

# THE MUSLIM BAN AND SEPARATION OF POWERS DOCTRINE IN TRUMP'S AMERICA

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“An elective despotism was not the government we fought for...”  
Thomas Jefferson

“Racial discrimination in any form and in any degree has no justifiable part whatever in our democratic way of life. It is unattractive in any setting, but it is utterly revolting among a free people who have embraced the principles set forth in the Constitution of the United States. All residents of this nation are kin in some way by blood or culture to a foreign land. Yet they are primarily and necessarily a part of the new and distinct civilization of the United States. They must, accordingly, be treated at all times as the heirs of the American experiment, and as entitled to all the rights and freedoms guaranteed by the Constitution.”  
U.S. Supreme Court Justice Frank Murphy, *Korematsu v. United States (dissenting)*<sup>1</sup>

Donald J. Trump's ascension to the White House is arguably the most consequential development for religious freedom in contemporary America – particularly as it relates to Muslims. The 2016 U.S. presidential election cycle exacerbated already worsening anti-Muslim sentiment across the country. Then Republican presidential candidate Trump specifically ran a campaign that exploited national divisions, animosities and anxieties surrounding Islam and Muslims, even inspiring a foreign government's covert propaganda operation. To help elect Mr. Trump, Russian operatives secretly purchased advertisements on Facebook that spread stereotypes and disinformation about Muslims,<sup>2</sup> including the threat the group poses,<sup>3</sup> in battleground states influential in the presidential race. Significantly, such divisive messages merely mirrored what Mr. Trump propagated – and then absorbed and reflected back by supporters.

Just a few months after declaring his candidacy, during a September 2015 town hall meeting in New Hampshire, one of Mr. Trump's supporters asked when the Government would “get rid of [Muslims]” while referencing imaginary “training camps” sprawled across the country. Rather than providing a corrective, Mr. Trump responded, “We're going to be looking at that and a lot of different things.” In the days and weeks that followed, in fact, Mr. Trump publicly advocated for closing mosques. He also spoke in favor of special identification cards, warrantless searches and a religious registry for Muslim Americans.

On December 7, 2015, Mr. Trump unveiled his infamous Muslim ban. In the aftermath of a tragic mass shooting at a disability center by a Muslim couple in San Bernardino, California, Mr. Trump released a written campaign statement that called for “... a total and complete shutdown of Muslims entering the United States until our country's representatives can figure out what is going on.” Later that same

day, on *MSNBC*, Mr. Trump explained how immigration officials would operationalize the measure: “[T]hey would say, are you Muslim?” When asked, “And if they said yes, they would not be allowed in the country?” Mr. Trump replied, “That’s correct.”

Soon thereafter, candidate Trump likened his Muslim ban to former U.S. President Franklin D. Roosevelt’s decision during the Second World War to intern Japanese Americans because of a perceived national security risk. Mr. Trump explained in relevant part, “This is a president highly respected by all, [Roosevelt] did the same thing.” Indeed, on February 19, 1942, two months after Japan attacked Pearl Harbor, a U.S. naval base near Honolulu, Hawaii, President Roosevelt signed Executive Order 9066. The order forced the relocation of more than 100,000 Japanese Americans into internment camps around the country. The U.S. Supreme Court upheld the order’s constitutionality in *Korematsu v. United States*, finding the Government’s exclusion of citizens to be lawful during wartime to avoid espionage. While *Korematsu* has been left undisturbed, the episode is widely regarded as one of the most appalling violations of civil liberties in American and legal history.

After becoming the presumptive Republican presidential nominee, Mr. Trump began tempering his language but remained staunchly in favor of the discriminatory immigration policy. For instance, when asked about the Muslim ban in a July 17, 2016, interview with *60 Minutes*, he responded, “Call it whatever you want. We’ll call it territories, ok?” A few days later, in a July 24, 2016, interview on *Meet the Press*, Mr. Trump was asked, “The Muslim ban. I think you’ve pulled back from it, but you tell me.” Mr. Trump explained,

“I don’t think it’s a rollback. In fact, you could say it’s an expansion. I’m looking now at territories. People were so upset when I used the word Muslim. Oh, you can’t use the word Muslim. Remember this. And I’m okay with that, because I’m talking territory instead of Muslim. Our Constitution is great. . . . Now, we have a religious, you know, everybody wants to be protected. And that’s great. And that’s the wonderful part of our Constitution. I view it differently.”

Even after prevailing in the presidential contest, Mr. Trump remained intent on enacting the Muslim ban. On December 21, 2016, for instance, a reporter asked Mr. Trump whether he “had cause to rethink or reevaluate [his] plans to create a Muslim register or ban Muslim immigration to the United States.” President-elect Trump responded, “You know my plans all along, and I’ve been proven to be right, 100 percent correct.”

Now in the White House, President Trump has persisted in exploiting divisions around religion. He consistently labels Muslims, numbering approximately 1.6 billion globally, in dehumanized terms: disloyal, suspicious, dangerous national security risks. Representative is a presidential tweet spreading a widely debunked myth that “a method hostile to Islam – shooting Muslims with bullets dipped in pig’s blood – should be used to deter future terrorism.” What is more, President Trump delivered on his pledge to ban Muslims from entering the U.S. during his first 100 days. And, all of his statements on the campaign trail are now probative evidence of the chief of state’s intent to discriminate against a minority faith group.

As President Trump fulfills campaign promises, like the Muslim ban currently characterized as a “travel ban,”<sup>4</sup> such discriminatory laws, practices and policies have broader social, political and economic ramifications. First, they reinforce misconceptions about Islam as an inherently violent religion. Second, they also breed intolerance, fear and hostility among the general population toward a marginalized minority faith community. Third, they signal Government approval for discrimination against Muslims – citizens and immigrants alike – from the classroom<sup>5</sup> to the neighborhood Panera Bread<sup>6</sup> and well beyond. Moreover, such institutionalized discrimination creates a precedent for the Government to similarly mark other minority groups for official disfavor in the future.

However, President Trump does not enjoy unfettered authority even in the Oval Office. The Separation of Powers doctrine, U.S. Constitution and rule of law remain substantial checks in a federalist system. From adjudicating constitutional challenges to the Muslim ban to introducing legislative measures to defund it, the other branches of state and federal government are engaged in dialogue with President Trump about the limits on the executive and, arguably, the place of Muslims in America. This chapter examines this extraordinary dialectic at the intersection of law, politics and religion. Specifically, it interrogates the executive, legislative and judicial branches as sources of protection for or discrimination against Muslims in the era of Trump. And, it does so through the lens of the Muslim ban for an international readership.

## **MUSLIMS AND ISLAM IN AMERICA: A DEMOGRAPHIC SKETCH**

Muslim Americans are a small minority religious group that enjoys academic achievement and economic challenges. There are approximately three<sup>7</sup> to seven<sup>8</sup> million Muslims in America. Whereas Christians comprise approximately 70% of the entire population, Muslim Americans constitute a mere one to two percent. The majority identify with the Sunni branch of Islam consistent with data about the global Muslim community. Approximately 31% are college graduates and an additional 11% hold postgraduate degrees.<sup>9</sup> While Muslim Americans often enjoy a public image as financially successful professionals – including doctors, engineers,

businessmen and lawyers – the research evidence reveals a more complicated reality. Consistent with their public image, approximately 23% enjoy a household income in excess of \$100,000, on par with other non-Muslim Americans.<sup>10</sup> However, almost twice as many – more than 40% - live on *less* than \$30,000.<sup>11</sup> In fact, Muslim Americans are significantly more likely than any other faith group to report such a low household income.<sup>12</sup> For the sake of perspective, note that middle class is generally defined as families earning between \$40,000 and \$80,000 annually. According to this standard, more Muslim Americans are living outside of the middle class. Rather, group members appear to now largely comprise the nation’s lower class. Other empirical data may provide relevant insight.

Significantly, only 44% of Muslim adults are fully employed and 29% are underemployed.<sup>13</sup> Even prior to the 2016 presidential election results, Muslim Americans were the most likely religious group to report having personally experienced racial or religious discrimination.<sup>14</sup> For years the minority faith group confronted increased religious animus. Such social hostilities resulted in disproportionate levels of bias incidents in schools, at work and on the street. As the Trump administration normalizes and legitimizes anti-Muslim prejudice and discrimination, economic challenges may become a reality for many more Muslims struggling to realize the American dream and religious liberty. For this and other reasons, the experience of Muslims living in poverty deserves additional research and analysis.

In addition to enjoying college degrees, most Muslim Americans are U.S. citizens, racially and spiritually diverse and proud of their national and religious identity. Approximately 82% are American citizens with approximately one half born in the U.S.<sup>15</sup> The minority community is diverse in its racial and ethnic composition with approximately 41% self-identifying as “white” (including Arab, Middle Eastern and Persian/Iranian); 28% as Asian (including South Asian); 20% as black; and 8% as Hispanic.<sup>16</sup> That diversity is similarly reflected in Muslim American belief and faith practices. Representative divisions surround diet and dress. Approximately 48% and 44% view consumption of *halal* food and modest religious attire as significant, respectively.<sup>17</sup> A similar number attend weekly religious services and observe the five daily prayers as proscribed by orthodox teachings. Despite such diversity, however, the overwhelming majority - 79% - agrees that religion is important.<sup>18</sup> There is a similar consensus about the complementary roles of one’s religious and national identity: 89% are proud to be Muslim *and* American with 60% viewing themselves as having “a lot” in common with other Americans.<sup>19</sup>

While Muslims may see commonalities with their compatriots, the American public remains suspicious about Islamic laws, beliefs and practices. About 44% of non-Muslim Americans believe Islamic teachings conflict with democracy while 65% of Muslim Americans see no such incompatibility.<sup>20</sup> Those who saw tension generally attributed it to conflicting “principles” and “morals,” with one respondent elaborating, “There is no democracy in Islam.” What is more, one half of Americans view Islam as outside of mainstream society, a sentiment that is only likely to

increase with executive actions such as the Muslim ban. In addition, Americans have also rated Muslims more negatively in surveys than other religious groups including Jews, Mormons, Catholics, Hindus and Buddhists. According to one such survey asking Americans to rate religious groups on a “feeling thermometer,” for instance, respondents felt the coldest and most negative feelings towards Muslims. Additionally, 25% believe half or more of Muslim Americans are “anti-American,” and another 24% said “some” Muslims are anti-American.<sup>21</sup>

The data also suggests that American perceptions of Islam have worsened over the past fifteen years. In March of 2002, approximately six months following the September 11<sup>th</sup> terrorist attacks, 25% of Americans believed Islam encourages violence more than other religions while 51% disagreed. But, in December of 2016, 41% said Islam is more likely to promote violence among adherents. It is important to note that these sentiments translate into popular support for discriminatory policies. According to a 2016 Chapman University study, for instance, approximately one-third of Americans viewed a blanket prohibition on Muslim immigration favorably. Dr. Ed Day, who led the research study during the presidential election cycle aptly observed, “A third of the population is basically saying we need institutionalized discrimination based on religion.”

## **THE SEPARATION OF POWERS DOCTRINE**

The Declaration of Independence, U.S. Constitution and Bill of Rights are the country’s foundational documents. They outline national values, principles and laws. The U.S. Constitution, specifically, creates three separate co-equal branches of the federal government to guard against the abuse of power by individuals or groups. This is known as the Separation of Powers Doctrine. By distributing the balance of power and providing for institutional checks, the Framers of the Constitution sought to curb Government abuses. This section provides a brief overview.

First, the legislative branch – also known as the U.S. Congress – establishes laws and regulations for the country. It also has authority to impeach the President in exceptional circumstances, reject or confirm presidential appointments and declare war.

Second, the executive branch – including the President, Vice President, Cabinet and executive agencies and commissions – enforces laws. The President leads the country as chief of state and serves as the Commander of Chief of the Armed Forces. To counteract Congressional powers, the President may veto (reject) legislation that should not become law. Of course, the President must exercise his executive authority lawfully. When he does not do so, it becomes the responsibility of the other branches to curtail those unlawful actions.

Third, the judiciary – essentially, the U.S. Supreme Court and other federal courts – adjudicates cases in which it interprets the application of laws according to the U.S. Constitution. The Supreme Court, the nation’s highest court, can reject unconstitutional laws enacted by Congress or the President as invalid. Whereas American citizens have the right to vote for members of Congress and the President in free elections to ensure a representative government, the President nominates Justices to the Supreme Court who are subject to confirmation by the U.S. Senate. Notably, all three branches are seated in Washington, D.C., the nation’s capitol.

In addition, the U.S. Constitution grants the nation’s fifty states authorities. On a state level, a representative government also operates with its own constitution outlining local laws and principles. State governments mirror the federal separation of powers with three equally powerful branches. In every state the governor leads the executive branch and is elected by the people in confidential ballots. Further, state legislatures are also comprised of elected representatives. It enacts laws introduced by members or suggested by the governor. Similar to the federal structure above, states also have a high (or supreme) court that adjudicates appeals from lower-state courts. Additionally, the federal judicial system has lower courts located in each of the states to hear cases that raise federal issues. If a case involves a question under the U.S. Constitution, a litigant may appeal the state supreme court decision to the U.S. Supreme Court for consideration.

In essence, the state governments share responsibilities with the national government in a federalist system. For instance, state governments oversee public schools and universities, tourism, police departments, local transportation, public health operations and libraries. In the context of the Muslim ban, the federal judiciary and states have played a powerful role in protecting constitutional guarantees against executive excesses.

## **THE FIRST AMENDMENT AND RELIGIOUS FREEDOM**

The Bill of Rights refers to the first ten amendments to the U.S. Constitution protecting individual civil liberties from Government encroachment. Specifically, the First Amendment protects the free exercise of religion and prevents Government from favoring one religion over another. It states,

“Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government of grievances.”<sup>22</sup>

As such, the First Amendment consists of two clauses ensuring religious freedom: the Free Exercise Clause and the Establishment Clause.

### *Free Exercise Clause*

First, the Free Exercise Clause prevents government interference with religious beliefs and faith practices. Specifically, the government “may not compel affirmation of religious belief, punish the expression of religious doctrines it believes to be false, impose special disabilities on the basis of religious views or religious status, or lend its power to one or the other side in controversies over religious dogma.”<sup>23</sup> Notably, the Free Exercise Clause protects individuals against actions by both the state and federal government. A related lawsuit must demonstrate that a government action burdened an individual’s sincerely held faith practice. In related litigation, however, the U.S. Supreme Court found that an individual’s right to freely exercise religion is not absolute.

In *Employment Division v. Smith*,<sup>24</sup> a controversial decision from 1990, the Court held that government interference with religious conduct is constitutional where the law is generally applicable to everyone and neutral to religion, affecting it only incidentally. In that case, the State of Oregon denied unemployment benefits to Native American workers whose private employer fired them for ingesting peyote, a hallucinogenic drug, according to a sincerely held religious belief. The state cited a local law disqualifying workers from unemployment compensation when terminated for “misconduct.” Under Oregon law, consumption of peyote is a crime. The discharged workers challenged the law. They argued that it criminalized their religious beliefs and violated the Free Exercise Clause. The Supreme Court upheld the state action, however. The Court drew a distinction between laws that regulate religious beliefs, specifically, and those that are religiously neutral and generally applicable.<sup>25</sup>

In response, in 1993, Congress passed the Religious Freedom Restoration Act (RFRA). The federal law prohibits both federal and state government from “substantially burden[ing]” religious conduct even with generally applicable laws unless it is “the least restrictive means of furthering ... a compelling governmental interest.”<sup>26</sup> Where a law affects a person’s faith practices, the state must use the least restrictive means to accomplish its objectives while respecting religious beliefs. In 1997, the Supreme Court struck down part of the statute. It held that it was unconstitutional in so far as it applied to states because Congress lacked that authority.<sup>27</sup> In reaction, almost two dozen states enacted local versions of the RFRA.

### *Establishment Clause*

Second, the Establishment Clause provides that "Congress shall make no law respecting an establishment of religion."<sup>28</sup> The Supreme Court has held that "The clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another."<sup>29</sup> When a law discriminates on its face, the Supreme Court has required the Government to show a compelling interest and that the measure is "closely fitted to further that interest."<sup>30</sup> On the other hand, when a law is facially neutral, making no specific reference to religion, the courts are guided by a three-part test set forth in its decision in *Lemon v. Kurtzman*.<sup>31</sup>

According to *Lemon*, to avoid running afoul of the Establishment Clause, Government action (1) must have a primary secular purpose, (2) may not have the principal effect of advancing or inhibiting religion, and (3) may not foster excessive entanglement with religion. If a measure does not satisfy any one of these three prongs of the *Lemon* test, the challenged law or policy is invalidated.<sup>32</sup> In order to make this determination, courts must consider "both direct and circumstantial evidence," including, "among other things, the historical background of the decision under challenge, the specific series of events leading to the enactment or official policy in question, and the legislative or administrative history, including contemporaneous statements made by . . . the decisionmak[er]."<sup>33</sup> The Establishment Clause jurisprudence proves particularly relevant in the instant context of the Muslim ban.

As a result of First Amendment protections, the Muslim American community enjoys autonomy and the same rights as other religious communities free from Government interference. Muslim Americans are permitted to own and operate *halal* butcher shops, for instance, and freely purchase and consume such products. Similarly, they are permitted to perform male circumcision rituals and participate in weekly prayer services. In addition, they are permitted to operate religiously affiliated cemeteries and practice Islamic burial rituals. Further, they are permitted to observe religious attire. In the event of discriminatory Government action, on a state or federal level, one may seek legal redress in court.

What is more, Muslim Americans, similar to other religious communities, may form commercial organizations (such as corporations, sole proprietorships, general partnership, limited liability partnership, and limited liability companies) or nonprofit organizations (which are typically organized as corporations) to obtain legal personality. Commercial entities and nonprofit corporations are formed under the law of the state in which they are formed. Most religious and faith groups are organized as nonprofit corporations to obtain favorable tax-exempt status.

It is important to note that in addition to the U.S. Constitution, federal statutes and state laws provide additional protections for religious groups and persons against discrimination. These include, for instance, the Religious Land Use and

Institutionalized Persons Act, Matthew Shepard and James Byrd, Jr., Hate Crimes Prevention Act of 2009 and the Civil Rights Act of 1964, among others.

## **THE MUSLIM BAN**

Despite legal protections, bias attitudes have too often translated into discriminatory practices in myriad contexts. In fact, Muslim (75%) and non-Muslim Americans (69%) agree that the minority faith group experiences a lot of discrimination. Muslim Americans classify discrimination, ignorance and misconceptions about Islam as the most significant challenges confronting their community today. Significantly, one half say it is more difficult to be Muslim in America today while citing, in relevant part, President Trump's rhetoric and policies. The Muslim ban is the minority faith community's case in chief. The ban also illuminates the role of the executive, legislative and judicial branches as sources of protection for and discrimination against Muslims in the era of Trump.

### *The First Executive Order*

On January 27, 2017, one week following his inauguration, President Trump signed an executive order entitled, "*Protecting the Nation from Foreign Terrorist Entry into the United States*." The order, also known as the Muslim ban, explained that its objective was to protect Americans from immigrants who "bear hostile attitudes" toward the U.S. and the Constitution, who would "place violent ideologies over American law," or who "engage in acts of bigotry or hatred." To that end, it immediately barred entry of immigrants and refugees from seven Muslim majority countries – Iran, Iraq, Libya, Somalia, Sudan, Syria and Yemen — for ninety days.<sup>34</sup> The order applied to non-citizens with lawful permanent residence, immigrants previously authorized to live and work in the country permanently; those outside the U.S. were barred from re-entry. In addition, immigrants enrolled in universities or employed on temporary work visas were halted at the border if they arrived from one of the seven designated countries.

The order also temporarily suspended the U.S. Refugee Admissions Program in its entirety, preventing travel into the country and any decisions on refugee applications for a period of 120 days. Once the admissions program resumed, the order explained, the Government would prioritize "refugee claims made by individuals on the basis of religious-based persecution, provided that the religion of the individual is a minority religion in the individual's country of nationality." Syrian refugees were barred indefinitely. This part of the directive's purpose, President Trump clarified in a subsequent television interview,<sup>35</sup> was designed to bar resettlement of Muslim refugees from Muslim-majority contexts while giving Christians preferential treatment.

Significantly, while the order repeatedly cites to 9/11 in the context of its purported objective to enhance national security, none of those hijackers came from the enumerated countries. According to research from the Cato Institute, not a single person from the designated countries has killed anyone in a terrorist attack on U.S. soil. Still, at the order's signing ceremony, President Trump read the title aloud and stated, "We all know what that means." He then explained that the measure was "establishing a new vetting measure to keep Islamic radical terrorists out" while adding, "We don't want them here."

Still, the order avoided explicit references to "Muslims" so as to appear facially neutral to religion. However, many pointed to President Trump's prior campaign promise to ban Muslim immigration as evidence of discriminatory intent. In fact, the day after its issuance, President Trump's advisor, Rudolph Giuliani, confirmed public suspicion when he explained on television:

"When [Mr. Trump] first announced it, he said, 'Muslim ban.' He called me up. He said, 'Put a commission together. Show me the right way to do it legally.'"

Mr. Giuliani said he assembled a group of "expert lawyers" that "focused on, instead of religion, danger—the areas of the world that create danger for us. . . . It's based on places where there [is] substantial evidence that people are sending terrorists into our country."

The response from Congress, including dozens from President Trump's own Republican political party, was swift. Some condemned the religious animus inspiring the ban. For instance, Arizona Senator Jeff Flake observed, "Enhancing long term national security requires that we have a clear-eyed view of radical Islamic terrorism without ascribing radical Islamic terrorist views to all Muslims." Similarly, Maine Senator Susan Collins said, "A preference should not be given to people who practice a particular religion, nor should a greater burden be imposed on people who practice a particular religion. As I stated last summer, religious tests serve no useful purpose in the immigration process and run contrary to our American values."

Others highlighted the threat to the nation's constitutional structure and the Separation of Powers Doctrine, intimating that the order exceeds executive authority. For example, Michigan Representative Justin Amash stated, "President Trump's executive order overreaches and undermines our constitutional system. It's not lawful to ban immigrants on basis of nationality. If the president wants to change immigration law, he must work with Congress." Nevada Senator Dean Heller added, "I encourage the Administration to partner with Congress to find a solution." Additionally, New York Congresswoman Elise Stefanik criticized, "It is Congress' role

to write our immigration laws and I strongly urge the President to work with Congress moving forward as we reform our immigration system to strengthen our homeland security.” Similarly, New Jersey Representative Leonard Lance stated, ““It is Congress’ role to amend our immigration laws and I strongly urge President Trump to work with legislators to enact a clear, effective and enhanced vetting and monitoring process.”

However, Republican condemnations did not evolve into concrete legislative initiatives. Rather, Democratic Congressmen John Conyers and Zoe Lofgren introduced legislation, the *Statue of Liberty Values Act*, in the House of Representatives to rescind the order and prohibit funding to enforce it. While House Democrats overwhelmingly supported it – with 185 of 196 signing on – Republicans acted along partisan lines and blocked a vote. Similarly, Democratic Congresswoman Dianne Feinstein introduced corresponding legislation in the Senate, cosponsored by 38 of the chamber’s 48 Democrats, but Republicans played politics. In both houses of Congress, Republican leadership blocked a vote on legislation to repeal the Muslim ban. Essentially, partisan politics paralyzed the legislative branch from guarding against executive abuses as the Framers of the Constitution intended. But, this was not hold true of the judiciary.

Almost immediately, a wave of lawsuits filed by states, organizations and individuals around the country challenged the ban in a number of venues as unlawfully excluding Muslims. As such, the Government action disfavored a religious denomination over others, litigants claimed, in violation of the Establishment Clause. Representative is *State of Washington v. Trump*.

On January 30<sup>th</sup>, several days after President Trump signed the first executive order, the State of Washington challenged the action on myriad legal grounds, asserting the rights of its residents – such as students and faculty at public universities – in federal district court. Significantly, the suit alleged that the order violated the Establishment Clause by disfavoring Muslims and Islam. To demonstrate its unlawful purpose, the state attorneys general cited then presidential candidate Trump’s repeated campaign promises to bar Muslim immigration and engage in “extreme, extreme vetting” as probative evidence. It argued that the first executive order was the fulfillment of that pledge. The state of Minnesota also joined the lawsuit.

On February 3<sup>rd</sup>, the court agreed with the state’s arguments and temporarily blocked key portions of the ban in a nationwide injunction becoming the first court to do so. The court found that the ban would adversely impact the state residents in the areas of employment, education, business, family relations and freedom to travel. The court also found that the states themselves were harmed in terms of the missions of public universities, public funds, tax bases and other operations. Interestingly, in a nod to the Separation of Powers Doctrine, the court noted its own role as one of three coequal branches of the federal government and its

responsibility to ensure that the actions of the executive and legislative comport with the U.S. Constitution.

Subsequently, the Government appealed the decision to the Ninth Circuit Court of Appeals, a San Francisco appellate court with federal jurisdiction. The Ninth Circuit refused to overturn the lower federal court's decision, noting a likely Establishment Clause violation among other legal concerns. In response, on February 16<sup>th</sup>, the Government stated that it planned to revise the order to address the court's constitutional concerns. At that time, President Trump pledged, "I keep my campaign promises...[W]e can tailor the order to [the Ninth Circuit] decision and get just about everything, in some ways, more." Rather than continue with the litigation, the Government moved to dismiss its own appeal.

### ***The Second Executive Order***

On March 6, 2017, one month after the federal court had blocked the original Muslim ban, President Trump rescinded it and issued a revised order. It was entitled identically as its predecessor, "*Protecting The Nation From Foreign Terrorist Entry Into The United States*," but was somewhat distinct in substance. The revised order removed Iraq from the list of designated countries, for instance. This version was also limited to foreign nationals outside the U.S. without visas, dual nationality, diplomatic status or legal permanent residency. Further, it eliminated preferences for religious minorities. It clarified that the original order was not motivated by religious animus but designed to protect religious minorities. It also omitted any specific references to Syrian refugees.

In essence, the revised order temporarily suspended refugee programs and visa approvals for immigrants from six Muslim majority countries although government officials could allow specific individuals entry upon review on a case-by-case basis. For instance, immigrants who were working or studying in the U.S. for continuous periods of time but outside of the country at the time of the order could receive a waiver. Also foreign nationals who sought entry to visit close family members, such as a child, parent or spouse, also qualified for a waiver. Young children and infants in need of medical care also deserved special consideration, the order explained. And, those employed or sponsored by, or visiting to meet with employees of, the Government could also gain entry.

Still, most drew little distinction between the original and revised orders' discriminatory intent. They pointed to statements by members of the Trump administration as evidence. On February 21, shortly before the revised order was signed, Senior Advisor to the President, Stephen Miller, appeared on Fox News and explained: "Fundamentally, you're still going to have the same basic policy outcome for the country, but you're going to be responsive to a lot of very technical issues that were brought up by the court and those will be addressed. But in terms of protecting the country, those basic policies are still going to be in effect." In fact, the

revised ban engendered another wave of lawsuits almost immediately. Representative is *State of Hawaii v. Trump*.

In *State of Hawaii v. Trump*, the state argued that the second order was tainted by religious discrimination in the same fashion as its predecessor, undermining constitutional and other legal guarantees. Similar to *State of Washington v. Trump*, Hawaii state attorneys general argued that its residents would be unable to receive visits from family members and friends traveling from the enumerated countries. Further, the state's interests in recruiting faculty and students to attend public universities would be adversely impacted, among other areas such as its tourist driven economy.

The state attorneys general argued that the order's implementation would run counter to the Establishment Clauses of both the federal and state constitutions, forcing it to tolerate an unconstitutional policy that disfavors one religion over another. As evidence of discriminatory purpose and illegitimate motive, the state emphasized the historical context: President Trump's rhetoric about Muslims on the campaign trail. It described "a perception that the Government has established a disfavored religion" with respect to Islam. While the order cited national security as its secular justification, the state pointed to additional research evidence that belied such concerns as pre-textual. Specifically, it cited a February 2017 Department of Homeland Security (DHS) report characterizing citizenship an "unlikely indicator" of terrorism threats. The DHS report confirmed that very few persons from the enumerated countries had perpetrated, or attempted to carry out, terrorist activities since 2011. The evidence suggested that the executive's action did not have a secular national security purpose, as required by the *Lemon* test. Rather, the state attorneys general argued, the second order was inspired by anti-Muslim animus. As such, the second ban injured its institutions, economy, and state interest in preserving the separation between church and state. Further, it stigmatized Muslim refugees and immigrants as well as Muslim American citizens. The state asked the court to prevent the ban's implementation during the course of litigation due to likely constitutional violations.

To counter, the Government argued that the revised ban did not facially discriminate for or against any particular religion. The Government emphasized that Congress and the Obama Administration had found that the enumerated countries "posed special risks of terrorism." It further argued that the Muslim ban could not have been religiously motivated because (a) the ban applied to everyone in those countries regardless of their religion, and (b) the affected countries only represent 9% of the world's fifty Muslim majority nations. Stressing the revised order's facially neutral language, it cautioned the court against a "judicial psychoanalysis of a drafter's heart of hearts."

Ultimately, the federal district court agreed with the State's assessment, granted injunctive relief, and rejected the Government's arguments. It held that "specific historical context, contemporaneous public statements and specific sequence of

events leading to its issuance would conclude that the Executive Order was issued with a purpose to disfavor a particular religion,” thus resulting in a likely Establishment Clause violation. The court reasoned that the second ban’s seemingly neutral language did not shield Government action targeting religious conduct. By targeting the enumerated countries, in which 99% of population is Muslim, the court explained, the Government likewise targets Islam. The court rejected the Government’s argument that religious animus toward a group is only evidenced when targeting all members of that group. It also highlighted the dearth of evidence supporting the purported national security objective.

Applying the *Lemon* test, the court found the ban’s stated “secular purpose” – protecting national security – “at the very least, ‘secondary to a religious objective’ of temporarily suspending the entry of Muslims.” In finding that religious animus inspired the proclamation, the court emphasized context over the revised version’s facially neutral text. Significantly, the court clarified that the Trump Administration’s prior statements and conduct does not necessarily “forever taint any effort by it to address the security concerns of the nation” but that the revised ban is devoid of “genuine changes in constitutionally significant conditions.” In the event the context changes, the court explained, so may the legal evaluation.

The Government appealed to the Ninth Circuit Court of Appeals. On June 12<sup>th</sup>, the appellate court largely agreed with the lower federal court’s decision but relied on distinct legal analysis. Rather than assessing an Establishment Clause violation, the court found that President Trump exceeded the authority intended by Congress in the *Immigration and Nationality Act* (INA).

By way of background, the Constitution gives Congress the primary authority to establish U.S. immigration policy. Congress, in turn, delegated considerable power to the Executive but the president must exercise that authority within the INA’s statutory parameters. As in the original version, President Trump executed the second order pursuant to his power under the INA allowing him to exclude non-citizens outside the country with no ties to the U.S. Specifically, section 212 (f) provides in relevant part:

Whenever the President finds that the entry of any aliens or of any class of aliens into the United States would be detrimental to the interests of the United States, he may by proclamation, and for such period as he shall deem necessary, suspend the entry of all aliens or any class of aliens as immigrants or nonimmigrants, or impose on the entry of aliens any restrictions he may deem to be appropriate.

The Ninth Circuit found that President Trump exceeded his authority by establishing visa procedures in violation of INA provisions prohibiting nationality-based discrimination. It declined to address the Establishment Clause claim and

upheld injunctive relief. In response, the Government appealed to the U.S. Supreme Court, which delivered a mixed response.

Specifically, on June 26<sup>th</sup>, the U.S. Supreme Court blocked the ban's application *only* to foreign nationals or refugees who have "*bona fide relationships*" with persons or entities in the U.S. Subsequent litigation clarified that the ban did not apply to immigrants with certain familial relationships including parents, parents-in-law, spouses, fiancés, children, adult sons and daughters, sons- and daughters-in-law, siblings (half and whole relationships), step relationships, grandparents, grandchildren, brothers-in-law, sisters-in-law, aunts, uncles, nieces, nephews, and cousins. Notably, the Supreme Court criticized the lower courts for blocking the ban against foreign nationals who have *no* connection to the country. The Court reasoned that while the exclusion of the former group would burden American parties by inflicting "concrete hardships," banning the latter group would not.

### *The Third Executive Order*

On September 24, 2017, President Trump signed the third iteration of the original Muslim ban. Entitled, "*Enhancing Vetting Capabilities and Processes for Detecting Attempted Entry Into the United States by Terrorists or Other Public-Safety Threats*," the proclamation was more narrowly tailored than its predecessors. It explains that seven countries do not meet a "baseline for the kinds of information required from foreign governments" to facilitate official vetting of immigrants and refugees. Specifically, the criteria require data to assess identity, security and public-safety threats, and national security risks. According to the baseline criteria, sixteen countries were initially categorized as "*inadequate*" while thirty-one additional nations were found to be "*at risk*" of becoming "inadequate." A subsequent "*engagement*" period allowing countries additional time to meet the baseline criteria yielded significant improvements, according to the proclamation. Ultimately, however, seven countries were still deemed "*inadequate*" and placed on the list.

Unlike in prior versions, the designated countries – Chad, Iran, Libya, North Korea, Syria, Venezuela and Yemen – do not consist exclusively of Muslim-majority nations. However, as to Venezuela, the ban only applies to high-level officials while few immigrants travel to the U.S. from North Korea. Notably, the list also includes Somalia even though the country met the baseline criteria while omitting Iraq, which did not. As with the first and second versions, foreign nationals from the Muslim majority countries are barred from traveling to the U.S. – but, this time, indefinitely. Similarly, this executive action inspired a wave of lawsuits claiming violations of constitutional and statutory guarantees. Representative, again, is *State of Hawaii v. Trump*.

On October 15<sup>th</sup>, the State of Hawaii challenged the third iteration of the original Muslim ban, presently described as a "travel ban," in federal district court on similar

grounds and asked for another nationwide injunction as litigation proceeds. While the third ban includes eight countries, the state attorneys general challenged only the restrictions against the nationals of the six Muslim-majority countries.

The Government argued for judicial deference in favor of presidential supremacy in matters of national security and foreign policy. It explained that “the Executive must be permitted to act quickly and flexibly” in these areas. As such, the Government cautioned the court against “second-guess[ing]” the “Executive Branch’s national-security judgments.”

Despite the Government’s assertions, the federal district court was guided by the Ninth Circuit’s approach to the second Muslim ban. It held that the proclamation likely violated the INA’s statutory provisions because (a) it does not make sufficient findings justifying the exclusion; and (b) it discriminates on the basis of nationality in its issuance of visas.

First, the Court highlighted that in order to exercise authority under the INA, the president must find, and provide evidence demonstrating, that entry of a certain group of immigrants is “detrimental” to national interests. The order contains no such findings, the court reasoned. Since the president did not present sufficient findings justifying the exclusion of millions of men, women and children as detrimental to national interests, the court stated, he exceeded his authority as intended by Congress under the INA.

Second, the court found that the ban’s discriminatory treatment of immigrants on account of nationality violates the INA provision that requires, “no person shall receive any preference or priority or be discriminated against in the issuance of an immigrant visa because of the person’s race, sex, nationality, place of birth, or place of residence.” Since it found likely statutory violations under the INA, the court did not reach the constitutional claim under the Establishment Clause, as in prior cases. The court granted the nation wide injunction for these reasons thus temporarily blocking the ban yet again.

The Government appealed to the Ninth Circuit, the same federal appellate court in San Francisco that had decided the previously discussed cases challenging the first and second orders. In the interim, on December 4<sup>th</sup>, the U.S. Supreme Court issued a surprising if not foreboding decision in *Hawaii v. Trump* allowing the third version of the originally conceived Muslim ban to take full effect nationwide during the pendency of the Government’s appeal.

Subsequently, on December 22<sup>nd</sup>, the Ninth Circuit issued its decision. The appellate court agreed with the federal district court’s ruling but only upheld the injunction as it applied to foreign nationals who have a *bona fide relationship* with a person or entity in the United States. In other words, as litigation ensued, those without *bona fide relationships* – like so many immigrants and refugees who have arrived at American shores since her founding – were effectively banned.

In granting injunctive relief, the Ninth Circuit clarified that the Executive branch must demonstrate a threat to public interest, welfare, safety or security in order to use its authority to exclude foreign nationals pursuant to the INA. Otherwise, the court explained, Congress has already enacted legislation, regulations and programs to prevent terrorists and those who pose a public safety risk from entering the country. As such, and while alluding to the Separation of Powers Doctrine, it found that the Executive Branch:

“...has overridden Congress’s legislative responses to the same concerns the Proclamation aims to address. The Executive cannot without assent of Congress supplant its statutory scheme with one stroke of a presidential pen.”

The court further highlighted the INA’s legislative history to find that the president is barred from broad authority to suspend immigration in the instant fashion outside exigencies, such as war or a national emergency, making it impossible for Congress to act in a timely manner. Further, the court cited the Executive branch’s historical practice of using such proclamations to find that President Trump’s action “is unprecedented in its scope, purpose, and breadth.”

The Ninth Circuit also reiterated the rationale set forth by the lower district court. It made clear that “National security is not a ‘talismanic incantation’ that, once invoked, can support any and all exercise of executive power...” In sum, in granting another nationwide injunction temporarily blocking the ban’s application, the Ninth Circuit held:

“The Proclamation, like its predecessor executive orders, relies on the premise that the Immigration and Nationality Act (“INA”) ... vests the President with broad powers to regulate the entry of aliens. Those powers, however, are not without limit. We conclude that the President’s issuance of the Proclamation once again exceeds the scope of his delegated authority. The Government’s interpretation ... not only upends the carefully crafted immigration scheme Congress has enacted through the INA, but it deviates from the text of the statute, legislative history, and prior executive practice as well. Further, the President did not satisfy the critical prerequisite Congress attached to his suspension authority: before blocking entry, he must first make a legally sufficient finding that the entry of the specified individuals would be ‘detrimental to the interests of the United States.’ The Proclamation once again conflicts with the INA’s prohibition on nationality-

based discrimination in the issuance of immigrant visas. Lastly, the President is without a separate source of constitutional authority to issue the Proclamation.”

The Government has appealed the decision. Ultimately, the U.S. Supreme Court will determine the fate of the executive proclamation.

### **WHY DOES THIS MATTER?**

One may draw myriad lessons from the sequence of executive, legislative and judicial events described above. First, the dialectic process that continues to unfold since President Trump’s inauguration highlights the significance of civic engagement. According to research evidence, Muslim Americans are the least likely faith group to vote in elections citing apathy. Still, Executive orders and Congressional inaction in the instant context highlights the significant role that each elected official plays in the U.S. political system. Only by casting a ballot or running for office can Muslim Americans, and members of other marginalized minority communities, influence that process.

Second, the Separation of Powers Doctrine is situated in a larger political context. One’s political affiliation or persuasion may serve as a lens through which a spectrum of issues – such as, religious freedom, national security and immigration – are viewed. Arguably, the constitutional structure envisioned by the Framers of the Constitution is undermined when a particular party dominates all three government branches. Consider, for instance, the Ninth Circuit’s judicial role repeatedly checking executive abuses of power in *Washington v. Trump* and *Hawaii v. Trump*. The appellate court has long enjoyed a reputation for its liberal persuasion. But, in March of 2017, the court’s Republican-appointed judges broke ranks with the three-judge-panel that decided those cases. They issued an unsolicited filing supporting President Trump’s ban: “Whatever we, as individuals, may feel about the President or the Executive Order, the President’s decision was well within the powers of the presidency.” In the era of Trump, and the Republican party’s political dominance, the Muslim ban reveals a Separation of Powers Doctrine fundamentally at risk together with the civil liberties of the individuals it was designed to protect.

Lastly, U.S. institutions play a complicated role in the lived experiences of Muslim Americans. In the era of Trump, the Muslim ban evidences the executive’s religious animus toward Islam and Muslims. But, responses from the legislative and judicial branches are mixed. On the one hand, Republican Congressmen rhetorically condemned the Muslim ban but blocked a vote on their Democratic colleagues’ legislative initiatives to defund and repeal it. Similarly, the Ninth Circuit has repeatedly blocked key portions of the ban from taking effect but the U.S. Supreme Court ultimately allowed for its implementation during the course of litigation. Are the executive, legislative and judicial branches sources of protection for or

discrimination against Muslims in the era of Trump? Perhaps the most accurate answer is: It's complicated.

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<sup>1</sup> 323 U.S. 214 (1944).

<sup>2</sup> See, e.g., Russian Operatives Used Facebook Ads to Exploit Divisions over Black Political Activism and Muslims, The Washington Post, Sept. 25, 2017, [www.washingtonpost.com/business/technology/russian-operatives-used-facebook-ads-to-exploit-divisions-over-black-political-activism-and-muslims/2017/09/25/4a011242-a21b-11e7-ade1-76d061d56efa\\_story.html?utm\\_term=.ea514534e779](http://www.washingtonpost.com/business/technology/russian-operatives-used-facebook-ads-to-exploit-divisions-over-black-political-activism-and-muslims/2017/09/25/4a011242-a21b-11e7-ade1-76d061d56efa_story.html?utm_term=.ea514534e779)

<sup>3</sup> See, e.g., Russian-linked Facebook Ads Targeted Michigan and Wisconsin, Oct. 3, 2017, <http://www.cnn.com/2017/10/03/politics/russian-facebook-ads-michigan-wisconsin/index.html>

<sup>4</sup> See A Dozen Times Trump Equated the Travel Ban with a Muslim Ban, CATO Institute, Aug. 14, 2017, <https://www.cato.org/blog/dozen-times-trump-equated-travel-ban-muslim-ban>

<sup>5</sup> See, e.g., San Jose Muslim Teacher Wearing Headscarf Repeatedly Bullied by Students, Mercury News, Nov. 24, 2017, <https://www.mercurynews.com/2017/11/24/san-jose-muslim-teacher-wearing-head-scarf-repeatedly-bullied-by-students/>

<sup>6</sup> See, e.g., New York City Muslim Activist Called a 'Terrorist' and Attacked by a Group of Teen Girls at Panera Bread, Newsweek, <http://www.newsweek.com/new-york-city-terrorist-hate-crime-muslim-activist-766482>

<sup>7</sup> See Demographic Portrait of Muslim Americans, Pew Research Center, July 26, 2017, <http://www.pewforum.org/2017/07/26/demographic-portrait-of-muslim-americans/>

<sup>8</sup> See Remarks by President at Cairo University, The White House, June 4, 2009, <https://obamawhitehouse.archives.gov/the-press-office/remarks-president-cairo-university-6-04-09>

<sup>9</sup> See Demographic Portrait of Muslim Americans, Pew Research Center, July 26, 2017, <http://www.pewforum.org/2017/07/26/demographic-portrait-of-muslim-americans/>

<sup>10</sup> See id.

<sup>11</sup> See id.

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<sup>12</sup> See American Muslim Poll, Institute for Social Policy and Understanding, June 2017, <https://www.ispu.org/wp-content/uploads/2017/03/American-Muslim-Poll-2017-Report.pdf>

<sup>13</sup> See Demographic Portrait of Muslim Americans, Pew Research Center, July 26, 2017, <http://www.pewforum.org/2017/07/26/demographic-portrait-of-muslim-americans/>

<sup>14</sup> See American Perceptions of Muslims, Gallup, <http://news.gallup.com/opinion/gallup/187664/perceptions-muslims-united-states-review.aspx>

<sup>15</sup> See Demographic Portrait of Muslim Americans, Pew Research Center, July 26, 2017, <http://www.pewforum.org/2017/07/26/demographic-portrait-of-muslim-americans/>

<sup>16</sup> See id.

<sup>17</sup> See id.

<sup>18</sup> See American Perceptions of Muslims, Gallup, <http://news.gallup.com/opinion/gallup/187664/perceptions-muslims-united-states-review.aspx>

<sup>19</sup> See Demographic Portrait of Muslim Americans, Pew Research Center, July 26, 2017, <http://www.pewforum.org/2017/07/26/demographic-portrait-of-muslim-americans/>

<sup>20</sup> See Among those who see conflict between Islam and democracy, U.S. Muslims and general public give similar reasons, Pew Research Center, June 26, 2017, [http://www.pewforum.org/2017/07/26/political-and-social-views/pf\\_2017-06-26\\_muslimamericans-04new-05/](http://www.pewforum.org/2017/07/26/political-and-social-views/pf_2017-06-26_muslimamericans-04new-05/)

<sup>21</sup> See Republicans Prefer Blunt Talk About Islamic Extremism, Pew Research Center, Feb. 3, 2016, <http://www.pewforum.org/2016/02/03/republicans-prefer-blunt-talk-about-islamic-extremism-democrats-favor-caution/>

<sup>22</sup> U.S. Const. amend. I.

<sup>23</sup> Employment Division, Dept. of Human Resources v. Smith, 494 U.S. 872, 877 (1990).

<sup>24</sup> See id.

<sup>25</sup> Id. at 878-89.

<sup>26</sup> Pub. L. No. 103-141, codified at 42 U.S.C. 2000bb.

<sup>27</sup> 521 U.S. 507 (1997).

<sup>28</sup> U.S. Const. amend. I.

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<sup>29</sup> *Larson v. Valente*, 456 U.S. 228 (1982).

<sup>30</sup> See *id.* at 246-47.

<sup>31</sup> *Lemon v. Kurtzman*, 403 U.S. 602 (1971).

<sup>32</sup> *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971).

<sup>33</sup> *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 534 (1993) (quoting *Gillette v. United States*, 401 U.S. 437, 452 (1971)).

<sup>34</sup> Proclamation No. 13769, [82 Fed. Reg. 8,977](#) (Jan. 27, 2017).

<sup>35</sup> In a January 27, 2017 interview with Christian Broadcasting Network, President Trump said that persecuted Christians would be given priority under the first Executive Order.