How the Supreme Court Avoided a Disaster with the Trump Travel Ban

Coming close to the end of its term, and not long before the announcement of Justice Kennedy's retirement, the Supreme Court's decision to uphold the constitutionality of President Trump's travel ban, *Trump v. Hawaii*, has all-but been eclipsed. But the Court's constitutional ruling was exceptionally important and deserves closer attention. The Court's narrow majority staved off a holding that could well have done severe damage to the foreign policy not only of this Administration, but of future ones.

The Trump travel ban placed restrictions on the entry into the U.S. of nationals of eight countries – most but not all of them Muslim-majority states – whose governments had inadequate systems for informing the U.S. about the risk level of their nationals. The President's order sought to improve the vetting procedures for admission into the U.S. by identifying flaws in managing and sharing information about foreign nationals to determine whether they posed threats to our public safety.

Working together, the Department of Homeland Security and the State Department came up with a list of eight countries that were deficient in terms of their risk profile and their willingness to provide the U.S. with information we requested. The order imposed a variety of restrictions on the entrance of nationals from those countries. The restrictions were customized to the different situations in each of the countries: for example, Iranians seeking non-immigrant student visas or exchange-visitor visas were not excluded. The order also provided for case-by-case waivers where foreign nationals of a listed country could show that they would suffer undue

hardship from exclusion and did not pose a security threat.

Significantly, the list was subject to periodic review and revision. Thus, if a listed country could demonstrate that it had sufficiently improved its practices, it would be delisted. One country – the Muslim nation of Chad – eventually was delisted because it had made sufficient improvements. Listing a country, therefore, was effectively a tool to motivate its government to upgrade its risk-assessment system.

Most Muslim countries (including those with large populations, such as Indonesia, Egypt and Turkey) were not listed. After being provisionally included, Iraq did not appear on the final list, on the recommendation of the State Department. Two non-Muslim countries – North Korea and Venezuela – were on the final list. The war-torn nations of Syria, Yemen, and Libya were listed, along with Iran, whose regime is hostile to the U.S.

The constitutional challenge to the travel ban was based on the Establishment Clause of the First Amendment. The Establishment Clause states that "Congress shall make no law respecting an establishment of religion." The challenge to the ban was therefore that by suspending the admission of foreign nationals (Muslim or non-Muslim) from six Muslim-majority (and two other) countries, unless and until their governments had upgraded their risk-assessment techniques or demonstrated a willingness to co-operate with the U.S., the President had "established" a religion.

If that claim strikes the reader as absurd, that is because it *is* absurd.

The Establishment Clause was directed against the possibility that the (then new) federal government might "establish" a national church along the lines of the (established) Church of England (or Anglican Church). "Established" churches were familiar to the Framers, and in the late 18thcentury several of

our States had them.

An "established" national Church like the Church of England was subject to government control and regulation in important ways. The government might prescribe the text of its sacred scriptures (such as the Authorized or King James Version of the Bible) or its ritual (as with the Book of Common Prayer). Or the government could appoint high-ranking clergy. An "established" Church would also enjoy certain legal privileges: for example, a contingent of Anglican bishops sat in the House of Lords, the upper chamber of Parliament. And taxes might be imposed on non-Anglicans to pay stipends for Anglican ministers and maintain Anglican churches.

If Congress "established" a particular denomination, therefore, it might impose taxes or exercise coercive power on behalf of that Church. Even apart from the Church of England, the Framers had an example of this before their eyes. In 1774, the British Parliament had passed the "Quebec Act," as a punishment for the Boston Tea Party. The Quebec Act affirmed the power of the Roman Catholic Church to collect "tithes" (in effect, to tax) in that province. The American reaction to this measure was intense. The first Continental Congress petitioned Parliament to repeal the Act – which it refused to do. Hostility to the Quebec Act was one of the causes of the Revolutionary War.

It should be obvious both from the language of the Establishment Clause and from its original purpose that it is designed to prevent the establishment of a *national* church, like the Anglican Church in England or the Roman Catholic Church in Quebec. Our Supreme Court has also construed it to preclude the establishment of churches in the States. But the Clause has essentially *nothing* to do with the activities of the President or Congress in the *international* arena. It was certainly not intended to preclude the federal government from using its leverage over the entry of foreign nationals to

motivate foreign governments to upgrade their intelligence gathering and sharing practices.

Moreover, the Supreme Court has never held that the Establishment Clause applies to our government's interactions with foreign governments. If the Court had so held in *Trump v. Hawaii,* that would have been a decisive – and clearly erroneous – innovation.

The truth is that our government can, and on occasion must, take account of religion in matters of foreign policy and national security – and thus in immigration, which is closely interwoven with both. President Bill Clinton's military intervention to protect the ethnic Albanian Muslims in Kosovo from their Christian Serb oppressors was probably intended, in part, to improve the U.S.' image in the Muslim world. There was nothing wrong – let alone *unconstitutional*– with a foreign policy objective of that kind.

Less defensible, but still *constitutional,* was the Obama Administration's long-held (but finally revoked) policy of discriminating against Near Eastern Christian victims of ISIS while preferring the claims of the Yazids, a small minority faith in the region.

Going further back, President Martin Van Buren intervened with the Ottoman rulers of Syria in 1840 on behalf of the Jewish population of Damascus, which was at risk because of a "blood libel" originally brought by a Roman Catholic order of monks. Was Van Buren unconstitutionally "establishing" Judaism over Catholicism in Ottoman Syria?

In the circumstances of the U.S.' conflict with radical Islamists, the question whether the Establishment Clause constrains Presidential action in foreign and military affairs is a vital one. For example, can Congress constitutionally fund radio broadcasts and social media messaging that employed mainstream Muslim clergy to attack the Islamic credentials of ISIS? One would think, and hope, so.

In *Trump v. Hawaii,* dissenting Justice Sotomayor and Ginsburg barely glanced at the difficulties in their blithe assumption that the Establishment Clause applied to, and invalidated, the President's order. Sotomayor devoted a mere footnote to the question. Grudgingly, she seemed to acknowledge that "there is no prior [Supreme Court] case on point." Nonetheless, she insisted that the Establishment Clause applies sweepingly even to "immigration policies, diplomatic sanctions, and military actions." To get that result, she deployed a broad-gaged interpretation of the Establishment Clause that understood it as an all-purpose barrier to *any* kind of governmental discrimination on the basis of religion *anywhere* in the world. Yet, in nasty fashion, she accused the Court's majority of "throw[ing] the Establishment Clause out the window."

The application of the Establishment Clause to foreign policy, military action overseas, intelligence activities abroad and immigration from States with high-risk profiles was an overridingly important issue in the travel ban case. Yet the issue was also a sleeper, dismissed by the dissent in a poorly reasoned footnote. Let us be grateful that the Court's majority avoided a constitutional disaster.

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