



A Complete and Total Ban

Placing the Muslim Ban in Historical Context

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President Donald Trump did not just use the term “radical Islamic terrorists” to describe attacks on American civilians, but also called for a “total and complete ban on all Muslims entering the United States until we can figure out what the hell is going on.”¹ That position was soon “modified” to mean “extreme vetting” of Muslims intending to enter the United States.² During the general election campaign, candidate Trump further clarified that what he really wanted was a policy with extreme vetting of immigrants from the countries from which the terrorists would ostensibly come—but did not then name those countries. In his relentless campaign to show that the Obama administration had betrayed its obligation to keep America safe and secure by not recognizing that the true enemy was rooted in Islamic ideology, after the brutal shooting at an Atlanta nightclub by a native-born U.S. citizen, Trump called for President Barack Obama to be removed from office for not using the phrase “radical Islam” to describe the perpetrator.³

Thus, if indeed belief or adherence to the Islamic faith were a trigger that placed the United States in danger, President Trump would have to guess right that the person could not have been “radicalized” to the point of wanting to attack the United States and be a citizen of a country not on his list.

Scarcely a week after his inauguration, the Trump administration rolled out the first travel ban impacting nationals of seven countries⁴ and a subsequent order halting all refugee admissions indefinitely.⁵ The policy was announced without specific guidance on the key logistical matters such as whether to detain, return, or admit anyone who came into the United States from those countries. Specifically, the question of whether permanent residents were included in the order presented a series of mixed messages and inconsistent “enforcement.” Customs and Border Protection officers were left with

rooms full of people they could neither admit nor remove from the United States and airport terminals were turned into massive protest zones as citizens and elected officials alike responded to this policy.⁶

The states of Washington and Minnesota, along with a series of large corporations, then brought actions stating that these orders violated the Equal Protection Clause of the 14th Amendment and that, as aggrieved parties, they had standing to litigate.⁷ The complaints listed a multitude of potential harms to the states and their corporations if the United States government refused to admit individuals from these countries. The potential harms ranged from the economic harm of losing established employees to the disruption to families and communities because of the sudden loss of people who could not enter the United States. The administration argued that under § 1182 of Title 8 of the United States Code, the president had unchecked

power to regulate entry into the United States.

The district court stayed the orders holding that the harm was immediate, the states had standing, and the administration was unlikely to demonstrate a rational basis for its order.

In issuing an injunction against the order, Judge Leonie Brinkema of the Eastern District of Virginia held that the executive order violated the Establishment Clause because it disfavored one religion over others.⁸

The administration withdrew that executive order to issue a subsequent order,⁹ one which included a grace period before going into effect, exempted permanent residents, and reduced the list of countries from seven to six (Iraq was removed). The states of Hawaii¹⁰ and Maryland¹¹ swiftly challenged these actions on similar grounds to those of Washington and Minnesota, and in both cases district courts issued stays pending litigation on their merits. The administration has appealed this decision to both the Fourth and Ninth Circuits and was awaiting a hearing at the time that this article was going to press. Thus the ultimate decision as to standing, presidential power, and equal protection remains unsettled. However, since the implementation of the initial executive order, 28 complaints have been filed against it, with most still pending.¹²

This article will examine the general limits on presidential power, as applied to immigration. It will also examine the application of the Equal Protection Clause in the context of what is permissible as a policy, and whether an immigration ban such as Trump first proposed must come from Congress, if at all. As immigration policy is generally made by Congress, we will first look at that power, and then discuss whether the ban could survive.

Who Can Be Targeted?

Congress generally enjoys plenary power over immigration matters.¹³ The United States has targeted people for individual acts, ideological deportations, and bars to admission since the nascent years of the country. The Alien and Sedition Acts of 1798 provided the legal foundation for removal based on ideology and beliefs both actual and imputed. One of the acts, the Alien Friends Act, allowed the president to imprison or deport aliens considered “dangerous to the peace and safety of the United States” at any time. The initial political disputes centered around those who supported a conservative independent country in which power rested in fewer hands but did not want to return to the monarchical rule. This led to an intense fear of opposition viewpoints; the Alien and Sedition Acts banned immigrants who were not loyal to the United States. Those acts gave the president the authority to detain males above age 14 of any country in a declared war with the United States and survives to this day (and has been expanded to include any national of the named country) and is codified today.¹⁴

The Alien Sedition Acts led to a legal regime in which presidents could exclude nationals and also imprison nationals within the United States, such as nationals of Japan during World War II. The Japanese Internment was upheld despite the fact that the United States could not produce any credible evidence that Japanese-Americans posed a threat to the security of the United States or demonstrated loyalty to the Japanese regime.¹⁵ The Chinese Exclusion Act’s display of seemingly limitless power derived from the Supreme Court’s view that decisions over admission and exclusion of aliens adhere in the ancient rights of the sovereign state. Moreover, the Court removed any authority the individual states had over immigration law and, in

Chy Lung v. Freeman,¹⁶ declared the field of immigration pre-empted by federal law. Shortly thereafter, the Court expanded the plenary power doctrine from excluding aliens outside the United States to removal of aliens inside the United States.¹⁷

Yet, however boundless the plenary power may have been (or remains)—it is not without its limits. The first limit came shortly after *Fong Yue Ting* when the Court decided that a criminal statute must meet constitutional standards, even if said statute was related to immigration.¹⁸ In *Wong Wing*, the Court examined a statute that imposed a year of imprisonment at hard labor, without a trial by jury, for Chinese people convicted and adjudged to be illegally present in the United States.¹⁹ The Court held that even though the statute was meant to further promote Congress’ “policy in respect to Chinese persons,” Congress could not subject aliens to such a harsh deprivation of liberty without providing judicial trials to establish their guilt as required under the Fifth and Sixth Amendments.²⁰ Therefore, when criminal statutes in the immigration arena implicate fundamental rights, the plenary power doctrine provides no cover from the constitutional spotlight. A court cannot pass on the constitutionality of a particular policy without analyzing the protections the defendant is due under the Fifth Amendment Due Process Clause.

Though the next century would cement the plenary power doctrine within the immigration context, the constitutional protections buffeting criminal proceedings—even in the immigration context—have never been seriously questioned, limited, or reversed.²¹ The Chinese Exclusion Acts contained numerous invidiously discriminatory provisions regarding the exclusion and removal of Chinese nationals (“members of the Chinese race,” as the Court described them), none of which were deemed constitutionally noxious. Only § 4 of the Chinese Exclusion Act of May 5, 1892—which criminalized the presence of an excluded Chinese person in the United States—was held by the *Wong Wing* court to be outside the ambit of the plenary power doctrine.

But even that broad and seemingly limitless power within the immigration context has begun to decay. In *Zadvydas v. Davis*,²² the Court noted there are “important constitutional limitations” on Congress’ plenary power. In modern times, there are phantom constitutional norms, diluted protections that serve to temper the otherwise ironclad plenary power doctrine.²³ In *Miller v. Albright*,²⁴ the Court applied a standard constitutional test, finding that “important” government interests supported the difference in statutory requirements and that the provision was “well-tailored” to serve those interests in upholding the old statutory scheme for derivative naturalization (which was more onerous for fathers attempting to pass on U.S. citizenship to their children than mothers). This was something more than rational basis review but perhaps less than traditional intermediate scrutiny for gender-based classifications—but, significantly, it was not absolute hands-off plenary power doctrine deference.

Another way the plenary power doctrine has been gutted is via avoidance canons—vehicles of statutory interpretation that allow the Court to prefer a permissible, even if not an optimal, reading of the statute to avoid constitutional problems. This is based on the assumption that Congress would not have intended to legislate unconstitutionally and, therefore, constitutionally suspect interpretations should be avoided.²⁵

In modern times a constitutional challenge of even a purely immigration-based statute may survive because it is not foreclosed. At a minimum, a rational basis test is applied—so it is not completely

hands-off.²⁶ Thus, where a fundamental right is implicated, stricter constitutional scrutiny is warranted, and even the stalwart plenary power doctrine cannot provide bulletproof protection. A court can review whether Congress has chosen a constitutionally permissible means of implementing its power over immigration—its plenary power notwithstanding.²⁷

Applied to a so-called Muslim ban, courts may well find it unconstitutional. Though the administration has argued forcefully that plenary power—at least as delegated to the president in § 212(f) of the Immigration and Naturalization Act, courts have generally found review is not precluded, and there is simply no rational basis to choose a religion (which, of course, would implicate a fundamental right as practiced inside the United States) as a basis for inadmissibility over, say, other indications of being prone to terrorism.

However, barring aliens from certain countries—even if those countries are disproportionately Muslim—would probably survive constitutional muster since there is at least a rational basis for doing so, and a fundamental right is not (directly) implicated. The strongest language against the executive orders thus far centers around the campaign rhetoric, and thus the question becomes, how far can a judge look beyond the four corners of an executive order to decide whether discriminatory intent exists? Taken to its logical end, when would the president ever be able to issue an order that affected Muslims? The constitutional spotlight exists, but there are limits. Indeed, it is not necessarily a very bright spotlight to begin with, as it is dimmed considerably by the plenary power doctrine. In order to apply a “strict scrutiny” test (which would most likely result in the scheme being struck) there must be a showing of discrimination coupled with a compelling reason for it.

The Rationale for Limiting Muslim Immigration

Before addressing the issue of whether a president could order a total and complete “ban” on Muslims, we must first discern the rationale for the ban. For example, while membership or adherence to a religion is not in itself a ground for inadmissibility, performing acts that constitute crimes in the United States would be inadmissible. For example, an adherent to the Rastafarian faith who smokes marijuana regularly per his religion would require a waiver of inadmissibility each time he came to the United States to perform with his reggae band since his consistent marijuana smoking was a religious dictate following long-held precedent that an individual’s religious belief does not excuse him or her from complying with an otherwise valid law prohibiting conduct that the government is free to regulate.²⁸ However, when the city of Hialeah, Fla., attempted to ban the Santeria Church practice of ritual animal sacrifice, the Court held that the statute discriminated against the church and, since killing animals was permitted both for food and sport in Florida, the law was narrowly tailored to target the church’s practices without a compelling rationale.²⁹

In the case of Islam, the views—such as those championed most recently by former National Security Adviser Gen. Michael Flynn—that Islam is not a religion, but rather an ideology that is at war with the United States³⁰ have permeated the media and political life with misinformation that has led to policies so extreme that they do not pass the rational basis test of the Equal Protection Clause.

Seven states have “banned” the use of Sharia law in their court systems. In what the measure’s central proponent labelled a “pre-emptive strike” voters passed the Oklahoma International and

Sharia Law Amendment. The Tenth Circuit held that the measure violated the Establishment Clause since it unconstitutionally targeted a religion without rational basis. In language similar to those of the travel ban courts, the Tenth Circuit implied that in this case the law was based on belief and prejudice rather than facts and created a false target in order to fulfill that prejudice. “Appellants do not identify any actual problem the challenged amendment seeks to solve. Indeed, they admitted at the preliminary injunction hearing that they did not know of even a single instance where an Oklahoma court had applied Sharia law or used the legal precepts of other nations or cultures, let alone that such applications or uses had resulted in concrete problems in Oklahoma.”³¹

The stoking of misinformation and fear regarding Muslims has led not only to these laws and the extremely dangerous rhetoric as exhibited by those in the political world such as Flynn, but also to Islamophobic ideas being voiced by those in the media world. This is part of a larger infrastructure that has targeted Muslims both within and outside of the United States.³²

The amount of resources that have gone into funding anti-Islamic think tanks is staggering. Seven charitable groups provided \$42.6 million to Islamic think tanks from 2001 to 2009.³³

As a result, this movement based on fear and bigotry against Muslims gained a foothold in popular media culture. For example, Frank Gaffney Jr., president and founder of the Center for Security Policy and former deputy assistant secretary of defense for nuclear forces and arms control policy in the Reagan administrations, is one of the leaders in the movement to “ban” what he calls “Sharia law.” However, Gaffney, who is credentialed with degrees from the top national security programs along with his professional career in the defense department, admitted, “I don’t hold myself out as an expert on Sharia Law ... but I have talked a lot about that as a threat.”³⁴ The Center for Security Policy has funded research by David Gaubatz, a former federal agent in charge of special investigations for the U.S. Air Force and a U.S. State Department-trained Arabic linguist who referred to President Obama as “our Muslim leader” and authored two books: *Infiltration: How Muslim Spies and Subversives Have Penetrated Washington* and *Muslim Mafia: Inside the Secret Underworld That’s Conspiring to Islamize America*. It is the norm for top, nationally syndicated conservative talk radio personalities to join in with similar rhetoric.

Gaffney and Gaubatz represent a wider group of “experts” on Islam who are able to disguise uninformed, bigoted views behind a veneer of legitimacy. They in turn “explain” the threat to the larger media personalities and have prominent roles in the public discourse.

Former House Speaker Newt Gingrich, who is both a political actor, pundit, and former adviser and leader on the Trump transition team, expressed the following: “Western civilization is in a war. We should frankly test every person here who is of a Muslim background, and if they believe in Shariah, they should be deported.... Shariah is incompatible with Western civilization. Modern Muslims who have given up Shariah, glad to have them as citizens. Perfectly happy to have them next door.”³⁵

In 2014 during an interview with (then) Fox host Megyn Kelly, when Hassan Shibly, a Muslim civil rights attorney attempted to explain the *maqāsid ash-shariah* (goals of Islamic ethics and law) Kelly retorted, “Well, I know they stone women!”³⁶ This is akin to judging the American legal system by focusing on errant decisions like *Dred Scott*, *Plessy*, or (for an unreversed example) *Korematsu*.

More recently, U.S. Department of Housing and Urban Development Director Dr. Ben Carson pronounced “what I would like for somebody to show me is an improved Islamic text that opposes Shariah.”³⁷ Both of these public figures benefit from the vacuum of facts: the media is rife with negative, prejudiced, and uninformed views of shariah and Islam set by over 15 years of an effort so successful that, after its success in having anti-shariah legislation passed in seven states, it was able to help elect a president. This effort has arbitrarily redefined the shariah as an object of hate and broadly applied it to any person sought to be excluded, immune from review under the plenary power doctrine.

Among his many anti-Muslim statements that have led to boycotts, nationally syndicated radio talk show host Michael Savage proclaimed: “The Muslims are running wild in this country, and the police are afraid of them.”³⁸

Kris Kobach, who has been unofficially advising the new administration, was seen in November 2016 carrying an outline of his “immigration strategic plan” for the first 365 days. This included, *inter alia* “updating the National Security Entry-Exit Registration System (NSEERS) ... extreme vetting for high-risk aliens, question them whether they support Sharia law, jihad, equality of men and women, and the U.S. Constitution.”³⁹ NSEERS was a failed Bush-era program that required Muslim male immigrants to register—and 84,000 did—and 14,000 found themselves in removal proceedings, with nearly 3,000 detained. NSEERS resulted in zero convictions for terrorism and the Obama administration halted use of the program in 2011 and dismantled it completely in late 2016.⁴⁰ Because President Obama ended NSEERS completely, any rebooting of NSEERS will now have to be re-enacted, either via some sort of executive order or through Congress.

Significantly, NSEERS did not have in itself a religious test. Instead, it targeted nonimmigrant (temporary or nonpermanent resident) males from 25 countries, 24 of which were majority Muslim countries with the 25th being North Korea. The program forced these people to be registered on entry, forcing them to register after ill-provided notice. The updating of NSEERS—what some lawyers are unofficially dubbing “NSEERS+” seem to include “extreme vetting” inquiries on religious belief.

Extreme Vetting

Due to the very real possibility of implementation in the future, it is important that we take the specific possibilities of “extreme vetting” seriously in order to see how they might be utilized and also whether they might hold up constitutionally.

This question “do you support Shariah law?” comes out of the idea floated at the highest levels of the U.S. government that “Shariah law” is “incompatible with the Constitution.”⁴¹ If Islam is deemed a political ideology at war with democracy, it does not get the protections afforded a religion. This idea that Islam contains tenets that threaten the United States has been forwarded by high-ranking leaders.

Indeed, the terms “Shariah law” or “believing in Sharia” are themselves misnomers that demonstrate the ignorance underlying these policies. University of Wisconsin law professor Asifa Quraishi-Landes wrote in the *Washington Post* that Shariah “is a body of Quran-based guidance that points Muslims toward living an Islamic life.... Shariah is divine and philosophical.”⁴² One can believe in God, or believe in an article of faith, or a divine book, or a prophet, but shariah isn’t a

belief. It is a code to be followed; a legal, spiritual, and ethical system.

Shariah is not defined by headline-grabbing rulings involving stoning, flogging, subjugation of women, and death. Yes, there are troublesome rulings, as there are in every legal system. But as Imam Zaid Shakir wrote, “Normative Islam is based on both rulings and interpretive principles. Those who, like ISIS, separate the rulings from the interpretive principles underlying them, both misrepresent Islam and open the door to varieties and degrees of harm that the religion strictly forbids.”⁴³ Like the system of common law, the Shariah as a legal and ethical system has the tools to tailor rulings for different societies and different times. The idea that Muslims within the United States would adhere to their religious belief in violation of the U.S. Constitution would certainly bar citizenship and could be considered a ground of inadmissibility. However, there is near-universal agreement among Islamic scholars that (1) Shariah applies only to Muslims, and (2) Shariah itself mandates following the law of the land. U.S. lawmakers are following the lead of Islamophobic media sources in Europe that falsely claim that there are “no-go” zones in which Islamic law rather than the law of the nation is practiced and enforced.⁴⁴ That so-called anti-foreign law bills have persisted in state legislatures is testament to the fallacy: There is simply no need to blaze new trails in the law by mandating that American judges apply American law in their American courtrooms.

Even if such a religious test were somehow workable, it is not likely to uncover any terrorists. Journalists who have interviewed ISIS fighters have found that the majority of these fighters have an extremely limited understanding of the tenets of the Islamic faith. In other words, they turn to terrorism in spite of Islam, not because of it. This is consistent with the findings from the Combating Terrorism Center’s 2016 report,⁴⁵ which showed that very small numbers of foreign fighters reported having any religious education and that approximately 70 percent of fighters reported having only a basic knowledge of Shariah.⁴⁶ Given these findings, it seems that the ability of the foreign fighters to develop an emotional and cognitive attachment to the extremist community is based on other factors, which may be more related to cultural and political dimensions of their identities as Muslims in non-Muslim societies rather than *bona fide* religious triggers. The ability of extremist groups to recruit foreign fighters is thus based on creating a narrative that is focused on the ongoing deprivation of Muslims, both in specific Western policies as well as in the international arena. While convincing them that joining

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extremist movements based on specific religious imperatives may be important, it seems to play a secondary role.⁴⁷ “This terror group [ISIS] has killed far more Muslims than Christians, Westerners, or any other religious community,” Maulana Qasim Nomani, a seminary leader, told the *Huffington Post*. “It is a terror group with political ambitions.”⁴⁸ While the perversion of Islam for violent political purposes is certainly a factor in which U.S. intelligence must be prepared, the long history of acceptance of “terrorists” who have perverted, say, Christianity has created a mindset in which the commons of American thought are unable to precisely comprehend this difference. Why politicians supporting Muslim bans have bought the narrative of ISIS defies comprehension.

Analogous in U.S. history is the Ku Klux Klan, an undesignated terrorist group proselytizing white supremacy, that not only defines itself as Christian but also as defending the values of the United States. In 1922, the Federal Council of Churches recorded its conviction that the rise of secret organizations such as the Klan “whose activities have the effect of arousing religious prejudice and racial consequences [is] fraught with grave consequences to church and society at large.”⁴⁹ However, the Klan remained powerful, and its version of Christianity was accepted by its members who were required to attend church. In an age of white supremacy and stubborn segregation, the Klan, while seen by many as too extreme, was certainly welcomed in the halls of power and mainstream society. In fact, much of the legislation dealing with race and immigration during the period of the second Klan in the early part of the 20th century was in line with the Klan’s goals of maintaining a white Christian nation.⁵⁰ Thus, aside from the fact that there is more vocal opposition to ISIS and its ilk from other Muslims, the relationship between the Klan to Christianity and ISIS to Islam are similar.⁵¹

Under any test, then, asking a would-be terrorist about their support for a legal system they statistically know little about is unlikely to be of any probative value.

Banning all Muslims would also draw into a large web the very people who are themselves most threatened by ISIS, the overwhelming majority of Muslims. Thus it would not only be counterproductive but also destructive.

Conclusion

If bad facts make bad law, fake facts make faulty policy. Calling a religion an ideology and obtaining information from those who use their power, experience, and privilege to misinform the public, while masking the fallacy with the old fallback of national security is the very definition of faulty policy. In *Padilla v. Kentucky*,⁵² the Supreme Court imposed the Sixth Amendment’s right to competent counsel on noncitizens charged with a crime, holding that “the importance of accurate legal advice for noncitizens accused of crimes has never been more important.” This represents a realization, first articulated by the *Wong Wing* court in 1896, that we cannot mete out criminal-like punishments without corresponding constitutional safeguards merely because the question involves immigration. The inconsistency in judicial interpretation articulated by *Motomura* compels a re-examination of the plenary power doctrine, and advocates must continue to question its applicability across the board. Where such policies are demonstrably based on agenda-driven politics, the fact that they involve national security must invite greater constitutional

scrutiny, not less, lest entire groups of people be labeled inadmissible for no good reason. In an era where ideas and people migrate more freely and in greater magnitude than ever before, turning a blind eye toward the reasons for exclusion is an abdication of judicial authority. There must be a check against xenophobia, and the administration’s rhetoric and track record leaves little doubt that this is precisely what drives their policies.

The United States stands on the precipice of prejudice and intolerance. It must decide whether it will live up to its promise as the beacon of freedom and liberty or choose to revert to the fear, bigotry, and violence that has so often plagued and almost destroyed its glorious promise as a pluralistic, peaceful republic. Reason, justice, and inclusion must prevail over this dark option. ☉

Endnotes

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⁴Exec. Order No. 13,767, 82 Fed. Reg. 8,793 (Jan. 25, 2017).

⁵Exec. Order No. 13,769, 82 Fed. Reg. 8,977 (Jan. 27, 2017).

⁶Joanna Walters, Edward Helmore & Saeed Kamali, *U.S. Airports on Frontline as Donald Trump’s Travel Ban Causes Chaos and Protests,* GUARDIAN (Jan 28, 2017, 6:13 PM), www.theguardian.com/us-news/2017/jan/28/airports-us-immigration-ban-muslim-countries-trump.

⁷*State of Washington & State of Minnesota v. Trump*, No. 2:17-cv-00141 (W.D. Wash. 2017).

⁸*Aziz v. Trump*, 2017 WL 580855.

⁹Exec. Order No. 13,780, 82 Fed. Reg. 13,209 (Mar. 6, 2017).

¹⁰*State of Hawaii v. Trump*, 1:17-cv-00050 (D. Haw.).

¹¹*International Refugee Assistance Project v. Trump*, 2017 WL 818255 (D. MD).

¹²*State of Hawaii v. Trump* Case Profile, CIVIL RIGHTS LITIG. CLEARINGHOUSE, <https://www.clearinghouse.net/detail.php?id=15626> (last visited Apr. 21, 2017).

¹³See, e.g., *Arizona v. United States*, 132 S. Ct. 2492, 2498 (2012) (acknowledging that the federal government’s “broad, undoubted power” over immigration rests in part on constitutional authority); *Chae Chan Ping v. United States*, 130 U.S. 581, 603 (1889) (the “Chinese Exclusion Case”—establishing a standard of judicial deference to Congress’ legislation in immigration).

¹⁴50 U.S. Code § 21.

¹⁵*Korematsu v. United States*, 323 U.S. 214 (1944).

¹⁶*Chy Lung v. Freeman*, 92 U.S. 275 (1875).

¹⁷*Fong Yue Ting v. United States*, 149 U.S. 698 (1893).

- ¹⁸*Wong Wing v. United States*, 163 U.S. 228 (1896).
- ¹⁹*Id.* at 233, 34.
- ²⁰*Id.* at 235, 36.
- ²¹“Freedom from imprisonment—from government custody, detention, or other forms of physical restraint—lies at the heart of the liberty that [the Fifth Amendment Due Process] Clause protects. *See Foucha v. Louisiana*, 504 U. S. 71, 80 (1992). And this Court has said that government detention violates that Clause unless the detention is ordered in a criminal proceeding with adequate procedural protections, *see United States v. Salerno*, 481 U. S. 739, 746 (1987), or, in certain special and “narrow” nonpunitive “circumstances...” [citations omitted]. *Zadvydas v. Davis*, 533 U.S. 678, 690 (2001). *See also United States v. Montoya de Hernandez*, 473 U.S. 531, 554 (1985) (finding that Fourth Amendment protections still applied at the international border, a place where historically there was the least expectation of privacy, where the strength of the plenary power over immigration is at its zenith, and where “far different considerations apply when detentions and searches are carried out for purposes of investigating suspected criminal activity.”)
- ²²*Zadvydas*, 533 U.S. at 695.
- ²³*See* Hiroshi Motomura, *Immigration Law After a Century of Plenary Power: Phantom Constitutional Norms and Statutory Interpretation*, 100 YALE L.J. 545 (1990). In this influential article, Motomura argued that courts have inconsistently applied their power of review over immigration. When interpreting statutes by invoking the avoidance canon (interpreting statutes in a way to avoid constitutional problems) courts used more mainstream rules than were generally favorable to aliens since they involved greater levels of due process and constitutional scrutiny. When interpreting constitutional questions directly, however, courts invoked the plenary power doctrine and declared themselves powerless to question Congress. This powerlessness revealed the avoidance canon to be a mere phantom constitutional norm, only visible under certain conditions. The inconsistency led Motomura to conclude that it would be best to simply apply constitutional protections to all immigration statutes and abandon the plenary power doctrine as applied to immigration. That he was able to articulate this in 1990, well before the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA) and the massive levels of detention, incarceration, and deportation that characterizes the modern immigration system is a testament to his forward thinking.
- ²⁴*Miller v. Albright*, 523 U.S. 420 (1998).
- ²⁵*Flores-Villar v. United States*, 131 S. Ct. 2312 (2011), *aff’d per curiam*. *See also, INS v. St. Cyr*, 533 U.S. 289, 320 (2001) (refusing to repeal INA § 212(c) retroactively because IIRIRA did not clearly indicate it was meant to be retroactive).
- ²⁶*Reno v. Flores*, 507 U.S. 292, 306 (1993).
- ²⁷*See INS v. Chadha*, 462 U.S. 919, 940-41 (1983).
- ²⁸*Employment Division, Department of Human Resources of Oregon v. Smith*, 494 U.S. 872 (1990) (finding that under strict scrutiny the state’s compelling interest in prohibiting the use of peyote trumped the interests of the Native American Church to ritually use peyote).
- ²⁹*Church of the Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520 (1993).
- ³⁰Hrafnkell Haraldsson, *Michael Flynn Called Islam “A Political Ideology” Hiding Behind “Being a Religion,”* POLITICO USA (Nov. 19, 2016, 7:54 AM), www.politicususa.com/2016/11/19/michael-flynn-called-islam-a-political-ideology-hiding-being-religion.html.
- ³¹*Awad v. Xiraxc*, D.C. NO. 5:10-CV-01186-M, quoting *Awad*, 754 F. Supp. 2d at 1308
- ³²*See generally*, WAJAHAT ALI ET AL., *Fear Inc.: The Roots Of the Islamophobia Network In America* (2011), *available at* cdn.americanprogress.org/wp-content/uploads/issues/2011/08/pdf/islamophobia.pdf.
- ³³*Id.*, p. 3.
- ³⁴*Id.*, p. 34.
- ³⁵Interview by Shaun Hannity, Fox News, with Newt Gingrich (July 14, 2016).
- ³⁶Interview by Megyn Kelly, Kelly Report, Fox News, with Hassan Shibley (Sept. 15, 2014).
- ³⁷Interview by This Week, ABC News, with Dr. Ben Carson (Sept. 26, 2015).
- ³⁸The Savage Nation (radio broadcast May 4, 2010 [6]).
- ³⁹Colleen Shalby, *World Gets Glimpse of Deportation Plan Kris Kobach Took to Trump*, L.A. TIMES (Nov. 21, 2016, 2:01 PM), www.latimes.com/nation/politics/trailguide/la-na-trailguide-updates-kris-kobach-publicly-displays-detailed-1479764896-htmllstory.html.
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