Census questionnaire. Exercising that authority, he was entitled to override the advice of the Census Bureau regarding the effect of a citizenship question on turnout and to disregard the Bureau's determination that it could obtain citizenship data through other sources.²²¹ The Secretary's decision, according to the

217. *See id.* at 541–42, 664–65.

218. *Id.* at 671 (explaining that Plaintiffs' decision to proceed without the stayed Ross deposition "was understandable, but means that the equal protection claims rises or falls on a record without Secretary Ross's deposition. . . . [T]hat record fails to support Plaintiffs' equal protection claim. . . .").

219. *In re Dep't of Com.*, U.S., 139 S. Ct. 566, 2018 WL 5458822 (Nov. 16, 2018).

220. *Dep't. of Com. v. New York*, 139 S. Ct. 2551, 2569 (2019) (quoting *Motor Vehicle Mfrs. Ass'n. of United States, Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) and *Burlington Truck Lines, Inc. v. U.S.*, 371 U.S. 156, 168 (1962)).

221. *Id.* (accusing dissenting opinion of "subordinating the Secretary's policymaking discretion to the Bureau's technocratic expertise . . . [T]he Census Act authorizes the Secretary, not the Bureau, to make policy choices within the range of reasonable options.").

Chief Justice, was a “paradigmatic example of the type of ‘value-laden decision-making and the weighing of incommensurables under conditions of uncertainty’ to which courts owe deference.”²²²

Justice Breyer’s concurrence and dissent dissected this reasoning, concluding that the “Secretary’s decision to add a citizenship question created a severe risk of harmful consequences”—suppression of minority responses—“yet he did not adequately consider whether the question was necessary or whether it was an appropriate means of achieving his stated goal.”²²³ The Secretary, Justice Breyer stated, “failed to consider . . . important aspect[s] of the problem,’ and ‘offered an explanation for [his] decision that runs counter to the evidence,’ all in violation of the APA.”²²⁴ Whether pretextual or not, Justice Breyer said, the Secretary’s decision was arbitrary, capricious, and an abuse of discretion.²²⁵

5. The Supreme Court Decision—Part 2

In the second part of his opinion, the Chief Justice—now joined by Justices Breyer, Ginsburg, Sotomayor, and Kagan—rejected the suspension of skepticism that animated the first part and undertook the analysis that he’d rejected in the *Travel Ban Case*. The Chief Justice found that Secretary Ross was adamant about adding a citizenship question before accosting any evidence and that the cover story regarding the Justice Department’s need for the data to assist with enforcement of the VRA “seems to have been contrived.”²²⁶ The entire exercise was an elaborate fabrication, from the effort to put the DOJ up to asking for a question on citizenship to the deployment of the fake DOJ rationale in overruling the Census Bureau’s strong recommendation against such a question.

The Government contended that there is nothing wrong with an agency head coming “into office with policy preferences and ideas, discuss[ing] them with affected parties, sound[ing] out other agencies for support, and work[ing] with staff attorneys to substantiate the legal basis for a preferred policy.”²²⁷ The Court agreed but only “to a point.”²²⁸ “Our review is deferential,” the Chief Justice stated, “but we are ‘not re-

222. Metzger, *supra* note 35, at 27 (quoting *Dep’t. of Com.*, 139 S. Ct. at 2555).

223. *Dep’t of Com.*, 139 S. Ct. at 2585; *id.* at 2584 (Breyer, J., concurring in part and dissenting in part).

224. *Id.* (quoting *Motor Vehicle Mfrs. Ass’n.*, 463 U.S. at 43).

225. *Id.* at 2584.

226. *Id.* at 2575.

227. *Id.* at 2574.

228. *Id.*

quired to exhibit a naiveté from which ordinary citizens are free.”²²⁹ In other words, the problem was not that the Secretary confronted the issue with preconceived ideas, that he proceeded with an improper purpose, or that he persuaded DOJ to ask for the citizenship question. The problem was that he did not tell the truth, resulting in a “significant mismatch between the decision the Secretary made and the rationale he provided.”²³⁰

Without invoking the arbitrary and capricious standard, the Chief Justice held that lying about the rationale for an administrative determination was impermissible and invalidated the decision to include the question. The Court treated the pretext inquiry as a thing apart from the assessment earlier in the opinion whether the conduct was arbitrary and capricious, rather than a step anterior and integral to that analysis.²³¹

6. The dissent

Justice Thomas’s dissent in the case, joined by Justices Gorsuch and Kavanaugh, suggested that there was no bad faith and that the contrary ruling “[e]cho[es] the din of suspicion and distrust that seems to typify modern discourse.”²³² That position is weak. The Secretary of Commerce had testified before Congress three times under oath that the DOJ had requested the citizenship question, without disclosing that Commerce had asked them to do so. False or misleading testimony shows bad faith,²³³ justifying further inquiry even without the additional evidence of dishonesty reflected in the Secretary’s clumsy cover-up, or in the effort to manufacture new circumstances that might justify such a late amendment to the census questionnaire.

Justice Thomas also argued that pretext was not a basis for ruling under the Administrative Procedure Act. He noted that it was “far from

229. *Id.* at 2575 (quoting *United States v. Stanchich*, 550 F.2d 1294, 1300 (2d Cir. 1977)).

230. *Id.*

231. *See id.*

232. *Id.* at 2576 (Thomas, J., concurring in part and dissenting in part); *see id.* at 2576–77 (writing that the district court’s decision was based on “an administration-specific standard”); *id.* at 2582 (“I do not deny that a judge predisposed to distrust the Secretary or the Administration could arrange those facts on a corkboard and—with a jar of pins and a spool of string—create an eye-catching conspiracy web.”).

233. In the criminal context, false exculpatory statements are evidence of consciousness of guilt. *See United States v. Reyes*, 302 F.3d 48, 56 (2nd Cir. 2002). New York has a specific rule of evidence recognizing the probative value of false exculpatory statements. N.Y. R. EVID. 4.20.3; *see United States v. Ath*, 951 F.3d 179, 187 (4th Cir. 2020); *United States v. Dawkins*, 999 F.3d 767, 794 (2d Cir. 2021).

clear” that pretext is a “subset” of arbitrary and capricious review.²³⁴ But even if it was, he opined, “an agency action is not arbitrary or capricious merely because the decisionmaker has other reasons for the decision. . . . [E]ven under respondents’ approach, a showing of pretext could render an agency action arbitrary and capricious only in the infinitesimally small number of cases in which the administrative record establishes that an agency’s stated rationale did not factor *at all* into the decision.”²³⁵ In fact, the case at hand falls into those small number of cases—the Secretary’s stated rationale did not factor at all into his decision. However, nothing in the majority opinion limited the holding to that scenario. Nor does Justice Thomas say why it is acceptable to conceal the primary rationale for an administrative decision, or even a substantial ground.

7. Effect on the Court’s legitimacy

Even before the *Census Case* was decided, critics were warning that upholding inclusion of the citizenship question would damage the credibility of the Court. Professor Richard Hasen charged that the Government was asking the Court to “become complicit in a cover-up of discriminatory activity,” and that, if the Court accepted the invitation, “any pretense of the legitimacy of the decision will be gone.”²³⁶ *New York Times* columnist Linda Greenhouse predicted that the “Trump Administration’s cynical hijacking of the census would have a devastating effect on the integrity of the Supreme Court.”²³⁷ These observations reflected the widely held view that the purpose of including a citizenship question was to cause an undercount of Hispanic voters. Such an undercount would disadvantage them in the allocation of goods and services predicated upon the Census numbers and—because most Hispanics voted Democratic—would skew redistricting in favor of Republicans.²³⁸ Justice Breyer, in dis-

234. *Dep’t of Com.*, 139 S. Ct. at 2579 (Thomas, J., concurring in part and dissenting in part).

235. *Id.*

236. Richard L. Hasen, *The Census Case is Shaping Up to Be the Biggest Tragedy Since Bush v. Gore*, SLATE (June 25, 2019, 6:29 PM), <https://slate.com/news-and-politics/2019/06/census-case-john-roberts-bush-v-gore-tragedy.html> [<https://perma.cc/3959-KNYK>].

237. Linda Greenhouse, *The Supreme Court, the Census Case, and the Truth*, N.Y. TIMES (May 9, 2019), <https://www.nytimes.com/2019/05/09/opinion/supreme-court-census-trump.html> [<https://perma.cc/Y9LG-36TW>].

238. Andrew Prokop, *Trump’s Census Citizenship Question Fiasco, Explained*, VOX (Jul. 11, 2019), <https://www.vox.com/2019/7/11/20689015/census-citizenship-question-trump-executive-order> [<https://perma.cc/LXU8-FXBX>] (“The widespread expectation was that the question would stoke fear among unauthorized immigrants and their family members, scaring off millions of mostly Latino residents from responding, and meaning states where those residents are concentrated will

sent, explicitly bared his concern that a decision upholding the Secretary's action would play poorly in the public arena. He noted that the Secretary's failures in reaching and explaining his decision, "risked undermining public confidence in the integrity of our democratic system itself."²³⁹ He worried that a Supreme Court decision validating the Secretary's actions would rope the Court into that malaise.²⁴⁰

The Court's decision confounded the predictions, but only partially. Rather than first assessing the dishonesty of the Government's explanation of its decision, the Court started with a shadow analysis, determining whether the Government's explanation would have been valid if it had articulated the real reason for the citizenship question, before finding that it did not.²⁴¹ In essence, the Court judged the quality of the Government's lie. The Court did not merely pretend that the Secretary's explanations were true; it went so far as to suggest that his judgment on the citizenship question was precisely the kind of "value-laden" policy choice that was lodged in his discretion.²⁴² This suggestion is particularly troubling given the common view that one of those laden values was discrimination against Hispanics in the electoral process.²⁴³

On any measure, the Court's characterization of the decision as a standard discretionary determination did not accord with reality. As one scholar noted,

The conservative majority found that the evidence before the Secretary could be read to suggest that each of the available alternatives for increasing access to citizenship data for purposes of VRA enforcement "entailed tradeoffs between accuracy and completeness." The District Court judge had seen no such trade-offs and illustrated that the addition of the citizenship

be undercounted. (Those states, which mostly favor Democrats, would then get smaller House of Representatives delegations and less federal funding because of the undercount.)").

²³⁹. *Dep't of Com.*, 139 S. Ct. at 2584 (Breyer, J., concurring and dissenting).

²⁴⁰. At the time Justice Breyer wrote, there was an apparently viable prospect that the Court might ultimately uphold the citizenship question in a subsequent round of the litigation. See Joshua Matz, *Thoughts on the Chief's Strategy in the Census Case*, TAKE CARE BLOG (July 1, 2019), <https://takecareblog.com/blog/thoughts-on-the-chief-s-strategy-in-the-census-case> [<https://perma.cc/Y9CY-Y672>].

²⁴¹. 139 S. Ct. at 2569–71.

²⁴². *Id.* at 2571.

²⁴³. See, e.g., Cristian Farias, *Is There Racist Intent Behind the Census Citizenship Question*, THE NEW YORKER (June 26, 2019), <https://www.newyorker.com/news/news-desk/is-there-racist-intent-behind-the-census-citizenship-question-wilbur-ross> [<https://perma.cc/B9ZN-NX4F>]; Associated Press, *U.S. Census: Asian American and Latino Groups Sue Over 'Racially Discriminatory' Citizenship Question—a First Since 1950*, FIRSTPOST. (June 1, 2018), <https://www.firstpost.com/world/us-census-asian-american-and-latino-groups-sue-over-racially-discriminatory-citizenship-question-a-first-since-1950-4490641.html> [<https://perma.cc/5XNE-L7PD>].

question would always generate worse results in terms of accuracy and completeness as compared to options that did not rely on such a question.²⁴⁴

The dissent agreed with the district court. Justice Beyer noted that the evidence before the Secretary *conclusively* established that the addition of the citizenship question would suppress the response rates of immigrants and Hispanics, and that the record refuted all reasoning to the contrary. Likewise, adding the question would negatively affect the accuracy of the census.²⁴⁵

The allegation that the addition of the citizenship question reflected invidious or at least partisan discrimination was another charge in the “everybody knows,” common-sense category. The Secretary’s meeting with Steve Bannon (Trump aide and known immigration foe) which began the discussion of the citizenship question, the clear evidence that the question would cause an undercount, the obvious political advantage to Republicans in undercounting Hispanics, the Secretary’s dishonest cover story for the change—these factors practically compelled the inference that the Administration sought to discriminate against Hispanics.²⁴⁶ The reason this invidious intent was not proven in the litigation was that the Supreme Court blocked the Secretary’s testimony.²⁴⁷

The notion that the Secretary’s decision was the kind of determination committed to his discretion rankled some scholars. Professor Jennifer Chacon noted that,

No administration in recent history has been as clear and transparent about its intent to increase white political power at the expense of communities of color. In light of this fact, the decision to treat Secretary Ross’s decision-making process as

244. Jennifer M. Chacón, *The Inside-Out Constitution: Department of Commerce v. New York*, 2019 SUP. CT. REV. 231, 241–42 (2019) (emphasis added).

245. *Id.* at 242 (footnotes omitted).

246. See Robert L. Tsai, *Equality is a Brokered Idea*, 88 GEO. WASH. L. REV. ARGUENDO 1, 7 (2020) (“[P]laintiffs built a circumstantial case of intent to harm on the basis of citizenship status and race. The case was based on evidence that Commerce Secretary Wilbur Ross had decided to add the question after conversations with anti-immigration figures like Steve Bannon and Kris Kobach, plus the unequal effects of the policy change.”).

247. *New York v. Dep’t of Com.*, 351 F. Supp. 3d 502, 671 (S.D.N.Y. 2019) (“To be fair, it is possible Plaintiffs could have carried their burden [of proof] had they had access to sworn testimony from Secretary Ross himself.”).

presumptively normal and to decline to allow for an exploration of his motives in this case evinces profound naiveté.²⁴⁸

As Professor Chacon points out, the Chief Justice crafted the entire opinion—including the portion on pretext—without mentioning Hispanics or Latinos, or even hinting that the purpose of the citizenship question might have been discriminatory. Professor Chacon criticized the opinion precisely on the ground of verisimilitude, “Chief Justice Roberts writes his entire opinion as if he is living in a parallel universe in which political operatives are not trying to game the system to take advantage of racism and the political divides that racism creates.”²⁴⁹ Similarly, Professor Richard Hasen said that the array of opinions in the case “shows the lengths to which many of the Justices are willing to go to ignore evidence of discriminatory intent and pretext, while cleansing discriminatory taint.”²⁵⁰ Professor Joshua Matz pointed out the Court’s reluctance to say that the Secretary’s “reasons were improper or bigoted; it merely said that his stated reasons were ‘a distraction.’”²⁵¹

The first part of the opinion is willfully blind to both the discriminatory purpose and effect of the citizenship question. This is made even more remarkable by subsequent events that bolstered the evidence of invidious discrimination and raised the threat that more facts showing such discrimination would emerge. When a longtime Republican redistricting strategist died, his daughter inherited his papers and turned them over to counsel for plaintiffs in a gerrymandering case, who were at the same firm as counsel in the *Census Case*. They found two aspects of those papers probative. First, the strategist wrote that citizenship data could assist in drawing electoral districts based on citizen voting

248. Chacón, *supra* note 244, at 252.

249. *Id.* at 254.

250. Richard L. Hasen, *The Supreme Court’s Pro-Partisan Turn*, 109 GEO L.J. ONLINE 50, 52 (2020-2021). Regarding the dissent, one scholar noted that “Justice Alito seemed to take offense at the suggestion that adding a citizenship question to the census might be racist, given that many countries routinely ask such a question. Yet context always matters. Those countries might not be governed by a political party that routinely suppresses and dilutes the votes of people of color or a President who constantly stokes racial resentment and displays racial animus.” Michael J. Klarman, *Foreword: The Degradation of American Democracy—and the Court*, 134 HARV. L. REV. 1, 218 (2020) (footnotes omitted).

251. Joshua Matz, *Thoughts on the Chief’s Strategy in the Census Case*, TAKE CARE BLOG (July 1, 2019), <https://takecareblog.com/blog/thoughts-on-the-chief-s-strategy-in-the-census-case> [<https://perma.cc/Y9CY-Y672>]; see also Jennifer Nou, *Census symposium: A Place for Pretext in Administrative law?*, SCOTUSBLOG (June 28, 2019, 12:54 PM) (the decision “hardly stands for the proposition. . . that bureaucratic honesty is the best policy”), <https://www.scotusblog.com/2019/06/census-symposium-a-place-for-pretext-in-administrative-law/> [<https://perma.cc/2WZY-9G93>].

age population (CVAP), which would be “*advantageous to Republicans and Non-Hispanic Whites*.”²⁵² Second, there was evidence this same strategist ghost-wrote or at least contributed to the bogus DOJ letter “requesting” a citizenship question to help enforce the Voting Rights Act.²⁵³

The plaintiffs in the *Census Case* moved in the district court for discovery regarding this development and provided a copy of their motion to the Supreme Court.²⁵⁴ The plaintiffs also filed a motion asking the Supreme Court, if it decided for the Secretary, to remand to the district court for the limited purpose of following up on this issue.²⁵⁵ The motion fired the following shot across the bow: “This Court should not bless the Secretary’s decision on this tainted record, under a shadow that the truth will later come to light.”²⁵⁶ Some have surmised²⁵⁷ that the Chief Justice seemingly switched sides in the case at the last minute due to concern about what other information might come out. A decision upholding the citizenship question would have undermined the Court’s legitimacy if additional blockbuster evidence showing invidious discrimination emerged from the yet unplumbed terabytes of the strategist’s files.²⁵⁸ Remarkably, even in light of this evidence, four Justices remained willing to bless the Secretary’s decision.²⁵⁹

252. Michael Wines, *Deceased G.O.P. Strategist’s Hard Drives Reveal New Details on the Census Citizenship Question*, N.Y. TIMES (May 30, 2019) (emphasis added) <https://www.nytimes.com/2019/05/30/us/census-citizenship-question-hofeller.html> [<https://perma.cc/X2SW-6Y5V>].

253. Hansi Lo Wang, *Emails Show Trump Officials Consulted with GOP Strategist on Citizenship Question*, NPR (Nov. 12, 2019, 11:37 AM) (emphasis added), <https://www.npr.org/2019/11/12/778496494/emails-connect-trump-officials-and-gop-redistricting-expert-on-citizenship-quest> [<https://perma.cc/8MJP-5BGZ>].

254. Melissa Boughton, *ACLU Notifies U.S. Supreme Court of New Evidence in Citizenship Question Case*, THE PULSE (May 31, 2019), <https://pulse.ncpolicywatch.org/2019/05/31/aclu-notifies-us-supreme-court-of-new-evidence-in-citizenship-question-case/#sthash.RgboaCTf.dpbs> [<https://perma.cc/G6RB-4L7V>].

255. NYIC Respondents’ Motion for Limited Remand, *Dep’t of Com. v. New York*, 139 S. Ct. 2551 (2019) (No. 18-966).

256. *Id.* at 11.

257. Linda Greenhouse, *It’s Not Nice to Lie to the Supreme Court*, N.Y. TIMES (July 3, 2019), <https://www.nytimes.com/2019/07/03/opinion/trump-supreme-court-census.html> [<https://perma.cc/Q8HN-G3CY>]. The rumors that the Chief Justice had changed his vote would explain the dualism of his opinion, where the first half upheld the Commerce Department, and the second half rejected its position.

258. At the time of the opinion, only a fraction of the data in Hofeler’s files had been reviewed. See Tsai, *supra* note 246, at 10 (“Had the Justices rushed to ratify the administration’s decision after this blockbuster revelation, history could very well have judged them harshly. And they would have deserved it.”); Metzger, *supra* note 35, at 29 (“To sanction Ross’s decision in the face of such evident deception and partisanship risked the Court being viewed as simply a political institution, much the way invalidating the signal Democratic political achievement in a generation might have done.”).

259. 139 S. Ct. at 2576, 2595.

The disposition of the case also prompted some cynicism regarding the Court's commitment to real world judging. The Court remanded the case to the agency, allowing it to try again. As Professor Matz noted at the time,

[the Court] wouldn't have remanded to the agency, and gone through all the trouble of rejecting every other legal argument at hand, if there were nothing the agency could do to save the challenged decision on remand. It is safe to anticipate that Ross and his lawyers will now offer a battery of reasons in an effort to justify the inclusion of a citizenship question—and that Roberts will be decidedly inclined toward accepting at least one of those reasons as sufficient to support the agency's decision.²⁶⁰

It is one thing to remand the case for the agency to fix when it has committed a procedural error. But when the agency has given a false reason for its decision, allowing a second chance to explain itself poses the obvious risk that only the explanation of the agency's actions, not the actual reasons, will change. The agency might simply do a better job of lying about its reasons for acting.²⁶¹ Professor Matz predicted that “the parties will once again litigate whether his reasons comply with the APA. But now they will do so on a battleground that the Chief has tilted sharply in Ross's favor—and from which the Chief has removed most of the plaintiffs' arguments.”²⁶² But before the Chief Justice “dirties his hands upholding Ross's decision,” Matz declared, “he has required Ross to clean things up a bit, thus ensuring that the citizenship question enjoys a patina of legitimacy when he finally okays it.”²⁶³

Professor Michael Dorf offered a similar view: “Based on the Travel Ban litigation, there is reason to fear that the SCOTUS will uphold the citizenship question after the administration ‘lawyers it up’ better.”²⁶⁴ The main distinction from the *Travel Ban Case*, Professor Dorf ex-

260. Matz, *supra* note 251.

261. Cf. Alexander Bickel, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS*, 216 (1962) (“If a statute is denied application for being impermissibly motivated, how is a legislature to respond? . . . Presumably only by imposing upon some of its members a requirement of less candor in debate. This is scarcely a desirable consummation.”).

262. Matz, *supra* note 251; see also Steven Mazie (@stevenmazie), TWITTER (July 1, 2019, 8:02 AM), <https://twitter.com/stevenmazie/status/1145664030142603266>, [<https://perma.cc/9XC2-8H3F>] (“Monday-morning quarterbacking the surprise Roberts decision in the census case, I’m increasingly wary”).

263. Matz, *supra* note 251.

264. Michael Dorf, *Pretext and Remedy in the Census Case and Beyond*, TAKE CARE BLOG (July 2, 2019), <https://takecareblog.com/blog/pretext-and-remedy-in-the-census-case-and-beyond> [<https://perma.cc/9K3N-XWRY>].

plained, is that the Court there “never actually found pretext. Here it has. And while an otherwise legitimate decision found to be pretextual should not be forever barred, where only a few months (at most) will pass and the motives remain the same, a new determination to include the citizenship question should be viewed with extreme skepticism.”²⁶⁵

Likewise, Professor Richard Hasen surmised that the Chief Justice was setting the case up for “animus laundering,” or “the ability of a government actor to change the rationale for a government action from a discriminatory one to something more palatable to satisfy further judicial review.”²⁶⁶ These reactions are hardly a vote of confidence in the Court’s commitment to verisimilitude.

Notably, if the Court’s plan was to affirm the Secretary’s next effort, it would have been inconsistent with the subsequent *DACA Case*. Absent a new, from the ground up decision, the Secretary would have been stuck with his initial rationale. The *DACA Case* prohibits an after-the-fact rationalization to justify the preformulated decision.²⁶⁷

As it turned out, the census deadlines resolved the issue. The Government did not have time to detoxify its prior explanation of the citizenship question.²⁶⁸ But it was not for want of trying. When the Justice Department said the Government would not seek again to include the citizenship question, the President ordered that the statement be retracted.²⁶⁹ Ultimately, the President had to accept the physical limitations on the ability of the Census Bureau to change the questionnaire. Perhaps the cynical view was wrong, and the Court expected this eventual outcome. But it could not have known for certain.

C. The *DACA Case*

Unlike the *Travel Ban Case* and the *Census Case*, the *DACA Case* (*U.S. Department of Homeland Security v. Regents of Univ. of Cal.*)²⁷⁰ does not have a problem with verisimilitude. To the contrary, the decision reinforces

265. *Id.*

266. Hasen, *supra* note 250, at 65. *But see* Tsai, *supra* note 246, at 12 (suggesting that Roberts was seeking to run out the clock on implementing the citizenship question).

267. *See* discussion *infra* notes 277-92.

268. Lyle Denniston, *It's final: no citizenship question on 2020 census* NAT'L CONST. CTR. (Jul. 3, 2019), <https://constitutioncenter.org/blog/its-final-no-citizenship-question-on-2020-census> [https://perma.cc/YDA8-5JBN] (“It seemed apparent on Tuesday that Secretary Ross and his aides either could not come up with another plausible justification, or at least did not want to delay preparations for the census by having the legal controversy continue, as it otherwise would have.”).

269. Prokop, *supra* note 238.

270. 140 S. Ct. 1891 (2020).

the proposition that accurate reasoning is a key element of the inquiry into whether administrative action is arbitrary and capricious. Further, it makes clear that, under the aegis of arbitrary and capricious review, the inquiry into pretext is more common and central to administrative law than the *Travel Ban* and *Census Cases* suggest.

1. The DACA program

In 2012, the Obama Administration instituted a program entitled Deferred Action for Childhood Arrivals (DACA), for “certain young people who were brought to this country [illegally] as children” through no fault of their own.²⁷¹ DACA deferred deportation proceedings and allowed these immigrants, known as “Dreamers,” to participate in benefits that were usually limited to citizens.²⁷² In 2017, Attorney General William Sessions advised the Department of Homeland Security that DACA was illegal and should be rescinded.²⁷³ Based on that advice and court rulings against the related program, Deferred Action for Parents of Americans and Lawful Permanent Residents, Acting Secretary Elaine Duke terminated the program, allowing some time to wind down.²⁷⁴ Three district courts enjoined the termination, but one of them stayed its decision for ninety days to allow DHS to provide a fuller explanation for the determination that the programs “lack[ed] statutory and constitutional authority.”²⁷⁵ DHS in the meantime had a new Secretary, Kirstjen Nielsen, who produced another explanation that included grounds her predecessor never addressed. As the Court explained,

despite purporting to explain the Duke Memorandum, Secretary Nielsen’s reasoning bears little relationship to that of her predecessor. Acting Secretary Duke rested the rescission on the conclusion that DACA is unlawful. Period. . . . By contrast, Secretary Nielsen’s new memorandum offered three ‘separate and independently sufficient reasons’ for the rescission, . . . only the first of which is the conclusion that DACA is illegal.²⁷⁶

271. *Id.* at 1901.

272. *Id.* at 1901–02.

273. *Id.* at 1903.

274. *Id.*

275. *Id.* at 1904.

276. *Id.* at 1908 (citations omitted).

2. The Supreme Court opinion

The Government sought certiorari before judgment in all three district court cases which the Court granted, thus bypassing decisions by the courts of appeals.²⁷⁷ The Court held that, “[i]t is a ‘foundational principle of administrative law’ that judicial review of agency action is limited to ‘the grounds that the agency invoked when it took the action.’”²⁷⁸ The agency could elaborate on or clarify what its original explanation meant, but it could not dream up new justifications. The predicate of this obligation is the agency’s duty to provide reasons for its decisions. The Court would not uphold the rescission based on “impermissible ‘post hoc rationalization.’”²⁷⁹

This rule, the Court found, serves “important values of administrative law.”²⁸⁰ First, requiring a new decision before considering new reasons promotes “‘accountability’ by ensuring that parties and the public can respond fully and in a timely manner to an agency’s exercise of authority.”²⁸¹ Unless the policy was reissued as new, the old version would be old news. Defending it with a new rationale could fly under the radar, preventing meaningful public accountability.²⁸² Second, requiring a new decision “instills confidence that the reasons given are not simply ‘convenient litigating position[s].’”²⁸³ And third, requiring that the explanation match the action allows effective judicial review, rather than making the courts and the litigants “chase a moving target” of justifications.²⁸⁴ Because DHS’s new reasons for rescinding DACA were different and independent from the prior analysis but the policy was not reissued as new, the rescission was arbitrary and capricious.²⁸⁵

The Court’s reasoning applies equally well to the determination of whether an agency’s rationale for its actions was a pretext. Whether an

277. *Id.* at 1905.

278. *Id.* at 1907 (quoting *Michigan v. EPA*, 576 U.S. 743, 758 (2015)); *see also* *SEC v. Chenery Corp.*, 318 U.S. 80, 87 (1943) (“The grounds upon which an administrative order must be judged are those upon which the record discloses that its action was based.”).

279. *Regents of the Univ. of Cal.*, 140 S. Ct. at 1908 (quoting *Citizens to Pres. Overton Park, Inc. v. Volpe*, 401 U.S. 402, 420 (1971) [hereinafter *Overton Park*]).

280. *Id.* at 1909 (citation omitted).

281. *Id.*

282. *See* Benjamin Eidelson, *Reasoned Explanation and Political Accountability in the Roberts Court*, 130 *YALE L.J.* 1748, 1766 (2021).

283. *Regents of the Univ. of Cal.*, 140 S. Ct. at 1909 (quoting *Christopher v. SmithKline Beecham Corp.*, 32 S. Ct. 2156, 183 (2012)).

284. *Id.*

285. There is a harmless error doctrine that comes into play when it is clear that the agency would reach the same result on remand and requiring a new decision would be empty formalism. *See* Eidelson, *supra* note 282, at 1773.

agency invokes a pretextual explanation at the time it first announces its decision or later, the explanation in either event is a “post-hoc rationalization”: a rationale conjured up for a decision already made on other grounds. Pretext, as a subset of “post-hoc rationalization,” evades accountability by obstructing an effective response to the actual grounds for the decision. It undermines confidence in the decision because the explanation in fact is not the actual basis for the determination. And it frustrates judicial review, as well as public accountability, because the court and the public cannot readily assess the genuine rationale for the decision.²⁸⁶ Like pretext, the subsequent explanation can be a subterfuge, a false explanation presented as the motivating rationale for the decision. Yet the post hoc rationalization is treated as a subset of the arbitrary and capricious inquiry, while pretext is its own category, isolated and separately determined—if the *Census Case* is the guide—only after the Court determines that the bogus explanation would not be arbitrary and capricious if it were true.

There is a potential distinction between the *Census Case* and the *DACA Case*, but it ultimately breaks down. The subsequent justifications for the rescission of DACA were real, in that they could have been considered legitimate policy explanations if offered at the time of the original decision. By contrast, in the *Census Case*, the justification was entirely fabricated—a made-up story with no basis in fact. Even so, this duplicity was not essential to a finding of pretext. The explanation was pretextual because it was not the actual grounds for the decision, just as the *post hoc* rationalization in the *DACA Case* was pretextual.²⁸⁷

Unlike the *Travel Ban Case* and the *Census Case*, the Court in the *DACA Case* addressed whether the administrative actions reflected an invidious purpose. As in those cases, in the *DACA Case* the Court continued to shield the Administration from claims of bias. To proceed with a claim of animus, the plaintiffs had to raise “a plausible inference that an ‘invidious discriminatory purpose was a motivating factor ‘in the relevant decision.’²⁸⁸ The respondents argued that three factors supported such an inference: (1) the disparate impact of the decision rescinding DACA on Mexican immigrants, (2) statements by President

286. See *Dep’t of Com. v. New York*, 139 S. Ct. 2551 (2019). The *Census Case* made clear that an agency is not required to enumerate all its reasons at the time it announces a decision. But the agency must provide the principal reasons, and it cannot conjure up substantial new justifications later. To hold otherwise would defeat the reason-giving requirement in administrative law.

287. It would be fruitless to confine “pretext” to such fabricated grounds. The explanation for an agency action is false if it is not the actual basis of the decision. It is no less false if it could have been the basis of the decision but was not.

288. *Regents of the Univ. of Cal.*, 140 S. Ct. at 1915 (quoting *Arlington Heights v. Metro. Housing Dev. Corp.*, 429 U.S. 252, 266 (1977)).

Trump, and (3) the unusual history behind the rescission. The Court found that none of these factors, alone or in combination, supported an inference of bias. The Court found it unsurprising that because Latinos were the largest portion of unauthorized immigrants, they were most affected by the rescission. That logic is flawed. It is true that one could not rescind DACA without having a disparate impact on Latinos. But it is likewise true that rescinding DACA is a direct and convenient way to effect such discrimination. As Justice Sotomayor stated in dissent, “[T]he impact of the policy decision must be viewed in the context of the President’s public statements on and off the campaign trail.”²⁸⁹ The Court also discounted those statements, finding that they were remote and in different contexts. But those statements did not need to be near in time or relate directly to DACA to suggest prejudice towards Latinos. Indeed, from his first trip down the escalator at Trump Tower, President Trump had made no secret of his views regarding Latino immigrants, which the respondents alleged “were an animating force behind the rescission of DACA.”²⁹⁰ There was no reason to believe the President had mellowed. Third, the Court found nothing unusual in the procedural history of the rescission. As Justice Sotomayor pointed out, the Administration cited its commitment to maintaining DACA just three months before rescinding it, without considering important aspects of the termination.²⁹¹

The factors may not conclusively establish animus, but to find that they cannot support a *plausible inference* reflects a particularly “blinkered approach,” in Justice Sotomayor’s words, a departure from the common sense that otherwise runs through the opinion.²⁹²

Justice Kavanaugh’s dissent also warrants brief mention. He argued that the arbitrary and capriciousness standard “simply ensures that the agency has acted within a broad zone of reasonableness and, in particular, has reasonably considered the relevant issues and reasonably explained the decision.”²⁹³ The only question in his view was whether the

289. *Id.* at 1918 (Sotomayor, J., dissenting in part and concurring in part).

290. *Id.* at 1917.

291. *See id.* at 1918; David Becker, Changing Direction in Administrative Agency Rulemaking: “Reasoned Analysis,” *The Roadless Rule Repeal, and the 2006 National Park Service Management Policies*, 30 *ENVIRONS* 65, 66 (2006) (“[W]hen an agency change[s] course by rescinding a rule, it ha[s] an obligation to supply a reasoned analysis for that change. Courts reviewing abrupt agency changes of direction apply this principle not only when an agency formally rescinds or revises an existing regulation, but also when the agency changes settled precedent in the course of adjudication, alters a prior interpretation of its own rules or governing statute, or makes a dramatic shift between a draft decisional document and the final document.” (internal citations omitted)).

292. *Regents of the Univ. of Cal.*, 140 S. Ct. at 1917.

293. *Id.* at 1933 (Kavanaugh, J., concurring in part and dissenting in part).

second memorandum explained the decision. The *post hoc* rule prevented lawyers from thinking up new explanations during litigation over agency actions. But outside of the context of administrative adjudication, it had never prevented the agency from supplementing its explanation. As Justice Kavanaugh noted, the *post hoc* justification doctrine:

...is not a time barrier which freezes an agency's exercise of its judgment after an initial decision has been made and bars it from further articulation of its reasoning. It is a rule directed at reviewing courts which forbids judges to uphold agency action on the basis of rationales offered by anyone other than the proper decisionmakers.²⁹⁴

Justice Kavanaugh is correct that the application of the *post hoc* rule in the *DACA Case* was novel. The novelty could reflect—as Justice Thomas charged in his dissent²⁹⁵—an effort to avoid a distasteful result. But it also may reflect an enhancement of the reason-giving requirement, migrating pretext into the arbitrary and capriciousness standard.

3. Effect on the Court's legitimacy

The *DACA Case* had little effect on the legitimacy of the Court. Verisimilitude is essentially a one-way ratchet; deciding a case largely consistent with reality is unlikely to generate much comment. We expect the Court to rule on cases in accord with the facts and to insist on reasonable explanations for administrative actions. Meeting that expectation is unremarkable. It is the departures from verisimilitude that invite notoriety and that spur the observations and recommendations offered here.

Prior to the oral argument in the *DACA Case*, columnist Linda Greenhouse opined on the significance of the case. The decision would be important, she said, “in defining the court's relationship to a president who behaves as if he has the Supreme Court in his pocket.” In particular, “[i]t [would] indicate whether the Roberts court—more specifically, the chief justice himself—[would] continue to insist on believable explanations from an administration that often appears incapable of giving one.”²⁹⁶

294. *Id.* at 1934 (quoting *Alpharma, Inc. v. Leavitt*, 460 F.3d 1, 6 (2006)).

295. *Id.* at 1919 (Thomas, J., concurring in part and dissenting in part).

296. Linda Greenhouse, Opinion, *The Supreme Court Confronts DACA*, N.Y. TIMES (Nov. 7, 2019), <https://www.nytimes.com/2019/11/07/opinion/supreme-court-daca.html>.

In fact, the Court did insist on a reasoned explanation at the time of the decision. A made-up explanation—contemporaneously or *post hoc*—will not suffice. The decision puts the executive branch on notice that explanations of administrative actions must correspond with reality, which in turn makes it more likely that decisions reviewing those actions also achieve verisimilitude.

IV. REFORMING DOCTRINES OF DEFERENCE

As the *DACA Case* suggests, the judicial doctrines and inclinations that produced the *Travel Ban* and *Census Cases* need not lead the Court to adopt, accept, or ignore bad administrative conduct. Modest shifts could prevent the kind of delusive results that can undermine the legitimacy of the Court.

A. National Security and Pretext

To justify its hands-off approach in the *Travel Ban Case*, the Court invoked *United States v. Curtiss-Wright Export Co.*,²⁹⁷ affording the highest level of deference to the executive branch on national security, and *Kleindienst v. Mandel*, which refused to look behind visa decisions.²⁹⁸ There are strong reasons for courts to be circumspect in matters of national security and foreign policy, and to a lesser degree, immigration. As the Court stated in *Curtiss-Wright*, in foreign affairs the President must have “a degree of discretion and freedom” that “would not be admissible were domestic affairs alone involved.”²⁹⁹ Compared to Congress—and for that matter, the judiciary—the President “has the better opportunity of knowing the conditions which prevail in foreign countries, and especially is this true in time of war. He has his confidential sources of information. He has his agents in the form of diplomatic, consular and other officials.”³⁰⁰ In addition, speed, secrecy, and uniformity are important in national security-related decisions, and those determinations can entail significant risks.³⁰¹ In addition, because the Constitution vests the exec-

297. 299 U.S. 304 (1936).

298. 408 U.S. 753 (1972).

299. 299 U.S. at 320.

300. *Id.*

301. Ganesh Sitaraman & Ingrid Wuerth, *The Normalization of Foreign Relations Law*, 128 HARV. L. REV. 1897, 1900 (2015) (“In foreign relations, the need for speed and secrecy is paramount. In foreign relations, decisions need to be uniform across the country. In foreign relations, the Executive

utive branch with the predominant role in managing national security and foreign affairs, the Court in *Curtiss-Wright* found that the other branches have a duty to afford comity to the exercise of executive branch prerogatives.³⁰²

The Court may have been concerned in the *Travel Ban Case* that a finding of animus would forever disable a president from responding to a threat if they made any biased statements in the past. There are several responses to this concern. First, the *Travel Ban Case* did not involve remote, ambiguous statements. President Trump plainly said what he intended to do, and promptly did it. Further, the President implied—and the Court concluded—that the elaborate administrative mechanism the President's aides designed to show that the third iteration of the Travel Ban was a bona fide response to a terrorist threat was pretextual. The pretext bolstered the conclusion that the animus continued. Second, if there were any doubt on that score, the Court could have adopted Justice Breyer's approach and put the government's waiver procedures to the test on remand.³⁰³ Third, if the Court was in fact concerned that the taint from the President's statements would be indelible, it should have said so. Candor about this implication of a ruling against the President would have been preferable to wholesale abdication of judicial review.

The asserted national security risks in the *Travel Ban Case* may have also put the Court in a difficult position in another respect. Suppose the Court had upheld the injunction against enforcement of the Travel Ban and then a Muslim individual from one of the banned countries had entered the United States and attacked a major commercial center. There is little doubt that President Trump would have blamed the Court—he already had explicitly said that blood would be on the district court judge's hands if there was an attack.³⁰⁴ In the event that such an attack occurred and was arguably traceable to the Court's decision—and even, perhaps, if it were not—the resulting uproar could have threatened the Court's legitimacy. Whether the Justices consciously recognized or articulated this factor, it was potentially significant, particularly for the

has special expertise compared to courts and Congress. And because of its subject matter, in foreign relations, one wrong turn can lead to national calamity.”).

302. See 299 U.S. at 320.

303. See discussion *supra* notes 134–42.

304. See Steve Inskip, *What if 'Something Happens' After Judge's Ruling on Trump's Travel Ban?*, WBUR (Feb. 7, 2017), wbur.org/npr/513870631/what-if-somethig-happens-after-judge-ruling-on-travel-ban [<https://perma.cc/5399-4UZV>] (after Judge James Robart of the U.S. District Court for the Western District of Washington enjoined enforcement of the Travel Ban, the President tweeted, “Just cannot believe a judge would put our country in such peril. If something happens blame him and the court system. People pouring in. Bad!”).

Chief Justice, who has a special responsibility for the Court's institutional wellbeing.

Nonetheless, though it may be unrealistic to expect the Justices to ignore this kind of concern, it should not receive substantial weight in decision-making. The same argument could apply to many, if not most, national security decisions. Indeed, the *Korematsu* majority likely confronted the same fear. The Court would have been excoriated if it had rejected the internment of Japanese Americans and one of the freed internees had then committed a destructive act of sabotage. To let that concern dictate the Court's response, however, would be to abandon judicial responsibility, as suggested by the near-universal condemnation of *Korematsu* in the ensuing years. Moreover, the stakes may be just as high in many domestic cases as in cases implicating foreign affairs and national security—for example, cases addressing domestic terrorism, privacy, or religious liberty—but that does not excuse the Court from its frontline responsibility to make difficult decisions.

The Chief Justice in the *Travel Ban Case* bristled at the dissent's invocation of *Korematsu* as an apt parallel. Aside from overruling *Korematsu*, the Chief Justice distinguished it on the grounds that the actions there occurred in the United States, involved American citizens, and were overtly based on race whereas the *Travel Ban* involved foreigners in foreign territory and was not explicitly based on an invidious classification. But the rights the Court addressed in the *Travel Ban Case* were those of domestic U.S. relatives of foreign individuals denied entry into the United States, not those of the foreigners.³⁰⁵ The Chief Justice's rationale would view *Korematsu* as correctly decided if the criterion for detention had been *facially* neutral—perhaps suspicion of pro-Japan sympathies—but had been enforced by indiscriminately rounding up people of Japanese descent. Facial neutrality would have provided little comfort to the individuals incarcerated in internment camps based on their race, and probably would not have saved the case from the register of the all-time worst Supreme Court opinions.³⁰⁶ In short, these ostensible distinctions do not differentiate the abdication of judicial review in the *Travel Ban Case* from the abdication in *Korematsu*.

305. See *Trump v. Int'l Refugee Assistance Project*, 137 S. Ct. 2080, 2085 (2017).

306. In addition, contrary to the Court's apparent understanding, the World War II internment did not involve only Americans. The United States pressured Latin American nations to send their citizens of Japanese descent to be interned in this country. Erika Lee, *The WWII Incarceration of Japanese Americans Stretched Beyond U.S. Borders*, TIME (Dec. 4, 2019, 5:15 PM), <https://time.com/5743555/wwii-incarceration-japanese-latin-americans/> [https://perma.cc/KBY5-PLBM]; Natasha Varner, *The US Imprisoned Japanese Peruvians in Texas, Then Said They Entered Illegally*, THE WORLD (Oct. 1, 2018, 12:00 PM), <https://theworld.org/stories/2018-10-01/us-imprisoned-japanese-peruvians-texas-then-said-they-entered-illegally> [https://perma.cc/DB9T-45EW].

Additionally, there are other challenges to national security exceptionalism, at least insofar as it requires judges to accept obvious untruths as fact.³⁰⁷ Not every case involving foreign affairs requires specialized expertise. And judges have no less expertise in foreign affairs than they have in many administrative matters they tackle, from telecommunications policy to molecular genetics. In addition, while “[s]ome national security decisions need to be shrouded in secrecy . . . others do not. Some might require great haste, others do not. At the same time, many ordinary ‘domestic’ issues require secrecy or haste, and yet the Supreme Court has never accepted blanket claims of deference to the president for all domestic policymaking.”³⁰⁸

In addition, as Justice Sotomayor correctly observed in the *Travel Ban Case*, the Court has recognized limits regarding its deference to the executive branch in national security. In *Hamdi v. Rumsfeld*, for example, the Court rejected the Government’s claim that extending “the full protection[] that accompan[ies] challenges to detentions in other settings” posed a “threat to military operations.”³⁰⁹ “We have long since made clear,” Justice O’Connor wrote for the plurality, “that a state of war is not a blank check for the President when it comes to the rights of the Nation’s citizens.”³¹⁰ Likewise, in *Rasul v. Bush*,³¹¹ *Hamdan v. Rumsfeld*,³¹² and *Boumediene v. Bush*³¹³—all relating to treatment of combatants in the war on terror—the Court handled the cases very much like domestic matters.³¹⁴

Excluding national security issues from meaningful judicial oversight does not allow consideration of factors such as the degree of secrecy and expertise required. And it does not permit assessment of pretext, even though effective judicial review demands a truthful

307. Immigration exceptionalism is “derived in part from the national security and foreign relations implications of immigration decisions” and therefore will not be separately analyzed. Ganesh Sitaraman & Ingrid Wuerth, *National Security Exceptionalism and the Travel Ban Litigation*, LAWFARE (Oct. 12, 2017), <https://www.lawfareblog.com/national-security-exceptionalism-and-travel-ban-litigation> [https://perma.cc/QXH3-ATBP].

308. *Id.*; see also Ilya Somin, *The Case Against Special Judicial Deference in Immigration and National Security Cases*, WASH. POST: THE VOLOKH CONSPIRACY (Oct. 22, 2017, 4:58 PM), <https://www.washingtonpost.com/news/volokh-conspiracy/wp/2017/10/22/the-case-against-special-judicial-deference-in-immigration-and-national-security-cases/> [https://perma.cc/G6C9-F2F4].

309. *Hamdi v. Rumsfeld*, 542 U.S. 507, 535 (2004); see Deborah N. Pearlstein, *After Deference: Formalizing the Judicial Power for Foreign Relations Law*, 159 U. PA. L. REV. 783, 785 (2010) (“[I]n a series of decisions involving national security, the Court has been anything but deferential to the executive’s interpretation of the relevant statute or treaty”).

310. *Hamdi*, 542 U.S. at 536.

311. *Rasul v. Bush*, 542 U.S. 466 (2004).

312. *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006).

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

314. Sitaraman & Wuerth, *supra* note 301, at 1903.

explanation of the government's policy. The President should have no claim to comity when he is lying about the reasons for his conduct. As Justice Kennedy observed, an "affirmative showing of bad faith" vitiates the deference to which Executive action would otherwise be entitled.³¹⁵

The concern that allowing a determination of pretext would intrude on the President's foreign affairs power is less dire than its expositors argue. No one suggests that courts have unfettered or even broad discretion to launch accusatory inquiries. There must be some antecedent showing that indicates falsity or bad faith to justify an inquiry into pretext. In such an inquiry, moreover, the Court is not limited to determining whether foreign policy trumps constitutional principles or vice-versa, or to overturning or sustaining Presidential initiatives. The Court can require the President to take a second look, factor in certain values, articulate their reasoning, and to provide evidence to support it. These alternatives may often be enough to redirect the decision or otherwise to protect individual rights.

To be sure, when the issue is *whether* the President's explanation is pretextual, the inquiry itself could potentially undermine comity regardless of how it turns out. Even if the President's explanation is pretextual, inquiry into that issue could theoretically threaten the secrecy or effectiveness of a foreign policy measure. But potential explanations of agency action are no more plausible or less threatening to liberty when they have a foreign policy tinge. History reveals many instances where false statements about national security undermined the domestic and foreign policy of the United States and the constitutional rights of its citizens, and few, if any, where judicial inquiry into those statements and actions did so.

As for *Kleindienst*, there is no reason why different principles should apply to visa decisions. Insofar as foreign policy and national security considerations present a compelling argument against judicial interference in a particular case, then Courts should defer to the extent necessary and no more, with regard to both to visas and other foreign affairs functions of the executive. Otherwise, there is no good reason to depart from the normal conventions of judicial review. The Court's responsibility to protect our foundational principles does not flag even when the attack on them comes clothed in the garb of foreign policy.³¹⁶

315. See *Kerry v. Din*, 576 U.S. 86, 105 (2015) (Kennedy, J., concurring).

316. *Trump v. Hawaii*, 138 S. Ct. 2392, 2448 (2018) (Sotomayor, J., dissenting) ("The constitutional scheme commands courts to act as guardians of precious liberties when fears and prejudices of the moment overrun Congress and the President."); see *id.* at 2424 (Kennedy, J., concurring) ("An anxious world must know that our Government remains committed always to the liberties the Constitution seeks to preserve and protect, so that freedom extends outward, and lasts.")

B. *Undue Reticence Regarding Pretext: The Reason-Giving Requirement*

Examination of whether the government's justifications for its actions are pretextual generally should occur at or near the threshold of judicial review because, as the Court acknowledged in the *Census* and *DACA Cases*, the requirement to give reasons for executive actions is fundamental to administrative law. Inherent in that obligation is the requirement that the reasons be truthful. As one scholar notes, "the rationalist reason-giving requirement provides external checks on agency power, constrains the internal decisionmaking processes, demonstrates respect for governed subjects, and enhances the legitimacy of agency decisions by rationalizing them."³¹⁷ The requirement cannot perform these functions if the reasons are contrived. Based on the explanation the agency provides, the reviewing court assesses whether "[a] decision [was] based on a consideration of the relevant factors and whether there ha[s] been a clear error of judgment."³¹⁸ Again, false reasons impair this function.

Administrative law scholars have developed a detailed and systematized approach that places reason-giving at the core of agencies' function. Requiring reasoned explanation of agency actions, this theory posits, "facilitates external checks on the exercise of agency power" by promoting political accountability and enabling judicial review, shaping the "internal decisionmaking dynamics of agencies in ways that tend to cabin administrative discretion," lending "moral force" to agency decisions based on demonstrated "respect for the governed subject," and legitimating "the exercise of administrative power."³¹⁹ As Professor Jerry Mashaw notes, "the legitimacy of bureaucratic action resides in its promise to exercise power on the basis of knowledge,"³²⁰ and giving reasons demonstrates that it has done so—*unless* the reasons given are not the actual reasons for the decisions under review. In that circumstance, giving reasons serves principally to mislead.

A pretextual explanation does not merely obstruct effective judicial review. It defeats one of the fundamental purposes of requiring reasons: curbing abuse of executive authority. A bogus explanation is, if anything, worse than no explanation. Beyond misdirecting and frus-

317. Jodi L. Short, *The Political Turn in American Administrative Law: Power, Rationality, and Reasons*, 61 DUKE L. J. 1811, 1820 (2012).

318. *Id.* at 1818 (quoting *Bowman Transp., Inc. v. Ark.-Best Freight Sys., Inc.*, 419 U.S. 281, 285 (1974)).

319. *Id.* at 1820–23.

320. Jerry L. Mashaw, *Reasoned Administration: The European Union, the United States, and the Project of Democratic Governance*, 76 GEO. WASH. L. REV. 99, 117 (2007).

trating judicial review and public accountability, the falsity can relieve the agency from its obligation to carefully consider every step it takes. And letting the Executive get away with a false explanation can embolden officials to perpetrate more abuses of power in the future.

State Farm deemed agency rules arbitrary and capricious if the agency relies on factors that Congress has not intended it to consider, fails to consider important aspects of the problem, or offers an explanation that is implausible or inconsistent with the evidence before the agency.³²¹ In theory, an agency's explanation of its conduct could appear to pass these tests and still be pretextual. The agency could cite the right factors, consider the full scope of the problem, and offer a plausible explanation consistent with the evidence, but decide the matter on entirely different grounds. However detailed and believable, the false explanation is just that—false—and false explanations frustrate the reason-giving requirement essential both to agency decision-making and to judicial review of the decisions. They defeat transparency. They prevent the public and reviewing courts from knowing the agency's true objectives and evaluating both the legitimacy of those objectives as well as the appropriateness of the method chosen to reach them. It is unlikely that the use of pretext is harmless. Agencies generally resort to pretext when they have considered something inappropriate or do not want to consider something important. And pretextual explanations often rely on made-up evidence.

1. Reason-giving and the Travel Ban Case.

In the *Travel Ban Case*, the Court excused the Government from meeting the reason-giving requirement. As far as the Court was concerned, the Government could have given good reasons, no reasons, or false reasons for its actions. Because the Court would not look behind the Government's explanation, any of these options would have carried the day, defeating the rationalist purpose of requiring an explanation. Judicial review provided no external check on the exercise of executive power, did not promote public accountability, did not shape the executive's behavior—at least not helpfully—and lent no moral force to the Executive decisions.³²² Further, letting a pretextual rationale stand undermined the Court's legitimacy.

321. *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 43 (1983).

322. See Short, *supra* note 317, at 1820–23.

2. Reason-giving and the Census Case.

a. Consideration of pretext

The *Census Case* at least considered whether pretext existed, but its initial suspension of disbelief in analyzing the Secretary's decisions compromised the value of the analysis. Treating the analysis of pretext as a wholly different inquiry from the determination of whether the action is arbitrary and capricious ignores the unity of purpose that underlay the government's actions. There were not two decision-makers in the *Census Case*, nor two separate decisions. One person, the Secretary, made the one relevant decision: to include a citizenship question in the census survey. He made it for a self-evidently improper reason that he attempted to conceal. As a practical matter, the decision could not be both non-arbitrary and pretextual. Bifurcating the inquiry as the Court did and examining the Secretary's decision as if it were real, deemed it the kind of value-laden judgment properly vested in his discretion and inappropriately dignified the sham exercise he undertook. Determining whether the Secretary's explanation was pretextual should have been a threshold step in the inquiry into whether his actions were arbitrary and capricious.³²³ As his answers were pretextual, the Secretary did not satisfy the reason-giving requirement of the arbitrary and capricious standard. The lie rendered his conduct arbitrary and capricious. Whether he was a good liar is irrelevant.

On the Court's approach, if the explanation for the Secretary's action was internally consistent and logical—in other words, if the lie was coherent and effective—then the decision was not arbitrary and capricious. On the Court's approach, only after making this determination and if faced with convincing evidence of bad faith would it be appropri-

323. Professor Metzger argues that “approaching pretext as part of general arbitrary and capriciousness review will fail to police against pretextual rationales in contexts where the agency's action is otherwise well supported.” Metzger, *supra* note 35, at 34. The trade-off is worthwhile, Metzger continues, because “at least absent allegations that the undisclosed rationale is invidious, the burdens of extra-record investigation in pretext are harder to defend when the agency action is independently supportable.” *Id.* As for the risk that the independent support may turn out to be chimerical, it “can be mitigated by subjecting stated agency rationales to more skeptical and probing scrutiny in the face of evidence of pretextual decision making.” *Id.* It is not inevitable that considering pretext as part of the arbitrary and capriciousness inquiry will fail to police pretext where the action is otherwise supportable. To begin with, the pretext inquiry does not necessarily require “extra-record investigation.” See discussion *infra* notes 330–32. Second, there may be little difference between assessing pretext and engaging in “skeptical and probing scrutiny” of agency rationales.

ate to examine whether the reasons given are pretextual. This topsy-turvy sequencing sacrifices the advantages of leading with pretext analysis and does not alleviate the Court's concerns with the line of inquiry.

To invariably consider the merits of the Government's explanation before ascertaining whether it is pretextual potentially forgoes insights into the merits that assessing the truth of the explanation can convey.³²⁴ In other contexts—for example, in determining whether a private actor's conduct is discriminatory—a pretextual explanation is grounds for inferring intentional discrimination.³²⁵ In the context of administrative action, a finding of pretext could permit inferences about the validity of the actual bases for the government's decision.

b. The Court's concerns regarding pretext

i. Extra-record discovery

Regarding the Court's concerns about the inquiry into pretext, the Chief Justice worried—and the dissent was particularly troubled—that litigants would use allegations of pretext to conduct discovery outside the administrative record, including taking the depositions of government officials.³²⁶ Courts ordinarily are limited to “evaluating the agency's contemporaneous explanation in light of the existing administrative record.”³²⁷ The parties and the court usually address the adequacy of the record at the outset of the case if or when the plaintiffs challenge whether it constitutes the “full administrative record before the [decision-maker] at the time he made the decision.”³²⁸ In some cases, the government voluntarily supplements the record, as it did in the *Census*

324. In some circumstances, arbitrary and capriciousness review may be less fraught and as effective in ferreting out pretext. The need for flexibility in administrative law inquiries counsels against any rigid sequence in considering the issues.

325. *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 147 (2000) (“[I]t is permissible for the trier of fact to infer the ultimate fact of discrimination from the falsity of the employer's explanation”) (emphasis omitted); see Tsai, *supra* note 246, at 11 (“[E]vidence of pretext can in some instances be treated as evidence of improper motive (it's evidence of a guilty mind, after all), especially when combined with other evidence of misconduct.”).

326. *Dep't of Commerce v. New York*, 139 S. Ct. 2551, 2574 (2019) (“We agree with the Government that the District Court should not have ordered extra-record discovery when it did.”); *id.* at 2576 (Thomas, J., dissenting) (crediting plaintiffs' accusations “could lead judicial review of administrative proceedings to devolve into an endless morass of discovery and policy disputes not contemplated by the Administrative Procedure Act (APA)”).

327. *Id.* at 2573 (majority opinion).

328. *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 420 (1971).

Case. In other cases, the court orders it to do so or remands to the agency. An order requiring discovery is unusual but does not depend on finding or even suspecting pretext.³²⁹ It turns on bad faith or improper conduct, which are broader concepts. Bad faith, for example, could reflect a desire to conceal certain issues, such as conflicts of interest or destruction of evidence. In addition, discovery should not be a punishment for bad faith or improper conduct. The discovery must be necessary to acquiring relevant facts that are not in the record but should be, or that reflect on the truthfulness of the record evidence.

Nor is discovery always necessary to show pretext. Although the district court in the *Census Case* ordered discovery, it made a point of basing its finding of pretext solely on the record as supplemented by the government. The court did not use the materials gathered in extra-record discovery.³³⁰ In any event, the *Census Case* did not invent the standard for ordering discovery beyond the administrative record. The standard originated in *Overton Park* in 1974.³³¹ The *Census Case* merely applied it.³³²

The issue, then, is not so much with the standard for pretext as with discovery beyond the administrative record. As the *Census Case* demonstrates, nothing prevents the Court from enforcing the ban on pretextual explanations of agency conduct without substantially expanding the availability of extra-record discovery or consulting that discovery to draw its conclusions. In fact, nothing in the *Census Case* effected such an expansion. Discovery is appropriate where there is a showing of bad faith or improper conduct *and* the record is insufficient to identify the basis of the government's decision.

ii. Political reasons for administrative action

A second source of the Chief Justice's reluctance is reflected in the holding that courts "may not reject an agency's stated reasons for acting simply because the agency might also have had other unstated reasons," in particular, "political considerations" or deference to "an Administration's priorities."³³³ The Chief Justice observed that administrative deci-

329. See generally Aram A. Gavoor & Steven A. Platt, *Administrative Records and the Courts*, 67 U. KAN. L. REV. 1 (2018).

330. See *New York v. U.S. Dep't of Com.*, 351 F. Supp. 3d 502, 630 (S.D.N.Y. 2019).

331. See 401 U.S. at 421.

332. See *Dep't of Com. v. New York*, 139 S. Ct. 2551, 2574 (2019) (explaining that courts can inquire into the mental processes of the decisionmakers on a "strong showing of bad faith or improper behavior").

333. See *id.* at 2573.

sions are “routinely informed by considerations of politics, the legislative process, public relations, interest group relations, foreign relations, and national security concerns (among others).”³³⁴ All of this is true but irrelevant. The pretext holding in the *Census Case* does not require officials to plumb their psyches and put on the record every potential influence on their decision, nor does the pretext holding turn on what explanations were permissible. The result, rather, turned on the Secretary’s false statements about his rationale. The problem was not the substance of his decision, but rather the transparency of his decision-making. Nothing in the discussion of pretext in the opinion precludes consideration of political factors in agency decisions. The decision simply dictates that the government not falsify its reasons.

iii. Intrusiveness

Third, as noted, the Chief Justice was concerned that inquiry into pretext meant inquiry into executive motivation, and “inquiry into ‘executive motivation’ represents ‘a substantial intrusion’ into the workings of another branch of government and should normally be avoided.”³³⁵ However, the standard for such discovery does not depend on pretext. Where there is a credible inference of invidious discrimination, there is little dispute that extra-record discovery is appropriate. And such claims of discrimination will often accompany allegations that the stated reasons for the government’s actions were pretextual. Thus there will frequently be grounds other than pretext to inquire into motive.³³⁶

In any event, the pretext inquiry is no more intrusive than determining that an administrative action is arbitrary and capricious. The inquiry under the arbitrary and capricious standard requires the Court to engage in a “searching and careful” review to determine whether the “decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment.”³³⁷ Ultimately, the Court assesses whether the agency’s determination was so far outside

334. *Id.*

335. *Id.*

336. Deposing government officials is far from the only way to establish their motives, or for that matter, pretext. In criminal cases, motive is usually in issue, yet the prosecution is not entitled to compel the testimony of the defendant.

337. *Marsh v. Or. Nat. Res. Council*, 490 U.S. 360, 378 (1989) (quoting *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 416 (1971)).

the realm of reasoned decision-making as to be arbitrary—that is, unreasoned and capricious—erratic or based on whim.³³⁸

The conclusion of the inquiry, a finding that an agency decision is implausible, outside the bounds of reasoned decision-making, incomplete, misdirected, or whimsical is hardly less harsh or intrusive on agency prerogatives than a determination that the agency offered a pretextual explanation for its action. Indeed, each of those findings often shades into or is a proxy for a determination of pretext.³³⁹ The Chief Justice reiterated the concern about extra-record discovery, but such concern, as noted above, is largely a separate question.³⁴⁰

c. Inquiry into Executive intent

In part, the Court's reticence about examining motivation may reflect a generalized reluctance to assess or impugn the intent of Executive Branch actors.³⁴¹ This reluctance is both misdirected and overly

338. See *Fed. Comm'n v. Fox Television Stations, Inc.*, 556 U.S. 502, 511–14 (2009); *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Services*, 545 U.S. 967, 981, 989 (2005); *Smiley v. Citibank (South Dakota), N.A.*, 517 U.S. 735, 740–47 (1996). It may be more insulting to find that a regulator's conduct was racist rather than incompetent. But racial animus is not the only—perhaps not the principal—basis for pretextual explanations and is an independent ground for overturning an administrative action.

339. Suppose, for example, the EPA Administrator explained a particular ruling on the ground that the emission is not toxic, but the substance emitted has long been on an authoritative EPA list of toxic substances. Barring some jurisdictional defense for the government, the Administrator would likely seek to explain to the court why she thought the substance was not toxic. The explanation would deal with the substantive issue, but it also could well recount her mental processes—what she considered, how she arrived at her decision, what she was trying to achieve, why she disregarded the Agency's prior determination. It is not a huge step from assessing the vitality of these explanations to considering whether they were actually the basis of her decision, and whether there was some other reason, nefarious or not, that was primarily determinative of her actions.

340. See discussion *supra* notes 335–38. It is possible, however, that considering pretext as part of arbitrary and capriciousness review may lessen the need for extra-record investigation of the motives of government actors. The arbitrary and capriciousness review can identify—and has identified—pretextual decisions without applying that label. See Metzger, *supra* note 35, at 33; *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mutual Automobile Ins. Co.*, 463 U.S. 29, 46–47 (1983).

341. This constrained approach took root in cases where courts were asked to determine the motives behind legislative action. Divining the intent of, say, the House of Representatives, with 435 members, is difficult, particularly when the inquiry moves beyond the statutory text. See Richard H. Fallon, Jr., *Constitutionally Forbidden Legislative Intent*, 130 HARV. L. REV. 523, 527 (2016). Collective intent problems, however, largely recede when the issue is the President's motivation, at least where the question turns on the President's own actions. See Katherine Shaw, *Speech, Intent, and the President*, 104 CORNELL L. REV. 1337, 1373 (2019) (“[T]here is strong support in both constitutional and constitutionally-inflected case law for looking to intent when a constitutional claim is raised in the context of presidential action.”); see also *id.* at 1389 (“Neither common law tradition nor constitutional provision shields *speech* by the Executive from potential later use in courts and other

constraining. Determining regulators' intent is a common inquiry, whether or not pretext is at issue. In cases involving the Dormant Commerce Clause, for example, the law requires courts to analyze state government actors' motives, including actors in the state's executive branch.³⁴² In many circumstances, equal protection law has evolved from focusing on impact to requiring discriminatory intent.³⁴³ In First Amendment jurisprudence, particularly cases dealing with religion, the Court recognizes "the intuitive importance of official purpose to the realization of Establishment Clause values."³⁴⁴ Further, in determining whether a display of the Ten Commandments in a courthouse had a religious or secular purpose, the Court looked at "readily discoverable fact[s]" to understand the "official objective."³⁴⁵ With regard to the First Amendment protection for freedom of speech, much of the jurisprudence, as then-Professor Elena Kagan pointed out, involves the application of reliable proxies that reveal the intent behind particular restrictions on speech.³⁴⁶ In her words, "the application of First Amendment law is best understood and most readily explained as a kind of motive-hunting."³⁴⁷

The former test in abortion cases announced in *Planned Parenthood v. Casey* similarly evaluates whether a regulation "has the purpose or effect of placing a substantial obstacle in the path" of a woman seeking an abortion, although subsequent cases have focused more on effects of the regulation.³⁴⁸

As Professor Kathleen Shaw points out, courts also focus directly on intent in some cases under the Administrative Procedure Act. In partic-

fora, as is the case with at least some legislative speech. . . . This distinction may shore up the case for the propriety of considering presidential intent, particularly where public statements appear to go to intent.").

342. See *Wyoming v. Oklahoma*, 502 U.S. 437, 454–55 (1992) ("This 'negative' aspect of the Commerce Clause prohibits economic protectionism—that is, regulatory measures *designed* to benefit in-state economic interests by burdening out-of-state competitors." (emphasis added) (quoting *New Energy Co. of Indiana v. Limbach*, 486 U.S. 269 (1988))); Peter C. Felmy, *Beyond the Reach of States: The Dormant Commerce Clause, Extraterritorial State Regulation, and the Concerns of Federalism*, 55 ME. L. REV. 467, 476 (2003) ("Modern cases evidence a focus towards a statute's purpose and effect . . .").

343. See *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252 (1977); *Washington v. Davis*, 426 U.S. 229 (1976).

344. *McCreary Cty. v. ACLU of Ky.*, 545 U.S. 844, 861 (2005).

345. *Id.* at 862.

346. Elena Kagan, *Private Speech, Public Purpose: The Role of Governmental Motive in First Amendment Doctrine*, 63 U. CHI. L. REV. 413 (1996).

347. *Id.* at 414.

348. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 877 (1992) (emphasis added), *overruled in Dobbs v. Jackson Women's Health Org.*, 114 S. Ct. 2169 (2021); see, e.g., *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292, 2324 (2016).

ular, the D.C. Circuit has held that “agencies proceeding by informal rulemaking should maintain minds open to whatever insights and comments produced by notice under [notice and comment procedures] may generate.”³⁴⁹ Thus, a litigant can set aside regulatory action or disqualify the regulator if she can make a “clear and convincing” showing that the regulator “has an unalterably closed mind on matters critical to the disposition of the proceeding.”³⁵⁰ When making these judgments, courts necessarily consider the prior statements and the contemporaneous mental state of the regulators.

However, for most administrative cases there is no reason to explore the regulator’s mental state. In determining whether an EPA regulation improperly allows pollution in excess of a statutory limit, the EPA’s motive in promulgating the regulation is generally irrelevant. The question is whether the allowable emissions are above or below the statutory specification. Still, if the plaintiff makes a preliminary showing of bad faith or improper conduct, inquiry into intent may be appropriate because the public is entitled to administrative proceedings untainted by invidious or venal considerations.

For the most part there is little discussion in these cases of whether a different analysis is required in determining the intent of the President as compared with other actors in the executive branch. In some respects, it is easier to determine the intent of one individual than that of a multi-person commission. But determining the intent of the President presents some potentially unique issues. One is the sheer number of Presidential statements, which fill multiple volumes every year. The executive branch speaks constantly in the name of the President, and the President is likely not even aware of many, if not most, of the statements. It is fair to presume, though, that the President has hired aides who understand his positions, reflect his views, and protect his interests. In any event, concern that statements do not actually reflect the President’s mental state are not substantial where—as in the *Travel Ban Case*—the President himself utters the words in question. Further, the problem of cherry-picking among the vast volume of presidential statements, even those he personally makes, is not a problem where the President repeats the statements over and over, tweets them, calls them into television and radio talk shows, and links them to an articulated

349. NRDC v. EPA, 859 F.2d 156, 194 (D.C. Cir. 1988); see Katherine Shaw, *Speech, Intent, and the President*, 104 CORNELL L. REV. 1337 (2019).

350. Ass’n of Nat’l Advertisers, Inc. v. FTC, 627 F.3d 1151, 1170 (D.C. Cir. 1979); Air Transport Ass’n of Am. v. Nat’l Mediation Bd., 663 F.3d 476, 487 (D.C. Cir. 2011); Miss. Comm’n on Env’t Quality v. EPA, 790 F.3d 138, 184 (D.C. Cir. 2011); Alaska Factory Trawler Ass’n v. Baldrige, 831 F.2d 1456, 1467 (9th Cir. 1987).

priority of the Administration. Insofar as the President's statements contradict those of the Justice or State Departments—well, he's the boss and his statements should control. All-in-all, the volume of the President's statements cannot give him a pass. Otherwise the more he says, the less it counts.

The means of discerning the President's intent should be familiar. As an incident of the human condition, each of us continually assesses the intentions and motives of the individuals we encounter. Our confidence in our ability to discern intent is sufficiently strong that we allow juries of 12 ordinary citizens to determine a defendant's intent in circumstances where their liberty and the public's safety may be at stake, even in the face of the defendant's outright denial. We likewise expect judges—when they are the finders of fact—to assess the defendant's mental state, detect when witnesses are uncertain or untruthful, tell when the asserted reasons for an individual's actions are not credible, and understand when a witness or party engages in puffery or malevolent deception.³⁵¹ Further, both judge and jury use the same tools today that they used 100 years ago: observation of demeanor, context, prior statements, plausibility, and a myriad of other situation-specific cues. Of course, the observation of the President is generally through an electronic medium, such as television, but courts and the public still can draw conclusions about the President's intent.

In trials, courts often instruct jurors that they can infer the defendant's intent to achieve the natural and probable consequences of his acts.³⁵² Moreover, jurors understand that they can use a defendant's voluntary statements—both pre- and post-arrest—against them.³⁵³ Normally, a defendant's stated intent to do an act would be highly probative evidence that they intended to do it. A jury would have no difficulty discerning the intent of a corporate chief executive who announced she would not hire any African Americans and then barred all applicants with addresses in the city's predominantly African American neighborhoods. Using their common sense, the jurors would compare the prior statements with the subsequent conduct and likely conclude that the new chief executive laid out what she intended to do and then did it. The exercise requires no elaborate reasoning or leaps of faith.

351. Although experience can deceive or be misinterpreted, the common-sense result is usually right. The purpose of this essay is not to exalt popular wisdom. It is, rather, to assess why key judicial opinions appear at times to defy common sense and to blink reality, and the consequences of those fillips.

352. *Frances v. Franklin*, 471 U.S. 307 (1985).

353. Indeed, the *Miranda* warning that Americans know by heart from police dramas and crime novels expressly warns arrestees that anything they say, "can and will be used against you." See *Miranda v. Arizona*, 384 U.S. 436, 469 (1966).

These techniques are just as valid in assessing the intent of government actors including the President. Even in *Village of Arlington Heights v. Metropolitan Housing Dev. Corp.*, where the Court found the evidence insufficient to prove racial animus, the Court recognized that “contemporary statements by members of the decisionmaking body” may be “highly relevant” to the inquiry.³⁵⁴ President Trump’s statements and conduct on the Travel Ban are a case in point. He was sometimes coy but by and large unapologetically transparent about his intent.

Instead of taking account of this “highly relevant” evidence in the *Travel Ban Cases*, the Court accepted the facial national security justification as gospel and precluded any inquiry into whether, as seemed likely, it was pretext. That approach defies common sense. Indeed, a jury would likely consider it bizarre if it were told that, when considering whether the defendant discriminated, it could not consider their recently stated intention to discriminate against the people they were now targeting.

The inquiry in the *Census Case* involved the intent of the Secretary of Commerce rather than the President but presents many of the same issues. Secretary Ross offered a public explanation for including a citizenship question in the nationwide survey, but his department’s internal documents revealed that the proffered explanation was a *post hoc* fabrication for a decision made on political, and probably invidious, grounds. This kind of evidence in the *Census Case* is what courts have long used to discern intent, comparing the witness’s statements to the written record and to the testimony of other witnesses. Yet the Supreme Court’s limited treatment of the evidence in the *Census Case* oozed reluctance and avoided drawing conclusions.

One objection to insisting that courts consider this type of evidence is that those courts regularly exclude probative evidence at trial and instruct juries to disregard evidence that jurors might see as highly probative to their decisions.³⁵⁵ But there are important distinctions between such situations and the refusal to consider the President’s statements in the *Travel Ban Case*. First, courts exclude evidence because of a problem intrinsic to the particular evidence at issue; for example, it is untrustworthy, or unduly prejudicial, or it was obtained in violation of a party’s constitutional rights.³⁵⁶ There is no such problem with the President’s prior statements. In a trial against him or the government,

354. *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 268 (1977).

355. Blackman, *supra* note 15, at 53.

356. FED. R. EVID. 801–06 (hearsay); 403 (undue prejudice); 404 (prior acts); TIM LYNCH, CATO INST., IN DEFENSE OF THE EXCLUSIONARY RULE, (1998), <https://www.cato.org/policy-analysis/defense-exclusionary-rule> [<https://perma.cc/W82Q-D7Y7>].

the statements would come into evidence as admissions of a party opponent.³⁵⁷ No one disputes that the President made the statements, that they reflect his views, and that they address Muslim immigration. The Court essentially acknowledges those points. It just refuses to look behind the President's official explanation of the Travel Ban because of his role in immigration and national security. Indeed, under the Court's logic, even if the President had sworn an oath that the Travel Ban reflected anti-Muslim bias, it would not have mattered so long as he also offered some facially neutral justification plausibly related to national security.

Another possible objection is that the Court need not look behind a facially adequate explanation because the President's real intent is irrelevant. Some might argue that if the order articulates a legitimate rationale and the process by which the order was promulgated guarantees appropriate review of the rationale, it should not matter whether the President had some different intent, even if it was malevolent. But the conduct of the *President* is at issue—the occupant of the highest office in the land who acts on behalf of the United States. For a President to act with an invidious purpose is inconsistent with the nation's values.³⁵⁸ Discrimination based on religion is invidious. It offends one of our most fundamental founding principles. That matters to the legitimacy of the government as a whole and of the courts reviewing the President's actions.

The Court's reluctance to inquire into intent led it to accept without question the rationale set forth in the Government's briefs, rather than the rationale found in the President's statements, ultimately leading the Court into error in the *Travel Ban Cases*. Insofar as that reluctance steered the Court to the what-if inquiry in the *Census Case*, it steered the Court in the wrong direction.

C. The Presumption of Regularity

In the *Census Case*, the dissent chided the Court for failing to extend the presumption of regularity to Secretary Ross's explanation of his de-

357. FED. R. EVID. 801(d)(1).

358. Micah Schwartzman, *Official Intentions and Political Legitimacy: The Case of the Travel Ban*, in NOMOS LXI: POLITICAL LEGITIMACY 205 (Jack Knight & Melissa Schwartzberg eds., 2019), <https://ssrn.com/abstract=3159393> [<https://perma.cc/SX6D-84YX>] (intentions are relevant to political legitimacy "because the moral principles and ideals that are acceptable to reasonable citizens, and which are used to structure constitutional essentials, may include limits on how public officials can be motivated"); *Trump v. Hawaii*, 138 S. Ct. 2392, 2424 (2018) (Kennedy, J., concurring).

cision to include a citizenship question in the Census.³⁵⁹ This presumption might be justified when applied to routinized functions—to spare the defendant from proving that lot one hundred was the same as lots one through ninety-nine, for example. But when substantive decisions are involved, the stakes are high, and motive is potentially an issue, the presumption of regularity is more difficult to justify. When a plaintiff alleges procedural impropriety or illicit motives the presumption allows a court to “presume that ‘official duties’ have been ‘properly discharged’ until the challenger presents clear evidence to the contrary.”³⁶⁰ Plaintiffs already bear the burden of proving their claims by a preponderance of the evidence. Thus, although the courts do not generally tie the presumption to any established standard of proof, the presumption of regularity must require the plaintiff to do something more than satisfy the normal burden to establish a procedural flaw or improper motive. Under the presumption, a plaintiff might be able to show by a preponderance of the evidence—*i.e.*, that it is more likely than not—that the government acted improperly, but the court still could refuse to consider the evidence.

Several justifications are offered for this thumb on the scale. One is factual. Administrators “are assumed to be men of conscience and intellectual discipline, capable of judging a particular controversy fairly on the basis of its own circumstances.”³⁶¹ That, however, is an empirical proposition advanced without empirical evidence. No doubt, many administrators are indeed “men [or women] of conscience and intellectual discipline,” and can judge a controversy fairly.³⁶² But not all. In fact, some scholars suggested that a presumption of *irregularity* should have applied during the Trump Administration.³⁶³ That proposition, too, requires empirical support.

A second rationale for the presumption of regularity stems from the separation of powers, or comity between branches of government. However, comity does not require a court to disregard a showing made by a preponderance of the evidence that the government engaged in misconduct. Granted, limiting the number of permissible inquiries into administrative misconduct decreases the opportunity for tension between the branches. One could make a policy judgment that this benefit outweighs the cost of denying a claim that meets the normal burden of

359. *Dep't of Com. v. New York*, 139 S. Ct. 2551, 2578–79 (2019).

360. *The Presumption of Regularity in Judicial Review of the Executive Branch*, 131 HARV. L. REV. 2431, 2431 (2018) (internal citations omitted).

361. *United States v. Morgan*, 313 U.S. 409, 421 (1941).

362. *Id.*

363. *See supra* note 36.

proof. But there is also a cost to the judicial system when courts deny a claim that, to all appearances, reflects what happened. Nor is it clear why comity demands that government officials enjoy a presumption of regularity but employees of Mercy Hospital, or the Sacred Heart Convent, or the Southern Poverty Law Center do not. While government officials take an oath to protect and defend the Constitution, doctors take an oath to do no harm, religious officials pledge their fealty to God, and attorneys swear to uphold the Constitution and the rule of law.

In large part, the presumption of regularity is a mechanism to spare courts from inquiry into the motivations behind the actions of government officials. As discussed above, avoiding that responsibility by presuming the conclusion is not justified.

V. CONCLUSION

In this era of alternative facts, the courts should be a bastion of truth. Doctrines that allow demonstrably untrue, perhaps laughable, claims to receive judicial imprimatur even indirectly run counter to this obligation. When it is obvious that the Supreme Court has blessed absurd or nihilistic claims, respect for the institution suffers. We can ill afford to cripple our courts in this manner at a time of dire need for their integrity, thoughtfulness, and commitment to truth.