

GIULIO NAPOLITANO*

THE US SUPREME COURT JUDGMENT
ON THE TRAVEL BAN
THE POWERS AND THE WORDS
OF THE US PRESIDENT

In a judgment delivered on 26 June 2018, the US Supreme Court declared the lawfulness of President Trump Executive Order which prohibited the entry into the country of citizens coming from eight “suspect” or “non-collaborative” nations, of which six are majority Muslim.

Labeled as “Travel Ban,” or in a more provocative way as “Muslim Ban,” since its first version enacted a few days after President Trump’s entry into office, the Executive Order immediately became the object of a bitter political and judicial battle. One year and half later, this battle was also echoed by the discussion in the Supreme Court, which ended on 26 June with a narrow majority vote 5-4 in support of the opinion delivered by the Chief Justice Roberts. The moral tension that deeply divided the Court within it can be grasped in the passionate dissenting opinion of Justice Sotomayor, who pointed out that “the United States of America was founded on the promise of religious freedom “and that” the decision taken by majority by the Court fails to safeguard the fundamental principle of religious neutrality enshrined in the Constitution.”

The judgment is particularly favorable for President Trump. But it would be a mistake to read the Court’s decision as a full pass to the President’s policy on security and immigration. And it would be all the more wrong to understand it as an implicit universal ode to neo-nationalist movements and to the choices of closing borders to migrants and travelers that are emerging at different latitudes and in various jurisdictions.

In the ruling, the Court reiterated its well-established jurisprudence that the decision

* Full Professor of Administrative Law and Comparative Administrative Law, Roma Tre University.

to admit and exclude foreigners from the national territory constitutes the exercise of a “fundamental sovereign prerogative” and pointed out that there is no constitutionally-protected right of foreigners to enter American soil. These statements should not be surprising if one considers the traditional refractoriness of the United States and its courts to assume and recognize the cogency of international restrictions and the absence of any reference to the right to asylum in the Bill of Rights. These statements however could not be formulated in the same terms in European countries, whose most recent constitutions, mindful of the horrors of the Second World War, expressly safeguard that right and operate within the common constraints voluntarily assumed in the migration policies of the European Union.

On the merits, the Supreme Court clearly stated that American law on immigration and citizenship gives a wide delegation to the President to suspend with a special “Proclamation” the entry of foreigners or classes of foreigners that may be harmful to the national interest, and in particular to its internal security. The Supreme Court underlined that the text of the statutory provision in question “exudes respect for the President in every clause.” Even in this case, however, the exact scope of this demanding statement by the Court should not be misunderstood. In fact, it should be placed in the context of a more general tendency of the American legal system to strengthen what scholars have called the “Presidential Administration.” This awareness should lead to the avoidance of partisan polemics, as the opinion of the Court suggests, making reference to previous similar measures ordered by both Republican and Democratic Presidents.

It should also be noted that the Court gave the go-ahead to the presidential “Proclamation” only in the third version, which appropriately amended the first two texts of the “Travel Ban.” This version, in fact, also includes people coming from countries of non-Muslim religion, such as North Korea and Venezuela. In addition, the new version of the Executive Order was adopted following a wide-ranging investigation, involving various federal departments and agencies and efforts at cooperation with affected foreign governments, and after the President consulted several members of the Executive. This confirms that important and complex decisions such as the “Travel Ban” can certainly not take place in an impromptu way or with extemporaneous and individual initiatives even by the highest political authorities.

The most sensitive point of this dispute remains the possible discriminatory nature of the announcement which excludes foreigners on the basis of their nationality, but in reality also, at least according to the applicants and to the dissenting opinion of some justices of the Supreme Court, on the basis of their religious beliefs. The knot is made up of the words with which President Trump, during the electoral campaign and once

elected, announced and accompanied his decision, with ambiguous and sometimes openly anti-Islamic public statements and messages on Twitter. The Court overcame the problem by focusing attention on the objective tenor of the measure, which is neutral on the religious level, and on the breadth of the presidential powers. But the Court did not shy away from an implicit reference to President Trump's statements, underlining the relevance of the "extraordinary power of speech" of American presidents and recalling the long and unbroken tradition of public speaking with which, from George Washington onwards, they always vigorously reaffirmed the US commitment to honor the principles of religious freedom, respect and tolerance. Of the debate in the Supreme Court, the words perhaps most impressive are those contained in the concurrent opinion with which Justice Kennedy has in fact taken leave of the Court, at the end of an extraordinary term played along the difficult ridge that has often separated conservatives and progressives within it: however broad the sphere of political discretion recognized to the members of the Government, "this does not mean that they are free to ignore the Constitution and the rights and liberties it protects." An "anxious world" must know that "our Government is always devoted to those freedoms that the Constitution seeks to preserve and protect, so that they extend also to the outside and last."