1-1-2017

Does the Constitution Allow President to Ban Muslims?

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Recommended Citation

John M. Greabe, Does the Constitution allow President to Ban Muslims?, Concord Monitor, Jan. 1, 2017 at D1, D3.
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Additional Information
This article is part of the series Constitutional Connections by John M. Greabe and was originally published by the Concord Monitor.

This editorial is available at University of New Hampshire Scholars' Repository: https://scholars.unh.edu/law_facpub/252
Clearly, there is robust competition. To properly assess things in a Trumpian way, I suggest using the 10 scale. This was the scale Trump previously used when ranking women on their looks. Think back to that interview when "Trump said, "I view a person who's flat-chested as very hard to be a 10."

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 laws discriminate among those who earn different incomes over a specified period of time. Other laws discriminate on the basis of inherent or unchangeable characteristics. Laws requiring that a person be at least 16 years old to obtain a driver's license 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."

Paladino

Paladino

John Greabe

Constitutional Connections

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NHsnapshot

Diane Weeks of Greenfield bids a tearful farewell to her husband, Larry Weeks, as he receives the 744th Transportation Company of the Army Reserve out from Fort Devens in Ayer, Mass., on Sunday, Jan. 20, 1991, on his way to Desert Storm.

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.
CONSTITUTION FROM D1

age at 16 is permissible, for example, even if it is shown that many 18-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 “reasonable” 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 domestic 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 discriminate on the basis of race.

No longer did the court review racially discriminatory laws for mere reasonableness. Instead, it found 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 test 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 the only 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 Japanese-American 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.

(John Greabe teaches constitutional law and related subjects at the University of New Hampshire School of Law. He also serves on the board of trustees of the New Hampshire Institute for Civics Education.)

Picks from D1

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

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 equivocation, I give Flynn a 1.5. Who needs Dr. Strangelove?递给

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