UNIVERSITY OF BERGEN
Department of Government

AORG350

Master`s Thesis in Administration and Organizational Science

Juridification and unilateral presidency: The power dynamic between the President and the courts

An explanatory thesis on the court battles faced by two Executive orders and a Proclamation

---

Sverre Myhre

Autumn 2022

Presidents come and go, but the Supreme Court goes on forever -William Howard Taft

Preface

This master thesis marks the end of five years well spent at the University of Bergen. This master thesis is one of the hardest challenges I've ever endured, but in hindsight also one of the greatest joys I've ever experienced working on something. I had no idea that something that is supposed to be so analytical, and objective could ever connect with me emotionally.

I must give a great amount of thanks to my supervisor Regine Paul, who has been beyond understanding and helpful in the situations where I have struggled the most. A most sincere thanks must also go to Vibeke, who has been my biggest source of information on so many subjects and has been a great friend. I also want to give thanks to Finn Andre, who was a great study partner during the bachelor years, and a better friend. Lastly, I must give kudos to my friend Ole Andre, who has spent many an evening letting me vent and lament the work that went into this thesis

Table of Contents

1.0 Introduction

In a quite famous interview with the journalist David Frost regarding the scandal now known as 'Watergate', President Richard Nixon was asked whether he could act illegally so long as it served what was best for the nation. He answered "*Well, when the president does it… that means it is not illegal*" (Teachingamericanhistory). The Presidential power has been a matter of debate since the office was established, and while a lot of it is codified in law, certain Presidential powers have been understudied to the point where the limits of the powers are vague and often unchallenged as a matter of convention. This is a thesis on one of these powers, the Executive Order. It is a way for the President to make policy purely by use of the Executive Branch, bypassing all of congress in the process. It is after all part of his executive privilege or prerogative according to Article 2 of the U.S. Constitution.

The United States presidential election in 2016 was one of the most polarizing elections in recent memory. The reason for this could be that while Americans may not be much further apart on issues than before, the divide seems much more personal: "*We don't just disagree politely about what is the best way to reform the health care system. We believe that those on the other side are trying to destroy America, and that we should spare nothing in trying to stop them*" (Gentzkow, 2016, p.20). This personal animosity between political figures seemingly reached a new height with the news that Donald J. Trump would become the new President of the United States of America. Trump had many key issues he campaigned on that garnered a lot of media attention, gaining nearly $2 Billion worth of free media from mainstream sources, nearly tripling the attention garnered by other candidates (Confessore and Yourish, 2016).

Most infamously however, was his suggestion for: "*A total and complete shutdown of Muslims entering the United States until our country's representatives can figure out what is going on"* (Johnson, 2015). This statement was later retracted and repackaged by Trump and his administration, promising that the ban would only affect Muslims from countries that had been compromised by terrorism. As we will see, this back- and – forth would continue for some time.

1.1 Main issue

This thesis is a document analysis into two of the Executive Orders and a Proclamation issued by President Donald J. Trump. Executive Order 13769, Executive Order 13780 and Proclamation 9645, all trying to limit immigration from certain countries on the grounds of national security concerns. The theories I will use for this thesis is the theory of juridification, which Blichner and Molander describe as "*In descriptive terms the 'proliferation of law'… or increase in formal law… In normative terms juridification is sometimes seen as the hallmark of constitutional democracy… at other times as undermining not only efficiency, but also democracy and civil society*" (Blichner and Molander, 2005, p.2). And the theory of unilateral presidency, which tries to explain the Presidents unilateral power, and particularly its modern overreach and how a president that can bypass any checks and balances can be a problem (Moe and Howell, 1999, Lowande and Rogowski, 2020). My research problem for this thesis is: "*How can the power dynamic between the President and the courts in E.O. 13769, E.O. 13780 and Proclamation 9645 be explained through the theories of juridification and the unilateral presidency*?"

1.2 Research Question

1. In what ways can the mechanism of lower courts having the ability to issue injunctions on competencies governed by the Executive Branch affect the preceding executive order?

Any attempts by lower courts to break precedent is an interesting way to view what mechanics they use to persuade the Supreme Court. In this case of E.O 13769 a lower court issued an injunction which led to several revisions and at last a whole new proclamation, ending again in the Supreme Court. Meaning that this case has several back-and-forths between the Trump administration, the 9th circuit (lower court), and the Supreme Court. But there are also democratic questions regarding this ability, such as the lower court's ability to effectively issue a nationwide injunction, which bars the executive branch from enforcing the laws it was put into office to enforce, while also taking a major toll on the federal courts. Something that is further exacerbated by fact that while injunctions temporarily disable the executive order at hand, parts of the executive order can still be implemented, if allowed by the Supreme Court (Howe, 2018).

2. In what ways, if any, has the Executive Order power been changed after E.O. 13769 and 13780?

While some signs point to the president gaining more power after every E.O. published, this is not necessarily the case with these two E.Os. There are competing opinions on whether the President simply used his presidential prerogative under the Constitution and Immigration and Nationality Act to enforce his executive privilege. Or if he pushed the boundary on the Presidents' power to ban immigrants from the country by using dubious reasoning.

3. How can the deference shown by the Supreme Court to the Presidential prerogative, and the lack of deference by the lower courts be explained by the theories of unilateral presidency and the theory of juridification?

As we will see, a staggering number of the Executive Orders that end up in the Supreme Court end up being upheld. While some of this can be explained by partisan judges, I want to look at how deference can be understood by the theories used in this thesis. Which is key to understanding the main thesis issue. The Doctrine of Deference is a widely upheld belief among Supreme Court Justices and will help me understand the power dynamic in the cases I present (Epstein and Posner, 2018).

1.3 Relevance of the thesis

Between the start of 2017 and the end of 2018 much of the media in the United States was dominated by the Executive Orders discussed in this thesis, as well as the court cases. There have been no shortages of articles written on the Executive Orders themselves, or the court cases they were involved in. What is discussed much less frequently however, is the power dynamic between the President and his Executive Orders and the courts. If discussed at all there seems to be a focus on the decision of the court and not much else.

What I want to focus on is the relationship between the President and the courts. This relationship is key not only in a bid to better understand the separation of powers between the three branches, but also to better contextualize why certain decision are made outside the legal- and political context. The Supreme Court's decisions regarding the use of a Presidential prerogative are in many cases a lot easier to rationalize after the fact. There are no shortages of precedent, law and convention the Supreme Court can reference regarding almost any decision.

Understanding through theories like juridification and the theory of the unilateral presidency how the power dynamic works might help us if not understand the power dynamic, at least rationalize it through the points of view of both the President and the courts. Understanding why a President acts as they do, or why courts make the decisions they do is very important. And a lot of these studies have seemingly been done after such a court case, where the only factors that seems relevant is the decision made in the case. What I propose is seeking to understand what happens before that decision is made.

By using the theory of juridification and the theory of the unilateral presidency, I hope we can through two different points of view, the President and the courts better understand and explain how and why courts defer to Presidents, and on what grounds. Then we might better understand how the separation of powers between the two coequal branches have evolved.

1.4 Disposition

This thesis is split into eight parts. In chapter two I start by presenting a brief literature overview of the previous studies done on Executive Orders and how they relate to the courts, as well as the relationship of the President and the courts. I also present context of the study, as well as explanations for things such as the Executive Orders, as well as a brief overview of the relationship between the courts and the President. In chapter three I present my theories and explain why they will be useful in answering my main issue. In chapter four I present my method, and discuss the methodological choices, data and data gathering process. In chapter five I present the empirical part of my thesis, which is done in chronological order and contains four court cases. In the sixth chapter I analyse the empiricism by dividing it by help of my research questions and analyse it through the two theories presented below. In the seventh chapter of my thesis, I discuss my findings of the main thesis issue through the two theories. Before I end the eight chapter with my thoughts regarding this thesis and further studies on the issue, I give my conclusion on the thesis.

2.0 Context

A lot of talk in the American media during the time these cases take place was how President Donald J. Trump was a prolific user of the Executive Order power. Not only is how many he issued in a small amount time, but also in how severe the use of his Executive Orders was. I did some research on my own during this time to see if that would make a good master thesis. What I found was that while the Executive Order power is interesting enough on its own, the phenomenon I found much more interesting was how this case went down in the Supreme Court.

The time this thesis takes place is between January 2017 and June of 2018. And during this time seemingly the only thing discussed in American politics were these travel bans as well as the implications of their court cases. As someone with a previous interest in politics in the United States I feel it is hard to overestimate how huge this issue felt, and how deep it cut for a lot of people. Not only was American politics reaching a level of polarization that seemed ridiculous, but it seemed like this polarization of the political also reached the Judiciary branch.

I think this is an important study not only due to the activity the President wished to legislate, but it is also in my mind a case that will be important in the future. I think that certain decisions and outcomes in the cases we will discuss in much detail below will have a major impact on the future. I am not alone in this remark, many citations will be made in this thesis to people who feel the same. And while the context of these Orders and court cases obviously effects the opinions many have on this matter, I contend that even if you were to look at this case without the context of the polarization and how the American society was at that time, I think this case is more than interesting enough purely on its jurisprudential and social science related merits.

2.1 Literature review

As I briefly mentioned in the introduction, the relationship between the Executive Branches Executive Order and the Supreme Court is not a well-studied area. Earlier studies that have done on the matter are mostly quantitative and focuses on the relationship between ideological distance of the President and the Supreme Court, and at what rate Executive orders are issued when this distance increases or decreases. The amount of literature related to the (de)judicialization of the Executive order and how this power dynamic is changed through the court system was unfortunately quite lacking.

To better understand what had happened and give context to further my study, I browsed a lot of opinions from political- and legal experts from 'both sides of the aisle', to see whether their opinions could form a basis for what had happened. This initial search showed the furore this Supreme Court decision had garnered but gave little to no useable information. The basis for much of this work is based on Erica Newlands "Executive Orders in Court" (2015), which gave me a good enough understanding of what Executive Orders are, as well as informing me of how little we understand regarding how the Supreme Court deals with these orders.

This search eventually brought me to the article by Epstein and Posner "The decline of the Supreme Court deference to The President" (2018). Which explains that while conventional wisdom would have you believe that The President can act with impunity with regards to the Supreme Court, due to the importance of the office of the Presidency, but that this is a trend which is no longer current. And that the Supreme Court no longer 'gives way' to the President and his will.

These two papers were extremely important in forming a basis for this thesis. If I wanted to understand what had happened in Executive order 13769 and 13780, I would have to better understand how the relationship between the Executive Branch and the Supreme Court functioned, and if the lack of an understanding as pointed out by Newland regarding the Executive Orders was a culprit in the conventional wisdom presented by Epstein and Posner.

These articles were key in helping me shape how I could approach an analysis on these cases. They outlined key factors for how I could view these Presidential Directives from the courts point of view.

2.2 Executive orders

The Executive Order is a term many Americans who read the news will be familiar with. Every time a President has been elected there have been issued several of these in the first months if not weeks of their respective terms. It is a tool for Presidents which can be compared to a federal law. There is however: "*No definition of executive orders, presidential memoranda, and proclamations in the U.S. Constitution, there is, likewise, no specific provision authorizing their issuance*" (Constitutioncenter). Which means that in basic terms, it is a federal law that is not legislation, seeing as they require no approval from the Congress, and can in turn not be overturned by them, only by a sitting US President (Americanbar) 2017). The only course of action for the Congress to directly influence an Executive Order is in a situation like Bill Clintons' 'Bailout' of Mexico, where funding is required. Meaning the Congress can only deny additional funds (Glass, 2019).

This unilateral power has been the topic of discussions for some time. This usually only garners nation-wide attention when it is used in a way that either encroaches on the rights of the people, or policy areas that are unpalatable to the political opposition. The only tangible evidence for this power even existing within the domains of the law is Article 2 of the U.S. Constitution, "*Confirming that the executive power be vested in a single person*" (Con.Ref.). This is then potentially a very powerful tool which by some Supreme Court justices accounts "*exudes deference to the president*" and gives him "*Inherent authority*" (Howe, 2018), on a lot of matters.

As discussed by former Supreme Court Justice and Secretary of Justice Robert Jackson: "(one) *may be surprised at the poverty of really useful and unambiguous authority applicable to concrete problems of executive power as they actually present themselves. a century and a half of partisan debate and scholarly speculation yields no net result but only supplies more*

or less apt quotations from respected sources on each side of any question. They largely cancel each other" (Mayer, 2021, p.40).

The Executive Order is one of the presidents many prerogatives. It allows him to issue policy but is as seen above a relatively vague term legally speaking. It does grant the President a great amount of power, but the issue is that the terms of the powers are quite vague. The constitution of the United States outlines in just a few pages the design of the American government, with little to no detail as to the limits of certain powers and delegation of power between the three branches of government (Moe and Howell, 1999, p. 853). As Philip Cooper noted "Executive orders and Proclamations are very important but little understood mechanisms of governance" (Lowande and Rogowski, 2021, p.19).

The Executive power is an extraordinary thing (Epstein and Posner, 2018). And has been discussed by many scientists related to the field of administration, social science, politics and jurisprudence. This case however does not look at the power purely by looking at where and how it derived its power and how it's used. I instead focus on how the Executive Order power not only challenges the court competencies, but also that the Presidents use of the power in this case is quite special.

2.3 The court system in the United States

The Supreme Court is the highest court in the United States. According to themselves: "The Court is the highest tribunal in the Nation for all cases and controversies arising under the Constitution or the laws of the United States" (Supremecourt.gov). As discussed, Justices of

the Supreme Court are appointed by the President of the United States and serve for life. The principle of neutrality is a well-known phrase regarding the Supreme Court and the Justice system as a whole. But the Supreme Court was never intended to be strictly apolitical institution (Zeitz, 2022). While the political affiliations are not strictly germane to answering the questions the thesis puts forward, I feel it's important to understand that not only is the political influence of the Supreme Court somewhat confusing and ambiguous, but its relationship with regards to the two other branches that make up the separation of powers is even more complex.

With regards to the Congress, Gibson and Nelson writes:

> "*The US Supreme Court Is particularly vulnerable to backlashes against its decisions because it often rules against the preferences of the majority and because, as an institution, it is unusually dependent upon the actions of the other actors and institutions. The Supreme Court has little meaningful inherent or constitutional jurisdiction; instead, it gets power to decide issues from ordinary legislation. What Congress giveth, Congress can taketh away*" (2014, p.203).

Meaning that the Supreme Court may be hesitant in ruling against the President. Below the Supreme Court you have two other courts of interest, the district courts and the circuit courts. District courts are trial courts that have jurisdiction to hear nearly all categories of federal cases, withing limits set by the Congress and the Constitution. The court of appeals: "Hears appeals from the district courts located within its circuit, as well as appeals from decisions of federal administrative agencies" (Fedbar). So, a case such as the one in this thesis goes from a district court, up to the appeals court which encompasses that district before it ends up in the Supreme Court. These lower courts might also be hesitant to rule against a sitting President, as the President can refuse to comply with a court judgement, and retaliate with Congress by limiting their jurisdiction or withdrawing funds to the Judiciary (Epstein and Posner, 2018, p.832).

2.4 Relationship between the Executive and Supreme Court

The United States is a federal republic that has mostly functioned with a two-party system, the Democrats and the Republicans. Every four years they elect a new President, or the previous President can do one more four-year term, for a total of eight years as President, or two terms. The power the President wields is a matter that has been discussed since the founding of the union. The constitution phrases it as such: "The executive Power shall be vested in a President of the United States of America" (Constitutioncenter). This is a huge source of contention for what the Presidents power really is, since 'Executive power' is not so easily defined, as we will see. But for our purposes we need only touch upon a few. The President is the head of state and is responsible for the both the execution and enforcement of laws, or vetoing the laws created by the US Congress. The President is also imbued with the power to select Supreme Court judges (Whitehouse.gov).

One of the sources of contention as mentioned, is what amount of power the Constitution grants the President. One view that seems broadly supported regarding this matter is according to Mortenson:

> "…*What I will call the 'Cross-Reference' theory, which understands 'the executive power' as a content-free referent to the rest of Article II. This thin reading of the Executive power clause has been embraced by the Supreme Court Justices, legislators… On this view, the term is a convenient lexical handle for a grab bag of powers*" (2019, p.1179).

This clarifies one view of the President as the single holder of the powers that might fall under this umbrella term. Which could mean that the President's actions with regards to this understanding of the Executive power could have powers that are non-judiciable. What matters of policy would fall under this 'grab bag of powers' is however another issue. One could read this as the Constitution always having granted the President this power, and that the ambiguity of the exact phrasing should mean that the President has sole power over all things commonly thought of as falling under the power of the Executive Branch.

A more historically pragmatic view holds that the Executive power granted to the President is a relic of the prerogative of the Royal powers, according to Paulsen: “But the President was left with whatever remained of the traditional ‘executive power’ in matters of war, peace, and foreign affairs, diminished to a significant extent, but not completely, by the re-allocation of some very important, traditionally executive, powers to Congress” (Mortenson, 2019, p.1181). The focus here is that while this theory might hold credence in practice, there seems to be a lack of information on if it was ever set in stone by passing laws to this effect.

The ambiguity of the Presidents power is not a new issue, but how that issue is dealt with in accordance too Supreme Court matters is one that seems to turn up a lot of the same answers. Either the relationship is insufficiently researched (Newland, 2015), or the ambiguity of the relationship and the Presidential powers is somehow interlinked, and maybe even desirable (Moe and Howell, 1999).

The prevailing literature seems to hold that this is a relationship which has been in flux since its inception, where the Supreme Court and the President along with Congress have a power dynamic that seems to change in line with their ambition (Moe and Howell, 1999, p.851), and that this relationship was calculated by the founding fathers. This has led to a lot of power struggles between the three actors. With President Thomas Jefferson quite famously complaining about the Chief Justice Marshall’s decision:

> *“The Court determined at once that, being an original process, they had no cognisance of it; and there the question before them was ended. But the Chief Justice went on to lay down what the law would be, had they jurisdiction of the case: to wit, that they should command the delivery… Yet this case of Marbury and Madison is continually cited by bench and bar, as if it was settled law, without and animadversion on it, being merely an obiter dissertation of the Chief Justice”* (Epstein and Posner, 2018, p.835).

And yet after so many years there seems to be a lack of theory regarding how one of the Presidents main powers, The Executive Order functions with regards to the Supreme Court.

With the Constitution itself being so vague on the matter, most Judiciaries seem to either quote from the cross-reference theory, or an understanding of the Relationship as influenced by the Prerogative powers as being derived from the same powers the King of England had, with limitations posed through the ambition struggle between the three coequal branches.

3.0 Theory

There are a lot of theories that could have been chosen for this thesis, but I went with the theory of juridification and the unilateral presidency theory. My thesis is chiefly concerned with explaining the power dynamic between the courts and the President during the court cases that took place regarding the Executive Orders and the Proclamation. I think the theory of juridification can help me better understand how and why courts act during times there are uncertainties in the law. And theory of the unilateral presidency I hope can help me explain the ambiguities that exists in the relationship between these actors, as well as help me better understand why Presidents choose to push the status quo of the separation of powers. These two theories I think make a good match, since they focus on separate actors, but they also have a lot in common regarding how one might view deference (Moe and Howell, 1999, Blichner and Molander, 2005, p.11).

3.1 The theory of juridification

In this thesis I use two theories to try and examine the power dynamic and relationship between the Executive and the Judiciary, namely the theory of the unilateral presidency, and the theory of juridification, the latter which Blichner and Molander define as:

> "*Juridification is an ambiguous concept with regard to both its descriptive and normative content. In descriptive terms some see juridification as "The proliferation of law" others as "the monopolization of the legal field by legal professionals… In normative terms juridification is sometimes seen as the hallmark of constitutional democracy… at other times as undermining not only efficiency… for example in the*

> *form of "legal domination" … if the process is reversed we speak of dejuridification* (2005, p.2-5).

This theory and its dimensions will hopefully enlighten the relationship between the Executive and the Judiciary in a case where there have been raised questions whether it broke the rule of law, or if it is simply a question of the Judiciary doing its job upholding said law.

In this thesis the theory of juridification will be the seminal lens I view both the courts and the executives' actions through. Using this theory will allow me to understand how the law interacts with political opposition, as well as understand how and what mechanisms they use to combat an attack on their competencies, or how they claim, 'fertile land" (Blichner and Molander, 2005, p.14). This will hopefully give me theoretical ground to stand on in a thesis on a power that is both vague and understudied with regards to how the courts interact with them (Newland, 2005).

Blichner and Molander differentiate between five dimensions, with the first being constitutive (A): *Constitutive juridification* is according to Blichner and Molander: "*a process where the norms constitutive for a political order are established or changed to the effect of adding to the competencies of the legal system…the more unclear the relationship between established practices and a new decision the more reason to speak of juridification*" (2005, s.6-10)

Juridification as law's expansion and differentiation is the second dimension (B):

> *Law's horizontal and vertical expansion, and law's horizontal and vertical differentiation. Law's expansion is the core element… when law conquers fertile ground… Law's horizontal differentiation means that one law is divided into two or more laws. Law's vertical differentiation means that a law is specified in order to differentiate between and increasing number of cases* (Blichner and Molander, 2005, s.11-12).

The third dimension is called 'increased conflict solving by reference to law' (C), and involves conflicts being increasingly solved with reference to law, even if that law does not exist, or apply. Which can imply a juridified society, even without the required legal expertise (Blichner and Molander, 2005, p.16-17).

The fourth is juridification as increased judicial power (D). Meaning in cases that are very vague and or there is uncertainty in application of certain laws judiciaries can be given the power of determining application or the power to interpret (Blichner and Molander, 2005, p. 18-19).

The last dimension presented by Blichner and Molander is juridification as legal framing (E), meaning: *"The increased tendency to understand self and others, and the relationship between self and others, in light of a common legal order"* (2005, p.23). This one in less relevant than the others in this particular case, but it all works out theoretically at least, to be an interesting domino effect. But I suspect four of the dimensions presented above will be excellent lenses to view many of the facets of these cases through.

Juridification is a term that has not been used in the same context in the United States as I'm doing in this thesis. While there are plenty of studies on the judicialization of politics and the executive, the word juridification has seldom been used. So why use it? Blichner and Molander have created five dimensions that are easily distinguishable yet interlinked. In my search for literature on the term judicialization I did not find theories that suited this case as well as their conceptualization. And as they themselves point out judicialization and juridification are ambiguous terms, often used interchangeably with each other. My reason for using their dimensions is that they seem to fit well with trying to make sense of how the courts interact with a power that is quite vague and can in certain instances weaken the power of the courts. The dimensions presented by Blichner and Molander study not only differing parts of the law and how laws change, but also the processes by which this can happen. The Dimensions do not necessarily need to stand on their own legs, but by combining them you can view a process whereby an action from for example, an ambitious court can change not only laws, but how those laws are perceived. Which can help you build models of juridification where the five dimensions have an impact on each other.

3.2 Unilateral presidency.

Spoken plainly, the theory of unilateral presidency posits that the President's formal capacity to act unilaterally and make law on his own is due to the ambiguity of where the power is derived from, and that this is a concerted effort that has with time, increased the President's power. And that the courts and Congress are not likely to stop it from growing. And one of the keys for the president in doing so is the power of the Executive Order (Moe and Howell, 1999).

Executive Orders, as I've explained above are issued directly by the President, bypassing the usual legislative process. This has been a point of contention for many legal and political scholars:

> "*Presidential unilateral powers in (advanced) democracies extend to determining the immigration status of thousands, public funding of abortion, regulation of fossil fuels… No area of policy seems out of reach. Observers argue that this subversion of the separation of powers has a direct negative impact on the democratic process itself*" (Lowande, Rogowski, 2021, p.22)

And it must be a tempting proposal for Presidents to continue using this avenue when issuing policy. The fear then from both media and experts related to the subject seems to be that a rise in the use of where the executive order is used can lead to this idea of the 'unilateral presidency'. Which has been a trend for quite some time: "President Bill Clinton frequently has engaged in unilateral acts of executive war making in defiance of the war clause of the Constitution, which vests in Congress the sole and exclusive authority to initiate hostilities on behalf of the American people" (Adler, 2000, p.155), "President Bush's administration has been accused of creating a unilateral presidency. He has disdained allies and, more than any president in recent memory, has refused to use Congress as a partner in fashioning national policy" (Krent, 2007, p.523). "Moreover, he used unilateral powers across an array of domestic-policy areas, alarming his opponents and confusing many of his supporters.

Unilateralism became President Obama's preferred method for getting thing done in Washington" (Barilleaux and Maxwell, 2017, p.31).

And the fear may not be unfounded. Before the second world war, treaties, which require senate ratification outnumbered the use of the Executive Order, which requires no such ratification. But after the second world war presidents signed ten times more executive orders than they did treaties. While this doesn't necessarily mean that the Presidents power has grown, it does point to the fact that in the post-war era, Presidents have gone further and further in issuing unilateral legislation. Bypassing Congress entirely ten times more than they did before the war (Howell, 2005, p.417).

Drawing upon the understanding of the President as a more and more unilateral actor when it comes to policy is in my mind a key factor alongside the theory of juridification for trying to understand the relationship between the Judiciary and the Executive. While deference to the Executive could be shown by the courts due to the President following what they deem as his Presidential prerogative, Moe, and Howell posits that while Presidents are exercising power that is not explicitly stated in the constitution, this could be allowed by the Supreme Court for several reasons. One of them is that while justices appointed to the Supreme Court sit for life and could therefore be expected to behave independent from the executive, they have some less than favourable ground when dealing with the President:

> "*While the Courts is said to be an independent branch of government, then, its power and prestige are profoundly dependent on the executive. The decisions that it renders, however well reasoned or legally significant in the abstract, are meaningless slips of paper unless they are put into effect, and they can only be put into effect if the executive is willing to implement them*" (1999, p.867-868).

This is especially true when it comes to decisions that impacts the Presidents' power or an issue the President cares greatly about: "*And this means, above all else, being favourable to them on the issues they care most about: those involving presidential power and its exercise*" (1999, p.868). And the data seems to agree with this, considering that: "*According to Howell's survey of judicial responses to executive orders, 83% of executive orders challenged*

in federal court between 1942 and 1998 were ultimately upheld" (Lowande and Rogowski, 2021 p.31). Courts have time and time again allowed the balance of power between Congress and the President to shift in favour of the President, by either allowing Presidents to issue orders that would usually require statutory authorization without said authorization by applying the: "*Better to ask for forgiveness than permission approach to lawmaking. Courts have generally supported presidents in this practice of lawmaking-in-reverse*" (Newland, 2015, p.2055). Which has slowly morphed the institutional balance of power from the Congress and the courts to the President due to the ambiguity of the power of the Executive Order (Moe and Howell, 1999, p.852).

While juridification does not necessitate anyone acting in a wilful manner for it to happen (Blichner and Molander, 2005), the theory of unilateral presidency and action seems to be a more wilful view of the power dynamic: "*We also argue that president have strong incentives to push this ambiguity relentlessly- yet strategically and with moderation- to expand their own powers, and that for reasons rooted in the nature of their institutions, neither Congress nor the courts are likely to stop them*" (Moe and Howell, 1999, p.852). And the tension of a wilful actor in pursuit of expanded power analysed with the theory of juridification is an interesting look into how the courts interact with executive orders that may in the thesis I am writing, enhance the president's power.

The use of Executive Orders in ways that has never been done has sometimes led to the discussion regarding the unilateral presidency. Sometimes it is argued that the reason the President holds this much power is due to an institutional struggle between the Congress and President for policy control, other times because of how vague or unspecific the constitution is (Moe and Howell, 1999). No matter what the justification is, the theory of the unilateral President is in some ways the other side of the coin with regards to the theory of a juridified or judicialized Executive Power. And what I mean by that is that there must be a balance between the idea of a highly juridified political system, and one with a unilateral presidency. The rule of law is no longer in place if either of these were to be the case. There exists on both side an extreme which sees either a highly juridified society and political system, and the other where the president's prerogative power trumps all other legislation. I am not looking at

these perspectives from the standpoint of extremes, but rather use them because one accounts more for the Executive's action, the other the Judiciary.

The use of these two theories may in some ways enlighten what has previously been a blind spot in the research of how courts interact with executive orders: *"...It suggests that courts lack a theory of the executive order's role in our separation of powers system and that, in the absence of such a theory, doctrine has developed along lines that augment executive branch power at Congress's expense*" (Newland, 2015, p.2049). Which is why I want to use theories that considers both the idea of the view of the executives struggles with the Supreme Court, and how the Supreme Court deals with the executive orders.

The current literature in the US mostly focuses on the president as a victim of the courts increasing power and a judicialization of prerogative powers, or as a holder of supreme power who should be held accountable to a higher degree by the courts. How I hope to shine a light on this blind spot is by use of these two theories, juridification which focuses on the judiciary, while the theory of the unilateral presidency can help me understand from the executives' point of view how they wield the power of the executive order. I hope that by marrying these two concepts, I can gain a new theoretical insight into how and why president frame their executive orders for them to pass, and why some may proclaim the passing of this executive order as "Authoritarian" While some see it as "upholding the rule of law". My hope is that by using these two theories in conjunction with one another, we gain a more 'complete' picture of what transpired in the court cases I present in my thesis, as well as a more diverse postmortem of the decision reached by the Supreme Court, and why.

3.3 The theories put together

While the theories will themselves be used independently in the analysis to answer my research questions, I will also try to combine two theories in giving a more complete overview of how these processes work. What I mean by this is how the two theories might explain the entire process better in conjunction. By looking at the research questions through just one of the theories at a time, I can better categorize and map out instances of for example juridification (B), which we will see in the analysis. But after analysing all the research questions one theory at a time, I can look through this information and try to pinpoint how one might affect to other, or how one could explain the other. By combining the output of each theory's view on the research question, I might be able to have a better foundation for answering my thesis's main issue.

This is by no means a complete attempt at combining the two theories into a synthetic-whole. It is instead a rather rudimentary attempt at using these two theories in combination with one another to gain a better overview of a very complex situation. Seeing as these two theories focuses on the two key actors of my thesis, the President and the courts, I feel they can together give a more complete understanding of the power dynamic than each one could on their own. I think that using these theories together can help better answer the main thesis issue. And by combining the data I got from analysing each research question separately with regards to theory, it might be possible to showcase a very basic model of how these two theories would function together in explaining the power dynamic between the President and the courts in these cases

4.0 Method

This is a qualitative case study using document analysis, seeking to explain the mechanics and relationship that exists between the courts and the President regarding the Executive Order power that the President possesses. With the goal being to understand how we are to interpret the power dynamic between the President and the courts. I feel a qualitative case study fits best with regards to my main objective. As Yin puts it "The more your questions seek to *explain* some contemporary circumstance… The more case study research becomes relevant. Case studies are also relevant the more that your questions require an extensive and in-depth description of some social phenomenon" (2018, p.4).

Since my research necessitated a rather extensive look at Executive Orders and their court battles and the relationship between President and courts, I feel a qualitative case study suits the thesis well. I also aim to explain this relationship and power dynamic, through a thorough look at legal precedent, conventions and statements by experts related to the fields in question. The timeline for this study ended up being almost one and a half years, but this was necessary since it was the natural beginning and ending point for the study. It is difficult to formulate whether this is multiple or one single case. As I already explained, these cases are so tightly linked that to separate them would lead to you losing a large and important part of the context of the study itself. My natural inclination and having studied them thoroughly would still present this as several cases, four by my count. And although they seem and in fact are quite similar, I contend that this only strengthens the rationale for asking my question, since the strength of a multiple case study is that you. Avoid "Putting all your eggs in one basket (Yin, 2018, p.61). While being a multiple-case study it is not comparative. The reason all these cases are presented is because they are linked together through contextual necessity.

4.1 Case study

Yin describes a 'true' case study as an empirical research method where you research a concurrent phenomenon in its true context when the borders between the phenomenon and the context are blurred, and multiple sources of data are used (Bukve, 2016, p. 121-122). Finding the case was no problem at all, I had figured out quite early on that this was the case I wanted to study. The demarcation, as Swanborn puts it was also quite apparent, since the phenomenon I wanted to study had a natural beginning and end, both with regards to timeline and subject matter (2010, p.47).

It also became apparent quite early on that this would be a qualitative case study. What was not so apparent even after researching the documents pertinent to the case was whether this was multiple cases as mentioned above. I contended above that these are multiple cases, and I do so for several reasons. They discuss if similar, different Executive Orders and Proclamations, and they take place at differing times, in different Courts. In my view this is four cases about three different Presidential Directives. The first being the court case with the State of Washington, the Second in Hawaii, the Third also in Hawaii and finally the Supreme Court case which sort of encapsulates the entire saga.

The cases also bring differing conclusions and information to draw from, giving me insight into how the lower courts and the Supreme Court interacts with the Executive Orders and Proclamations. And while I could certainly understand arguments for this being a single case study, I choose to see them as separate for the reasons above as well as Swanborns reason that: “

> *We prefer two cases to one case and three to two. This is reliability in the classic sense: a multiple-case design is considered to be a series of replications of measurement of the same phenomenon under different, but hopefully irrelevant conditions. The idea is that the more cases one studies, the better the chances to separate the general (relevant) to the specific (irrelevant) features of the case” (2010, p.46).*

4.2 Data

Data gathering for this thesis was initially quite straightforward, with the focus being mostly on the relevant Executive Orders, Proclamations and relevant court cases. What I tried to keep in mind throughout the entire process was the five considerations that Gerring discusses: Relevance, proximity, authenticity, validity and diversity (2017, p.172). Relevance is fulfilled mostly by the vast majority of information being from the case itself but was still a good guide to remind me that while certain things may be interesting, they are not necessarily relevant to the thesis at hand. Proximity is mostly a nonissue for reasons stated above. It did however make me rethink a lot of the secondary sources used.

Validity is a lot harder to keep in mind. It was a challenge to write this thesis without it seeming biased in one way or another. The validity of the secondary sources I do not rely on for information, but rather to give context to the differing opinions and I tried to present it as such. For example, with regards to the term 'Muslim ban'. Diversity I think is fulfilled with opinions from relevant sources that disagree on the varying factors, but in a matter that is relevant to the thesis.

Availability was not usually a problem, with most of the data relevant for my case being available to everyone from Governmental websites and the Supreme Court websites. Some of the opinions of the relevant courts, as well as the complaints from the Government to these lower courts were a lot more difficult to find. As I discuss later in the thesis, a lot of litigation happened regarding the Presidential Directives I am focused on. In a matter of weeks there were a whole host of court cases both from States and several individuals. The bigger problem was reading through entire court cases that ended up being irrelevant to the question at hand. I had initially used some of these court cases to reiterate some of my points, but with this thesis already looking at several cases, and my knowledge on some of the cases initially cited being lacklustre, I chose against involving more than strictly necessary. All the key data employed in this thesis covers only the natural life span of the Immigration ban issue, while I avoided as much as possible to use secondary material that were produced after the Supreme Court case to not cloud my own analysis using the theories I chose, there is, as referenced many times in this thesis, a dearth of articles and information written on the relationship between courts and Executive orders. So, the articles I did end up using that were produced after the verdict, are there purely in a supplementary way, not as another mode of analysis.

The empirical information in this thesis is gathered from the Presidential Directives: Executive Order 13769, Executive Order 13780, Proclamation 9645.

And the court cases: State of Washington V. Trump. The State of Hawaii V. Trump. The State of Hawaii V. Trump (2), And the Supreme Court Case: The State of Hawaii V. Trump.

4.3 Document analysis

Seeing as I chose to employ a qualitative case study in this thesis, I felt that document analysis was the logical, if not the only way to go forward. Seeing as I would be unlikely to achieve any interviews considering the actors involved. Bowen defines document analysis as "…A systematic procedure for reviewing or evaluating documents…Like other analytical methods in qualitative research, document analysis requires that data be examined and interpreted in order to elicit meaning, gain understanding and develop empirical knowledge (2009, p. 27). Which is why I it was important to keep in mind that what the observation I wanted to measure actually reflect what I want to find (Adcock and Collier, 2001, p.529-539).

My initial process was to search through various data which involved Executive Orders, the Supreme Court or any federal courts. My basis for this was that if I were to begin to explain this phenomenon I am studying, I should see what base of information I must build on. I also quickly identified what I believe to be are the three main questions which will help me answer the main thesis issue.

By identifying these three questions I could divide the information more logically into categories. The categories I used were: Injunctions and temporary restraining orders, references to change in the Executive Order, and finally references to deference by the courts to the Executive branch. These were categories I felt should help me answer the main thesis because they each covered a vital part of what I felt mattered in the relationship between the courts and the President. The injunctions covered the lower courts influence on the Orders and Proclamations, the reference to change, either positive or negative, covers the key actor's opinion on where the Presidential prerogative begins and ends. And finally, the reference to deference covers in part the opinions of various actors what influence the courts and the President have on each other, as well as whether key issues that are discussed are justiciable at all.

I then further delineated each of these three categories into two parts with the help of my theories. For example, if I chose to focus on looking for references to deference in the data I had gathered, I had a paper ready where I marked that a reference to deference had indeed happened, and then I placed it into one of four boxes. Box one for juridification, box two for dejuridification, box three for unilateral presidency, and box four which was titled decline of deference. Box one marked where I felt for example: a statement by a person or citation to a statute either denied the Presidents prerogative or championed in some way the justiciability of a matter usually left to the Executive Branch. Box two was for the opposite.

Box three collected all statements whereby deference was shown to the President, as well as cases where the matter was found nonjusticiable through reference to Article two of the constitution or the Immigration and Nationality Act. Box four was reserved for cases were courts declined to show deference to the President on matters he usually governs, such as the vetting process which is described in further detail in the empirical part of the text.

I then in an effort to use the two theories in conjunction in the later parts of my analysis, charted out a little map where for example a case of juridification (B) led to a strengthening of the court, which in turn can be said to affect the status quo with regards to the Presidents prerogative, in turn leading to Jurdification (A), since some see this as upholding the rule of law.

There are of course problems with this approach. The theories I have chosen to use have a lot more nuance than I present above, which is why it's a massive simplification of the process that went into it. But broadly speaking it worked well enough to simplify the process that would become the analysis. The analysis itself put more onus on the wider context of the statements that went into the boxes. There is also some overlap between the boxes, but for the context of answering the main thesis issue I did not find this to be a major problem. The use of the two theories in conjunction started out as a much more ambitious project. I knew quite quickly I had taken on more than I was able to do, so the resulting product is a more rudimentary experiment.

4.4 Methodical challenges

The main issue I faced was time, and an overwhelming amount of new information to parse. In the information gathering stage I spent too much time on information, cases and court cases that ended up being irrelevant. I had the main issue of the thesis ready, but my lack of focus regarding the research questions quickly showed me that I had approached the study in the wrong way. I waited for questions to come to me after researching all the material, instead of formulating some questions ahead of time. Another challenge is also the fact that a lot of what I chose to research is quite esoteric, I probably spent more time than I had seeking to understand things that were beyond my comprehension, which made the analysis and categorizing quite difficult, at least in the beginning.

Getting a concrete handle on the data selection for use in the analysis was also initially very challenging, I kept going back-and-forth for several months with regards to the number of cases and what cases I ended up selection. I still question whether I made the right choice with the cases I ended up using for the case study, but I do think I got a fair representation for the differing opinions contained within them.

Getting a clear delineation through data selection of what was supposed to be analysed, and more importantly *how*, was also a major issue for a while. This I chalk up to two things: My outrageously wide opening search and arrogance. I likely started out doing far too much, and I fear the thesis reflects this is a bad way. The demarcation of what to study was as I explained very easy, the problem lies in the fact that I narrowed the scope of the thesis way to late by trying to go through all the evidence I could find. The main reason for this being that I had initially thought this thesis was to revolve around theory-testing the theory of juridification, so I did as Bukve recommends, I scanned through every possible case and tried to understand all of them (2016, p.128). But I ended up switching course.

5.Empiricism

I this part of the thesis I will present four different yet entangled court cases the Executive Orders and Proclamation 9645 encountered. One might look at these coming cases and see four separate court cases that revolve around Executive Order 13769, Executive Order 13780, Proclamation 9645 and finally the Supreme Court case. I contend that these four cases better represent a full view of what my main thesis issue, which is "*How can the power dynamic between the President and the courts in E.O. 13769, E.O. 13780 and Proclamation 9645 be explained through the theories of juridification and the unilateral presidency*?".

The reason for this is that by looking at these four cases in a chronological order, you gain a better overview over how the power dynamic and be understood and explained. As we will see, the second Executive Order would not have happened without the first one, and it might be likely that the Proclamation came as a response to the reaction of the other Executive

Orders. I argue that these Orders are co-dependent, and that the Proclamation is strongly related to the Orders as well. Which is my rationale for presenting the cases as I do.

On the 27th of January 2017, President Donald J. Trump issued Executive Order 13769, titled "Protecting the Nation from Foreign Terrorist Entry into The United States" (E.O 13769, 2017, p.1). This Executive Order would later be replaced by another, rendering it ineffective. The reason I still look at Executive Order 13769 as well as the Order that subsumed it is because it gives context to the entire saga which lasted almost a year. It is almost impossible to separate the second Executive Order from the first, due to the number of times it is referenced in the Courts and how similar they or to one another. This thesis then concerns two Executive orders issued by President Donald Trump in his first year as President: Executive Order 13769 and Executive Order 13780, which came to be known by critics of the Orders as: 'Muslim ban 1.0' and 'Muslim ban 2.0'. I will also Look at Proclamation 9645, which is an extension of Executive Order 13780, dubbed by the same critics as 'Muslim ban 3.0'.

This I will do by looking at the Executive Orders and Proclamations themselves, but also by looking at what I thought to be the key legal battles in the lower courts after reading the

Supreme Court judgement. I give a relatively brief overview of the respective Orders and Proclamations, as well as their time in litigation in the lower courts. But it is important to keep in mind for the purposes of this thesis that while there are some differences separating the Orders and Proclamations, they act as one throughout the timeline of this case study, which covers a little over a year. The reason for this is that not only did I have trouble separating the various orders, so apparently did the courts. Their similarity is why they all deserve to be looked at and gives for interesting reading I think given the differing judgements made on them by all parties involved in this thesis. All cases are presented in a chronological order, but the arguments by the differing parties will be presented in a more structured fashion in the analysis.

5.1 Executive Order 13769

Executive Order 13769 was created to revise the visa-issuance process that had not been changed since right after the September 11 attacks. And would target people from countries deemed to inhabit potentially dangerous individuals. The countries that were affected by this were Iran, Iraq, Somalia, Libya, Syria, Sudan and Yemen (E.O 13769, 2017, p.2). This was meant to make it harder for people from the listed countries to gain entry into the United States and was issued under the reasoning of national security concerns:

> "*I hereby proclaim that the countries referred to in section 217(a)(12) of the INA… would be detrimental to the interest of the United States, and I hereby suspend entry into the United States, as immigrants and nonimmigrants, of such persons for 90 days from the date of this order*" (E.O 13679, 2017, p.2).

This reasoning did not sit right with everyone however, with the American Civil Liberties Union stating: "The order demonises the vulnerable – those who have fled torturers, warlords and dictators – and those who simply want to be with their families. It is essentially a licence to discriminate, disguised as a national security measure" (ACLU, 2020). While some commented that the ban was merely a ban targeted at Muslims (Panduranga, Patel and Price, 2017). This would be further exacerbated by a quote from President Trump just two days before releasing his Executive order where he discussed these new strict vetting procedures: "No, it's not the Muslim ban. But it's the countries that have tremendous terror… It's countries that people are going to come in and cause us tremendous problems" (CASE No. 17-00050, p.10). And just days after being issued by President Donald J. Trump, Executive Order 13769 had garnered nationwide attention, and would soon get as much attention from the courts as it did by the public.

Besides what the Executive Order set out to do, or how it was interpreted by different people and groups, it might help to give some context regarding what actually transpired as soon as it was implemented. According to the Court of Appeals: "The impact of the Executive Order was immediate and widespread. It was reported that thousands of visas were immediately cancelled, hundreds of travellers with such visas were prevented from boarding airplanes bound for the United States or denied entry on arrival, and some travellers were detained (CASE NO. 17-35105). And Protests began almost immediately (Diamond, Almasy, 2017).

It seems clear from some reading that there was initially some confusion about what and how this order would affect things. There does seem to be a polarizing side to the interpretation of the Executive Order, with a lot of worst-case scenarios being prophesized. The statements from President Donald J. Trump also caused furore, with him commenting during the signing of the Executive Order: "We all know what that means…Establishing a new vetting measure to keep radical Islamic terrorist out of the United States of America… We don't want them here" (CASE No. 17-00050, p.11).

It did however lead to a lot of litigation. An initial search on the Clearinghouse litigation search history showing some 50 cases filed in the first month (Clearinghouse.net). The first of these only days after the Executive Order was implemented. The first legal battle of note was already settled on February third, 2017, when the State of Washington, et al., V. Donald J.

Trump et al. took place. The initial response from actors who were opposed to this Executive Order was to file for a temporary restraining order, which is "A short-term injunction issued to prevent a party from taking a certain action until the court is able to issue a more enduring order" (Law.Cornell.edu). Which is what the State of Washington asked for.

The reasoning given by the State of Washington for seeking this temporary injunction mainly follows two lines. That it contradicts the Due Process Clause of the Fifth amendment, which should prohibit the federal Government from denying equal protection of laws for all citizens. Which is to say that this Executive Order could potentially ban American citizens in the countries mentioned from returning to the United States. The second allegation concerns the establishment clause which states that: "Congress shall make no law respecting an establishment of religion" (Mtsu.edu). The Executive and Congress should not act in a manner which clearly indicates a preference of one religion over another in federal matters, this has been ruled quite clearly on in the Supreme Court (Conkle, 1988, p.1118).

The temporary restraining order (TRO) was granted, with Federal District Judge James Robart stating:

> *"Although Federal Defendants argued that any TRO should be limited to the States at issue… the resulting partial implementation of the Executive Order would undermine the constitutional imperative of a 'uniform rule of Naturalization' and Congress's instruction that the immigration laws of the United States should be enforced vigorously and uniformly*" (Case NO. C17-0141JLR).

While the temporary restraining order did not outright reject the Executive Order wholesale, it did place a lot of the text pertinent to immigration matters under a TRO. Meaning that the parts of the Executive Order which actually stopped immigration from the relevant countries full stop would have to see another litigation battle before it came into effect. This would come soon as the TRO would be judged by the United States Court of Appeals on the 9th of February. With the State of Minnesota and Washington v. Donald J. Trump and his cabinet.

In their brief to the Appeals Court, The President and the Executive Branch argue as follows:

That the State of Washington filing an injunction contravenes the constitutional separation of powers by thwarting enforcement of an Executive Order issued by the nation's representative (Case NO.17-35105, C, p.3). This argument is based on the interpretation of the Immigration and Nationality Act as well as the Executive prerogative which gives the President precedent to enforce these federal laws. They cite precedent from another district court, which concluded that:

> "*The order is a lawful exercise of the political branches' plenary control over the admission of aliens into the United States. It also contravenes the considered judgement of Congress that the President should have the unreviewable authority to suspend the admission of any class of aliens*" (Case No.17-35105, C, p.4)

Going into the Appeals court it was clear that the Executive Branch leaned heavily on the interpretations of courts which had previously sided with the President when it came to how the Prerogative power worked. The side arguing for an injunction did not however base their claims for an injunction on the refutation of these powers and precedents. Instead, they claimed as described above, that the Executive Order specifically targeted Muslims, which would be illegal according to the establishment clause. As well as contravening the due process clause, granting the same treatment to all citizens.

Seeing as Executive Order 13769 was granted a temporary restraining order, it was in the Appeals Court it would be decided whether the TRO should be stayed. One of the first complaints from the Governments side as we saw was that the State of Washington and other States seeking litigation had no grounds to sue. The Government considered this matter non judiciable and falling only under the purview of the Government and especially the President. I.e., the political question doctrine, which is intended to "Maintain the separation of powers and recognize the roles of the legislative and executive branches in interpreting the Constitution" (Lampe, 2022, p.1). Meaning that the federal courts should stay out of it, even if it contravenes constitutional rights and protections:

> "*The Government contends that the district court lacked the authority to enjoin enforcement of the Executive Order because the President has unreviewable authority to suspend the admission of any class of aliens. The Government does not merely*

> *argue that courts owe susbstanial deference to the immigration and national security policy determinations of the political branches…Instead, the Government has taken the position that the President's decision about immigration policy, particularly when motivated by national security concerns, are unreviewable*" (Case No. 17-35105, p.13).

This reasoning is not new, especially when it comes to national security concerns (Hirschl, (2013, p.4-5). And has been a matter of discussion forever. The Appeals Court rejected this unreviewability, stating the while deference has long been counselled to the President on matters of immigration and national security, it should not be done if it contradicts the Constitution. They also reinstate their duty which "Sometimes require the resolution of litigation challenging the constitutional authority of one of the three branches", also quoting the Supreme Courts continued rejection of the notion that the President has unreviewable authority in matters like this (Case No. 17-35105, p.14). They also considered the harm done to the citizens affected by this Executive order, claiming that while in effect, this Order would do irreparable harm to the States' university students and their families, seeing as residents currently outside the country would not be able to finish their terms. Harming students and universities monetarily (Case No. 17-35105, p.28).

The Appeals Court refused to reinstate the parts of the Executive Order 13769 specifically rejected in the temporary restraining order, leading us to Executive Order 13780.

5.2 Executive Order 13780

After the defeat in the Appeals Court, it was uncertain what would happen regarding the fate of Executive Order 13769. The Executive order was fighting litigation from many states and organizations concerned with the discriminatory effects of the Executive Order. A month would pass after the decision from the Appeals Court before we got Executive Order 13780. This was a similar order to the first, with some exceptions. But it still defended the Original: "*Executive order 13769 did not provide a basis for discriminating for or against members of any particular religion… That order was not motivated by animus toward any religion but*

was instead intended to protect the ability of religious minorities" (E.O. 13780, 2017, p.13210).

The President and his cabinet continued defending the initial Executive Order to both the media and his political adversaries, but it must have been made clear to them through litigation that it could not pass in its current form. I made a point quite early in the thesis that the new Executive Order is very similar to the first one. But according to the Government it "clarifies and narrows the scope of Executive action regarding immigration, extinguishes the need for emergent consideration, and eliminates the potential constitutional concerns identifies by the Ninth Circuit" (Case No. 17-00050, p.8-9). Which is to say that the Government feels this Executive Order has successfully removed the concerns the Appeals Court parroted, as discussed above.

This time around, Iraq has been removed from the list of seven countries banned, making it so the New Executive Order targets six countries. It blacklists entry for refugees from these countries for 120 days, but it also removes the clause that would allow people from persecuted religious minorities to apply for refuge in the United States, essentially meaning there will be no refuges of any kind for the length of the Executive Order. It was also created with the express intent to make permanent changes to the refugee and visa process, making it easier for the Department of Homeland Security and the President to allow them to put countries that do not satisfy their demands on a permanent blacklist, something which would half the number of refugees that were originally planned to be allowed to enter.

Only Ten days after the new Executive Order was released, and before it came into effect, it would see new legal battles reminiscent of the process with Executive Order 13769. This time it would be the State of Hawaii who acted. The State of Hawaii took the case to the District Court of Hawaii seeking a temporary restraining order:

> "*Plaintiffs' Second Amended Complaint… and Motion for TRO… contend that portions of the new Executive Order suffer from the same infirmities as those provisions of Executive Order No. 13,769… Once more, the State asserts that the*

Executive Order inflicts constitutional and statutory injuries upon its residents, employers, and educational institutions" (CASE No. 17-00050, p.9).

Much is made of the context of President Trumps claims during his campaign, where he explicitly stated during numerous rallies that this ban would target Muslims for what he considered national security reasons. The State of Hawaii argues that this new Executive Order targets the same population as the first Order, for the exact same reasons. Meaning that while the order states neither it nor the first order were created to discriminate for religious reasons, it still only targets countries where most of the population happen to be Muslim, for dubious reasons.

This was further exacerbated by the senior advisor to the President, Stephen Miller commenting on the new Executive Order: "Fundamentally… You're still going to have the same basic policy outcome for the country, but you're going to be responsive to a lot of very technical issues that were brought up by the court… But in terms of protecting the country, those basic policies are still going to be in effect" (Siddiqui, 2017). Leading some to believe that this new Executive Order is there not to address the fundamental Constitutional issues that were brought up in the original Order. Rather, the second Executive Order looks for loopholes within the Courts to achieve the same goal, no matter how adverse they may be with regards to the establishment clause (Case. No. 17-00050, p.10).

The first case in the district Court of Hawaii is very similar to the litigation Executive Order 13769 faced in Washington. The reasons stated for seeking a temporary restraining order on Executive Order 13780 is the violation of the establishment clause of the first amendment, violation of the due process clause, and violation of the Immigration and Nationality Act on bounds of discrimination based on nationality (Case. No. 17-00050, p.13). These were the exact same reasons brought up in the first legal battle discussed in this thesis.

This is also reflected in the argument whereby the district Court of Hawaii supports the Plaintiffs in their arguments:

"*Ninth Circuit panel in Washington concluded on a similar record that the alleged harm to the states' proprietary interests as operators of their public universities were sufficient to support standing, the Court concludes likewise here… These types of injuries are nearly indistinguishable from those found to support standing in the Ninth Circuit's decision in Washington*" (Case No. 17-00050, p.17-19)

The district Court of Hawaii also calls into question the statement by the Government that the new Executive Order does not discriminate between any religion or ethnicity. While it removed the references to Muslims between Executive Order 13769 and 13780, it still has the same effect without the express intent of targeting Muslim. The Governments argument is that it cannot be said to expressly target Muslims, seeing as the countries that are barred from entry only make up nine percent of the global Muslim population, something the district Court of Hawaii disagrees with:

"*The illogic of the Government's contentions is palpable. The notion that one can demonstrate animus toward any group of people only by targeting all of them at once is fundamentally flawed. The Court declines to relegate its Establishment Clause to a purely mathematical exercise*" (Case No. 17-00050, p.30-31).

The context of former statements as well as references to intended effects against Muslims seems to have harmed the first cases against Executive Order 13780. A lot of personal litigation seeking damages against Executive Order 13769 were also brought up in the new Executive Order. It could not be said that Executive Order 13780 could stand on its own without references to the old one in any court case. The Court states this several times, rebutting the Governments wishes for this new Executive order to be judged on its text alone:

"*The Government compounds these shortcomings by suggesting that the Executive Order's neutral text is what this Court must rely on to evaluate purpose…The Supreme Court has been even more emphatic: Courts may not turn a blind eye to the context in Which a policy arose… Historical context and the specific sequence of events leading up to the adoption of a challenged policy are relevant considerations*" (Case No. 17-00050, p.32-33).

Numerous statements by President Trump are again reiterated by the Court where he mentions Muslims as the cause for this travel ban, effectively meaning the Court grants support for both key arguments by the State of Hawaii; The damages faced by citizens such as students and monetary loss by institutions such as universities. As well as the discriminatory effect of the violation of the Establishment Clause due to the context of the purpose of the ban: "Last, the Court emphasizes that its preliminary assessment rests on the peculiar circumstances and specific historical record present here" (Case No. 17-00050, p.39). The temporary restraining order would be granted, essentially blocking Executive Order 13780 before it could take effect (Vogue, CNN 2017).

Executive Order 13780 would survive in some form or another until the final Supreme Court ruling, with several litigations barring the full implementation of the travel ban nationwide. The Supreme Court allowed a narrowed portion of the ban to move forward until final arguments could be heard later in that year (ACLU, 2017). What's important to note is that legal battles would continue for the entire year in all arenas of the court system. Covering them all would be an impossible task but focusing on the challenges made by States such as Hawaii and Washington lead us well into the next major thing that would happen before the final Supreme Court case.

5.3 Presidential Proclamation 9645

Before the Executive Order 13780 could be Assessed properly by the Supreme Court, President Trump and the Government released Proclamation 9645 which was titled 'Enhancing vetting capabilities and processes for detecting attempted entry into the United States by terrorists or other public-safety threats". This Proclamation would build upon Executive Order 13780, adding 'Certain Venezuelan government officials', as well as North Korea to the list of countries barred from immigration. With some restrictions on the country of Chad (Proclamation No. 9645, 2017, p.3). Being released just two weeks before Executive Order 13780 was supposed to be settled in the Supreme Court, this third ban indefinitely bans people from the countries mentioned in the earlier order.

This time Hawaii would also be the first legal ground, with the State of Hawaii seeking a temporary restraining order on what some in the media dubbed 'Muslim Ban 3.0'. The Plaintiffs argue that since this same courts' decision on Executive Order 13780, the record and context had only gotten worse (Case No. 17-00050 DKW, p.8-9). The Government however refute this notion and add that "Courts may not second-guess the political branches' decision to exclude aliens abroad where Congress has not authorized review, which it has not done here" (Case No. 17-00050 DKW, p.23).

The Government again cites the Presidential prerogative to by proclamation suspend the entry of all aliens should they wish. The district Court of Hawaii unlike the Court in Washington in Executive Order 13769 puts this prerogative under the scope: "An Executive order promulgated pursuant to INA Sections… requires the President *find* that the entry of a class of aliens into the United States *would be detrimental* to the interests of the United States" As well as denying his Prerogative with regards to the Immigration and Nationality act: "Further, the INA *requires* that the President's *findings support the conclusion* that entry of all nationals from the list… would be harmful" (Case No. 17-00050 DKW, p.26). They deny the President his to main weapons when it comes to the power usually thought of as a political or Presidential power. They somewhat repeal the idea of consular nonreviewability which "Restricts the judicial review of federal laws dealing with immigration matters, even if those laws infringe on constitutional rights" (Schmitt, 2018, p.58).

Which is where a lot of the claims of justiciability come from. First, we have the Presidential prerogative which is linked under Article two of the Constitution. But we also have consular nonreviewability to consider. But according to the district Court in Hawaii the Government fails to show any relevant findings as to how the immigration bans from these particular countries tie into terrorist organizations or any link between these individuals' nationality and their likeliness to commit a terrorist act (Case No.17-00050 DKW, p.27). The case made by the Government seem to fail all tests the district Court of Hawaii puts it through claiming it is "Simultaneously overbroad *and* underinclusive", And "Contains internal inchoherencies that markedly undermine its states 'national security' rational" (Case No.17-00050 DKW, p.29).

The Government however feels that it has precedent on its side, and "Reads reads in sections… a grant of limitless power and absolute discretion to the President…The Government counsels that deference is historically afforded the President in the core areas of national security and foreign relations, which involve delicate balancing in the face of everchanging circumstances" (Case No.17-00050 DKW, p.32). And in a lot of cases, precedent backs the President here (Krent, 2007, Barilleaux and Maxwell, 2017). But the Court finds the context lacking to back such a rationale and another temporary restraining order was issued by the district Court of Hawaii for Proclamation 9645 of Executive Order 13780 (Case No.1700050 DKW, p.38).

5.4 The Supreme Court Oral Hearing

This thesis has so far condensed three legal battles concerning variations of the immigration ban that President Trump first launched in January of 2017. These three legal battles cover what I would call the three major transformations of the Executive order. And while one could discuss Proclamation 9723 and 9983, I feel these three best describe substantial alterations not only in the Executive Order itself, but also in how the lower Courts argued regarding the justiciability of a subject matter that 'normally' falls under the Presidential prerogative. These three cases are also all key to the Supreme Court ruling itself.

The latest Court battle described in this thesis was regarding Proclamation 9645 in the district court of Hawaii, which ended in October 2017. In the passing months several variations of the Executive Orders would go trough litigation in courts all around the United States. The key notes are however that while the Supreme Court got ready to decide on Proclamation 9645 and Executive Order 13780 several State Courts blocked the effects from these immigration

bans to go into effect. However, the Supreme Court decided on the 4th of December 2018 to temporarily allow the immigration ban to take full effect awaiting the trial in the Supreme Court (Acluwa).

The Oral arguments began on the 25th of April in 2018. The Opening arguments concerned the President's authority on the matter of immigration, especially concerning the immigration and nationality act, with Solicitor General Noel Francisco making the oral arguments on behalf of the Government. He argues that the since Proclamation 9645 reflects foreign policy under a national security judgement, that the President is well within his power under the Immigration and Nationality Act, (Case No. 17-965, p.4) And that this same clause gives the President the authority to supplement Executive order 13780 with the vetting procedures that came with Proclamation 9645, seeing as "the whole vetting system is essentially determined by the executive branch" further showing precedent set by the Supreme Court with cases made with regards to immigration in the Carter and Reagan Era (Case No. 17-965, p.7).

The oral arguments quickly moved on to the context of the Immigration ban which was so often discussed in the lower courts. The Supreme Court Justices asks that if this broad power should be exercised by the President without restrictions, what would happen if you had a President in power who very much *wanted* to discriminate against one nationality or another? (Case No. 17-965, p.25). The Solicitor General Answers that: "Here, however, you don't have anything like that. Rather, you have the cabinet doing its job through the agencies, where the ask the agencies to construct and apply this neutral standard to every country in the world, including every Muslim country" (Case No. 17-965, p.25). Essentially saying that this standard that was used to ban the countries mentioned in the Executive Orders were the only countries that fell below the standard they used to confirm whether a countries citizen should be allowed entry to the United States.

One of the problems noted is that these standards and the evidence behind them is kept secret to the President and the Cabinet, which Justice Sotomayor points out, asking why this is. In cases in the lower courts the argument made was based on national security, which if true is a good reason for keeping these standards a secret, The Solicitor General also points out that:

> "*I think the proclamation is very transparent and lays out in great detail both the process and the substance upon which the proclamation is based. And I think that under the duty of regularity or good faith… That one branch of the government owes to another coequal branch of the government, there is a very strong presumption that what is being set out there is the truth*" (Case No. 17-965, p.27).

This transparency and detail claim was not parroted by the lower courts, which as we saw were confused by not only the wording of the Executive Orders and the Proclamation, but also regarding its implementation. Justice Kagan asked the Solicitor General whether the President explicitly stating he was targeting Muslims would invalidate the Proclamation, to which he answered yes, but that things said on the campaign trail are words said by a private citizen before he takes the oath of office meaning they are not worth considering in a court room, because the oath marks a "fundamental transformation", further stating that if this was a Muslim Ban: "It would be the most ineffective Muslim ban that one could possible imagine" (Case No. 17-965, p.27-30).

Justice Sotomayor points asks the question "where does a President get the authority to do more than Congress has already decided is adequate?" (Case No. 17-965, p.6) with regards to the much stricter immigration- and entry processes for citizens of these countries who aren't terrorist or in any way linked to terrorism. Essentially questioning why this ban should me so much broader than the cases the Solicitor General cited concerning Reagan and Carter (Case No. 17-965, p.11). The Solicitor General's answers to this are that everyone should be barred to exert diplomatic pressure on the governments of the countries in question. Defending the blanket ban to get information from these governments regarding the terrorist they want to hinder (Case No. 17965, p.33).

In summation the arguments from The Solicitor General mirror those set out in the hearing at the lower courts. The Government contend that they do have the power to dictate immigration related matters through Article 2 of the Constitution and the Immigration and Nationality Act through the justification that this situation falls under a national security concern that has been a response to a standard set out by the Cabinet and agencies that falls under the Executive

Branch that we currently do not know, seeing as that also falls under national security concerns. But that these standards and facts known to the President and his Cabinet should not be presented to the lower Courts or the Supreme Courts, due to national security concerns, the separation of powers, and a presumption of truth between the coequal branches.

Arguing on behalf of the Respondents was Neal Katyal who argues that the Executive order is unlawful for three reasons and argues that Congress already has a solution concerning the vetting problem set out in proclamation 9645: "It conflicts with Congress's policy choices. It defies the bar on nationality discrimination… And it violates the first Amendment" (Case No. 17965, p.39). Furthermore:

> "*Aliens have to go through the individualized vetting process with the burden placed on them. Second, when Congress became aware that some countries were failing to satisfy the very same baseline criteria you just heard about, the order uses, Congress rejected a ban. Third, Congress was aware circumstances could change on the ground, so it required reporting to them so it could change the law*" (Case No. 17965, p.39).

Again, we see the same argumentation used in the lower courts, refuting the broad Presidential prerogative the Government claims. What is interesting about this argument is the timeline. Since the lower courts in Hawaii and Washington argued over a year has passed. Chief Justice Roberts contends that if the President has the power to act in the case of an emergency, should this Proclamation and Executive order not pass, seeing as the President can encounter situations where he should act quickly?

Neal Katyal argues that this is no matter of national security, or an emergency: "But here we are 460 days on – later, Mr. Chief Justice. He's never even introduced legislation about this. So we're far from the hypothetical" (Case No. 17965, p.41). His chief argument concerns the fact that it conflicts with Congress's policy choices due to the fact that Congress's has already rejected what Katyal claims they are doing here, a flat nationality ban (Case No. 17965, p.43). This argument is based on the fact that the President is essentially overruling what is already

decided by Congress: “Article I Section 8 puts Congress in the driver’s seat and says there must be a uniform rule of naturalization…. And that this executive order transgresses the limits that every President has done with this proclamation power since 1918 (Case No.17965, p. 74).

The discussion regarding whether the President has authority to put out blanket bans on countries was again started by a hypothetical by Justice Alito, where he questions Katyal on if he could imagine any scenario whereby this power would be deemed okay for the Court to defer to the President to possess:

> “*I think you have wide deference, Justice Kennedy. It’s exactly as you said… In Hamdan, which is, As long as – you know, President have wide berth in this area, but if – you know, certainly if there’s any sort of emergency that precludes it. But when you have a statute that considers the very same problem and there’s nothing new that they’ve identified in this worldwide review process that Congress didn’t consider… It is a perennial problem*” (Case No. 17965, p.57).

It is argued by Katyal that allowing this authority to be wielded by the President would set a precedent where the Executive could supplant Congress’s judgement on immigration and vetting, something that has not been done in all 43 of the Executive Orders that came before in the area (Case No. 17965, p.47). It would allow the President to take a wrecking ball to the Immigration and Nationality Act (Case No. 17965, p.50), Stating that “If you accept this order, you’re giving the President a power no President in 100 years has exercised, an executive proclamation that countermands Congress’s policy judgements” (Case No. 17965, p.53). This argument then is based on the fact that the President cannot supplant legislation by the Congress, only supplement. And in Noel Katyals’ view, This Proclamation supplants the vetting process already in place as legislated by the Congress.

It in his view seeks to establish a new and permanent immigration policy, it contradicts judgements made earlier by Congress with regards to immigration, which is that immigration should be balanced against foreign policy, humanitarian and economic considerations. This

ban contradicts the multifaceted immigration policy that is in place, supplanting it with a "Perpetual policy that bans" (Case No. 17965, p.45).

5.5 Supreme Court Decision

The Supreme Court decision would be published on the 26th of June 2018, some two months after the Oral Arguments. This is one year and five months after the first battle in court took place regarding Executive Order 13769 which was briefly explained in this thesis. And after a summary of the Executive Orders, Proclamations and legal battles that took place since then, the Supreme Court first consider whether they have the authority to decide on the matter. They begin this by referencing the Government earlier claims on consular nonreviewability, where the Government stated in the previous legal battles that "exclusion of aliens is a fundamental act of sovereignty by the political branches, review of an exclusion decision is not within the province of any court, unless expressly authorized by law" (585 U.S. 17-965, 2018, p.8). The Court cites precedent in a previous case, where The Supreme Court went on to consider statutory claims like this one without addressing nonjusticiability: "As a result, we may assume without deciding that plaintiffs' statutory claims are reviewable, notwithstanding

consular nonreviewability or any other statutory nonreviewability issue" (585 U.S. 17-965, 2018, p.9).

Before we move on to the decision of the Supreme Court, which is often presented at the beginning of their briefs, I think it's better to present the concurring and dissenting opinions of the Supreme Court Justices, as many of them fall in line with themes and statutes discussed in the lower court hearings.

Discussed first by Chief Justice Roberts in the plaintiffs' challenge to Proclamation 9645 and Executive Order 13780 under the Immigration and Nationality Act. In the lower court hearings, the plaintiff's challenged the usage of the Presidential prerogative which reads: "*Whenever the President finds that the entry of any aliens or of any class of aliens into the United States would be detrimental to the interests of the United States, he may by proclamation, and for such a period as he shall deem necessary, suspend the entry of all aliens*" (Law.cornell.edu).

In their line of reasoning, the President should *find* that the entry of aliens into the United States would be *detrimental*. In other words, there was a burden of proof on the President to show his findings regarding why this Executive Order and Proclamation was needed. The first opinion of the court as delivered by Chief Justice Roberts denies this. Stating that "By its terms, §1182(f) exudes deference to the President in every clause. It entrusts to the President decisions whether and when to suspend entry… and on what conditions" (585 U.S. 17-965, 2018, p.10-11). He argues that the review set out by Homeland Security is enough of a reason to fulfil the condition set out in the statute itself. He goes further however, by questioning whether a review of such a Presidential prerogative is even necessary, claiming that even if they were: "When the President adopts a preventative measure… in the context of national security, he is not required to conclusively link all of the pieces in the puzzle before the courts grant weight to his empirical conclusions" (585 U.S. 17-965, 2018, p.12-13).

The concurring opinion by the Chief Justice almost goes as far as saying that this is not a matter that should be discussed by the courts, quoting earlier court cases:

> "For more than a century, this Court has recognized that the admission and exclusion of foreign nationals is a fundamental sovereign attribute exercised by the Government's political departments largely immune from judicial control…Respect for the political branches' broad power…Meant that the Government need provide only a statutory citation to explain visa denial… It is not the judicial role in cases of this sort to probe and test the justifications of immigration policies" (585 U.S. 17-965, 2018, p.29-31).

Dissenting opinions spent no time discussing the Presidents power under §1182(f) of the Immigration and Nationality act, and Chief Justice Roberts in the opinion of the court formulates that the plaintiff's challenge that this Executive Order and Proclamation supersede the President authority is wrong. The statutory language is so clear in its deference to the President that the national security concerns the President and his cabinet found in their review should be enough to satisfy the demands the statute contains:

> "The President lawfully exercised that discretion based on his findings – following a worldwide, multi-agency review – That entry of the covered aliens would be detrimental to the national interests. And plaintiffs' attempts to identify a conflict with other provisions in the INA, and their appeals to the statute's purposes and legislative history, fail to overcome the clear statutory language" (585 U.S. 17-965, 2018, p.10).

This statement by the Chief Justice went unchallenged by the rest of the court, effectively granting the President a lot of leeway with regards to the use of this power, since the basis for national security concerns were based on secret reasons, and trust between the branches that they act out of good reason and the fact that the President must act quickly without fear of being stalled by the two other branches. Effectively also giving the President the power to supplant legislation by Congress on matters of immigration policy, which we heard the plaintiffs argue hade never happened before in the oral arguments to the Supreme Court. With the Supreme Courts concurring opinions stating that plaintiff's and dissenting opinions interpretation of the statutes grant of power to the President is far too narrow (585 U.S. 17965, 2018, p.18. Case No. 17965, p.47).

Justice Thomas, who also concurred, stated that the provision of the Immigration and Nationality act do not describe any enforceable limits on the President which are subject to judicial review. Claiming the President's authority is inherent, hearkening back to what he feels is the starting point for reviewing the Presidential prerogative, The Crown of England (585, U.S. 17-965, p.6).

Justice Thomas spent most of his time explaining what he feels is starting to become a problem in the court system, which are the national injunctions which were present in all three of the cases discussed:

> "District courts, including the one here, have begun imposing universal injunctions without considering their authority to grant such sweeping relief. These injunctions are beginning to take a toll on the federal court system – preventing elgal questions form percolation through the federal courts… And making every case a national emergency for the courts and for the Executive Branch" (585, U.S. 17-965, p.2).

He questions the authority of the lower courts to impose these national injunctions. Essentially claiming that imposing these injunctions conflicts with the role of these lower courts. Summing up his arguments by explaining that "Universal injunctions are legally and historically dubious. If federal courts continue to issue them, this Court is dutybound to adjudicate their authority to do so. (585, U.S. 17-965, p.10).

The next topic up for discussion was whether this Executive Order and Proclamation violated the Establishment Clause, which stated above reads that Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof. In this case the plaintiffs argue that the Executive Order and Proclamation violates the Establishment Clause as it according to them strictly targets Muslims. Which was granted in the lower courts due to the contextual factors I described in the district Court of Hawaii's legal challenge to Executive Order 13780.

The Supreme Court in their opinion written by the Chief Justice does agree that contextual factors should be considered in this case. What they disagree on however, is whether they are relevant to the matter at hand. The plaintiffs argued since the start of Executive Order 13769 that earlier statements from the President shows a clear animus towards people of the Muslim faith. In the Chief Justices opinion:

> "*…But the issue before issue before us is not whether to denounce the statements. It is instead the significance of those statements in reviewing a Presidential directive, neutral on its face, addressing a matter within the core of executive responsibility. In doing so, we must consider not only the statements of a particular President, but also the authority of the Presidency itself*" (585 U.S. 17-965, 2018, p.29).

He argues that the Proclamation itself is neutral, but that a standard review should be applied, which is to say: "whether the entry policy is plausibly related to the Government's stated objective to protect the country and improve vetting processes", and that "Any rule of constitutional law that would inhibit the flexibility of the President to respond to changing world conditions should be adopted only with the greatest caution. And our inquiry into matters of entry and national security is highly constrained" and that such reviews hardly ever strike down policies as illegitimate (585 U.S. 17-965, 2018, p.32). And seemingly only ever does so in situations where the desire to harm other groups is so overt as to be obvious.

The consenting opinions go directly against what the Court of Hawaii said relating to the argument from the Government that this could not be discrimination since it only affected 8% of the worlds Muslims population: *The Court declines to relegate its Establishment Clause to a purely mathematical exercise*" (Case No. 17-00050, p.30-31). Since according to the Chief Justice:

> "*The Proclamation does not fit this pattern. It cannot be said that it is impossible to discern a relationship to legitimate state interests, or that the policy is inexplicable by anything but animus. But because there is persuasive evidence that the entry suspension has a legitimate grounding in national security concerns, quite apart from any religious hostility, we must accept that independent justification"* (585 U.S. 17965, 2018, p.34).

The consenting opinions deny the fact that the Executive Order or Proclamation is motivated by religious animus since the text itself says nothing about religion. They support the opinion given by the Government that only 8% of the Muslim population is affected, and also point out that North Korea and Venezuela were also affected by the Executive Order and Proclamation. Justice Kennedy however, who was one of the concurring Justices, had doubts about the constitutionality of the contents of the Proclamation, but not about the Presidents' ability to issue the Proclamation (Hurd and Schwartz, 2018).

Dissenting Opinions on this point was led by Justice Sotomayor who asks the question

> "*The dispositive and narrow question here is whether a reasonable observer, presented with all openly available data, the text and historical context of the Proclamation, and the specific sequence of events leading to it, would conclude that the primary purpose of the Proclamation is to disfavour Islam and its adherents by excluding them from the country… The answer is unquestionably yes*" (585 U.S. 17965, 2018, p.2).

She contends that the Courts use of a rational-basis scrutiny is absurd. Seeing as in previous cases where the Establishment Clause is key, a stricter standard had been used. Explaining that if such a standard were to be used, this Proclamation and Executive Order would be plainly unconstitutional (585 U.S. 17-965, 2018, p.15-16). She bemoans the fact that concurring opinions wholly set aside the context that led up to the Executive Order and Proclamations, showing several pages of quotes from President Trump where he explicitly states that an immigration ban would target Muslims: "When Donald Trump first announced it, he said, 'Muslim Ban'. He called me up. He said, 'Put a commission together. Show me the right way to do it legally" (585 U.S. 17-965, 2018, p.7).

Which according to her means that the Proclamation and Executive order is nothing more than religious gerrymandering (585 U.S. 17-965, p.17), and references the fact that "It is unsurprising that the President's lawyers have, at every step in the lower courts, failed in their attempts to launder the Proclamation of its discriminatory taint" (585 U.S. 17-965, p.12).

Justice Breyer mirrors this thought process: "If this Court must decide the question without this further litigation, I would, on balance, find the evidence of antireligious bias" (585, 17965, p.8). Justice Sotomayor questions why what she contends started as a total and complete shutdown of Muslims entering the country morphed into a question regarding the President's authority on matters related to national security. She contends that this is nothing more than window dressing to conceal what this Proclamation and Executive order really is:

> "*Rather than defend the President's problematic statements, the Government urges this Court to set them aside and defer to the President on issues related to immigration and national security. The majority accepts that invitation and incorrectly apples a watered-down legal standard in an effort to short circuit plaintiffs' Establishment Clause claim*" (585 U.S. 17-965, p. 13).

She states that the Majority of the Court has utterly failed in its legal analysis to consider the statements from the President regarding his anti-Muslim sentiment. Which is why according to her the Proclamation has no legitimate basis (585 U.S. 17-965, p.16). Justice Sotomayor also questions why the Majority opinion accepts the justifications given by the President and his Cabinet for this immigration ban "The Court offers insufficient support for its view that the entry suspension has legitimate grounding in national security concerns" And that the Majorities opinions that this is not a Muslim ban since North Korea and Venezuela is also affected is flawed: "The Proclamation's effect on North Korea and Venezuela, for example, is insubstantial, if not entirely symbolic. A prior sanctions order already restricts entry of North Korean Nationals… And the Proclamation targets only a handful of Venezuelan officials" (585 U.S. 17-965, p. 17-18).

The consenting opinions also found the President and his Cabinets reasoning for this review sufficient. Which was based on national security concerns and a brief from the Department of Homeland Security which we discussed earlier.

> "*... The majority empowers the President to hide behind an administrative review process that the Government refuses to disclose to the public… Furthermore, evidence of which we can take judicial notice indicates that the multiagency review process could not have been very thorough. Ongoing litigation… Reported the Government produced after its review process was a mere 17 pages*" (585 U.S. 17-965, 2018, p.18).

Further reiterating what the lower courts stated regarding the need for such a transformative action to the immigration system by asking why the President and his Cabinet feels the need to change what is already a substantial vetting process as legislated by the Congress. And if such a change is needed, why the Government has remained wholly unable to present any evidence to articulate why this is in the nations interest, and why the current system is inadequate to solve the 'problem'. She refutes that this Proclamation and Executive Orders are rooted in national security concerns (585 U.S. 17-965, 2018, p.21).

She ends her and the dissenting opinions by stating that this hearing holds stark parallels to the Korematsu case, where the "Court gave a pass to an odious, gravely injurious racial classification authorized by an executive order" dismissing the claim by the Government that since the Executive Order would only last a 120 days it could not supersede legislation by Congress by quoting the dissenting opinion in Korematsu by Justice Jackson: "For although the executive order was not likely to be long lasting, the Court's willingness to tolerate it would endure" (585 U.S. 17-965, 2018, p.26-27).

The decision in the Supreme Court reached was a 5-4 majority in favour of President Donald J. Trump and the Government. The reasons stated for this are the following: The President lawfully exercised his prerogative with regards to the Immigration and Nationality Act due to the deference given by the statute according to the majority opinion. And the sole requisite, if the Courts even had authority to decide upon this, which requires the President to *find* that

entry would be detrimental to the United States is fulfilled according to the majority opinion by the 17-page document that the lower court and dissenting opinions found lacking. (585 U.S. 17-965, 2018, p.3).

The decision by the majority also refutes the lower courts and dissenting opinions that the Executive Orders and Proclamation 9645 violate the Establishment Clause. Due to the fact that the majority feels the plaintiffs have not demonstrated a reason as to why the orders and Proclamation would discriminate against any religion. Stating that the contextual factors mentioned by other courts and dissenting opinions are invalid in addressing a matter within the core of executive responsibility. Supporting the stance that the authority of the President to decide on immigration matters in the context of all things related to national security (585 U.S. 17-965, 2018, p. 4-5).

Chief Justice Roberts comments on the dissent's invocation of the Korematsu case: "*Korematsu* has nothing to do with this case. The dissent's reference to *Korematsu*, however, affords this Court the opportunity to make express what is already obvious: *Korematsu* was gravely wrong the day it was decided… And has been overruled in the court of history" (585 U.S. 17-965, 2018, p.38). To which Justice Sotomayor answers:

> "*This formal repudiation of. A shameful precedent is laudable and long overdue. But it does not make the majority's decision here acceptable or right. By blindly accepting the Government's misguided invitation to sanction a discriminatory policy motived by animosity toward a disfavoured group, all in the name of a superficial claim of national security, the Court redeploys the same dangerous logic underlying Korematsu and merely replaces on gravely wrong decision with another*" (585 U.S. 17-965, 2018, p.28).

Which shows that while this decision did end up going in the Presidents favour this time, the dissenting opinions on this case was quite strong. This decision was decried by many of the plaintiffs in all the lower courts that preceded the Supreme Court decision, while some took the chance to note that the Presidential prerogative had only won the Supreme Court case by a

majority of 5 to 4. With one of the concurring Justices in Justice Kennedy even doubting the constitutionality of the contents of the Proclamation.

6.0 Analysis

This case study examined the court battles that two Executive Orders and a Proclamation faced in the span of almost a year and a half. And during this time these cases were almost always through my research discussed under three key questions regarding the orders and the Proclamation. If what the President did was justiciable, if the President and his cabinet contravened the Establishment Clause and finally whether he had the authority to execute the orders and Proclamation through the Immigration and Nationality Act. As we saw while the Supreme Court was split on almost all these issues, the lower courts were mostly united in their repudiation of the Orders and the Proclamation. So how are we to understand this power dynamic between the President giving an Executive Order, and the Courts reaction to them?

In the start of the thesis, I presented three questions after my main thesis issue which I hope would be able to help me help me answer this main issue which is: "*How can the power dynamic between the president and the courts in E.O. 13769 and 13780 be explained through the theories of juridification and the unilateral presidency*?" These questions are here to help me parse a difficult question down to some key issues. They reflect what I through research of all the court cases related to the topic at hand, consider to be main drivers of the dynamic

between the President and the courts in these Orders and the Proclamation. After analysing these research questions by each of my two theories separately, I will try to give a more collected and brief overview by looking at the information analysed through combining the two theories.

6.1 Injunctions

My first research question was: In what ways can the mechanism of lower courts having the ability to issue injunctions on competencies governed by the Executive Branch affect the preceding executive order?

In the all the Court battles we looked at up until the Supreme Court ruling, injunctions were put out on large parts of both Executive Order 13769, Executive order 13780 and Proclamation 9645. With the first ruling being made by granting the plaintiffs request for a temporary restraining order on Executive Order 13769 in the case of Washington V. Trump (CASE NO. C17-0141JLR). This seemed to snowball somewhat, with the proceeding Executive Order 13780 being granted the same TRO by reference to Washington V. Trump in Hawaii V. Trump (Case No. 17-00050, p.17-19).

This seems to run somewhat counter to the theory of the unilateral presidency: "*According to Howell's survey of judicial responses to executive orders, 83% of executive orders challenged in federal court between 1942 and 1998 were ultimately upheld*" (Lowande and Rogowski, 2021 p.31). The lower courts again and again in this period denied the President his Executive Orders and following Proclamation even though they were based on a power some consider a Presidential prerogative not beholden to the same judicial review process as other powers:

> "*The Courts has also either approved of, or declined to block, the president's expansion of power to conduct foreign relations. A range of doctrines require courts to defer to the president1s interpretation of treaties, to block private litigants from challenging national security policies, and to stay out of political disputes*" (Epstein and Posner, 2018, p.831).

I pose that through juridification there are three ways we can view this process: First is through juridification (A), which is a "Process where the norms constitutitve for a political order are established or changed to the effect of adding to the competencies of the legal system (Blichner and Molander, 2005, p.6). If we are to believe that this is a relatively new process, this adds another mechanism for the lower courts to interact with legislation often thought of as belonging to the Presidential prerogative, which Justice Thomas touched upon in the Supreme Court ruling: "These injunctions are a recent development emerging for the first time in the 1960s and dramatically increasing in popularity only very recently. And they appear to conflict with several traditional rules of equity, as well as the original understanding of the judicial role" (585 U.S. 17-965, 2018, p.5).

If this is a 'recent' phenomenon that has been getting more and more popular over time, the lower courts have put themselves in a position to if not litigate the decisions of the Presidents themselves, at least bring enough attention to the case by making it a Supreme Court decision. As we saw in the Supreme Court hearing, the majority opinion seemed to be of the mind that the Immigration and Nationality Act statute used by the President was nonjusticiable. Granting some credence to the theory that injunctions cause proceeding Executive Orders in the same vein to the preceding one to face the same injunctions, even if the decisions were reached by different courts, as happened in this case.

The second way to look at this Juridification as increased judicial power (D). The majority opinions seem to be that the lower courts have decided to litigate on the Presidents prerogative power by issuing nationwide injunctions. These injunctions were quite special in that when the State of Washington and Hawaii sought out these temporary restraining orders, they affected the entire nation of the United States, not only the district where they were deliberated. As said by the majority opinion in the Supreme Court, these nationwide injunctions hinder Executive policy for nearly a year, a fourth of the Presidential term. If

federal courts can issue nationwide injunctions on a matter the Supreme Court nearly finds nonjusticiable, that is a massive amount of power for the lower courts to have.

The third way to look at this through the lens of juridification is through juridification (C) "Increased conflict solving by reference to law" (Blichner and Molander, 2005, p.16). The Government claimed in their Oral hearing to the Supreme Court that this is a case of the lower courts impeding the President in what is essentially a domain solely belonging to the Executive Branch and the President (Case No. 17-965, p.7). An opinion reflected by Justice Thomas "By the latter half of the 20th century, however, some jurists began to conceive of the judicial role in terms of resolving general questions of legality, instead of addressing those questions only insofar as they are necessary to resolve individual cases and controversies" (585 U.S. 17-965, 2018, p.8).

Meaning the Government and the majority opinion in the Supreme Court is that too often are these political matters discussed by the courts. Claiming that matter of the executive has become too judicialized. This ruling can be seen to confirm at least by the majority opinion of the Supreme Court, that problem solving by reference to law regarding political matters has been rampant for too long. And that the issuance of injunctions by the lower courts is a power grab where they have no authority to do so.

And if it is a so-called power grab by the courts it runs counter to the idea that courts fear ruling against the President since:

> "*When it deals with issues affecting the presidency, however, its strategic situation is less favourable. There is no higher executive authority than the president, so no other executive is going to come riding to the Court's rescue to force the president into action. The president, moreover, is in charge of the entire federal executive branch and thus has a major say in how all the Court's decisions are enforced at that level*" (Moe and Howell, 1999, p.868)

The lower courts then have a double problem. If in issuing these nationwide injunctions the courts draw the ire of the President, they face not having their rulings enforced on a federal level. Moreover, they have a problem in that the Supreme Court chooses to stay their injunction, and rule that not only is the decision by the lower courts invalid, but their usage of the injunction might also be as well. The lower court might then through these injunctions have initially delayed the Presidents Executive Order from taking effect for a while, but it might also have weakened their power in future cases where they would like to file for injunctions.

6.2 Executive Order power

My second question to help answer the main thesis issue was in what ways, if any, has the Executive Order power been changed after E.O. 13769, 13780 and Proclamation 9645?

Epstein and Posner present a view that the traditional idea of a unilateral presidency is contradictory to the actuality of the present times: “According to entrenched conventional wisdom, the president enjoys considerable advantages over. Other litigants in the Supreme Court… the historical dominance of the president in the Supreme Court reached its apex in the Reagan administration, and has declined since then” (2018, p.829-8309). Their findings do not consider the Presidency of Donald Trump, and there is reason to believe according to some, that these Executive Orders changed quite a lot.

One of these opinions was propagated by Noel Katyal speaking for the plaintiffs in the oral hearing before the Supreme Court, where he stated: “if you accept this order, you’re giving the President a power no President in 100 years has exercised, an executive proclamation that countermands Congress’s policy judgements” (Case No. 17965, p.53). Which is quite a statement to make. If the Presidency is granted precedent for wielding a power in such a way

that it has not done for 100 years, that would indicate quite a change in how the Presidential prerogative is viewed.

This point is backed by Michele Waslin, stating:

> *The 'travel ban' Eos and proclamation go well beyond the traditional implementation of the suspension clause, barring large numbers of individuals from several countries… Moreover, Trump often exercises his executive authority without much process, circumventing the well-established procedures for consultation and securing input from Congress, federal agencies… (Waslin, 2020, p.63-64).*

Apparently, the Executive Orders and Proclamations not only goes further beyond traditional implementation procedures, but also supersedes the relationship Executive Orders are thought to have with dialogue and input from Congress. One can also speak of dejuridification here, more specifically dejuridification (A), if we are to believe that the President used his prerogative beyond the limits of this power. If he circumvented the Congress, one might discuss this as dejuridification (A) precisely because it might shift the balance that is the separation of powers, which was so often propagated by the plaintiffs in all four court cases.

By changing the scope of the Immigration and Nationality Act, and the implementation of it one might also discuss the process of juridification (B), specifically law's vertical differentiation (Blichner and Molaner, 2005, p.13). The reasoning here is that The Supreme Court and The President essentially reinterpreted the INAs scope to encompass a lot more than it ever did before: "… The majority of Trump's EOs have been used to set new policy directions, reinterpret current laws… Trump has broken from the patterns and processes of his predecessors by using EOs and proclamations to create new immigration policies" (Waslin, 2020, p.63).

This brings up an interesting point, which is that while immigration has been legislated through Executive Orders before, it had never been done through a proclamation (Waslin, 2020, p.57). The Supreme Court and the Government argued that Reagan and Carter both had what they called similar Executive Orders pass without litigation, but none of those

proclamations were nearly as extensive as the one issued by President Donald J. Trump (585 U.S. 17-965, p.2).

The theory of the unilateral presidency can explain this through the fact that according to the it, The President will wilfully act to increase their power and establish a new status quo, it contends that the entire framework of the three branches is predicated on it. And that "Ambition could be made to check ambition" (Moe and Howell, 1999, p.850-853). In this frame of mind, the President as an actor that has gained more and more power since its founding (Epstein and Posner, 2018, p.830). One of the reasons for this can be related to the

Fact that the courts have reason to act in a friendly manner to the President: "The Court has reason, then, to be friendly to the presidents. And this means, above all else, being favourable to them on the issues they care most about: those involving presidential power and its exercise" (Moe and Howell, 1999, p.868).

If the courts and Congress are unlikely to stop the President in the usage and scope of his prerogatives it makes sense for the President to always push the limit of his Presidential power. The Theory of juridification is not opposed to this idea, the courts do not necessarily seek out power for powers sake (Blichner and Molander, 2005, p.11). While some may claim that this is not a big deal, seeing as future presidents can overturn the Executive Orders (Thrower, 2018, p.520), The precedent is still there for the Supreme Court to reference, as they did with Raegan and Carters use of the order in the Supreme Court decision.

As many unilateral presidency theorists cited in this thesis claims, the Presidency is an institution that has seemingly only gotten stronger over time, with less and less checks being made on the Presidential prerogative over time, and it could be that this is due to the Courts hesitancy to apply standards it does otherwise:

> "*Courts have applied doctrines that widen, rather than narrow, the distance between legislative intent and presidential exercises of authority. Congress´s reduced role visà-vis executive orders is compounded by the failure of the courts to force other*

types of commitment devices on presidential use of these instruments" (Newland, 2015, p.
2075).

Which is considered quite normal in many circumstances, the President does have an easier time in court, since "A range of doctrines require courts defer to the president's interpretations of treaties, to block private litigants from challenging national security policies" (Epstein and Posner, 2018, p.831).

6.3 Deference

My third question was: How can the deference shown by the Supreme Court to the Presidential prerogative, and the lower courts lack of deference be explained by the theories of unilateral presidency and the theory of juridification?

The unilateral presidency theory posits that when the founders of the United States designed the Constitution, they specifically designed it in such a way that the separation of powers was vague enough that ambition functioned as a check on each other's power. The resulting shift in the balance of power between the three branches of government would reflect the societal changes that occurred (Moe and Howell, 1999, p.854). It is also a matter of much study that this change in power results in a change regarding how the Supreme Courts interacts with Presidential Directives (Epstein and Posner, 2018, p.833).

One explanation for the Supreme Courts deference is simply rooted in the theoretical idea that Executive Orders are often thought of as nonjusticiable (Lowande and Rogowski, 2021, p.8). Subject matter also plays are part, in that the Supreme Court almost always defers to the President on matters regarding national security (Newland, 2015, p.2064). If we take into

account the plaintiffs view in these cases that these Presidential Directives transcends the power the President is supposed to have, we can liken it to a case of constitutive dejuridification (A), in that the Supreme Court according to Justice Sotomayor used a watered down rational-basis scrutiny test to review the Proclamations and Executive Orders. When in cases where the Establishment Clause have previously been discussed, a heightened standard was used (585 U.S. 17-965, 2018, p.15).

The reason this can be spoken of in dejuridification terms is that the Supreme Court applied a less stringent test on a matter involving religion and Establishment Clause claims, to give deference to the President on a national security basis. Effectively amplifying the Presidential prerogative to such a degree that review processes that should be used when discussing matters of the Constitution, such as the Establishment Clause, are rendered null and void due to the deference given by the majority of the Supreme Court to the President.

The lower courts do not play much into the theory of the unilateral presidency, and the reason for this can be twofold. The first is that as Justice Thomas discussed in the Supreme Court decision, these universal injunctions are fairly new (585 U.S. 17-965, 2018, p.5). One way of thinking about it is that, as the dissent points out in the Supreme Court hearing "Our Constitution demands, and our country deserves, a Judiciary willing to hold the coordinate branches to account when they defy our most sacred legal commitments. Because the Court's decision today has failed in that respect, with profound regret, I dissent" (585 U.S. 17-965, 2018, p.28).

If the lower courts have found the Supreme Court unwilling or unable to hold the Executive Branches power in check, they have subsumed a role the constitution intended the Supreme Court to have. While Justice Thomas decried the use of universal injunctions by the lower courts, he does confirm they have such a power if used against the Constitution: "If district courts have any authority to issue universal injunctions, that authority must come from a statue or the Constitution" (585 U.S. 17-965, 2018, p.2). All three court cases that took place at a State level did indeed conjure Constitutional claims for these universal injunctions, such as the Establishment Clause. And if the lower courts find that the Supreme Court shows

deference to the President over enforcement of the Constitutional rights of citizens to not be discriminated against due to their religion, it gives more credence to the claim that the lower courts see a Supreme Court that fails in their role and assume the role they have failed.

This is somewhat telling, in that one of the Justices who concurred with the majority doubted the constitutionality of the Proclamation itself, just not with the President's ability to issue it. Which really speaks the amount of deference shown to the Executive. If Justice Kennedy had applied the same stringent review as Justice Sotomayor, he might have concluded that the constitutionality of the Proclamation violated the Establishment Clause of the Constitution. This is speculation of course, but I think the fact that the contents of the Proclamation being less important than the President ability to issue it is an interesting thing to analyse. Especially considering they could have chosen to stay the injunction, but instead chose complete deference, while questioning its contents.

If the lower courts and Justices who dissented see a Supreme Court showing unconstitutional deference to the President, we can in juridification terms explain that as an activity by the Executive that was normally regulated become unregulated, which is dejuridification (B), which can then lead to dejuridification (D), as in decreased judicial power. In turn this can lead to the Prerogative being wholly removed from jurisprudential discussion, leading to dejuridification (C), decreased conflict solving by law (Blichner and Molander, 2005, p.1719).

6.4 Conjunction

By combining the analysis of the three research questions we might find ways one might model this conjunction of theories. The analysis will mostly function as a model that combines the three research questions, as everything that's has been shown in the 'model' has already been discussed in the sections and chapter above.

When the President uses his prerogative in a way that some find beyond his scope, we can discuss this as dejuridification (A), or in the case of the unilateral presidency, it is the President moving the status quo to his favour. In both cases shifting the balance in the separation of powers, as shown in the analysis above. When this happened, there was a reaction from the lower courts by issuing the relatively new nationwide injunctions, which can lead to juridification (A) by restoring the separation of powers if enforced, and juridification (D), as increased judicial power by the lower court. In unilateral presidency terms we could see this as the courts declining to show reference or acting against their own interest.

Then the President changes the status quo again, by issuing a new Executive Order which can lead to dejuridification (A), and again facing injunctions; juridification (D) and (A), while also having a case of juridification (C), because the nonjusticiable Prerogative as coined by the Supreme Court is discussed with reference to law in the lower Courts. The President in

turn issues a Proclamation which some see as an overreach of how the power is supposed to be used shifting the status quo again and ending up in the Supreme Court. The majority in the Supreme Court then decry the use of injunctions as an overreach and defers to the President dejuridification (C).

What this shows is simplified process of how we can understand the power dynamic between the courts and the President in the battle for these two Executive orders and the Proclamation. If we understand these processes as driving one another,

It is by no means an in-depth use of the two theories in conjunction with one another, and it must also be mentioned that the word 'might' carries a lot of weight in this analysis. The processes of juridification, apart from the Supreme Court rulings deference did not at any point become entrenched in law. But I do believe that my employing the theory of the unilateral presidency and using that in conjunction with the dimensions of juridification as done above, you can at least spot some trends of where this power dynamic might be headed. So, I would describe the part of the analysis as a cursory glance at the trends of the dynamic of power between the President and the courts.

7.0 Findings

I have through this thesis discussed how we are to understand the power dynamic between the President and the courts through Executive Orders and Proclamation. I did this by narrowing

this question down into what I consider to be three key factors of this case, which I wrote further on in the analysis.

While the often vague and ambiguous relationship between the courts and the Presidents has made this thesis quite hard to study, there are some interesting observations regarding their power dynamic in the court cases over Executive order 13769, Executive Order 13780 and Proclamation 9645. The Supreme Court has often shown deference to the President, which is no secret as discussed, many times above. What is more interesting is the use of deference in a case as controversial as this, that according to plaintiffs covers so many people in a discriminatory manner. The Supreme Court argues that the Executive Orders and Proclamations are not discriminatory since the text found within them are neutral and do not explicitly bar a certain religious group.

The ambiguity of the Executive Order power shows us that when the Supreme Court is debating a presidential directive, it seems to exclude contextual factors as irrelevant, since the authority of the President seems to take precedence to any objections dissenting members of the Court seems to have. An interesting point that struck out is that the lower courts through these nationwide injunctions seem to have adopted a stance where they adopt the responsibility they think belongs to the Supreme Court, insofar that they challenge the presidential prerogatives the Supreme Court does not.

The lowered standard used by the Supreme Court with regards to the plaintiffs Establishment Clause is interesting. In the lower courts the Establishment Clause was used as a reason for imposing the nationwide inunctions (CASE NO. C17-0141JLR). The Supreme Court however dismissed this claim, since the majority mostly ignored the context behind the immigration ban. Meaning that they set a standard whereby the contextual factors, such as the Presidents many derogatory statements against Muslims, can be dismissed by the sheer force of the Presidential authority in immigration, and by invoking national security concerns. The Supreme Court gave deference to the President on a matter where the factors the Executive Branch claimed were present which warranted such a ban, are kept secret and only available to the President and his Cabinet.

Another reason the majority of the Supreme Court might have wanted to dismiss the Establishment Clause claim by the lower courts and the plaintiffs is that by removing the Establishment Clause you effectively steer the court case out of the realm of the Constitution. If we take into consideration Justice Thomas' claim that lower courts have the power to issue nationwide injunctions only on Constitutional matters (585 U.S. 2018, p.2), you remove the judicial claim the lower courts had to issue the injunctions. Meaning that the prerogative was used in such a way as to make it nonjusticiable. The proof of burden is lower in the Presidents case than a private person, but by allowing contextual matters to be dismissed and national security concerns to take precedence over all other factors, you remove the ability of the courts to interpret factors brought up by plaintiffs. It regards almost any claim as null and void due to the perceived idea that the Presidents Directives must avoid litigation on these contextual factors because time is of the essence and national security is at stake.

The President had good reason to believe his Executive Orders and Proclamations would pass. As discussed throughout this entire thesis, precedent and convention spoke in his favour. What was unusual however were the number of nationwide injunctions that were imposed. In the unilateral presidency theory, one would as we've discussed before, expect the courts to somewhat allow the Presidents to make law through the Executive Orders since their power is designated by the Constitution and its relationship with Congress (Moe and Howell, 1999, p.852).

And this doesn't just pertain the Supreme Court. It is a brazen thing for a lower court to impose these nationwide injunctions, considering the majority in the Supreme Court are unsure of their legality. It runs somewhat counter to the theory of the unilateral presidency that the lower courts oppose an Executive Order on an issue such as immigration, which the President has mostly exercised with freedom from litigation. I think this can signal a change I how we may perceive the power dynamic between the court and the President. Depending on what the Supreme Court makes of this use of injunctions, it can trigger either a juridification in the sense that lower courts keep issuing injunctions even if national security I invoked by

the Executive Branch, or The Supreme Court puts a stop to the issuance of nationwide injunctions.

It seems that the ambiguity of the power dynamic between the President and the courts seem to mainly benefit the President. While the President has great authority to control and conduct immigration and vetting processes through the Immigration and Nationality Act, the Executive Orders and proceeding Proclamation was much broader than any such order ever issued. The more interesting point to note in the analysis is that the Presidents final Presidential Directive was issued through a proclamation, which went well beyond the scope of the traditional use and implementation of the power (Waslin, 2020, p.63).

The President went from having all Executive Orders and the Proclamation discussed in this thesis fail at almost every level except for the Supreme Court. This fact is not only interesting on the surface, but it also points to the power dynamic between the President and the Supreme Court. This is a power dynamic I believe

7.1 (De)Juridification

The power dynamic present between the courts and the President in the court battles over the various Executive Orders and the Proclamation proved to be a harder task than I thought. The

most obvious instance of juridification in this power dynamic is the nationwide injunctions issued by the lower courts. By issuing these injunctions the courts stalled a Presidential prerogative from being active until the Supreme Court chose to stay the temporary restraining orders and injunctions.

This is a judicialization of the lower courts power, at least temporarily. While Supreme Court Justices were mixed in their reception to these injunctions, the fact that so many courts nationwide chose to issue injunctions on a Presidential prerogative is a clear indicator that the lower courts felt the President had gotten away with too much. To reiterate a point I've presented a lot, courts usually defer to the President on these matters, and while the Supreme Court did so at the end, the lower courts could have faced the ire of the entire Executive Branch by imposing the restrictions on Presidential powers.

That's not only juridification in the sense of increased judicial power by the lower courts, but it can also be seen as increasingly referencing conflicts of prerogative power with reference to law, law the Supreme Court chose to ignore as irrelevant, but the fact that it happened so many times at the lower level is still interesting. Another interesting note to this is that while the Supreme Court did rule in favor of President Donald J. Trump, it was a slim victory with 5 Justice concurring and 4 Justices dissenting. This at least show that some Justices are willing to take a stand against the Doctrine of Deference that is usually practiced in the Supreme Court.

While the Presidential prerogative won out through the usual means of national security and references to the Immigration and Nationality Act, several Justices were willing to call this Order unconstitutional on ground of discrimination, even if the Executive Orders and the Proclamation were underpinned by national security concerns. While I won't go as far as calling this juridification, it does give credence to the something pointed out by Epstein and Posner, which is that in the last thirty years the Supreme Court has gotten more aggressive with regards to how it views the Presidential prerogative (2018,p.859), so this small majority victory could give a glimpse into future of how the prerogative could become more juridified

in the sense that it becomes subject to law, like the contextual factors that were often brought up in the lower courts, and by the dissent in the Supreme Court.

I think the findings become more substantive when we move the discussion to dejuridification. It's cited by many sources in this thesis that the Executive Orders and especially the Proclamation went way beyond the scope of its limits, by reinterpreting the Immigration and Nationality Act in such a way that the President essentially supplanted legislation by Congress. This point is highly contested mind but issuing such a broad legislation by circumventing the Congress can in theory change the separation of power to favour the President even more. If as we discussed, the President used this Proclamation to supplant instead of supplement existing legislation, one might speculate whether the President has, in some way, been granted the legislative power usually reserved to Congress. The President then has again morphed the institutional balance of the separation of powers in his favour.

There is also dejuridification if we observe the basis used by the Supreme Court to judge the Proclamation on Executive Orders. The Supreme Court as pointed out in the analysis, declined to use the heightened standard of which Establishment Clause cases are usually reviewed under. Which by precedent can grant the President a massive advantage in future use of the Executive Orders and Proclamation regarding immigration. Since Apparently the national security concerns and the Doctrine of deference makes almost all other contextual factors a matter not worth reviewing. The dissent brought up Korematsu as a similar case where people were judged by race, the concurring opinion however stated that this case was nothing like that, but refused to apply the principle of heightened standard in Establishment Clause cases, which is quite bizarre considering the heightened standard would have made the case reflect the context of the Orders, making the comparison at least more apt. Specific instances of juridification were hard to find relating to the dynamic of the relationship between the President and the courts in these cases, but I do think in the instances presented in the analysis and this chapter that the theory of juridification had some applicability, even though this seemed to be a trend of dejuridification being if not the most common, at least easiest to observe.

7.2 Unilateral presidency

The theory of the unilateral presidency seems to be able to better explain the ambiguities of the complex power dynamic that is the relationship between the President and the courts. As we've discussed, the President seems to have been able to push the status quo of the INA and the use of Proclamations to supplant existing legislation that was drafted by Congress. The founding of the United States was based on a power struggle in the separation of powers that was characterized by ambition, and as we've seen, where there is ambiguity or hesitancy the President seems to win out a lot of the time.

The majority in the Supreme Court held that Article 2 of the Constitution exudes deference to the President. And the unilateral presidency theory posits that the President will continue to push that status quo while the courts are unlikely to stop this, creating a situation that can worsen over time since the more the President pushes, the weaker to two other branches become. This, if we consider the plaintiffs and dissents opinions in this case seems to have been realised. In the sense that we have a Proclamation being used for sweeping legislative changes, and a Supreme Court majority that is unwilling to hold the President to the same stringent standards usually found in the Establishment Clause cases. The President has then effectively avoided a court case that could be based on Constitutional review by invoking national security concerns. I find this to be a massive case for the unilateral presidency theory being a good tool for this case.

Another thing I found interesting is that some of the prevailing literature I used in this thesis presents a view that while still applied at many levels, the Doctrine of deference to the

president is in a downwards trend. Which I discussed in the analysis. The find here then, is that while this might have been the case for many years, the Supreme Court in this case showed a huge amount of deference to the President. Two of the Supreme Court Justices in this thesis practically referred to the Presidential prerogative as nonjusticiable and wanted to review the use of nationwide injunctions to stop the Executive Branch from legislation through Executive Orders. Which means that not only does the Supreme Court in this case maintain its Doctrine of Deference, but it also wishes to bar the lower courts from issuing these injunctions, even though in some of the cases they were made on Constitutional claims.

The unilateral presidency theories explain that the power dynamic in this case is very much in the Presidents hand. It could have been an easy opportunity for the Supreme Court to score some points with the public by opposing this controversial Executive Order, and it could have entrenched the Supreme Court as the counterweight to a Presidential power some think have gone too far. Instead, they upheld the status quo by deferring to the President. There seems to

I consider the unilateral presidency theory to be a theory which holds a high level of applicability throughout this thesis. It gives a good insight into what the motivations of the President are, and what avenues they might use to achieve their goal.

8.0 Conclusion

In this master thesis I have tried to present the judicial struggle that surrounded Executive Order 13769, Executive Order 13780 and Proclamation 9645 that were issued by President Donald J. Trump which concerned several revisions on an immigration ban to the United States. By using the theory of juridification and the theory of the unilateral presidency, I have tried to show how deeply complex, ambiguous and often contradictory the power dynamic between the courts and the President is.

By presenting these cases in a chronological timeline, I tried to show that there is a big difference in how the lower courts and the Supreme Court treats the Presidential power of the Executive Order, and where they chose to defer to the President. My initial thoughts on this matter were that the Presidential prerogative regarding immigration was nonjusticiable, but in doing this study I hope I have shown that the actuality of the matter is much more complex. While the power itself is thought of as nonjusticiable by the Supreme Court, as I referenced in the empirical and analytical part of my thesis, the most confounding thing to me was that the lower courts repeatedly focused in on and agreed with the plaintiffs that the contextual factors in all these cases were extraordinary, which was the cause for all the injunctions. Which is why the dichotomy between the Supreme Court case and the lower court cases are so interesting to me.

So, while the power dynamic still seems everchanging, the explanation for how we are to understand this case seems to be by concluding that the lower courts as I posited in my analysis, played a much bigger role than normal by repeatedly issuing nationwide injunctions

on a Presidential prerogative by reference to a Constitutional statute the Supreme Court chose to ignore.

8.1 Thoughts

This master thesis started out because I already have an innate fascination with the relationship that exists between politics and law. My prior knowledge on this matter was mainly from a European perspective, which I fear is shown in this thesis. Focusing on the United States was an exciting challenge, but it also was quite arrogant for a master thesis. I also think I took on more than I could handle. I would have liked to go much deeper into one case, than I ended up doing.

I think this speaks to not only the subject matter, but also my inexperience. I chose something that was extremely interesting to me, but likely above my station. Had I done this entire thesis again from the start I likely would have focused only on the lower court decisions, or the Supreme Court decision. This was something I considered doing part way through the study, but by then I had already chosen the theories and mapped out a lot of what came to be the disposition for this study.

Something I regret doing is focusing way too much on the data gathering process. I spent a great majority of the time trying to understand the court cases and legal precedents cited by various Justices and judges. In hindsight much of what I focused on came to be wholly irrelevant to the thesis this ended up being. The focus on the theory of juridification was initially quite comforting, since it was something I thought I had a decent understanding of.

Too late unfortunately, and especially after writing the thesis, I wish I had focused more on theories that explicitly focused on judicialization in the United States. The separation of power and status quo of the President and courts are a lot different in the United States than they are in Europe. Which in hindsight leaves the thesis mired in what I can only call a ‘European perspective’.

A final thought I have is that I should have either narrowed this study down or focused more on the analytical parts earlier. I feel I could have done this thesis a lot more justice by looking deeper at various mechanism and perhaps employ a more historical context on the study, which would obviously give more context to not only my main issue, by also my research questions.

8.2 Further studies

While my thoughts on the execution of the thesis is mired in melancholy, there is a lot to take away for further research. The Presidents Executive Order is as explained many times in this thesis a power that is derived from a vague reference in the Constitution and is often afforded deference by the Supreme Court Justices. What surprised me about these cases were the contextual factors employed by the lower courts but rejected by the Supreme Court. In a similar study I would have focused more on the relevant caselaw where such considerations were made, and test that against the lower court's contextual factors, and the Supreme Courts denial to do so.

Another crucial part that is omitted from this thesis is of course the fact that Supreme Court Justices in the United States are thought of as having political affiliations due to them being appointed by the Presidents. This is an area I would have liked to include, but it would have made the thesis to unfocused. But as I briefly mentioned in my thesis, one of interesting things is that number of Executive Orders are thought to increase the more politically opposed the Supreme Court and the President are. Since Doctrine of Deference was such a key part of my thesis, it would have made for an interesting qualitative study to figure out why and how Presidents somehow issue more Executive Orders the more politically opposed to them the Supreme Court is.

While I went into this study with the idea to use the theory of juridification, another angle that was interesting to me was to use a discourse analysis. In a case such as this one, where you have several court battles that end up presenting differing opinions, I would have been very interesting to catalogue them to find out how argumentation differed between the lower courts

and the Supreme Court. Another use of the discourse analysis could have been to apply it to the Executive Orders and Proclamations themselves.

As shown in this thesis, many experts thought that the wording in the Executive Orders was 'too strong', while others pointed out that the Presidential Proclamation had never before been used to issue such a wide range of immigration related bans. Comparing Proclamation 9645 to the Proclamations issued by Carter and Raegan by using discourse analysis would have granted a much better insight into why Proclamation 9645 was thought to be so transgressive by its opponents.

I also wish I could have had more time to do a proper combination of these two theories, since I believe the brief example presented in the analysis can make for an interesting study, particularly if focused on the relationship between the Executive and Judiciary Branch.

Lastly, I would have liked to have done a comparative analysis between this Executive Order and other Executive Orders which banned a large group of people, such as the one issued by Jimmy Carter on Cuba. With such a close split in the Supreme Court in the case over Proclamation 9645, it would have given me more confidence in making more substantive arguments for why some Justices concurred, while others dissented.

Sources

ACLU (2017). *We'll see you in court, 2.0: Once a muslim ban, still a muslim ban.* available at << https://www.aclu.org/blog/immigrants-rights/well-see-you-court-20-once-muslim-banstill-muslim-ban?redirect=blog/speak-freely/well-see-you-court-20-once-muslim-ban-stillmuslim-ban>> read: 5th November. 2021.

ACLUNC (2017). *Trump sings first muslim ban, sparks airport protests nationwide.* Available at: << https://www.aclunc.org/sites/muslim-ban/>> Read: 3rd November. 2021

ACLU Washington. *Timeline of the Muslim Ban.*

Available at << https://www.aclu-wa.org/pages/timeline-muslim-ban

Adcock, R. And Collier, D. (2001) Measurement validity: A shared standard for qualitative and quantitative research. *American political science review,* 95(3) s.529-546.

Adler, D.G. (2000). *The law: The Clinton Theory of the War Power.* Presidential studies quarterly. (30) no.1

Americanbar (2021) *Executive orders*.

Available at:

<<https://www.americanbar.org/groups/public_education/resources/teacher_portal/educational_resources/executive_orders/>>

Amnesty (2017) *Licence to discriminate: Trump's Muslim and refugee ban*. Available at: << https://www.amnesty.org.uk/licence-discriminate-trumps-muslim-refugee-ban>> Read: 3rd November. 2021.

Barilleaux, R.J. Maxwell, J. (2017). *Has Barack Obama Embraced the Unitary Executive?*

Cambridge University Press.

Bailey, J *Transcript of David Frost's interview with Richard Nixon.*

Available at << https://teachingamericanhistory.org/document/transcript-of-david-frostsinterview-with-richard-nixon/>> (Read 19th of September 2022).

Blichner, L.C. Molander, A. (2005) *What is Juridification?* Arena Centre for European Studies. University of Oslo.

Bowen (2009). *Document Analysis as a Qualitative Research method*.

Qualitative Research Journal. Vol.9, No.2.

Bukve, O. (2016) *Forstå, forklar, Forandre. Om design av samfunnsvitenskapelig forskningsprosjekt.* Oslo: Universitetsforlaget.

Clearinghouse (2017). *State of Washington and Minnesota v. Trump*. Available at: << https://www.clearinghouse.net/detail.php?id=15606>>

Conkle, D.O. (1988) *Toward a General Theory of the Establishment Clause.*

Northwestern University Law review. Vol. 82. No.4.

Confessore, N. Yourish, K. (2016). *$2 billion worth of Free Media for Donald Trump*.

Available at << https://www.nytimes.com/2016/03/16/upshot/measuring-donald-trumpsmammoth-advantage-in-free-media.html>> (Read 11th of October 2022).

Constitution. *The Constitution annotated*.

Available at << https://constitution.congress.gov/browse/article-2/>>

Diamond, J. Almast, S. (2017) *Immigration ban sends shockwaves.*

Available at << https://edition.cnn.com/2017/01/28/politics/donald-trump-executive-orderimmigration-reaction/index.html>> (Read 20th October 2021).

Epstein, L. Posner, E.A. (2018) *The decline of Supreme Court deference to the President.*

University of Pennsylvania law review. Vol.166 No.4. Pages 829-860.

Executive order 13769 (2017) Protecting the Nation from Foreign Terrorist Entry into the United States.

Available at: << https://www.federalregister.gov/documents/2017/02/01/201702281/protecting-the-nation-from-foreign-terrorist-entry-into-the-united-states>>

Executive order 13780 (2017) Protecting the Nation from Foreign Terrorist Entry Into the United States.

Available at: << https://www.federalregister.gov/documents/2017/03/09/201704837/protecting-the-nation-from-foreign-terrorist-entry-into-the-united-states>>

Federal Bar Association. (2022) *About U.S. Federal Courts.*

Available at << https://www.fedbar.org/for-the-public/about-u-s-federal-courts/>>

Gerring, J. (2017) *Case Study Research, Principles and Practices.*

Cambridge: University printing House. Second Edition.

Gibson, J.L. Nelson, M.J. (2014) *The Legitimacy of the U.S. Supreme Court: Conventional Wisdoms, and Recent Challenges thereto*. Centre for comparative and International Politics.

Gentzkow, M. (2016) *Polarization in 2016.* Stanford University.

Glass, A. (2019). *Clinton Bails out Mexico, Jan. 31, 1995.*

Available at << https://www.politico.com/story/2019/01/31/this-day-in-politics-jan-31-19951129932>> (Read 20th of October 2021).

Howe, A. (2018) *Opinion analysis: Divided court uphold Trump travel ban*.

Available at << https://www.scotusblog.com/2018/06/opinion-analysis-divided-courtupholds-trump-travel-ban/>> (read 28th of November 2022).

Hurd, H. Scwartz, Y. (2018). *The Supreme Court Travel Ban Ruling: A Summary*.

Available at << https://www.lawfareblog.com/supreme-court-travel-ban-ruling-summary>>

Howell, W.G. (2005) *Introduction: Unilateral powers: a brief overview*. Presidential studies quarterly (35) No. 3.

Hirschl, R. (2013) The Judicialization of Politics. *Oxford handbook*

Johnson, J. (2015). *Trump calls for 'total and complete shutdown of Muslims entering the United States*.

Available at << https://www.washingtonpost.com/news/post-politics/wp/2015/12/07/donaldtrump-calls-for-total-and-complete-shutdown-of-muslims-entering-the-united-states/>> (Read 28th of November 2022).

Krent, H.J. (2007) *From a unitary to a Unilateral Presidency.*

Boston University Law Review, Forthcoming.

Legal information Institute. *Injunction*.

Available at << https://www.law.cornell.edu/wex/injunction>>.

Legal information Institute. *Inadmissible Aliens.*

Available at << https://www.law.cornell.edu/uscode/text/8/1182>>

Lowande, K. Rogowski, J.C. (2021) *Presidential Unilateral Power*. Annual review of political science (24) 21-43.

Mayer, K. (2021) *With the Stroke of a Pen: executive orders and Presidential power.* Princeton Universiy Press.

Moe, T. Howell, W.G. (1999) *Unilateral action and Presidential power: a theory.* Presidential studies quarterly. (29) No. 4.

Mortenson, J.D. (2019) *Article II Vests the Executive Power, not The Roylar Prerogative*. Columbia Law review. Vol. 199 No.5.

Mtsu. *Case categories: Establishment Clause.*

Available at << https://www.mtsu.edu/first-amendment/encyclopedia/case/128/establishmentclause>>

Newland, E. (2015) *Executive orders in Court.* The Yale Law Journal. 124:2026.

Panduranga, H. Patel, F. Price, M.W. (2017) *Extreme vetting and the muslim ban.* Brennan Center for Justice.

Proclamation 9645 (2018) *Enhancing Vetting Capabilities and Processes for Detecting Attempted Entry Into the United States by Terrorists or Other Public-Safety Threats.* Available at << https://www.govinfo.gov/app/details/DCPD-201700685>>

Siddiqui, S. (2017) *Meet Stephen Miller, the architect of the first travel ban, whose words may haunt him*. Available at << https://www.theguardian.com/us-news/2017/mar/15/stephenmiller-new-trump-travel-ban> > (Read 4th of April 2022).

Schmitt, D.C. (2018). *The doctrine of consular nonreview in the travel ban cases: Kerry V. Din revisited.* Georgetown immigration Law Journarl. Vol 33. No.55. Pages 55-89.

Swanborn, R. (2010) Case study research: what, why and how? London: Sage publications.

Theusconstitution. Available at: << https://www.theusconstitution.org/litigation/hawaii-vtrump/>>

Vogue, A.D. (2017). *Trump's temporary travel ban.*

Available at << https://edition.cnn.com/2017/10/17/politics/travel-ban-3-0blocked/index.html>> (Read on the 10th of august 2022).

Whitehouse. *The Executive Branch.*

Available at << https://www.whitehouse.gov/about-the-white-house/our-government/theexecutive-branch/>>

Waslin, M. (2020) *The use of Executive Orders and Proclamations to Create Immigration Policy: Trump in Historical Perspective.*

Journal on Migration and Human Security. Vol 8. No. Pages 54-67.

Yin, R.K. (2018) *Case study research and Applications, Design and Methods*.

London: Sage publications. Sixth edition.

Zeitz, J. (2022) *The Suprme Court has never been Apolitical.*

Available at << https://www.politico.com/news/magazine/2022/04/03/the-supreme-court-hasnever-been-apolitical-00022482>> (Read 15th of August 2022).

Court Cases

Western District of Washington. State of Washington V. President Trump, Complaint.

Available at <https://www.atg.wa.gov/executive-order-lawsuit> (Marked under Complaint filed 1/30/17. Marked As case (CASE NO. C17-0141JLR), in thesis. C for complaint as this has no new case number.

Court of Appeals for the Ninth Circuit. Available at: <https://cdn.ca9.uscourts.gov/datastore/general/2017/02/04/17-35105%20motion.pdf >> (Marked under (Case NO.17-35105, C) in thesis. C for complaint, as this has no new case number.

Court of Appeals for the Ninth Circuit. State of Washington V. Donald J. Trump.

(Marked under (Case NO.17-35105)

Available at << https://www.politico.com/f/?id=0000015a-12e6-d2c9-a55a-b2ef79280001>>
State of Hawaii V. Donald J. Trump.

Available at << https://www.govinfo.gov/content/pkg/USCOURTS-hid-1_17-cv00050/pdf/USCOURTS-hid-1_17-cv-00050-0.pdf>> (Marked as (Case No. 17-00050) in thesis.

State of Hawaii V. Donald J. Trump.

Available at << https://case-law.vlex.com/vid/hawai-i-v-trump-890996432>> (Marked as (Case No. 17-00050 DKW) in thesis.

Supreme Court Oral hearing. Hawaii V. Donald J. Trump. Available at << https://www.supremecourt.gov/oral_arguments/argument_transcripts/2017/17965_l5gm.pdf> >

(Marked as (Case No. 17-965) in thesis).

Supreme Court decision. Donald J. Trump V. Hawaii. Available at <https://supreme.justia.com/cases/federal/us/585/17-965/>

(Marked as (585 U.S. 17-965) in thesis.