February 2018

A Muslim Registry: The Precursor to Internment?

Sahar F. Aziz

Follow this and additional works at: https://digitalcommons.law.byu.edu/lawreview

Recommended Citation
Available at: https://digitalcommons.law.byu.edu/lawreview/vol2017/iss4/4
A Muslim Registry: The Precursor to Internment?

Sabar F. Aziz

Being political scapegoats in the indefinite “war on terror” is the new normal for Muslims in America. With each federal election cycle or terrorist attack in a Western country comes a spike in islamophobia. Candidates peddle tropes of Muslims as terrorists in campaign materials and political speeches to solicit votes. Government officials call for bold measures—extreme vetting, categorical bans, and mass deportations—to regulate and exclude Muslim bodies from U.S. soil. The racial subtext is that Muslims in the United States are outsiders who do not belong to the political community.

A case in point is the “Muslim ban” issued by the Trump administration in 2017. As the ban dominated public debate and litigation, another racialized counterterrorism policy lurked in the backdrop: a Muslim registry. This Article explores the political and legal plausibility of a de jure or de facto Muslim registry. Analyzing separately the case of nonimmigrants, immigrants, and U.S. citizens, the Article concludes that proponents of a nonimmigrant special registration program based on national origin will find support in the law. A registry of immigrants is also possible, though much will depend on whether courts will look to the islamophobic political environment arising from Trump and his advisor’s anti-Muslim statements to apply strict scrutiny; or whether courts will accept facially neutral national security justifications to apply the rational basis test that nearly guarantees the government’s victory. In contrast, a registry of U.S. citizen Muslims is unlikely to pass constitutional muster, as is a special registration program explicitly based on religion.

Separate from the dignitary harms and privacy concerns arising from a Muslim registry are threats to the liberty of millions of people in

* Professor of Law, Chancellor’s Social Justice Scholar, Middle East Legal Studies Scholar, and Director of the Center on Security, Race, and Rights at Rutgers Law School. Thank you to Kevin Johnson, Barbara Hines, Richard Delgado, Denise Gilman, Shoba Sivaprasad Wadhia, Eric Yamamoto, Shirin Sinnar, Ediberto Roman, and Fatma Marouf for their insightful feedback to earlier drafts. Thank you to Callie Dodson and Isabelle Hutchinson for their diligent research assistance. All errors are mine alone.
For Mohammed and Fatima Salem, it was an ordinary Friday evening preparing for dinner. As their children’s gazes oscillated between their smart phones and the television, a public service announcement suddenly captured their attention. A stern voice bellowed out of the

INTRODUCTION

For Mohammed and Fatima Salem, it was an ordinary Friday evening preparing for dinner. As their children’s gazes oscillated between their smart phones and the television, a public service announcement suddenly captured their attention. A stern voice bellowed out of the
television that “The President of the United States hereby declares that, to preserve American national security, all Muslims in the United States are required to register at their local post office. Those failing to do so within the next four weeks will be deemed in violation of the law and subject to arrest and fines.” A chilling silence filled the house. The Salem children looked puzzlingly at their parents. Why were only Muslims required to register, asked thirteen-year-old Yusuf. Would the government close their mosques, asked ten-year-old Noura. Were they all going to jail, cried seven-year-old Ali. Mohammed and Fatima had immigrated to the United States thirteen years prior from Yemen, and were waiting to finalize their naturalization. All three U.S.-citizen children spent their entire lives in the United States, where they learned in school that respect for different religions was a fundamental American value. Their textbooks taught them the Constitution granted all people the right to practice their religion without fear. What they heard on television that night, however, shattered those ideals. For the first time in their young lives, Yusuf, Noura, and Ali felt like outsiders in their own country.

* * *

American society is built on racial and religious hierarchies. Persons deemed “White” and “Christian” are permanently at the top where they receive more opportunities, wealth, and power than groups on the bottom rungs. Groups compete to move up the hierarchy with mixed success. Persons of Chinese, Irish, German, and Italian descent, for example, were at one point deemed undesirables in society but later promoted to “model minority” or admitted into Whiteness, respectively. Similarly, persons of Jewish and Catholic faith

---

2. See generally Cheryl I. Harris, Whiteness as Property, 106 Harv. L. Rev. 1707 (1993) (providing a landmark work on the property value attached to Whiteness).
once occupied the lowest rungs of the religious hierarchy but were later promoted above Muslims, Hindus, and other faiths in America’s newfound Judeo-Christian identity. All the while, African Americans and Native Americans remain at the bottom of social, political, and economic hierarchies, as evinced by their disproportionate representation among the poor, unemployed, and incarcerated.

In the post-9/11 era, Muslims find themselves among the most distrusted groups in the United States, thereby securing their place near the bottom of the social and political order. Previously an obscure group at the periphery of public discourse, Muslims now purportedly pose an existential threat to the most powerful nation in the world.

---

1943). In Chae Chan Ping v. United States, a unanimous Court reasoned that in light of the “Oriental invasion” posing a “menace to our civilization,” if Congress “considers the presence of foreigners of a different race in this country . . . to be dangerous to its peace and security, their exclusion is not to be stayed.” Chae Chan Ping v. United States, 130 U.S. 581, 595, 606 (1889). Benjamin Franklin famously stated about the Germans in 1753: “Few of their children in the Country learn English . . . . [T]he Signs in our Streets have inscriptions in both languages . . . ; unless the stream of their importation could be turned . . . they will soon so out number us, that all the advantages we have will not . . . be able to preserve our language, and even our Government will become precarious.” Benjamin Franklin, Letter to Peter Collinson: The Support of the Poor, May 09, 1753, TEACHINGAMERICANHISTORY.ORG, http://teachingamericanhistory.org/library/document/letter-to-peter-collinson (last visited Nov. 28, 2017); see also DAVID ROEDIGER, WORKING TOWARD WHITENESS: HOW AMERICA’S IMMIGRANTS BECAME WHITE: THE STRANGE JOURNEY FROM ELLIS ISLAND TO THE SUBURBS (2005); STACEY J. LEE, UNRAVELING THE “MODEL MINORITY” MYTH, LISTENING TO ASIAN AMERICAN YOUTH 120–42 (2d ed. 2009), http://www.faculty.umb.edu/lawrence_blum/courses/CCT627_10/readings/lee_unraveling_model_minority_stereotype.pdf.


Consequently, the U.S. government’s heightened focus on national security allocates hundreds of millions of dollars toward surveilling, policing, and expelling Muslims. Police departments have spent tens of millions of dollars surveilling Muslim students, mosques, and businesses. The Federal Bureau of Investigations (FBI) regularly conducts aggressive sting operations on young Muslim men, particularly ones suffering from mental health problems, recently released from jail, or facing personal crises. This systemic targeting signals to private actors that otherwise discriminatory actions against Muslims are patriotic, leading to a consistent spike in hate crimes and discrimination. The rise in Islamophobia has emboldened some elected officials to brazenly call for tracking Muslims as a standard national security practice.

article quoted him as saying, “There is tremendous hate. Where large portions of a group of people, Islam, large portions want to use very, very harsh means . . . .” Charlotte Alter, Muslim Women Say They Don’t Need Donald Trump’s Help, TIME (Mar. 11, 2016), http://time.com/4255987/muslim-women-donald-trump-islam.


11. Aaron Blake, Trump Says We’ve Known His Muslim Ban and Database Plans ‘All
A case in point is the call for a Muslim registry. Some Republican candidates in the 2016 presidential elections, including Donald Trump, unabashedly called for tracking Muslims in the United States.12 Such proposals were supported by the same constituents who support a Muslim ban.13 Indeed, should another major terrorist attack occur on U.S. soil, some politicians will line up to compete for who can be the most extreme in calling for rights-infringing, anti-Muslim policies. While many Americans would like to believe that such concerns are farfetched, special registration was historically used to track and in some cases, deport persons whose national origins were deemed a threat to U.S. national security. This overt government tracking facilitates identifying targets of future internment. As such, serious consideration of a prospective Muslim registry is warranted.

In November 2015, then presidential candidate Donald Trump expressed his willingness to create a database that tracked all Muslims in the United States as a national security measure.14 He also called for “a total and complete shutdown of Muslims entering the United States,” claiming that “there is great hatred towards Americans by large segments of the Muslim population.”15 Trump’s incendiary

---

statements against Islam over the course of two years coupled with his executive orders in 2017 barring millions of Muslims from entering the United States reveal a desire to exclude and surveil Muslims en masse. The Trump administration has no qualms in collectively punishing Muslims for real or imaginary national security threats.

Although calls for a Muslim registry may seem farfetched or mere political theater, President Trump’s executive order banning nationals from seven (later changed to six and then to five) Muslim-majority countries is a troubling harbinger. So, too, is the precedent set by the National Security Entry Exit System (NSEERS) mandating registration for nonimmigrant males from twenty-four Muslim majority countries. Should another major terrorist attack occur in the United States, calls to track all Muslims through a special registration program are likely to dominate mainstream media and congressional hearings. Reckless politicians will exploit the terrorist attack to pedal Islamophobia for votes.

Accordingly, this Article examines the legal and policy implications should a Muslim registry be implemented. In doing so, it seeks to forewarn advocates, policymakers, and people opposed to the Muslim ban to be prepared for this plausible next phase in the Trump administration’s anti-Muslim political agenda. Notably, the scope of

16. See infra note 112 and accompanying text.

17. In the months immediately following the 9/11 attacks, approximately one third of Americans agreed that Americans of Arab descent should be interned until their innocence could be proven. Deborah J. Schildkraut, The Dynamics of Public Opinion on Ethnic Profiling After 9/11: Results from a Survey Experiment, 53 AM. BEHAV. SCIENTIST 65 (2009), http://journals.sagepub.com/doi/abs/10.1177/0002764209338786; see also Lynette Clemetson, Civil Rights Commissioner Under Fire for Comments on Arabs, N.Y. TIMES, July 23, 2002, at A14 (“If there’s another terrorist attack, and if it’s from a certain ethnic community or certain ethnicities that the terrorists are from, you can forget civil rights in this country.”) (quoting the chair of the U.S. Commission on Civil Rights)). Sixty years prior, the bombing of Pearl Harbor set into motion the internment of approximately 126,000 persons of Japanese ancestry, including U.S. citizens. ERIC K. YAMAMOTO ET AL., RACE, RIGHTS AND REPARATION: LAW AND THE JAPANESE INTERMENT 103 (2d ed. 2013).


analysis is limited to persons in the United States who are out of status, nonimmigrants (temporary visas), immigrants (legal permanent residents), and U.S. citizens. It does not include persons outside the United States seeking entry on a nonimmigrant or immigrant visa for the first time, also known as initial entrants.\(^{20}\)

Because past special registries of nonimmigrants and immigrants based on national origin have been upheld as constitutional by U.S. courts, the government is likely to use nationality as a proxy for religion.\(^{21}\) Should the government seek to register U.S. citizens, however, it will have to convince the courts that an American’s ancestry determines her loyalty—a move that, if successful, would negate decades of progress on racial justice.\(^{22}\) The overt rise of White supremacy in American politics coupled with the fact that Korematsu has not been officially overruled by the U.S. Supreme Court suggests that a special registration of U.S. citizens based on race is neither a legal nor political impossibility.\(^{23}\)

A special registry of persons within the U.S. based solely on religion, however, is unlikely to withstand constitutional challenges.\(^{24}\)

\(^{20}\) But see Kerry v. Din, 135 S. Ct. 2128, 2140 (2015) (Kennedy, J., concurring) (noting that visa revocations or denials that implicate constitutional rights must be supported by “a facially legitimate and bona fide” reason” (quoting Kleindienst v. Mandel, 408 U.S. 753, 770 (1972))).


\(^{24}\) See Rajah v. Mukasey, 544 F.3d 427, 433 (2d Cir. 2008) (holding that a selective prosecution based on religious animus would call for some remedy under the Due Process Clause); Karen C. Tumlin, Suspect First: How Terrorism Policy Is Shaping Immigration Policy, 92 CALIF. L. REV. 1172, 1184 (2004) (arguing that, post-9/11, the U.S. government engages
For that reason, the Executive will cite national security as the justification for a national origin based program that has the effect of targeting Muslim individuals.\textsuperscript{25} Opponents will have to persuade the courts to look behind facially neutral justifications on national security grounds to determine that the government’s actual motive is religious animus, making the national-origin criteria unlawful pretext.\textsuperscript{26} As demonstrated in the Muslim ban cases, proving unlawful animus is easier under an administration whose hostility toward Muslims is explicit.\textsuperscript{27} In that regard, the Trump administration is at a disadvantage as compared to previous administrations whose political rhetoric proclaiming Islam is a religion of peace provided political cover for their foreign and domestic counterterrorism practices selectively targeting Muslims.\textsuperscript{28}
Without foreign citizenship as the eligibility criterion, the
government would be hard pressed to find another lawful proxy for
religion that sweeps in all Muslims in the United States. Not only is it
impracticable to identify all Muslims due to a lack of census data and
individuals refraining from self-identification, but the Constitution
would bar it. 29 Short of a judicially accepted executive report finding
a military necessity to register Muslims—similar to the now
discredited DeWitt Report during Japanese internment—special
registration of Muslim U.S. citizens may be a legal nonstarter. 30
Should such a report surface, the courts would apply strict scrutiny to
determine if a Muslim registry is narrowly tailored to meet the
government’s compelling national security interests. The outcome
would depend in large part on the composition of the Supreme Court
and the political environment at the time. 31

I. THE POLITICS OF SURVEILLANCE OF MUSLIMS POST-9/11

While surveillance of minority groups long predated 2001, the
9/11 terrorist attacks triggered myriad forms of surveillance targeting
Muslims. 32 Ranging from electronic and physical surveillance of
Muslim leaders, organizations, and businesses by the government to
private actors reporting suspicious activity about their Muslim
neighbors, clients, and co-workers, America’s racialized
counterterrorism regime is grounded in the premise that Muslims

29. See generally A Brief History of Religion and the U.S. Census, PEW RES. CTR.
(Jan. 26, 2010), http://www.pewforum.org/2010/01/26/a-brief-history-of-religion-and-
the-u-s-census.

30. YAMAMOTO ET AL., supra note 17, at 4 (noting the DeWitt report was based on a
factual record deliberately fabricated in key parts by high U.S. government officials and lawyers).

31. See Jeffrey Toobin, Trump’s Real Personnel Victory: More Conservative Judges, NEW
personnel-victory-more-conservative-judges (noting that Trump’s nominations to the federal
bench, if confirmed, will push the judiciary to the right politically).

32. See generally SIMONE BROWNE, DARK MATTERS: ON THE SURVEILLANCE OF
BLACKNESS (2015) (describing the extensive history of policing black life under slavery,
branding, runaway slave notices, Jim Crow laws, and currently through technology).
are suspects who must be tracked. Special registration is a key component of this racial project.

Donald Trump’s endorsement of a registry for Muslims began in November 2015 when he was asked by a reporter, “Do you think we might need to register Muslims in some type of database, or note their religion on their ID?” Trump responded, “There should be a lot of systems, beyond databases, we should have a lot of systems, and today you can do it.” He confirmed his approval of government officials going to mosques to “sign these people up.” He acknowledged, “Different places, you sign them up at different, but it’s all about management, our country has no management.” After being subjected to a backlash of criticism, Trump recanted on Twitter: “I didn’t suggest a database—a reporter did. We must defeat


34. MICHAEL OMI & HOWARD WINANT, RACIAL FORMATION IN THE UNITED STATES 125 (3d ed. 2015) (“A racial project is simultaneously an interpretation, representation, or explanation of racial identities and meanings, and an effort to organize and distribute resources (economic, political, cultural) along particular racial lines.”).


37. Id.

38. Id. (“We’re going to have to look at a lot of things very closely. We’re going to have to look at the mosques . . . very, very carefully.”)
Islamic terrorism & have surveillance, including a watch list, to protect America.”

In the following days, Trump maintained that he did not suggest the database, but in an interview with George Stephanopoulos on ABC News’s This Week on November 22, 2015, Trump stated he was not ruling out the possibility of a database of Muslims:

I want a database for the refugees that—if they come in the country. We have no idea who these people are. When the Syrian refugees are going to start pouring into this country, we don’t know if they’re ISIS, we don’t know if it’s a Trojan horse. And I definitely want a database and other checks and balances. We want to go with watch lists. We want to go with databases. And we have no choice.

Throughout the twelve months prior to the presidential elections, Trump made clear his deep suspicion of Muslims as terrorists or terrorist supporters. For instance, he stated that it is “hard to separate . . . who is who” between Muslims and terrorists. He insisted that “hundreds of thousands of refugees from the Middle East” would attempt to “take over” and radicalize “our children.” Trump warned that Syrian refugees would “be a better, bigger, more horrible version than the legendary Trojan Horse.” And when he

42. Anderson Cooper 360°(CNN television broadcast Mar. 9, 2016) (transcript available at http://cnn.it/2jJmaEC).
“talked about the Muslims,” he reiterated: “[W]e have to have a ban . . . it’s gotta be a ban.”

In March 2016, Trump responded to a journalist asking him if he believed that “Islam is at war with the U.S.,” saying, “I think Islam hates us . . . There’s an unbelievable hatred of us . . . [T]here is a tremendous hatred and we have to be very vigilant and we have to be very careful and we can’t allow people coming into this country who have this hatred of the United States and of people who are not Muslim.” In July 2016, Trump admitted that he reframed his ban to target “territory instead of Muslim,” which he praised as an “expansion” rather than “rollback.” In October 2016, Trump disclosed that “[t]he Muslim ban . . . ha[d] morphed into extreme vetting from certain areas of the world.”

After the June 2016 mass shooting in Orlando, Florida, Trump announced plans to suspend immigration from countries with a history of terrorism. Subsequently, Trump referred to his plan as a “Muslim ban,” which would require “extreme vetting.” By referring to the ban as specifically targeting a particular religious group, Trump admitted that his executive order was intended to function as an immigration ban based on religious identity. Indeed, as he prepared

45. _Presidential Candidate Donald Trump Town Hall Meeting in Londonderry, New Hampshire_ 28:16 (C-SPAN Feb. 8, 2016), http://cs.pn/2kY4f1T.
49. _See_ Donald J. Trump, _Donald J. Trump Addresses Terrorism, Immigration, and National Security_, FACEBOOK (June 13, 2016), https://www.facebook.com/DonaldTrump/posts/10157163861635725?__a (“I will suspend immigration from areas of the world where there is a proven history of terrorism against the United States, Europe, or our allies until they understand how to end these threats.”).
50. _See_ Elise Foley, _Donald Trump Says His Muslim Ban Has ‘Morphed’ Into ‘Extreme Vetting,’_ HUFFPOST (Oct. 9, 2016, 10:59 PM), http://www.huffingtonpost.com/entry/presidential-debate-syrian-refugees_us_57e9820f4b08d73b832e76a (quoting Trump during a presidential debate).
to sign the first executive order, President Trump stated, “This is the ‘Protection of the Nation from Foreign Terrorist Entry into the United States.’ We all know what that means.” By that time, it was no secret that Trump equated terrorists with Islam.

To sidestep a backlash against a registry of people based on their religion—a concept antithetical to American values of equal protection and religious freedom—Trump used the term “extreme vetting” as a moniker for smart counterterrorism. Trump reassured his right wing base at a rally that “extreme vetting” would ensure the U.S. only accepts “the right people,” using “ideological certification to make sure that those we are admitting to our country share our values and love our people.”

Trump’s broader anti-immigrant agenda, although primarily targeting Latinos, encompassed excluding and deporting Muslims. During a speech in Ohio in August of 2016, Trump called for the suspension of visas from countries with ties to terrorism and proposed a test designed to determine if individuals entering the United States from these countries support American values.
The Extreme Vetting Initiative will apply predictive policing methods to determine which prospective immigrants are at risk of committing terrorist acts.\textsuperscript{57} Factors may include an immigrant’s religious practices, political views, and national origin. In effect, extreme vetting is an ideological and religious test designed specifically for Muslims. Immigration officials would ask those entering the United States questions about their views on freedom of religion, gender equality, and gay rights, which along with personal interviews of the individual’s family or friends would determine a Muslim’s admissibility.\textsuperscript{58} As such, civil rights and liberties groups have criticized the program as a “digital Muslim ban.”\textsuperscript{59}

That a significant number of Americans support exclusion of Muslims from the United States further emboldened President Trump and other presidential candidates.\textsuperscript{60} In an online poll on June 17, 2016, Reuters found that 45.2\% of Americans were in favor of a ban on Muslims, 45\% disagreed with the ban, and 9.8\% were undecided.\textsuperscript{61} Eight months later in a Quinnipiac University poll released on February 7, 2017, only 51\% of American voters opposed Trump’s January 27, 2017 executive order barring tens of millions of Muslims from entering the United States.\textsuperscript{62} Thus, President Trump

\textsuperscript{57} See supra note 54.


\textsuperscript{61} Agree/Disagree: The United States Should Temporarily Stop All Muslims from Entering the United States, REUTERS (June 17, 2016), http://polling.reuters.com/#poll/TM923Y16_4/type/smallest/dates/20160601-20160617/collapsed/true/spotlight/1.

had a popular mandate when he ordered an indefinite halt to admission of Syrian refugees, temporary suspension of admissions for other refugees, and a bar on entry of immigrant and nonimmigrant nationals from Syria, Iraq, Yemen, Libya, Somalia, Iran, and Sudan. Notably, support for Trump's immigration ban fell squarely along party lines. An IPSO/Reuters poll conducted in January 2017 reported that 53% of Democrats strongly disagreed with the ban. In contrast, 51% of Republicans "strongly agree[d]" with the ban.

With Congress and the White House firmly within the control of a Republican party supportive of a Muslim ban, a special registration program for Muslims is not as politically implausible as some Americans would like to believe. Indeed, many Republican political candidates engage in Muslim bashing to attract a growing number of voters.

Half Oppose Trump Travel Ban, HILL (Feb. 7, 2017 2:46 PM), http://thehill.com/home/news/administration/318330-poll-over-half-oppose-trump-travel-ban (stating that more than half of voters oppose a ninety-day ban of travelers from Muslim-majority nations).


64. William Gallo, Trump Supporters See ‘No Problem’ With Travel Ban, VOA (Feb. 6, 2017 7:07 AM), http://www.voanews.com/a/donald-trump-supporters-no-problem-travel-ban/3705449.html (noting that 45% of people approve of the ban and 51% of people disapprove of the ban, "sharply divided along party lines").


far-right voters. Combined with over sixteen years of selective counterterrorism practices that legitimize racialized notions of Muslims as a threat to national security, state sanctioned islamophobia has produced a political climate hostile to Muslims. The extent to which this political climate will influence the judiciary’s legal analysis of a prospective Muslim registry remains an open question. A look at past special registration programs is instructive.

II. THE CHECKERED HISTORY OF NATIONAL ORIGIN BASED SPECIAL REGISTRATION PROGRAMS

America has a checkered history of national origin based special registration programs. Registration of foreign nationals dates back to the eighteenth century starting with the Naturalization Act of 1798 that required all entering aliens to register with the government. By the late 1800s, Chinese immigrants were of special concern to the U.S. government. As a result, the 1892 Geary Act required noncitizens of Chinese origin to register and extended the Chinese Exclusion Act that barred Chinese nationals from applying for U.S. citizenship. Xenophobia against Chinese nationals, many of whom came to the U.S. to build the railroads, was rising to such levels that politicians...

71. Naturalization Act of 1798, ch. 54, 1 Stat. 566 (repealed 1802); YAMAMOTO ET AL., supra note 17, at 33.
sought ways to push them back to China. Special registration was a tool of stigmatization aimed to make Chinese nationals feel sufficiently unwelcome to cause them to leave the U.S.\footnote{Chinn, supra note 73.}

In 1940, The Alien Registration Act (also known as the Smith Act) was enacted to calm fears of a subversive overthrow of the United States government by communists.\footnote{See Joshua Azriel, Five Years After the 9/11 Terrorist Attacks: Are New Sedition Laws Needed to Capture Suspected Terrorists in the United States?, 6 CONN. PUB. INT. L.J. 1, 13 (2006).} The Smith Act was a pre-wartime registration law aimed at expelling political subversives and communists, and in turn became the centerpiece of several national security prosecutions during the Cold War.\footnote{The U.S. government prosecuted associations with groups inclined to advocate the overthrow or disruption of the United States system, such as membership in the Communist Party. See, e.g., Scales v. United States, 367 U.S. 203 (1961); Dennis v. United States, 341 U.S. 494 (1951).} The Smith Act required nearly all noncitizens, including permanent residents, to register at a post office and submit to fingerprinting to allow immigration authorities to inventory information about individuals suspected of espionage or subversive threats.\footnote{See Alien Registration (Smith) Act of 1940, ch. 439, § 30, 54 Stat. 670, 673 (repealed 1952); Nancy Morawetz & Natasha Fernandez-Silber, Immigration Law and the Myth of Comprehensive Registration, 48 U.C. DAVIS L. REV. 141, 156 (2014). Yates v. United States later heightened the burden of prosecution for association, requiring the government to prove not only advocacy of abstract doctrine to overthrow the government, but also advocacy of action. This case ended the utilization of the Smith Act in relation to the criminalization of Communist Party leaders. See Yates v. United States, 354 U.S. 298 (1957); see also David Cole, Judging the Next Emergency: Judicial Review and Individual Rights in Times of Crisis, 101 MICH. L. REV. 2565, 2573 (2003).} The Act prohibited the creation or circulation of printed material advocating the overthrow of the U.S. government.\footnote{See Azriel, supra note 75.} This requirement applied to both initial entrants to the United States and noncitizens already present regardless of immigration status.\footnote{Id.} Those who registered had to update their current address every ninety days or face imprisonment and fines.\footnote{Id. Expanding registration to all aliens, the Internal Security Act of 1950 required annual registration and 10-day notification of change of address requirements of all aliens. Internal Security Act of 1950, ch. 1024, § 24, 64 Stat. 987 (1950).}
Nearly a decade later, between World War I and World War II, citizens suspected of subversive political views, including those of Japanese, German, and Italian origin, were required to register with the government. In contrast to the individualized determinations afforded to Italian and German nationals, the special registration of persons of Japanese ancestry resulted in mass internment of U.S. citizens and Japanese nationals who were prohibited by law from naturalizing. That all three groups of nationals were citizens of enemy states, and yet the Japanese were treated substantially worse, speaks volumes about the role of race in national security enforcement.

Notably, none of the past special registration programs explicitly used religion to determine an individual’s eligibility. Instead, targeted persons were nationals of China, Japan, Italy, Germany, and Iran because their imputed collective threat was associated more with their race and national origin than their religious identities, although the two are intertwined. Had a religious test been used, the special registration program would have likely been struck down by a court as violating the Establishment Clause of the First Amendment, as discussed further in section IV.A.


82. Hirabayashi v. United States, 320 U.S. 81 (1943) (noting that two-thirds of the 126,000 persons of Japanese descent subject to curfews were U.S. born citizens); YAMAMOTO ET AL., supra note 17, at 9, 99; see also IAN HANEY LOPEZ, WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE (2006) (discussing the bars on naturalization of persons deemed to be Asian by law).

83. See Sahar F. Aziz, From the Oppressed to the Terrorist: Muslim American Women Caught in the Crosshairs of Intersectionality, 9 HASTINGS RACE & POVERTY L.J. 191 (2012) (arguing that racialization of Islam contributes toward the government’s adverse disparate treatment of Muslims and the public’s violation of Muslims’ civil rights).

Although the comprehensive registration programs were eventually rescinded, targeted national origin based registration of noncitizens returned, but this time focusing on persons of Middle Eastern origin. After the 1979 Iranian Revolution and the subsequent hostage crisis, President Carter issued Executive Order 12170, declaring a national emergency arising from the Iran hostage crisis. When Iranian college students occupied the U.S. Embassy in Tehran, leading to the hostage crisis, their counterparts in the U.S. were swept into a dragnet of suspicion and surveillance. President Carter determined the hostage crisis constituted “an unusual and extraordinary threat to the national security, foreign policy and economy of the United States.” As a result, all Iranian nonimmigrant postsecondary students were ordered to report to the nearest Immigration and Naturalization Service office for identification and examination of status. Mandatory registration allowed the government to "identify any Iranian students in the United States who are not in compliance with the terms of their entry visas, and to take the necessary steps to commence deportation proceedings against those who have violated applicable immigration laws and regulations."

The special registration program required all nonimmigrant natives or citizens of Iran enrolled as post-secondary school students to report to a local immigration office or campus representative to "provide information as to residence and maintenance of

88. Narenji v. Civiletti, 617 F.2d 745 (D.C. Cir. 1979) (quoting 8 C.F.R. § 214.5 (1979)).
89. American Federation of Labor and Congress of Industrial Organizations: Remarks at the 13th Constitutional Convention, 1979 WEEKLY COMP. PRES. DOC. 2121–22 (Nov. 15, 1979); see also Narenji, 617 F.2d at 749 (quoting 44 Fed. Reg. 65,727).
nonimmigrant status." A group of Iranian students filed suit alleging the special registration program violated their equal protection rights. Although four judges in the United States Court of Appeals for the District of Columbia Circuit acknowledged that U.S. law has a "deep aversion to selective law enforcement against a group solely on the basis of their country of origin," the plaintiffs’ equal protection challenges failed. The court noted that “[d]istinctions on the basis of nationality may be drawn in the immigration field by the Congress or the Executive.”

The heightened suspicion of Middle Easterners continued as the U.S. Immigration and Nationality Services developed a secret contingency plan to register, intern, and deport nonimmigrants from Libya, Iran, Syria, Lebanon, Tunisia, Algeria, Jordan, and Morocco. Although the plan was never implemented, its existence was a harbinger of an expansive special registration program, the National Security Entry-Exit Registration System, implemented in 2002. NSEERS’s precursor occurred during the first Gulf War when nationals of Iraq and Kuwait seeking entry into the United States were registered and fingerprinted, soon joined by those of Sudanese citizenship. Citizens of Iran and Libya were then added in 1996.

Special registration programs based on national origin are statutorily authorized in 8 U.S.C. § 1303(a) of the Immigration and Nationality Act (INA). Specifically, the Attorney General is granted broad powers to prescribe regulations for "registration and

---

90. Narenji, 617 F.2d at 748.
91. Id. (finding that Iranian students equal protection rights were not violated since the registration requirement had a "rational basis").
92. Id.
93. Id.
96. Diana C. Bauerle, Special Registration: Past & Present, Consequences & Remedies, 8 PUB. INT. L. REP., Spring 2003, at 1, 2.
fingerprinting” of certain classes of aliens.\textsuperscript{97} This includes "aliens of any other class not lawfully admitted to the United States for permanent residence."\textsuperscript{98} As a result, special registration programs before the 9/11 attacks set the precedent for the de facto Muslim nonimmigrant registry known as NSEERS.\textsuperscript{99}

The legality of a prospective Muslim registry, thus, depends in large part on the avenue through which the registration process is implemented. Immigration regulations or an executive order issued by the President, as opposed to legislation, historically have been the most common methods for imposing special registration of foreign nationals.\textsuperscript{100} As a result, congressional opposition can be overcome through executive fiat.\textsuperscript{101} For example, NSEERS granted the Executive authority to target nationals of twenty-four Muslim majority countries plus North Korea and Cuba.\textsuperscript{102} Nationality served as a proxy for religion to avoid actionable claims alleging violations of the Establishment Clause of the First Amendment and equal protection under the Fifth Amendment.\textsuperscript{103} I now turn to the

\begin{itemize}
\item \textsuperscript{97} Immigration and Nationality Act, 8 U.S.C. § 1303(a) (2012).
\item \textsuperscript{98} Id. See Narenji, 617 F.2d at 747 (finding that 8 U.S.C. § 1303(a) allows the Attorney General to draw immigration distinctions based on nationality).
\item \textsuperscript{99} See Kandamar v. Gonzales, 464 F.3d 65, 73 (1st Cir. 2006) (noting that 8 U.S.C. §§ 1305 and 1303(a) “give[] the Attorney General great latitude in setting special registration requirements”).
\item \textsuperscript{100} See DAVID COLE, ENEMY ALIENS: DOUBLE STANDARDS AND CONSTITUTIONAL FREEDOMS IN THE WAR ON TERRORISM 5–7, 85–86 (2003) (arguing that the government’s post-9/11 national security policies have targeted Arab and Muslim noncitizens in the U.S.); Erica Newland, Executive Orders in Court, 124 YALE L.J. 2026 (2015). Notably, an executive order is faster because it is not subject to the notice and comment period applicable to executive agency regulations. However, an executive order can just as quickly be repealed by the next president whereas regulations require more legal process to rescind. KENNETH R. MAYER, WITH THE STROKE OF A PEN: EXECUTIVE ORDERS AND PRESIDENTIAL POWER 179 (2001).
\item \textsuperscript{102} See Kaveh Waddell, America Already Had a Muslim Registry, ATLANTIC (Dec. 20, 2016) (stating that NSEERS was a special registration program of people from Muslim-majority countries), https://www.theatlantic.com/technology/archive/2016/12/americas-already-had-a-muslim-registry/511214/.
\item \textsuperscript{103} See Lemon v. Kurtzman, 403 U.S. 602, 602 (1971) (establishing a three-part test
regulatory scheme undergirding NSEERS, which the government will likely point to as a model for future national origin based special registration programs.

III. THE NATIONAL SECURITY ENTRY-EXIST SYSTEM (NSEERS) FOR NONIMMIGRANTS

Less than a year after the 9/11 terrorist attacks, the Bush administration established the National Security Entry-Exit System (NSEERS). On August 12, 2002, the Department of Justice (DOJ) issued a press release stating the purpose of NSEERS was to “enable mass tracking of individual entries, departures, and domestic whereabouts.” The program initiated mass fingerprinting for “higher-risk visiting aliens” at ports of entry, using “intelligence criteria reflecting patterns of terrorist organizations’ activities.” These purportedly high-risk individuals—nearly all of whom were nationals of Muslim majority countries—would be required to “periodically confirm where they are living and what they are doing in the United States.” The individuals must also confirm their exit from the United States. Rejecting claims that NSEERS was

wherein the law at issue: 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); Yick Wo v. Hopkins, 118 U.S. 356, 373–74 (1886) (holding that unequal application of a San Francisco city ordinance that disproportionately affected Chinese laundry owners constituted a denial of 14th Amendment equal protection to aliens in the U.S.); Michael Price & Faiza Patel, Muslim Registry or NSEERs Reboot Would be Unconstitutional, BRENNAN CTR. FOR JUST. (Nov. 22, 2016), http://www.brennancenter.org/blog/muslim-registry-or-nseers-reboot-would-be-unconstitutional. In Yick Wo, the Court explained that “[t]he rights of the petitioners . . . are not less because they are aliens and subjects of the emperor of China. . . . The fourteenth amendment to the constitution is not confined to the protection of citizens.” Yick Wo, 118 U.S. at 368–69.


107. Id.

108. Id.
discriminatory, the DOJ noted “[t]his practice of requiring foreign visitors to periodically register with law enforcement authorities has long been commonplace in European countries.”

But it was no secret that NSEERS was a de facto Muslim registry. Legally grounded in the Executive’s broad powers in immigration law pursuant to the plenary power doctrine, NSEERS required all nonimmigrant males over the age of sixteen from the twenty-four Muslim majority countries, Cuba, and North Korea to register with the U.S. government. Only persons whose legal presence was temporary—such as persons with student, work, and visitor visas—were subject to special registration while persons with

---

109. Id.


lawful permanent residence and U.S. citizenship were exempt.113 As a result, more than 80,000 people were registered under NSEERS.

Eligible foreign nationals had to register at ports of entry and follow up with an in-person interview.114 Those already in the country had to register with the U.S. Department of Homeland Security.115 Individuals who failed to register risked being placed in removal proceedings for failure to appear, a consequence that continues to harm individuals long after NSEERS ended.116

NSEERS utilized intrusive registration, interviewing, and identification processes to track targeted individuals.117 Within thirty to forty days of arrival in the United States, the individual had to report to an immigration office.118 He was also required to update every change of address with the immigration authorities, and return to the immigration office again if his presence extended longer than a year.119 Each visit was an opportunity for the government to chill religious and political behavior through questions about mosque attendance, opinions about American foreign policy, and stances on current events in the Middle East.120 Upon leaving the country, registrants had to report to an immigration inspecting officer at the port of exit.121

113. 8 U.S.C. § 1101(a)(15) (2012) (“The term ‘immigrant’ means every alien except an alien who is within one of the following classes of nonimmigrant aliens.”); id. § 1101(a)(15)(A)–(Y) (stating nonimmigrant aliens include: foreign government officials, visitors for business and pleasure, aliens in transit through the United States, treaty traders and investors, students, international representatives, temporary workers and trainees, representatives of foreign information media, exchange visitors, fiancé(e)s of U.S. citizens, intracompany transferees, NATO officials, and religious workers).

114. Lohmeyer, supra note 21, at 140.


118. See id. at 76.

119. See id.

120. Wadhia, supra note 115, at 1502.

121. Shora, supra note 117, at 76.
When immigration officials could not handle the thousands of people attempting to register in person, the Department of Homeland Security (DHS) created a “call-in” component. Government officials conducted call-in interviews to obtain information about bank accounts, credit cards, and political, religious or social group affiliations. Despite registering tens of thousands of people, the Attorney General acknowledged that, as of 2003, NSEERS led to the capture of only eleven individuals with ties to a terrorism organization. The DOJ never disclosed any additional information regarding the captured individuals, and did not indicate whether the individuals were detained while in the country or at a port of entry.

A. Statutory Authorization of NSEERS

Although NSEERs proved ineffective in capturing suspected terrorists, it quite effectively expelled thousands of Muslims from the U.S. More than 13,000 men were placed into removal proceedings after reporting in person to immigration offices. The men were removed for immigration visa violations, not terrorism-related charges. One report stated that immigration officials in Southern California detained between five hundred and seven hundred Muslim men, who voluntarily registered, based on suspected visa violations. The derivative consequences of NSEERS still adversely affect noncitizens from the twenty four Muslim majority countries. For many, noncompliance with NSEERS has resulted in a denial of immigration relief or benefits and led to removal proceedings years

123. Wadhia, supra note 115, at 1502.
125. Id.
127. Id.
129. Wadhia, supra note 115, at 1507.
after NSEERS ended.130

In 2011, the Bush administration delisted all twenty-six countries thereby ceasing enforcement of NSEERS. In 2016, just before leaving office, Obama repealed NSEERS.131 However, the program’s regulatory structure remains intact, causing concerns that Trump may reinstate it.132 That multiple failed constitutional challenges to NSEERS warrants a closer look at national origin based registration programs.133

Although NSEERS limited registration to nonimmigrants, its legal structure offers a potential model on which the government may propose a de facto Muslim registry for both nonimmigrants and immigrants. Statutory authorization for the NSEERS is found within the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA).134 Section 110 of the IIRIRA states: “The Attorney General shall implement and integrate entry and exit data system.”135 This section was later amended in 2000 to clarify that the system documenting entries and exits is not meant to be construed “to permit the United States government to impose any new documentary or data collection requirements. . . .”136

130. Id. at 1508.
132. Waddell, supra note 102, at 3; see also J. David Goodman & Ron Nixon, Obama to Dismantle Visitor Registry Before Trump Can Revive It, N.Y. TIMES (Dec. 22, 2016), https://nyti.ms/2hdfReq.
136. PENN. STATE UNIV. DICKINSON SCH. OF LAW CTR. FOR IMMIGRANTS’ RIGHTS, supra note 134, at 12.
Further authorization exists pursuant to the Immigration and Nationality Act. Section 263 of the INA allows for the registration of several nonimmigrant groups at the discretion and requirement of the Attorney General. The provision states: “[T]he Attorney General is authorized to prescribe special regulations and forms for the registration and fingerprinting of . . . aliens of any other class not lawfully admitted to the United States for permanent residence.”

The provision also allows for the registration of alien crewmen, holders of border-crossing identification cards, aliens confined in institutions, and aliens on criminal parole or probation. However, none of the classifications specifically permits selective registration based on country of origin or religion.

Following the 9/11 terrorists attacks, the government revisited the entry-exit data collection system. The USA PATRIOT Act required the development of a system focused on entry and exit in order to provide greater protection for the United States and to help aliens fulfill their responsibilities under the laws of the United States. In 2002, Congress mandated such an entry and exit system, delegating the responsibility to the Department of Justice. NSEERS was among the first programs initiated under this mandate.

B. Equal Protection Challenges to NSEERS

Civil liberties advocates opposed to NSEERS for unfairly targeting Arabs and Muslims filed lawsuits challenging the program on equal

137. Id. at 14; see also Immigration and Nationality Act, 8 U.S.C. § 1303 (2012).
139. Id.
140. PENN. STATE UNIV. DICKINSON SCH. OF LAW CTR. FOR IMMIGRANTS’ RIGHTS, supra note 134, at 12.
141. Id.
142. Id.
143. Id.
144. Id. at 13.
A Muslim Registry

A threshold issue was whether courts should review the government’s actions based on the strict scrutiny test reserved for invidious criteria, or the rational basis test that effectively rubber-stamps executive action. Under a rational basis analysis, so long as the government’s actions are rationally related to a "legitimate" government interest, then the law at issue is constitutional. That is, a classification is permissible “if there is any reasonably conceivable state of facts that could provide a rational basis.” In cases where the rational basis test applies, legal challenges to government action frequently fail. In the NSEERS cases, the courts applied rational basis, and as a result, none of the lawsuits were successful.

---


146. City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 446 (1985) (noting that under a rational basis review, the court must determine whether a classification is “rationally related to a legitimate governmental purpose”).


150. Id. All the courts of appeals that considered the constitutional validity of the NSEERS held that special registration of aliens based on nationality did not violate the Equal Protection Clause. See Rajah v. Mukasey, 544 F.3d 427, 435 (2d Cir. 2008) (“[C]lassifications on the basis of nationality are frequently unavoidable in immigration matters. . . . [S]uch classifications [are] commonplace and almost inevitable. Indeed, the very concept of ‘alien’ is a nationality-based classification.”); Malik v. Gonzales, 213 Fed. App’x. 173 (4th Cir. 2007) (explaining that courts have no jurisdiction to review equal protection challenges in immigration cases); Zerrei v. Gonzales, 471 F.3d 342, 347–48 (2d Cir. 2006) (rejecting the claim that the NSEERS violates the Equal Protection Clause); Zafar v. U.S. Att’y Gen., 461 F.3d 1357, 1367 (11th Cir. 2006) (“Petitioners’ equal protection rights were not violated by being required to be registered in the national Security Entry-Exit Registration System.”); Sewani v. Gonzales, 162 Fed. App’x. 285, 287 (5th Cir. 2006) (“Due process does not require Congress to grant aliens from all nations with the same chances for admission to or remaining with the United States. Congress may permissibly set immigration criteria that are sensitive to an alien’s nationality or place of origin.” (quoting Rodriguez-Silva v. INS, 242 F.3d 243, 248 (5th Cir. 2001))); Shaybob v. U.S. Att’y Gen., 189 Fed. App’x. 127, 129–30 (3d Cir. 2006) (“The Call-In Program does not violate the Equal Protection guarantee of the Fifth Amendment. . . . [T]he power to exclude or expel particular classes of aliens is historically within the province of the political branches.”); Ali v. Gonzalez, 440 F.3d 678, 682 n.4 (5th Cir. 2006) (“[N]ationality classification has been repeatedly upheld by this Court and others against constitutional attack.”).
For example, the First Circuit in *Kandamar v. Gonzales*\(^{151}\) held that NSEERS did not violate petitioner’s equal protection rights. Abdelaziz Kandamar, a native of Morocco, voluntarily complied with NSEERS during which the government discovered he was out of status. He was subsequently arrested and issued a notice of removal. Kandamar challenged his deportation on constitutional grounds “that NSEERS constitutes racial profiling and discrimination based on national origin; violates substantive due process because its use ‘to entrap nationals of certain countries’ is fundamentally unfair; and violates equal protection by treating legal and illegal entrants differently.”\(^{152}\) At the outset, the First Circuit highlighted Supreme Court jurisprudence holding that “judicial review of line-drawing in the immigration context is deferential.”\(^{153}\) The court noted that an alien's nationality and place of origin are permissible criteria for enforcing immigration law, pointing out that INA section 263 allows for the registration of “any other class not lawfully admitted to the United States for permanent residence.”\(^{154}\) In rejecting Kandamar’s constitutional claims, the court applied the rational basis test to hold that NSEERS served a legitimate government objective of “monitoring nationals from certain countries to prevent terrorism and is rationally related to achieving these monitoring objectives.”\(^{155}\)

The Second Circuit in *Rajah v. Mukasey* also upheld NSEERS as constitutional.\(^{156}\) Plaintiffs were nonimmigrant male foreign nationals from the designated Muslim majority countries and included non-Muslim nationals from designated countries. Upon complying with registration requirements, Plaintiffs were subject to deportation orders based on alleged violations of immigration law. Among other claims, plaintiffs filed an equal protection claim alleging NSEERS was motivated by unlawful religious animus.\(^{157}\) In rejecting the claims, the court found the program was motivated by bona fide and legitimate

\(^{151}\) Kandamar v. Gonzales, 464 F.3d 65 (1st Cir. 2006).

\(^{152}\) *Id.* at 68.

\(^{153}\) *Id.* at 72.

\(^{154}\) *Id.* at 73 (quoting 8 U.S.C. § 1303(a) (2012)).

\(^{155}\) *Id.*

\(^{156}\) Rajah v. Mukasey, 544 F.3d 427, 435 (2d Cir. 2008).

\(^{157}\) *Id.* at 438; see Roudnahal v. Ridge, 310 F. Supp. 2d 884, 892 (N.D. Ohio 2003).
national security reasons.

That NSEERS was an immigration program purportedly motivated by national security made constitutional claims more difficult to win. Immigration law is an area over which the Executive and Congress exercise plenary power. In addition, courts frequently find national security to be a compelling state interest that supersedes equal protection concerns in classifications based on alienage or national origin. Citing a line of post-9/11 cases dismissing equal protection claims arising from the detention and abuse of nonimmigrant Muslims, the government may argue the registrants’ religious traits are merely incidental to the neutral national security purpose of a special registration program. As such, challengers of a Muslim registry targeting nonimmigrants will face a tall order in persuading courts to break with the tradition of judicial deference pursuant to the plenary power doctrine.

Notwithstanding the government’s argument that it need only provide a “facially legitimate and bona fide” reason for an immigration decision such that a court may not inquire into evidence of an unlawful motive, the courts are becoming increasingly suspicious of national security as a smokescreen for unconstitutional executive action. The Ninth Circuit and Fourth Circuit decisions blocking Trump’s travel bans suggest that courts may be willing to hold the Executive accountable for sweeping programs affecting the rights of tens of millions of people. That the U.S. Supreme Court upheld the


159. See Haig v. Agee, 453 U.S. 280, 307 (1981) (“It is ‘obvious and unarguable’ that no governmental interest is more compelling than the security of the Nation.”); see also Zerrei v. Gonzales, 471 F.3d 342, 344 (2nd Cir. 2006); Zafar v. U.S. Attorney Gen., 461 F.3d 1357 (11th Cir. 2006).


temporary restraining orders of the Muslim bans as they pertain to any entrant without a “bona fide relationship” in the United States is further indicia that the plenary power is not limitless. 163

For two reasons, the courts are unlikely to grant the same judicial deference as they did for NSEERs should Trump seek to reinstate a program similar to NSEERs. First, the Muslim ban cases demonstrate there is ample evidence to support allegations that a special registration of people from Muslim majority countries would be driven by religious animus. 164 Second, in contrast to the years following 9/11 when there was no automated entry-exit database for all foreigners, Trump cannot point to a non-discriminatory need for a special registration program based on national origin.

Currently, the United States Visitor and Immigrant Status Indicator Technology (US-VISIT) tracks all foreign visitors who enter and exit the United States thereby allowing the government to identify persons who may be engaged in terrorism or other illegal activity. 165 The implementation of US-VISIT coupled with persistent criticism of NSEERs as discriminatory, prompted DHS to remove all designated countries from NSEERs. 166 Weeks before Trump’s inauguration, President Obama repealed the regulations authorizing NSEERs after civil rights advocates pointed out that special registration could easily be reinstated merely by adding countries to the list. 167

Ultimately, the fate of a prospective de facto Muslim registry depends on what judicial standard of constitutional review applies. 168

---

164. See supra notes 26–27 (travel ban cases).
168. See Yamamoto et al., supra note 17, at 103.
If the courts treat special registration as an immigration matter, then the rational basis test applies pursuant to the plenary power doctrine. Similarly, if the courts accept the government’s national security justifications, courts are likely to apply the rational basis test to an equal protection challenge. This outcome nearly guarantees judicial approval of executive action. Should a court determine the Muslim registry targets persons based on their alienage without serving an immigration purpose, then the strict scrutiny test applies.169

A de jure Muslim registry implemented by the Trump administration, however, may not even pass the rational basis test due to the lack of a plausible national security reason for singling out Muslims. Terrorist attacks in the United States are conducted by people of various faiths, or no faith at all, and the majority are not Muslim.170 There is no scientific evidence showing that a person’s religion, much less Islamic beliefs, is a causal factor in domestic terrorism.171 Moreover, international terrorist groups are savvy at finding persons who do not fit a racial or religious profile as a means of averting state detection. John Walker Lindh, Adam Yahye Gadahn, Jose Padilla, Bryant Neal Vinas, and Colleen LaRose are some examples of Americans convicted of terrorism whose ancestors are not from Muslim majority countries.172 Absent credible factual support

169.  See Graham v. Richardson, 403 U.S. 365, 375–76 (1971); see also Nyquist v. Mauclet, 432 U.S. 1, 11–12 (1977); Takahashi v. Fish & Game Comm’n, 334 U.S. 410, 413, 420, 422 (1948) (holding unconstitutional a California statute that targeted individuals of Japanese descent by barring issuance of fishing licenses to persons “ineligible to citizenship” and explaining that “the power of a state to apply its laws exclusively to its alien inhabitants as a class is confined within narrow limits”); Fatma Marouf, Alienage Classifications and the Denial of Health Care to Dreamers, 93 WASH. U. L. REV. 1271, 1289 (2016) (noting that “there is currently a circuit split about whether strict scrutiny is limited to legal permanent residents (“LPRs”) or extends to others who are lawfully present”).


that the deprivation of rights is related to an “immediate, imminent, and impending” public danger, a de jure Muslim registry is unlikely to pass constitutional muster.173

Finally, the courts’ granting of preliminary injunctions for Trump’s travel bans being unlawfully motivated by religious animus does not bode well for a prospective de facto Muslim registry.174 Much will depend on whether judges will include Trump’s anti-Muslim statements and tweets in their determination of the primary purpose of a Muslim registry. Hence, a look at the travel ban cases is instructive.

IV. TRUMP’S “MUSLIM BAN” AS PROLOGUE FOR A MUSLIM REGISTRY

On January 29, 2017, President Donald Trump signed an executive order indefinitely halting admission of Syrian refugees, suspending admissions of other refugees for 120 days, and barring entry of all nationals from seven Muslim majority countries for 90 days.175 Citizens of Syria, Yemen, Iran, Iraq, Libya, Somalia, and Sudan were denied entry even if they were students, workers, or lawful permanent residents who had lawfully lived in the United States for

---


Not since the Reagan administration barred Iranians from entering the United States after the Iranian hostage crisis had a President invoked section 1182(f) to ban all citizens from an entire country.  

The Trump administration maintained that the purpose of the ban was to combat terrorism, and more specifically, to address the alleged growing threat of foreign fighters entering the United States. It claimed its program was merely an expansion of the Visa Waiver Program Improvement and Travel Prevention Act of 2015 that excluded from the Visa Waiver Program nationals of or people who have recently visited Iraq, Syria, Iran, or any other country designated as a state sponsor of terrorism by the State Department. In 2016, visitors to or dual citizens of Libya, Somalia, and Yemen were also excluded from the Visa Waiver Program.

---

176. See Executive Order Text, supra note 175.
179. Visa Waiver Program Improvement and Terrorist Travel Prevention Act of 2015, 8 U.S.C. 1187 (Supp. III 2012); DHS Announces Further Travel Restriction for the Visa Waiver Program, DEP’T OF HOMELAND SEC. (Feb. 18, 2016), https://www.dhs.gov/news/2016/02/1/dhs-announces-further-travel-restrictions-visa-waiver-program (excluding dual nationals of or have recently visited Iraq, Syria, or any country designated by the Secretary of State as a state sponsor of terrorism). The Visa Waiver Program allows nationals of certain countries to seek temporary admission into the United States for 90 days or less. 8 U.S.C. § 1187(a)(12).
Trump’s executive order continued the post-9/11 legacy wherein the liberty, livelihoods, and dignity of Muslims were subordinated by racialized counterterrorism practices. Even though few confirmed terrorists are nationals of the seven selected countries, all of their citizens were penalized as a result of stereotypes of Muslims as inherently prone to terrorism and violent anti-Americanism. Indeed, an affidavit signed by ten former national security, foreign policy, and intelligence officers in democratic and republican administrations stated that as of January 19, 2017 (when Donald Trump was inaugurated as President) “there is no national security purpose” for a total bar of entry for aliens from the designated countries, an unprecedented and sweeping exclusion of a broad class of people. Tellingly, similar stereotypes of persons of Japanese ancestry as collectively disloyal, and thus predisposed to espionage, buttressed the internment and curfew cases in the 1940s.

The explicit association of Muslims with terrorism, coupled with political opposition to Trump’s presidency, triggered protests across the country at over forty airports and state capitals. Lawyers immediately filed lawsuits in multiple states seeking to block enforcement of the executive order. The complaints alleged

181. Leti Volpp, The Citizen and the Terrorist, 49 UCLA L. REV. 1575, 1581 (2002); Alex Nowrasteh, Where Do Terrorists Come from? Not the Nations Named in Trump Ban, NEWSWEEK (Jan. 31, 2017, 8:40 AM), http://bit.ly/2kWoddx; see Aziz, supra note 83, at 194 (noting that opponents of Muslim accommodation dismiss religious freedom by shifting the debate to Islam’s pathological violence); Aziz, supra note 28, at 430 (stating that the government sent the message to millions through the media that “Muslims and Arabs [were] inherently violent and intent on destroying the American way of life.”). See generally Neil Gotanda, Comparative Racialization: Racial Profiling and the Case of Wen Ho Lee, 47 UCLA L. REV. 1689, 1692 (2000) (demonstrating how racial and cultural profiling changes the political outcome of an individual’s case).


183. See Hirabayashi v. United States, 320 U.S. 81, 96 (1943) (“There is support for the view that social, economic and political conditions which have prevailed since the close of the last century, when the Japanese began to come to this country in substantial numbers, have intensified their solidarity and have in large measure prevented their assimilation as an integral part of the white population.”); YAMAMOTO ET AL., supra note 17, at 7.

184. See Andy Newman, Highlights: Reaction to Trump’s Travel Ban, N.Y. TIMES (Jan. 29,
the order was motivated by unlawful religious animus, thereby violating the Establishment Clause, equal protection rights, and the Immigration and Nationality Act.\textsuperscript{185}

Government lawyers argued the President’s plenary power to enforce immigration law authorized the use of nationality to bar persons from entering the United States.\textsuperscript{186} They pointed to 8 U.S.C. § 1182(f), which authorizes the President to “suspend the entry of all aliens or any class of aliens as immigrants or nonimmigrants” when allowing admission would be “detrimental to the interests of the United States.”\textsuperscript{187} Furthermore, Congress authorized the Executive

\begin{itemize}
\item \textsuperscript{186} The amended executive order makes the following rationale for excluding all citizens from the six selected nations:
\begin{itemize}
\item Each of these countries is a state sponsor of terrorism, has been significantly compromised by terrorist organizations, or contains active conflict zones. Any of these circumstances diminishes the foreign government’s willingness or ability to share or validate important information about individuals seeking to travel to the United States. Moreover, the significant presence in each of these countries of terrorist organizations, their members, and others exposed to those organizations increases the chance that conditions will be exploited to enable terrorist operatives or sympathizers to travel to the United States. Finally, once foreign nationals from these countries are admitted to the United States, it is often difficult to remove them, because many of these countries typically delay issuing, or refuse to issue, travel documents.
\end{itemize}
\item \textsuperscript{187} The full text of the provision is
\begin{itemize}
\item 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
Branch to designate countries for immigration enforcement based on “whether the country or area is a safe haven for terrorists” or “whether a foreign terrorist organization has a significant presence in the country.” 188

Plaintiffs responded by pointing out that the Immigration and Nationality Act was amended in 1965 to prohibit discrimination on the basis of national origin. 189 Federal law states that “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.” 190 Cannons of statutory construction make the later-in-time and more specific 1965

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.


provision take precedence over the earlier and more general 1952 provision.\textsuperscript{191} Although the 1965 provision does not include religion as an unlawful basis for government action in issuing immigrant visas, Trump’s claim that national origin motivated his executive order put it squarely at odds with § 1152(a)(1) as to immigrant visas.\textsuperscript{192} However, § 1152(a)(1)’s exclusion of nonimmigrants seeking or in possession of student, work, visitor, and other forms of temporary visas left these persons vulnerable to a categorical travel ban.\textsuperscript{193} Nonetheless, with the exception of a court in Massachusetts,\textsuperscript{194} federal district courts found plaintiffs challenging the first executive order were likely to win their claims on the merits and, as a consequence, enjoined enforcement of the travel ban.

On March 6, 2017, Trump issued a revised executive order that reiterated the national security justifications and made the following changes: (1) removal of Iraq from the list of countries, (2) removal of legal permanent residents from the order’s applicability, (3) elimination of the exemption for religious minorities in the refugee ban, and (4) clarification that individuals with a valid visa were not subject to the executive order.\textsuperscript{195} Again, plaintiffs sought injunctive relief to the amended executive order; and again the courts sided with the plaintiffs.\textsuperscript{196}

\begin{figure*}[h]
\centering
\includegraphics[width=\textwidth]{image.png}
\caption{Image of the page}
\end{figure*}

\textsuperscript{191} See Antonin Scalia & Bryan A. Garner, \textit{Reading Law: The Interpretation of Legal Texts} 183–87 (2012). § 1152(a)(1)(A) was enacted in 1965, after § 1182(f) was enacted in 1952.


\textsuperscript{193} 8 U.S.C. § 1152(a)(1).

\textsuperscript{194} Id.


\textsuperscript{196} Washington \textit{v. Trump}, 847 F.3d 1151, 1151 (9th Cir. 2017); Order Granting Motion for Temporary Restraining Order, Hawai’i \textit{v. Trump}, 241 F. Supp. 3d 1119; Int’l
Despite the changes in language, courts were not persuaded by the government’s denial that religious animus motivated the travel ban. In a ten to three vote, the Fourth Circuit held that Trump’s statements about Muslims during his presidential campaign, coupled with his advisors’ admissions, demonstrated Trump’s intention to institute a travel ban based on religious identity in both the original and amended executive order. The court found ample evidence of “a direct link between the President’s numerous campaign statements promising a Muslim ban that targets territories, the discrete action he took only one week into office executing that exact plan, and EO-2, the ‘watered down’ version of that plan.” It also highlighted a report by the Department of Homeland Security that concluded that citizenship is not a reliable indicator of whether a particular individual poses a terrorist threat.

For these reasons, the executive order was not “facially legitimate and bona fide” such that it warranted judicial probing of the government’s stated national security purpose. Courts found the primary purpose of the executive bans was not a secular one of preserving national security but rather a religious one of discriminating against Muslims. The litigation over the travel bans demonstrates that, while the executive and legislative branches have broad power in the immigration arena, they must still comply with the Constitution.


197. See IRAP, 857 F.3d at 557; Green v. Haskell Cty. Bd. of Comm’rs, 568 F.3d 784 (10th Cir. 2009); Glassroth v. Moore, 335 F. 3d 1282, 1284–85 (11th Cir. 2003).

198. IRAP, 857 F.3d at 599–600.


200. IRAP, 857 F.3d at 557.

201. Id.

202. Zadvydas v. Davis, 533 U.S. 678, 695 (2001) (dealing with indefinite detention of aliens); Abourezk v. Reagan, 785 F.2d 1043, 1061 (D.C. Cir. 1986) (dealing with admission and exclusion of aliens); see Kevin Johnson, Dean, UC Davis School of Law, Dreyfous Lecture on Civil Liberties and Human Rights at the Tulane University Law School Endowed Lecture Series: Immigration and Civil Rights in the Trump Administration (Mar. 20, 2017), https://www.youtube.com/watch?v=JAnETPSR-4U (arguing the Supreme Court has
I now turn to the courts’ analysis in finding that anti-Muslim animus, not bona fide national security threats, motivated the travel ban cases. The plethora of evidence of Trump’s longstanding hostility towards Islam and Muslims persuaded the courts that national origin was merely a subterfuge for an executive order motivated by religious animus. The same evidence could be brought forth in challenging a prospective Muslim registry.

A. The Establishment Clause for Citizens and Noncitizens

In finding Trump’s original and amended executive orders legally suspect, judges highlighted the First Amendment mandate that “Congress shall make no law respecting an establishment of religion.” The Establishment Clause requires “governmental neutrality between religion and religion” and “that one religious denomination cannot be officially preferred over another.” When government action is suspected of having a religious objective, courts apply the “objective observer” test to examine “readily discoverable facts” including the “text, legislative history, and implementation” of the action.

Courts use two tests to enforce the Establishment Clause: the Larson test and the Lemon test. In Larson v. Valente, the Supreme Court held that if a law facially discriminates among religions, it can survive only if it is “closely fitted to the furtherance of any
compelling interest asserted,” also known as the strict scrutiny test in constitutional jurisprudence. If a law is facially neutral as to religion, *Lemon v. Kurtzman* provides an alternative test requiring that the 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.

1. A Facially Discriminatory Registry

A special registration program that explicitly targets Muslims will trigger strict scrutiny, pursuant to the *Larson* test. A legal challenge to a de jure Muslim registry would succeed on the merits if the claimants can prove that the law facially discriminates against Islam and is not narrowly tailored in furtherance of a compelling government interest. Because national security is frequently accepted by courts as a compelling government interest, the crux of the legal dispute will center on whether imposing special registration on Muslims—regardless of their citizenship, ties to the United States, and individual behavior—is narrowly tailored to serve national security.

The Tenth Circuit’s ruling in *Awad v. Ziriax* is informative here. An Oklahoma constitutional amendment was passed by public referendum that prohibited consideration of international law in Oklahoma courts. The Tenth Circuit upheld the lower court’s preliminary injunction on Establishment Clause grounds. Oklahoma’s constitutional amendment, tellingly entitled “Save Our State,” intended to ban only one form of international law—Shari’a law (also known as Islamic law). Because the law facially discriminated against Islam, it was subject to strict scrutiny. The

---

212. *Awad v. Ziriax*, 670 F.3d 1111, 1127 (10th Cir. 2012) (quoting Colo. Christian Univ. v. Weaver, 534 F.3d 1245, 1266 (10th Cir. 2008)).
213. *See Awad*, 670 F.3d at 1111.
214. *Id. at 1129–30.
215. *Id. at 1128–29.*
court found no compelling state interest existed because “abstract principles do not satisfy the government’s burden to articulate a compelling interest.”216 The government did not offer any reasoning for the distinction, and instead offered “[m]ere speculation of harm” from Muslims that “does not constitute a compelling state interest.”217 In finding that Awad was likely to prevail in his Establishment Clause claim, the court concluded that he suffered harm in the form of condemnation of his religion, stigmatization, and exposure to disfavored treatment.218 The same reasoning was applied by the Fourth Circuit in IRAP v. Trump in enjoining enforcement of the travel ban. The Fourth Circuit recognized that stigmatization arising from the travel ban targeting Muslim majority countries is a cognizable injury for standing purposes.219

Should the Trump administration require only Muslims to register, the government may be found to show preference to other religions over Islam in the same way the Oklahoma Legislature did in prohibiting only Islamic law in Awad. That is, the government would convey a clear message of disapproval of Islam and an otherization of Muslims as permanent outsiders of the political community regardless of their citizenship.220

To be sure, the government would insist that preventing terrorism is a compelling state interest and point to the history of Al Qaeda and

216. Id. at 1130.
218. Id. at 1122–23.
219. Int’l Refugee Assistance Project (IRAP) v. Trump, 857 F.3d 554, 586 (4th Cir. 2017). The dissenting opinion, however, argued that stigmatization alone was insufficient to be a cognizable injury. Id. at 659–67 (Agee, J., dissenting).
220. Smith v. Jefferson Cty. Bd. of Sch. Comm’rs, 788 F.3d 580, 587 (6th Cir. 2015); see IRAP, 857 F.3d at 582 (“[T]he core objectives of modern Establishment Clause jurisprudence has been to prevent the State from sending a message to non-adherents of a particular religion ‘that they are outsiders, not full members of the political community.’” (quoting Moss v. Spartanburg Cty. Sch. Dist. Seven, 683 F.3d 599, 607 (4th Cir. 2012))). Even if lawful, the government has no way of identifying who is Muslim because the U.S. Census Bureau does not track religion and individuals are more likely not to voluntarily self-identify if faced with adverse government action on account of their religion. A Brief History of Religion and the U.S. Census, PEW RES. CTR. (Jan. 26, 2010), http://www.pewforum.org/2010/01/26/a-brief-history-of-religion-and-the-u-s-census/. 
the Islamic State of Iraq and Syria’s (ISIS) targeting U.S. interests.221 The government may then reason that Muslims in the United States are most likely to be recruited to conduct a terrorist attack on behalf of Al Qaeda and ISIS and thus warrant tracking.222 But the government will be hard pressed to find credible objective evidence showing a person’s religion per se makes her susceptible to becoming a terrorist. Indeed, of the estimated 3.3 million Muslims in the U.S., less than 500 have been charged with terrorism in the last sixteen years.223 Without a causal link between Islam and terrorism, a court may find the primary or predominant purpose for special registration is religious animus, thereby striking down the special registration program for violating the Establishment Clause.

2. A Facially Neutral Registry

For the aforementioned reasons, future legislation or executive order imposing special registration is unlikely to explicitly name Islam or Muslims. Rather, like the travel bans currently being litigated, the language would target persons with origins from Muslim majority countries.224 The government would rely on its plenary authority in


immigration as well as invoke judicial deference in national security to argue the rational basis test should apply.225

In adjudicating Establishment Clause cases, courts interrogate whether the stated secular purpose is “genuine, not a sham, and not merely secondary to a religious objective.”226 A Muslim registry that is facially neutral will be struck down if it has the effect of inhibiting Islam and entangling the government in regulating Islam pursuant to the Lemon test. Opponents of a de facto Muslim registry could argue that Trump’s established record of anti-Muslim and islamophobic statements over the course of his two-year presidential campaign and tenure as President is evidence that a Muslim registry is based on religious animus rather than a secular national security purpose.227 Although courts normally exercise judicial deference in the area of national security (and immigration law), multiple abuses of executive authority have caused judges to be more skeptical of claims using broad national security justifications that implicate constitutional rights.228

---

225. See, e.g., Mathews v. Diaz, 426 U.S. 67, 83 (1976) (considering whether a law that made distinctions based on alien status was “wholly irrational”); Guzman v. U.S. Dep’t of Homeland Sec., 679 F.3d 425, 432 (6th Cir. 2012) (“[D]eference to Congress with respect to immigration law has led this court to uphold statutory distinctions between classes of aliens if predicated on a rational basis.” (citing Hamama v. INS, 78 F.3d 233, 237 (6th Cir. 1996))). But see United States v. Robel, 389 U.S. 258, 263–64 (1967) (rejecting the invocation of national security as a “talismanic incantation” that can support any and all exercise of executive power).


227. See Lemon v. Kurtzman, 403 U.S. 602, 612–13 (1971) (establishing a three-part test wherein the law at issue (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); see also infra Part I.

A federal district judge in Hawaii, for example, found in the Muslim ban case that “the entirety of the Executive Order runs afoul of the Establishment Clause,” which prohibits the government from disfavoring a particular religion.\(^\text{229}\) In evaluating Trump’s travel ban, the court looked to Trump’s anti-Muslim rhetoric prior to taking office. His multiple inflammatory statements against Muslims during his presidential campaign further evinced a hostility toward Islam.\(^\text{230}\) In addition to the statements described in Part I, the court highlighted the Trump presidential campaign’s press release in stating:

Donald J. Trump is calling for a total and complete shutdown of Muslims entering the United States until our country’s representatives can figure out what is going on. According to Pew Research, among others, there is great hatred towards Americans by large segments of the Muslim population. Most recently, a poll from the Center for Security Policy released data showing “25% of those polled agreed that violence against Americans here in the United States is justified as a part of the global jihad” and 51% of those polled, “agreed that Muslims in America should have the choice of being governed according to Shariah.” Shariah authorizes such atrocities as murder against non-believers who won’t convert, beheadings and more unthinkable acts that pose great harm to Americans, especially women.\(^\text{231}\)

Religious minorities in the six Muslim-majority countries, Christians in particular, were not subject to the first executive order, thereby demonstrating that nationality was a proxy for an otherwise religion-based executive order.\(^\text{232}\) Indeed, Trump boasted on the


824
Christian Broadcasting Network on January 27, 2017, that he plans to give priority to Christian refugees. Trump also exempted persons from the seven countries who held dual Israeli citizenship, thereby exempting persons likely to be Jewish from the travel ban.

Moreover, the reference to “honor killings” as a basis for excluding persons from entry was a thinly veiled reference to Muslims. The amended executive order retained the provision instructing the Secretary of Homeland Security to collect and report on “information regarding the number and types of acts of gender-based violence against women, including so-called ‘honor killings,’ in the United States by foreign nationals.” Using a term that perpetuates Orientalist stereotypes of Muslim men as misogynist is further evidence of Trump’s anti-Muslim animus. As Leti Volpp notes, honor crimes “are mistakenly thought to be a uniquely Muslim practice and specific to Muslim communities” and frequently cited by

registry-says-adviser. The executive order prioritized refugee claims for religious minorities from the banned Muslim-majority countries, stating, “[T]he Secretary of State . . . is further directed to make changes . . . to prioritize refugee claims made by individuals on the basis of religious-based persecution, provided that the religion of the individual is a minority religion.” Exec. Order No. 13769, 82 Fed. Reg. 8977, 8979 (Jan. 27, 2017). Trump has previously said in an interview that Christian refugees will be given priority over non-Christian refugees attempting to enter the country, claiming Christians have been “horribly treated.” See Daniel Burke, Trump Says US Will Prioritize Christian Refugees, CNN POL. (Jan. 30, 2017, 11:28 AM), http://www.cnn.com/2017/01/27/politics/trump-christian-refugees/ (quoting Trump in an interview with Christian Broadcasting Network).


235. The “Purpose” section of the executive order states that “the United States should not admit those who engage in acts of bigotry or hatred (including ‘honor’ killings, other forms of violence against women, or the persecution of those who practice religions different from their own) or those who would oppress Americans of any race, gender, or sexual orientation.” Exec. Order No. 13769, 82 Fed. Reg. at 8977 (emphasis added). Section 10 on “Transparency and Data Collection” also mandates the Secretary of Homeland Security to regularly “collect and make publicly available . . . information regarding the number and types of acts of gender-based violence against women, including honor killings, in the United States by foreign nationals.” Id. at 8980–81.


noted islamophobes to vilify Muslims. Finally, the White House issued the first executive order without input from the Department of Justice or relevant national security agencies, thereby undermining its claims that national security informed the executive order.

The disparate impact of a de facto registry on Muslims will inevitably inhibit the practice of Islam, thereby violating the second prong of the *Lemon* test. People would likely hide their Muslim identity, fear attending mosques, fear giving religious tithing, and otherwise change how they practice their faith to avoid stigmatization and unfavorable government attention. A de facto Muslim registry may also affect how Imams manage their mosques to shield their congregants from civil liberties violations. For example, they would likely censor their sermons in ways that are not based on their independent religious judgments but rather fear of government persecution. It may also be more difficult for Muslim American communities to engage in interfaith activities, as people of other faiths may view them as suspect and disloyal. For these reasons, the lower courts granted plaintiffs’ motion for a temporary restraining order.


240. See Sahar F. Aziz, *Policing Terrorists in the Community,* 5 HARV. NAT’L SEC. L.J. 147 (2014) (describing the outcomes of Muslims fearing prosecution); Aziz, *supra* note 28 (same); see also IRAP, 241 F. Supp. 3d 539 at 561–62 (“Courts have recognized that for purposes of an Establishment Clause claim, non-economic, intangible harms to ‘spiritual, value-laden beliefs’ can constitute a particularized injury sufficient to support standing.” (quoting Suhre v. Haywood Cty., 131 F.3d 1083, 1086 (4th Cir. 1997)), aff’d in part, 857 F.3d 554 (4th Cir. 2017); Awad v. Ziriax, 670 F.3d 1111, 1122–23 (10th Cir. 2012) (holding that a Muslim plaintiff residing in Oklahoma suffered a cognizable injury in the form of condemnation of his religion and exposure to “disfavored treatment” based on a voter-approved state constitutional amendment prohibiting Oklahoma state courts from considering Sharia law); Catholic League for Religious & Civil Rights v. City & Cty. of S.F., 624 F.3d 1043, 1048 (9th Cir. 2010) (stating that a “psychological consequence” constitutes a concrete injury where it “is produced by government condemnation of one’s own religion or endorsement of another’s in one’s own community”).

The Muslim ban litigation illustrates that the legality of a prospective Muslim registry depends largely on how the proposal is written and what courts find to be the underlying motivations of the special registration program. Because the plenary power doctrine mandates judicial deference to the executive branch on immigration and courts regularly exercise heightened judicial deference on national security and foreign relations matters, legal disputes will likely center around the extent to which individual rights can be circumscribed in the name of national security, including equal protection rights under the Fifth Amendment. I now explore such claims in more detail.

B. Alienage, Citizenship, and Equal Protection Rights

Noncitizen Muslims in the United States, whether lawfully or unlawfully present, have standing to file constitutional claims. The

242. See Zadvydas v. Davis, 533 U.S. 678, 678 (2001); Fong Yue Ting v. United States, 149 U.S. 698 (1893); Chae Chan Ping v. United States, 130 U.S. 581 (1889); Kiyemba v. Obama, 555 F.3d 1022, 1026 (D.C. Cir. 2009) (stating that the decision on who may be admitted to the United States and what term “has been a matter of political determination by each State-a matter wholly outside the concern and competence of the Judiciary”), vacated, 559 U.S. 131 (2010). But see Holder v. Humanitarian Law Project, 561 U.S. 1, 33–34 (2010) (explaining that, where the Executive had concluded that material support to terrorist organizations “will ultimately inure to the benefit of their criminal, terrorist functions,” the “evaluation of the facts by the Executive . . . is entitled to deference” because it “implicates sensitive and weighty interests of national security and foreign affairs”); N.Y. Times Co. v. United States, 403 U.S. 713 (1971) (rejecting national security arguments to justify government restrictions on the press’s freedom of speech); Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952) (rejecting national security as a basis for taking possession of private property in order to keep labor disputes from stopping production during wartime).

243. Narenji v. Civiletti, 617 F.2d 745, 748 (D.C. Cir. 1980) (“Certainly in a case such as the one presented here it is not the business of courts to pass judgment on the decisions of the President in the field of foreign policy. Judges are not expert in that field and they lack the information necessary for the formation of an opinion. The President on the other hand has the opportunity of knowing the conditions which prevail in foreign countries, he has his confidential sources of information and his agents in the form of diplomatic, consular and other officials.” (citing United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 320 (1936)). But see Kevin R. Johnson, Immigration in the Supreme Court, 2009–13: A New Era of Immigration Law Unexceptionalism, 68 OKLA. L. REV. 57 (2015) (arguing Supreme Court jurisprudence has narrowed the plenary doctrine over the years). See generally Gabriel J. Chin, Segregation’s Last Stronghold: Race Discrimination and the Constitutional Law of Immigration, 46 UCLA L. REV. 1 (1998) (analyzing the modern vitality of the plenary power doctrine). For articles discussing the highly deferential stance of the courts in national security cases, see Robert Chesney, National Security Fact Deference, 95 VA. L. REV. 1361 (2009); Ashley S. Deeks, The Observer Effect: National Security Litigation, Executive Policy Changes, and Judicial Deference, 82 FORDHAM L. REV. 827 (2013).
Supreme Court in *Plyler v. Doe* found that noncitizens in the United States can claim constitutional protection if they are physically present within the boundaries of the country.244 *Plyler* arose when a school in Texas sought to exclude unauthorized immigrant children from attending school pursuant to a Texas law permitting the withholding of state funds from school districts with unauthorized immigrant students.245 The children sought declaratory and injunctive relief.246 Whether the children were subject to the Equal Protection Clause was a threshold issue before the Court.247 Because the Equal Protection Clause provides that no state shall “deny to any person within its jurisdiction” equal protection, the court held the children’s presence in United States gave them standing to bring an equal protection claim.248

The question remains, however, whether the court would find a federal immigration law (as opposed to a state school funding law) in violation of equal protection when balanced against the plenary powers doctrine and judicial deference in national security. Indeed, the Supreme Court has found that constitutional rights do not always apply in the same way for immigrants as they do for citizens.249 Additionally, an equal protection claim requires plaintiffs, regardless of citizenship, to show disparate treatment, or an intent to discriminate based on race, religion, gender, or national origin.250

Targets of a Muslim registry could demonstrate disparate treatment in one of three ways: (1) the program classifies people on the basis of race, religion, or national origin; (2) a facially neutral...
program is applied in an intentionally discriminatory manner; or (3) a facially neutral program is motivated by discriminatory animus and its application produces a discriminatory effect. Though the United States has a history of immigration bans based on national origin, there has yet to be an immigration ban or special registration explicitly based on religion. This is likely because a federal registry of U.S. citizens and noncitizens based solely on religion would run afoul of the First Amendment’s Establishment Clause, as discussed in section V.A.

Under a Fifth Amendment equal protection analysis, religion, like race and national origin, is considered a suspect class, thereby requiring strict scrutiny when determining whether a government action comports with the Constitution. The government would have to prove the action is justified by a compelling government interest and is narrowly tailored to advance that interest. Singling out Muslims en masse for special registration, and by extension mass surveillance, is unlikely to be based on a compelling government interest because not every Muslim is engaged in activity threatening


252. See, e.g., Chae Chan Ping v. United States, 130 U.S. 581 (1889). In Chae Chan Ping, also called the Chinese Exclusion Case, the U.S. Government denied Chinese laborers reentry into the country following the passage of the Scott Act of 1888, which was an addition to the Chinese Exclusion Act of 1882. Id. at 596–99. Those denied entry argued that the Act conflicted with the Burlingame Treaty of 1868, which provided them with licenses to enter the country. Id. at 600. The Court held that foreign treaties cannot affect Congress’ authority, and that Congress can broadly disallow entry into the United States by certain groups of people who may threaten the country. Id. at 609. This decision provides precedent for the Supreme Court’s deference to Congress on immigration decisions and Congress’ broad plenary power over immigration.

253. See The Trump Memos, supra note 53, at 4; see also Reno v. Am.-Arab Anti-Discrimination Comm., 525 U.S. 471 (1999) (stating that deportation may not be based upon an unjustifiable standard such as race or religion).

254. Many courts across the United States have held that religion is a “suspect” class similar to race or national origin in Equal Protection claims. Harbin-Bey v. Rutter, 420 F.3d 571, 576 (6th Cir. 2005) (holding that when a government action “invades a ‘fundamental right,’ such as speech or religious freedom, the law will be sustained only if it is ‘suitably tailored to serve a compelling state interest’”) (quoting City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 440 (1985))); see also City of New Orleans v. Dukes, 427 U.S. 297, 303 (1976); Hassan v. City of New York, 804 F.3d 277, 299 (3d Cir. 2015); Alpha Delta Chi-Delta Chapter v. Reced, 648 F.3d 790, 804 (9th Cir. 2011); Abcarian v. McDonald, 617 F.3d 931, 938 (7th Cir. 2010).
the national security of the United States.\textsuperscript{255} To the contrary, most terrorist attacks in the United States are conducted by members of white supremacist groups, Muslims are within the ranks of law enforcement,\textsuperscript{256} and Muslims have reported suspicious terrorist activity to law enforcement.\textsuperscript{257}

Moreover, sweeping approximately three to six million people into a surveillance dragnet via special registration is not a narrow tailoring of terrorism prevention. Similar to the case of Japanese internment, individuals are presumed suspect based on an immutable characteristic rather than individual culpability or specific behavior. To withstand a strict scrutiny test, the government would have to provide more detailed criteria beyond mere religious affiliation or national origin and prove the criteria is directly tied to specific national security threats.\textsuperscript{258} This is a tall order before a judiciary increasingly skeptical of far-reaching executive action in the name of national security.\textsuperscript{259}

Even if the government can prove a compelling state interest exists, a court is unlikely to accept that a blanket registration of all Muslims—regardless of criminal records, known ties to terrorism, or individualized suspicious behavior—based solely on religion or

---

\textsuperscript{255} The Trump Memos, supra note 53, at 11–12.


\textsuperscript{258} But see Reno v. Am.-Arab Anti-Discrimination Comm., 525 U.S. 471, 491 (1999) (noting that the President is not obligated to disclose his “reasons for deeming nationals of a particular country a special threat . . . and even if [he] did disclose them a court would be ill equipped to determine their authenticity and utterly unable to assess their adequacy”).

national origin is narrowly tailored. 260 For example, in the travel ban cases, the Ninth Circuit noted that “the Order does not tie these nationals in any way to terrorist organizations within the six designated countries. It does not identify these nationals as contributors to active conflict or as those responsible for insecure country conditions.”261 Additionally, the Supreme Court has recognized that “[t]he specific sequence of events leading up to the challenged decision also may shed some light on the decisionmaker’s purposes.”262 A Muslim registry following Trump’s Muslim ban would likely cause further judicial concerns that religious animus, not legitimate national security interests, is the underlying motive.

That said, the government may attempt to rely on the Supreme Court’s rulings in Korematsu and Hirabayashi. 263 Korematsu found national security to be a compelling government interest during World War II when it upheld an executive order detaining and interning Japanese Americans and nationals of Japan solely based on their national origin. 264 Hirabayashi rejected an equal protection claim challenging Congressional action that imposed a curfew on all Japanese nationals and Japanese Americans.265 Of course, the fundamental difference between registration and internment of

260. Similar to an Establishment Clause claim, proving a compelling state interest would require construction and actual interest instead of perceived harm or fear of harm. See Awad v. Ziriax, 670 F.3d 1111, 1120 (10th Cir. 2012). In Awad, the Oklahoma House and Senate passed a resolution forbidding the consideration of Sharia law in Oklahoma courts, and an Oklahoma resident challenged the resolution on Establishment Clause grounds. Id. at 1116–17. The court held that merely speculated or perceived harm did not meet the burden of demonstrating a compelling state interest. Id. at 1130.

261. Hawai’i v. Trump, 859 F.3d 741, 772 (9th Cir. 2017).


263. See generally YAMAMOTO ET AL., supra note 17 (noting that Korematsu continues to be cited by courts in equal protection and national security cases).

264. Korematsu v. United States, 323 U.S. 214, 219 (1944); Fritz Snyder, Overreaction Then (Korematsu), and Now (The Detainee Cases), 2 CRIT. 80, 91 (2009). But see YAMAMOTO ET AL., supra note 17, at 159 (noting that at the black-letter, legal doctrine level, the majority in Korematsu contradicted itself because it stated that strict scrutiny was the standard for racial classifications but found the case was not about race, thereby deferring to the government’s claim of military necessity).

265. Hirabayashi v. United States, 320 U.S. 81, 91 (1943) (noting that “Congress, by the Act of March 21, 1942, ratified and confirmed Executive Order No. 9066” and as such legalized the curfew).
Japanese nationals and Japanese Americans and a prospective Muslim registry of noncitizens and Americans is religion, not national origin, as the identity trait of targeted groups.

Even if a Muslim registry of immigrants is judicially sanctioned, the question remains whether special registration of U.S. citizens is politically and legally plausible.266

V. THE (UN)LIKELIHOOD OF A MUSLIM REGISTRY FOR U.S. CITIZENS

Shortly after the 9/11 terrorist attacks, calls to racially profile and intern Muslims and Arabs circulated among some political circles.267 Another major attack on U.S. soil could prompt similar debates. Proponents of a Muslim registry may seek to broadly define national origin to include naturalized and U.S.-born Americans whose country of origin is a Muslim majority country.268 Pointing to U.S. citizen terrorism suspects such as the Times Square bomber or New York City subway bomber, the government might seek to register all citizens based on ancestry.269 The (mis)treatment of Japanese Americans during World War II is edifying.

Like the registration and internment of Japanese Americans, government officials would have to define national origin broadly to include Americans whose ancestry is from countries with active terrorist activities or whose citizens have engaged in terrorism against


the U.S. On February 19, 1942, President Franklin D. Roosevelt signed Executive Order 9066, authorizing detention of Japanese Americans to designated internment camps. From 1942 to 1946, approximately 120,000 Japanese and Japanese Americans were forced to relocate to camps across the country established by the War Relocation Authority. Not only did they lose their liberty, but they also lost their property and means of livelihood.

Almost two-thirds of the Japanese internees were American citizens, and one-fourth were children and infants. Conditions of the internment camps were inhumane. Many camps were converted livestock areas, with some livestock moved a few days prior to internees’ arrival. Forced to move to the camps without warning, Japanese internees were treated like prisoners, remaining in them for months and, in some cases, years after World War II. Though sympathetic organizations like the American Civil Liberties Union opposed the internments, many Americans supported the order, and no substantial public opposition campaign occurred.

In an act of resistance, twenty-three-year-old Fred Korematsu, an American citizen of Japanese ancestry, remained in his home of San Francisco.

270. Hirabayashi, 320 U.S. at 101 (“The adoption by Government, in the crisis of war and of threatened invasion, of measures for the public safety, based upon the recognition of facts and circumstances which indicate that a group of one national extraction may menace that safety more than others, is not wholly beyond the limits of the Constitution and is not to be condemned merely because in other and in most circumstances racial distinctions are irrelevant.”).
274. Id. at 620.
275. Id. at 621.
276. See WENDY NG, JAPANESE AMERICAN INTERNMENT DURING WORLD WAR II: A HISTORY AND REFERENCE GUIDE 20 (2002); Deborah J. Schildkraut, The Dynamics of Public Opinion on Ethnic Profiling After 9/11: Results from a Survey Experiment, 53 AM. BEHAV. SCIENTIST 61, 64 (2009) (noting that “[a] 1942 survey by the National Opinion Research Center found that 93% of Americans felt that the government was doing the right thing with [Japanese] internment”).
Leandro, California, instead of reporting to his camp location. He was convicted of violating the executive order, which was found to be constitutional because the executive branch had the authority to enact such restrictions when a "pressing public necessity" is present. As a result, the Court denied Korematsu’s request to “reject as unfounded the judgment of the military authorities and of Congress that there were disloyal members of that population . . . [who] could not readily be isolated and separately dealt with, and constituted a menace to the national defense and safety.”

Decades later, a Congressional commission exposed the fallacy of the government’s claim that mass internment was a “military necessity.” The Commission on Wartime Relocation and Internment of Civilians concluded that no evidence supported the claim of military necessity for internment, and that it was instead the result of “race prejudice, war hysteria and a failure of political leadership.” Lower federal courts vacated the convictions of Korematsu and Hirabayashi, another internee, in the 1980s after finding the executive branch intentionally omitted exculpatory evidence from the Supreme Court. The U.S. government subsequently issued a public apology. Despite this, Korematsu has

278. Id.
279. Id. at 218 (quoting Hirabayashi v. United States, 320 U.S. 81, 99 (1943)); see also Yasui v. United States, 320 U.S. 115 (1943) (affirming the validity of exclusion orders against Japanese-Americans).
281. Personal Justice Denied, supra note 280, at 18.
282. Yamamoto et al., supra note 17, at 401; see also Proclamation No. 4417 (repealing Executive Order 9066 that was issued by President Roosevelt to initiate and authorize internment of Japanese citizens and noncitizens).
not been overturned by the Supreme Court or repealed by legislative action. Thus, mass internment of U.S. citizens and noncitizens remains a legal possibility.  

Should the government regress to focusing on ancestry as opposed to nationality as a touchstone for registration, a number of obstacles would stand in the way. Government officials would have to explain why a special registry would not include Americans of European descent in light of Al Qaeda member John Walker Lindh and White supremacist terrorists’ illegal acts. Furthermore, excluding U.S. citizens of Jewish and Christian faith with ancestral origins in Muslim majority countries would expose the religious motivations behind a prospective registry.

Whether the United States is in a state of war and evidence that ancestry makes a person more susceptible to espionage or sabotage were dispositive factors in the Japanese curfew and internment cases. These factors are irrelevant in the contemporary era wherein non-state international terrorists recruit nationals from across the world to attack people of myriad faiths and nationalities. Factually, the government could not prove that millions of Americans are more

---

283. See generally Saito, supra note 225.

284. See, e.g., Narenji v. Civiletti, 617 F.2d 745, 749 (D.C. Cir. 1979) (MacKinnon, J., concurring) (“The status of Iranian aliens cannot be disassociated from their connection with their mother country since the alien ‘leaves outstanding a foreign call on his loyalties which international law not only permits our Government to recognize but commands it to respect.’” (quoting Harisiades v. Shaughnessy, 342 U.S. 580, 585–86 (1951))).


likely to become terrorists on account of their ancestry. Indeed, courts noted in the Muslim ban cases the government’s findings that nationality, much less ancestry, are not reliable indicators of terrorist membership.\footnote{See \textit{generally} U.S. Dep’t of Homeland Sec., Citizenship Likely An Unreliable Indicator of Terrorist Threat to the United States, https://assets.documentcloud.org/documents/3474730/DHS-intelligence-document-on-President-Donald.pdf; Alex Nowrasteh, \textit{Terrorism and Immigration: A Risk Analysis}, POL’Y ANALYSIS, Sept. 13, 2016, at 1, https://object.cato.org/sites/cato.org/files/pubs/pdf/pa798_2.pdf.} Unless the courts accept racist notions that certain groups are categorically more prone to criminal activity than others, the government would have to find more particularized proof that a U.S. citizen whose ancestors are from a certain country is a national security risk.

Finally, in contrast to the 1940s, the legal authority for internment of U.S. citizens must now come from Congress, not the executive branch. In 1971, Congress enacted 18 U.S.C. § 4001(a), providing that “[n]o citizen shall be . . . detained by the United States except pursuant to an Act of Congress.”\footnote{18 U.S.C. § 4001(a) (2012).} Although this makes it less likely that American Muslims will be subjected to mass internment, the statute does not offer the same protections to immigrant and nonimmigrant Muslims in the United States.

\section*{Conclusion}

Examining the legality of a Muslim registry is not merely an academic exercise. The alarming rise in anti-Muslim bias since the 9/11 terrorist attacks contributed to the travel ban issued by the Trump administration.\footnote{See \textit{generally} Brian Levin, CTR. FOR THE STUDY OF HATE \& EXTREMISM, HATE CRIME IN THE UNITED STATES: 20 STATE COMPILATION OF OFFICIAL DATA (Kevin Grisham ed., 2016); \textit{Anti-Muslim}, S. POVERTY L. CTR., https://www.splcenter.org/fighting-hate/extremist-files/ideology/anti-muslim (noting a 197% increase in the total number of anti-Muslim hate groups up from 2015) (last visited Dec. 26, 2017); Katayoun Kishi, \textit{Anti-Muslim Assaults Reach 9/11-Era Levels, FBI Data Show}, PEW RES. CTR., (Nov. 21, 2016), http://www.pewresearch.org/fact-tank/2016/11/21/anti-muslim-assaults-reach-911-era-levels-fbi-data-show/. See \textit{generally} Cynthia Lee, \textit{Hate Crimes and the War on Terror} (George Washington Univ. Legal Studies Research Paper No. 442, 2008) (describing both public and private hate crimes committed after 9/11).} Despite candidate Trump’s multiple statements of his intent to bar Muslims from the United States, many Americans were surprised by his sweeping executive order issued days after he took office. The xenophobic campaign rhetoric had translated

into national policy. For this reason, the grassroots protests and litigation in the courts were an organic reaction, and one that arguably affected judges’ refusal to enforce the executive order.

Although litigation reigned in the scope of the third amended executive order, the Muslim Ban was the rare occasion when courts refused to grant the executive heightened judicial deference in national security cases. That Trump’s anti-Muslim animus was so explicit distinguished his actions from preceding presidents, giving plaintiffs an advantage in court. The same animus is likely to lead to further government action infringing on the rights of Muslims, including through a Muslim registry. Even though the Trump administration bolstered references to national security and added North Korea and Venezuelan diplomats in the third version of the Muslim ban, the change in language does not reflect a change in motives.

Trump still believes terrorism is exclusively a Muslim problem. His anti-Muslim tweets as President show he has not had a sudden change of heart when it comes to his distrust of Muslims. For example, on August 17, 2017, Trump tweeted after a terrorist attack in Barcelona, Spain that people should “study what Gen. Pershing of the United States did to terrorists when caught. There was no more Radical Islamic Terror for 35 years.” He was referring to a false story claiming that Pershing stopped terrorism in the Philippines by shooting Muslim insurgents with bullets dipped in pigs’ blood. His message was clear: kill, expel and bar Muslims from your country if you want to be safe. Similarly, on November 29, 2017, President Trump re-tweeted three inflammatory videos by a far-right anti-Muslim British group. To his 43 million followers, he imprinted his presidential stamp of approval for “VIDEO: Islamist mob pushes teenage boy off roof and beats him to death!”; “VIDEO: Muslim Destroys a Statue of Virgin Mary!”; and “VIDEO: Muslim migrant beats up Dutch boy on crutches!”

In light of these communications directly from the President of the United States, the government will face significant evidentiary hurdles in proving a counterterrorism registry targeting persons based on their Muslim faith is rationally related or narrowly tailored to

---

protect national security. Likewise, a de facto Muslim registry targeting certain immigrants will not find support in the facts. By its own admission, the government cannot find a relationship between terrorism and national origin. Nor can it prove that certain factors predict a person’s engagement in terrorism.

Nevertheless, opposition to racialized counterterrorism programs including a Muslim registry cannot be resolved only in a court of law. To the contrary, the court of public opinion significantly affects the Executive’s stance on addressing violence. Indeed, it is no coincidence that over half of Trump’s supporters view Muslims as terrorists and per se threats to national security; and as a result, he is emboldened to issue travel bans dripping with religious animus. All the while, violence committed by White supremacists and mass shootings by white males is treated as an acceptable price for freedom of speech and the right to bear arms. Whites as a group are not treated as a threat to public safety. Such contradictions in the exercise of state power are all the more reason for civil rights and liberties advocates to anticipate further anti-Muslim programs should another major terrorist attack on U.S. soil occur by a self-described Muslim.

Invidious special registration programs not only impose dignitary harms arising from stigmatization, but also set the stage for internment. The registration records of hundreds of thousands of people facilitates a government internment program that will predictably be demanded by growing chorus of right wing politicians and extremist organizations. Though many Americans would like to believe such possibilities are unduly alarmist, the Muslim ban cases have shown that what we once believed was farfetched is now plausible.

292. Sean McElwee & Philip Cohen, The Secret to Trump’s Success: New Research Sheds Light on the GOP Front-Runner’s Stunning Staying Power, SALON (Mar. 18, 2016, 10:34 AM), https://www.salon.com/2016/03/18/the_secret_to_trumps_success_new_research_sheds_light_on_the_gop_frontrunners_stunning_staying_power/ (showing that over 40% of Trump supporters believe that “violent” describes Muslims extremely well, and 18% believe it describes Muslims very well).