Does the Constitution Allow President to Ban Muslims?

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Does the Constitution allow president to ban Muslims?

The president-elect has stated that he intends to protect national security by banning Muslim immigration into the United States. He also has signaled an openness to some form of Muslim registration program. Does the Constitution impose barriers to the adoption of such policies?

Since 1868, the Constitution's Equal Protection Clause has formally guaranteed all "persons" - a term that encompasses non-citizens - the "equal protection of the laws." Sometimes, this guarantee is described as protecting against governmental "discrimination." But that description is too general. All laws that regulate human behavior "discriminate" in some way. Some laws discriminate on the basis of conduct. Homicide laws discriminate against those who have taken a human life. Environmental laws discriminate against polluters. Tax licenses discriminate against the young. Laws imposing mandatory retirement ages discriminate against the elderly. Laws requiring airplane pilots to pass vision tests discriminate against those with poor eyesight.

Nearly all such laws are perfectly constitutional if they use rational means to achieve reasonable ends. This is true even of laws that discriminate on the basis of inherent or unchangeable characteristics. And it is true even when a court knows that the fit between a law's means and ends is likely to be far from perfect. Setting the driving

A Little Perspective

THE WASHINGTON POST EDITORIAL BOARD: "The best response to racism is to call it out, loudly and by name. That's especially true now, amid an election-fueled surge in hate crimes and hateful public remarks, on social media and elsewhere. The good news is that even as odious and dismaying commentary spreads, it has triggered a forceful response, including, crucially, from President-elect Donald Trump and his advisers. Politicians cannot be expected to repudiate every insufferable remark by allies and supporters. Still, Trump, who insists he is the "least racist person on Earth," is well advised to demonstrate that his distaste for political correctness is not license for hate speech. It was therefore welcome to hear his transition team denounce as "absolutely reprehensible" the latest obnoxious racist rant from Trump backer Carl Paladino, erstwhile Republican gubernatorial candidate in New York and now a school board member in Buffalo. Paladino, long prone to raw and racist taunts, had publicly expressed the wish that President Barack Obama would die of mad cow disease and that first lady Michelle Obama would "return to being a male and let loose in the outback of Zimbabwe," where she would cohabitate with a gorilla in a cave. Calling out racists such as Paladino is a good way for the incoming team to show that it does not welcome the support of people with odious views."

NHwayback

ON JAN. 1, 1926, the Granite Monthly magazine reports on a $50,000 ad campaign by the state to lure new residents. "Some would have us believe that the present publicity campaign is New Hampshire's dying gasp. They point to the declining rural population, to the exodus of youth from the state and to the slack conditions in some of our industries and conclude that New Hampshire is "done." "Not so," the editor assures his readers.
Trump campaign statements may complicate non-discrimination claims

CONSTITUTION FROM D1

age at 16 is permissible, for example, even if it is shown
that many 15-year-olds are capable of driving safely and
many 16-year-olds are not.

So what does the Equal Protection Clause actually
accomplish? For the first three-quarters of a century of
its existence, the answer was “not much.” During this era,
the Supreme Court almost always characterized as “reason­
able” the executive and legis­lative judgments that were
challenged under the clause. Indeed, in 1927, Justice Oliver
Wendell Holmes derided
equal protection as “the usual
last resort of constitutional arguments.”

But all of this changed in
the following decades. Per­haps
prompted by the horrors of
genocide, totalitarianism and
deeply entrenched domes­tical racial discrimination,
the Supreme Court began to
take a different approach to a
small subset of laws that dis­criminate on the basis of
inherent or unchangeable char­acteristics — those that
criminate on the basis of
race.

No longer did the court view
racially discriminatory laws
for mere reasonable­ness. Instead, it subjected them to a heightened form of
scrutiny and held them uncon­stitutional unless they
used narrowly tailored means to achieve a “compelling”
governmental interest. This
has proven to be a very diffi­cult task to meet.

Soon, the Supreme Court extended heightened scrutiny
to laws that discriminate on
the basis of religion, ethnicity and
national origin. And it eve­ntually applied a modified form to heightened scrutiny
to laws that discriminate on
the basis of gender. The court
also extended heightened scrutiny to laws that infringe upon “fundamental” rights,
such as the First Amendment
right to freely exercise one’s
religion.

So what does all of this
mean for the president-elect’s plans with respect to Muslims? If the administration
adopts measures that explic­itly subject Muslims to differ­ent treatment on account of
their religion, it should antici­pate immediate court chal­lenges. To survive these chal­lenges, the government will
need to establish that its mea­sures advance a compelling
government interest through means that are narrowly
tailored — i.e., that are neither
overinclusive nor underinclu­sive.

This will be a very diffi­cult showing to make. Obviously, national security is a “com­PELLING” government interest. In
fact, it is one of the very few interests that the
Supreme Court has described as compelling. (The court pro­vided this description in the notorious Korematsu case,
which held that the Japanese­American internment policy
implemented during World
War II survived strict
scrutiny.) The difficulty, how­ever, will be in showing that
the measures are neither
overinclusive nor underinclu­sive because the over­whelming
majority of Muslims pose
no threat to national security.

Second, courts are reluctant
to find that policies neutral
on their face with respect to
religion are in fact moti­vated by religious discrimin­ation. Thus, if the new admin­istration were to target immi­gration from countries
deemed likely sources of ter­rorist threats, a court would
not lightly conclude that such
a measure discriminates on
the basis of religion — even if
the affected countries contain
largely Muslim populations.

In fact, from 2002-2011, the
Bush and Obama administra­tions administered just such a
country-specific immigration
policy. It survived constitu­tional challenges in lower
courts. But those administra­tions also emphasized in their
public statements that it was not
government policy to dis­criminate against Muslims.

The president-elect has thus far taken a different
approach. As a consequence, if
his administration seeks to
implement a policy that tar­gets Muslim-majority coun­tries, his campaign state­ments might well complicate
any argument that the policy is non-discriminatory toward
Muslims.

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As Oklahoma attorney general, Pruitt sued the EPA at least 13 times

PICKS FROM D1

Flynn Sr. stays on. Flynn is
buddy-buddy with Vladimir
Putin. Seriously, with Flynn,
you have to wonder: Is there
a screw loose? And I am not
even mentioning the anti­
Semitic tweet. Without equiv­
ocation, I give Flynn a 1.5.
Who needs Dr. Strangelove?

Pruitt, the nominee for the
Department of Housing and
Urban Development. It is hard
to know what to make of this
pick. When his name was
floated, Carson said he felt
unqualified to run a federal
agency. He was a brain sur­
geon with no relevant experi­
ence.

During the campaign,
Trump said horrible things
about Carson. He said Car­

Pilgrims touch the Kaaba, the sacred Muslim shrine, at the Great Mosque in the Muslim holy city of Mecca, Saudi Arabia, on Dec. 29, during the minor pilgrimage, known as Umrah.