

# Justice Kennedy reminds Trump he is not above the law

By Vikram David Amar and Akhil Reed Amar

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In one of this year's most-watched cases, *Trump v. Hawaii*, Chief Justice John Roberts on Tuesday authored a [five-justice opinion](#) upholding the latest version of the Trump administration's so-called travel ban. While Roberts is the court's formal leader, Associate Justice Anthony Kennedy is often its fulcrum – the proverbial swing justice – and its conscience.

In the *Hawaii* case, Kennedy penned a brief and high-minded concurrence, epitomizing his approach to being a good judge and a good leader.

By joining Roberts' opinion, Kennedy kept his eye on the ball: the executive order itself, which regulates entry into the United States by nationals of several Middle Eastern and African countries, rather than the President's various inflammatory tweets about Muslims. (More on that later.)

As important as his swing vote was, Kennedy's [words in concurrence](#) are also noteworthy. In classic Kennedy fashion, he called for civility and mutual respect in an increasingly polarized country and world.

Kennedy begins his concurrence by trying to identify "common ground" between all the justices in this case: everyone on the court abhors religious

and other invidious discrimination. Finding common ground in contentious cases is what Kennedy has tried to do for decades. Sometimes, he votes with the liberals, other times the conservatives.

When he is on the losing side of a case, he registers his disagreement by "respectfully dissenting," whereas many other justices in hot-button cases more curtly "dissent." He never insults the positions advanced by other members of his court, the lower courts, or the lawyers appearing before him.

Respect for the dignity of all persons does more than inform Kennedy's personal style; it underlies his substantive constitutional vision. In case after case, he has taken the lead to invalidate government actions that reflect disrespect of all manner of groups and individuals. He has done so in landmark rulings protecting gays and lesbians (e.g., *Romer v. Evans* in 1996 and *Obergefell v. Hodges* in 2015), religious minorities (*Lee v. Weisman* in 1992 and *Church of Lukumi Babalu Aye City of Hialeah* in 1993), and religious majority expression (in this year's Colorado baker case.)

Why, then, did Justice Kennedy vote to uphold the travel ban, given some of the nasty comments tweeted by President Donald Trump in the run-up to earlier versions of the order? Because there is a difference between what a President (or presidential candidate) offhandedly says, and what a policy adopted by an administration actually does.

The travel ban, in form and effect, does not single out Muslims; indeed, the countries with the largest Muslim populations aren't covered. Although this Supreme Court, including Justice Kennedy, is sometimes criticized for not staying in its institutional lane (e.g., *Bush v. Gore*), today Kennedy and the majority were properly mindful of the limits on the court's role. Especially in the foreign affairs realm, Justice Kennedy didn't think the court's job includes policing the President's potty mouth.

And yet, Kennedy did feel the need to remind us all that even though the court is not in a position to censor or closely edit a President in the foreign affairs arena, the President himself should remember that he is not above the law, and is bound by oath to uphold constitutional values of religious tolerance and respect.

In Kennedy's words: "An anxious world must know that our Government remains committed always to the liberties the Constitution seeks to preserve and protect, so that freedom extends outward, and lasts."

Although today Kennedy voted with Trump, he distanced himself from the President in style and in substance – a polite uniter rather than an insulting divider.