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Donald Trump's 'travel ban' is still a 'Muslim ban' no matter what the Supreme Court ruled

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There are none so blind as they who choose not to see. That saying captures the grave error the Supreme Court made in Tuesday's travel ban decision. In a 5-4 ruling written by Chief Justice John Roberts, the justices largely upheld President Donald Trump's "proclamation" banning nearly all entry into the United States by citizens of five Muslim-majority nations.

They did so even though, during the 2016 campaign, Trump repeatedly called for a "Muslim ban" forbidding Muslims from entering the United States. When he later switched to a "territorial" ban focusing on Muslim-majority nations, he repeatedly equated this new approach with his original policy, and even called it an "expansion" of the earlier Muslim ban.

The overwhelming majority of the people barred by the "proclamation" are Muslim, and there is little if any evidence indicating that their exclusion protects national security. Over the past 40 years, the number of people killed in terrorist attacks on U.S. soil by entrants from any of the five nations is zero. On average, they probably pose less risk than even native-born Americans.

The religious discrimination is clear

In any other circumstance, such clear and overwhelming evidence of discriminatory motive, combined with the absence of legitimate justifications, would be a violation of the First Amendment, which bans government policies that discriminate on the basis of religion. The court has repeatedly ruled that evidence of discriminatory motive targeting people on the basis of race, ethnicity or religion can invalidate even a seemingly "neutral" policy that does not explicitly mention the forbidden classification, unless the government can prove it would have adopted the same policy for legitimate reasons.

Just three weeks ago, in the Masterpiece Cakeshop case, the court invalidated a judgment against a baker who had violated state anti-discrimination laws by refusing to provide a cake for a same-sex wedding, on the grounds that two of seven members of a state agency that reviewed his case expressed hostility to his religious beliefs.

The evidence of bigoted motivation in the travel ban case is far stronger.

Chief Justice Roberts' opinion cites Trump's statements, and assumes that they are relevant evidence. Nonetheless, he essentially ignores their impact by ruling that legal challenges to presidential decisions on immigration policy are subject only to minimal "rational basis" review that can be satisfied so long as there is a plausible basis for the policy.

This approach comes close to gutting the Bill of Rights as a constraint on presidential power over immigration. Almost any discriminatory exclusion can be justified on the theory that the people barred pose some sort of threat, especially if the courts refuse to consider the quality of the evidence that supposedly justifies such claims.

The Constitution protects noncitizens' rights

Nothing in the Constitution justifies such near total exclusion of immigration policy from the constraints of the First Amendment. Like most of the rest of the Bill of Rights, the amendment is phrased as a general constraint on government power, not one limited to particular types of policies, or protecting only a specific group of people, such as citizens of the United States. The Founding generation recognized this, which is why they applied the Bill of Rights even to pirates captured at sea, regardless of whether they were American citizens or not.

It is true that immigration and national security policy involve issues on which the executive has greater expertise than the courts. But the same can be said of many other policies covered by the Bill of Rights, including those involving internal violence and terrorism. And even if executive expertise on national security is normally due deference, that should not apply in a case where there is overwhelming evidence that security is not the true purpose of the government's policy.

Roberts endorses the government's claim that the travel ban is based on a "worldwide review process." But that supposedly thorough review produced a cursory report only 17 pages long, and the resulting proclamation does not even consistently apply the report's supposed "information-sharing" criteria for determining which nations should be subject to a travel ban and which should not.

The territorial approach is still discriminatory

The majority also emphasizes that the travel ban does not cover all the Muslims in the world. But that does not change the fact that those countries it does cover were barred because the vast majority are Muslim. Imagine a head of a government agency who repeatedly states that he wants a ban on hiring African-Americans. He adopts a "territorial" approach that bars the hiring of residents of five majority-black neighborhoods, but emphasizes that the new policy is essentially similar to the old. There is little doubt that this territorial hiring ban would be unconstitutional, even if it does not exclude all black applicants.

In one of the few bright spots in Tuesday's decision, the court overrules Korematsu v. United States, the notorious 1944 ruling in which the court used deference to the executive to uphold the cruel policy of interning thousands of Japanese-Americans who posed no real security threat

during World War II. But even as it rejected one decision that immunized discriminatory policies from effective review, the court established another that has the same terrible flaw.

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