

# The Muslim Ban Cases: A Lost Opportunity for the Court and a Lesson for the Future

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*On January 27, 2017, newly inaugurated President Donald Trump signed an Executive Order that banned individuals from certain Muslim-majority countries from entry into the United States. The district and circuit courts' subsequent refusals to sanction the Muslim Bans offered hope to those who recognized the bans as part of a legacy of racist and Islamophobic lawmaking, and suggested that the new Trump administration could not expect to implement its policy objectives free from judicial scrutiny. The lower courts, however, revealed significant blind spots in their reasoning when they limited their focus to analyzing Trump's public statements that the purpose of the ban was to exclude Muslims.*

*The Supreme Court compounded these errors when it ignored these public statements altogether in its extraordinarily deferential review of the Executive's action. Through its acquiescence, the Supreme Court accepted the construction of Muslims as a threat to national security. Trump's bans provided the Court with a critical opportunity to correct basic distortions in race and immigration law doctrine, the specters of which continue to haunt the justice system. They also provided an opportunity for the Court to mature in its institutional role by recognizing and repudiating past errors and setting the terms for guarding against current and future failures.*

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*The courts have a duty to protect “discrete and insular minorities.” Rather than paralyzing the courts, the fluidity of this category should provide courts with an opportunity for meaningful analysis of the social factors that influence executive and legislative actions. Courts can use this fluidity to course-correct and fulfill their institutional responsibility to prevent unconstitutional action arising from racial fear and mass panic.*

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#### INTRODUCTION

On January 27, 2017, one week after taking the oath of office, President Donald Trump signed Executive Order 13769, “Protecting the Nation from Foreign Terrorist Entry Into the United States” (EO-1 or First Executive Order).<sup>1</sup> The First Executive Order had the stated purpose of “Protect[ing] the American people from terrorist attacks by foreign nationals.”<sup>2</sup> In order to protect

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1. Exec. Order No. 13769, Protecting the Nation from Foreign Terrorist Entry into the United States, 82 Fed. Reg. 8977 (Jan. 27, 2017) [hereinafter Exec. Order No. 13769].

2. *Id.*

Americans, the United States must ensure that it does not admit foreign nationals who “bear hostile attitudes” toward the nation and its Constitution, who would “place violent ideologies over American law,” or who “engage in acts of bigotry or hatred,” such as “‘honor’ killings.”<sup>3</sup> Just before signing EO-1, President Trump stated, “[T]his is the ‘Protection of the Nation from Foreign Terrorist Entry Into the United States.’ We all know what that means.”<sup>4</sup>

Federal district courts in Washington, Maryland, and Hawai‘i enjoined the implementation of this order and subsequent versions of the order that followed, finding them unlikely to withstand legal scrutiny. As explicit evidence that the bans were inspired by racial animus and thus invalid, the district courts pointed to the numerous anti-Muslim statements made by Trump and his associates when describing the inspiration behind the ban. Many Americans celebrated as the federal courts restrained the unlawfulness of the Trump administration. Indeed, there was much to celebrate. Those who felt that the new administration did not represent their values took to the streets and airports, decrying blatant Islamophobia and vocally committing to welcoming refugees and immigrants to the United States.

The district and circuit courts’ refusal to sanction the Muslim Bans offered hope to those who recognized the bans as part of a legacy of racist and Islamophobic lawmaking, and suggested that the new administration could not expect to implement its policy objectives free from judicial scrutiny. By limiting the focus of the analysis to Trump’s public statements, however, in which he declared outright that the purpose of the travel ban orders was in fact to exclude Muslims, the courts reveal significant blind spots in their reasoning. These blind spots are a result of a long legacy of racial animus underpinning legal decision-making in the United States.

When the Trump administration appealed the injunctions against the ban to the Supreme Court, a majority of the Justices largely ignored Trump’s statements of intent altogether, instead extending overwhelming deference to the executive’s unilateral determination that travelers from mostly Muslim-majority countries constituted a threat to national security. But looking behind the facial neutrality of the text of Trump’s orders demands cognizance of the broader context in which they arose, in which racial bias and prejudice against Muslims has long been a feature of exclusionary legislation in the United States.

Trump’s bans provided the courts with a chance to correct basic distortions in racial doctrine and immigration doctrine, the specters of which continue to haunt the justice system. The Muslim Bans also provided an opportunity for the court to mature in its institutional role by recognizing and repudiating past errors

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3. *Id.* at 8977; see also Leti Volpp, *Protecting the Nation from ‘Honor Killings’: The Construction of a Problem*, 34 CONSTITUTIONAL COMMENTARY 133 (2019).

4. Matt Shuham, *Trump Signs Executive Order Laying Out ‘Extreme Vetting,’* TALKING POINTS MEMO (Jan. 27, 2017), <https://talkingpointsmemo.com/livewire/trump-signs-vetting-executive-order> [<https://perma.cc/U2BS-S6ZC>].

and setting the terms for guarding against failures to protect minorities from discriminatory government action. Despite the counter-majoritarian role that the courts might hold, courts are ultimately constrained by majoritarian politics.<sup>5</sup> The Muslim Ban executive orders did not arise in a vacuum, and the judicial decision upholding them perpetuates the pattern of using national security as an excuse to discriminate against minorities. The nation has seen this before, in *Chae Chan Ping v. United States* and *Korematsu v. United States*. Unlike in those cases, however, the Muslim Bans were not enacted after a recent attack on American soil, providing the courts with a wider window of opportunity to excise the demons of racism from legal doctrine.

Part I will discuss Trump's Executive Orders banning the admission of travelers from Muslim-majority countries and the ways in which the lower courts adjudicating the cases defined the scope of their inquiry into discriminatory intent. This will include discussion of how the lower courts responded to the Government's invocation of national security as a justification for the deprivation of constitutional rights. Part II will examine the history of anti-Muslim hostility in the United States and the ways in which the Muslim Bans are part of a pattern of American Islamophobia. Part III will reconsider the Muslim Ban cases and examine their limitations with respect to intent doctrine and immigration doctrine in greater detail. Part IV will discuss the partial autonomy of the courts as counter-majoritarian institutions and their failure to guard racial minorities against majoritarian prejudice. Finally, the closing Part will develop an aspirational theory of the Court and argue that the courts should seize upon the present political moment to repudiate past failed doctrines and defend against current and future racism.

## I.

### MUSLIM BAN CASES

#### *A. The First Executive Order*

The story of the Muslim Bans begins well before their implementation in 2017. On December 7, 2015, six months after obtaining the Republican nomination for president, then-candidate Donald Trump published a "statement on Preventing Muslim Immigration" on his campaign website, in which he proposed "a total and complete shutdown of Muslims entering the United States until our country's representatives can figure out what is going on."<sup>6</sup> In an

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5. See generally JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* (1980).

6. Trump's "Statement on Preventing Muslim Immigration" reads in full: (New York, NY) December 7<sup>th</sup>, 2015, -- 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

interview with CNN in March 2016, Trump stated, “I think Islam hates us,” and “[w]e can’t allow people coming into this country who have this hatred.”<sup>7</sup> Later that month, in an interview with Fox Business television, Trump reiterated his call for a ban on Muslim immigration writ large, stating, “we’re having problems with the Muslims, and we’re having problems with Muslims coming into the country.”<sup>8</sup>

Amid a chorus of voices pointing out that a ban on Muslims likely violated the Constitution, Trump later attempted to re-characterize his ban as one on nationals from certain countries or territories. On July 17, 2016, Trump was asked about a tweet, “Calls to ban Muslims from entering the U.S. are offensive and unconstitutional.”<sup>9</sup> Unmoved, Trump answered, “So you call it territories. OK? We’re gonna do territories.”<sup>10</sup> He echoed this statement a week later in an interview with NBC’s Meet the Press. When asked whether he had “pulled back” on his “Muslim Ban,” Trump replied, “[w]e must immediately suspend immigration from any nation that has been compromised by terrorism until such

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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 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.

Mr. Trump stated, “Without looking at the various polling data, it is obvious to anybody the hatred is beyond comprehension. Where this hatred comes from and why we will have to determine. Until we are able to determine and understand this problem and the dangerous threat it poses, our country cannot be the victims of the horrendous attacks by people that believe only in Jihad and have no sense of reason or respect of human life. If I win the election for President, we are going to Make America Great Again. – Donald J. Trump.

Christine Wang, *Trump Website Takes Down Muslim Ban Statement After Reporter Grills Spicer in Briefing*, CNBC (May 8, 2017), <https://www.cnbc.com/2017/05/08/trump-website-takes-down-muslim-ban-statement-after-reporter-grills-spicer-in-briefing.html> [<https://perma.cc/A8SC-FPH7>].

When an injunction was sought against the ban in the district court in Maryland, it noted that as of February 12, 2017, this statement remained on Trump’s campaign website. The statement was subsequently removed shortly before the May 8, 2017, oral argument before the Fourth Circuit Court of Appeals. Fred Barbash, *Muslim Ban Language Suddenly Disappears from Trump Campaign Website after Spicer Questioned*, WASH. POST (May 9, 2017), <https://www.washingtonpost.com/news/morning-mix/wp/2017/05/09/trumps-preventing-muslim-immigration-vow-disappears-from-campaign-website-after-spicer-questioned> [<https://perma.cc/FCL4-DZPY>].

7. Theodor Schleifer, *Donald Trump: ‘I Think Islam Hates Us’*, CNN (Mar. 10, 2016), <https://www.cnn.com/2016/03/09/politics/donald-trump-islam-hates-us/index.html> [<https://perma.cc/DLAU-KC3E>].

8. Matthew Wisner, *Donald Trump Calls for End of Visa Waiver Program*, FOX BUS., (Mar. 22, 2016), <https://www.foxbusiness.com/politics/donald-trump-calls-for-end-of-visa-waiver-program> [<https://perma.cc/QZL5-SWL3>].

9. Ruth McCambridge, *Appeals Court Retains Injunction on Temporary Travel Ban—and You Should Read the Decision*, NONPROFIT Q. (May 26, 2017), <https://nonprofitquarterly.org/appeals-court-retains-injunction-temporary-travel-ban-read-decision> [<https://perma.cc/PYT5-HQWG>].

10. Lesley Stahl, *The Republican Ticket: Trump and Pence*, CBS NEWS (July 17, 2016), <https://www.cbsnews.com/news/60-minutes-trump-pence-republican-ticket> [<https://perma.cc/XCU2-D22H>].

time as proven vetting mechanisms have been put in place.”<sup>11</sup> Adding that he considered the ban’s reincarnation as an “expansion,” Trump publicly acknowledged the religious targeting motivating the ban and explained his reason for reconstituting the language of the executive order: “People were so upset when I used the word Muslim. . . . And I’m okay with that, because I’m talking territory instead of Muslim.”<sup>12</sup> Finally, Trump conceded that the U.S. Constitution provides for protection from religious discrimination, but noted he “view[s] it differently.”<sup>13</sup>

Through the First Executive Order (“EO-1”), the President immediately suspended the immigrant and non-immigrant entry of foreign aliens from seven Muslim-majority countries for ninety days: Iraq, Iran, Libya, Somalia, Sudan, Syria, and Yemen.<sup>14</sup> EO-1 also placed several constraints on the admission of refugees into the country, reducing the number of refugees to be admitted in fiscal year 2017 from 110,000 to 50,000, barring indefinitely the admission of Syrian refugees and ordering the Secretary of State to suspend the United States Refugee Admissions Program (USRAP) for 120 days.<sup>15</sup> Notably, while imposing a ban on immigration from seven Muslim-majority countries, EO-1 simultaneously established preferential treatment for refugees from “minority religion[s]” in their country of origin.<sup>16</sup> Making no attempt to minimize the exclusionary significance of this legislation, Trump explained that the preferential treatment provision was indeed intended to prioritize Christians.<sup>17</sup>

The day after EO-1 was signed, former New York City Mayor and presidential advisor Rudolph Giuliani appeared on Fox News. When Giuliani was asked, “How did the President decide the seven countries?”<sup>18</sup> he answered candidly: “I’ll tell you the whole history of it. So when [the President] first announced it, he said, ‘Muslim Ban.’ He called me up. He said, ‘Put a

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11. *Meet the Press*, NBC NEWS (July 24, 2016), <https://www.nbcnews.com/meet-the-press/meet-press-july-24-2016-n615706> [https://perma.cc/FPY6-EP7L].

12. *Id.*

13. *Id.*

14. According to the Pew Research Center, Iraq’s population is 99% Muslim, Iran’s is 99.5%, Libya’s is 96.6%, Sudan’s is 90.7%, Somalia is 99.8%, Syria’s is 92.8%, and Yemen’s is 99.1%. *See* PEW RES. CTR., THE GLOBAL RELIGIOUS LANDSCAPE 45–50 (2012), <https://assets.pewresearch.org/wp-content/uploads/sites/11/2014/01/global-religion-full.pdf> [https://perma.cc/549P-QJLF].

15. Exec. Order No. 13769, 82 Fed. Reg. 8977, 8979, § 5(a)–(d) (Jan. 27, 2017); U.S. DEP’T OF STATE ET AL., PROPOSED REFUGEE ADMISSIONS FOR FISCAL YEAR 2017 (2016) <https://2009-2017.state.gov/j/prm/releases/docsforcongress/261956.htm> [https://perma.cc/2LPT-UTYR].

16. Exec. Order No. 13769, 82 Fed. Reg. at 8979, § 5(b).

17. *President Trump Says Persecuted Christians Will Be Given Priority as Refugees*, CBN NEWS (Jan. 7, 2017), <https://www.youtube.com/watch?v=yDQxTL0GNvg&feature=youtu.be&a=> [https://perma.cc/5MV3-FFVY].

18. Amy B. Wang, *Trump Asked for a ‘Muslim Ban,’ Giuliani Says — and Ordered a Commission to do it ‘Legally’*, WASH. POST (Jan. 29, 2017), <https://www.washingtonpost.com/news/the-fix/wp/2017/01/29/trump-asked-for-a-muslim-ban-giuliani-says-and-ordered-a-commission-to-do-it-legally> [https://perma.cc/4WZ7-DAV7].

commission together. Show me the right way to do it legally.”<sup>19</sup> Giuliani said he assembled a team of “expert lawyers” that “focused on, instead of religion, *danger* – the areas of the world that create danger for us . . . It’s based on places where there [is] substantial evidence that people are sending terrorists into our country.”<sup>20</sup>

The administration’s rhetoric made the true anti-Muslim motivations underlying the travel bans abundantly clear and many members of the public reacted with accordant outrage. People protested in the streets, condemning Islamophobia. Money poured into organizations like the American Civil Liberties Union, which quickly emerged as a leader in the legal fight against the bans.<sup>21</sup> When the courts enjoined substantial sections of the orders, anti-ban Americans celebrated the institution of the court on a scale rarely previously seen, casting the courts as the victor in a moral triumph against the xenophobic executive, and lauding its potential to protect what they understood to be American values, or at least to enjoin overt discrimination against Muslims for the sole reason of their religious identity.

### B. *The Courts’ Response and the Second Executive Order*

On February 3, 2017, Judge James L. Robart in the Western District of Washington granted a Temporary Restraining Order (TRO) enjoining the enforcement of the main sections of EO-1 nationwide.<sup>22</sup> The Ninth Circuit subsequently denied the Government’s request to stay the TRO pending appeal and declined to “rewrite” EO-1 by narrowing the TRO’s scope, noting that this was a task better suited to the “political branches.”<sup>23</sup> In an effort to avoid further litigation on EO-1, the President enacted a second order (EO-2 or Second Executive Order) on March 6, 2017.<sup>24</sup> The second order revoked and replaced the first.<sup>25</sup>

The Second Executive Order, “Temporary Suspension of Entry for Nationals of Countries of Particular Concern During Review Period,” reinstated the ninety-day suspension of nationals from Iran, Libya, Somalia, Sudan, Syria, and Yemen, but eliminated Iraq from the list.<sup>26</sup> The President declared that the “unrestricted entry” of nationals from these countries was “detrimental to the interests of the United States.”<sup>27</sup> According to EO-2, “[s]ince 2001, hundreds of

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19. *Id.*

20. *Id.*

21. Brian Stelter, *ACLU Racks up \$24.1 Million in Donations Over Weekend*, CNN (Jan. 30, 2017), <https://money.cnn.com/2017/01/30/news/aclu-online-donations/index.html> [https://perma.cc/4YAC-D33A].

22. *See* *Washington v. Trump*, No. C17-0141JLR, 2017 WL 462040, at \*2 (W.D. Wash. 2017).

23. *Washington v. Trump*, 847 F.3d 1151, 1167 (9th Cir. 2017).

24. Exec. Order No. 13780, *Protecting the Nation from Foreign Terrorist Entry into the United States*, 82 Fed. Reg. 13209 (Mar. 6, 2017) [hereinafter Exec. Order No. 13780].

25. *Id.* at 13212, § 1(i).

26. *Id.* at 13213, § 2(c).

27. *Id.*

persons born abroad have been convicted of terrorism-related crimes in the United States.”<sup>28</sup> Two examples were offered: a pair of Iraqi refugees were convicted of terrorism-related offenses in January 2013, and a naturalized citizen who came to the United States as a child refugee from Somalia was sentenced for terrorism-related offenses in October 2014.<sup>29</sup> EO-2 contained no examples of individuals from Iran, Libya, Sudan, Syria, or Yemen committing terrorism-related offenses in the United States.

With regards to its refugee provisions, EO-2 also suspended the United States Refugee Admissions Program (USRAP) for 120 days and decreased the number of admissions for 2017. The new version did not include the indefinite ban on Syrian refugees and notably eliminated the earlier provision that mandated preferential treatment of religious minorities seeking refugee status.<sup>30</sup> This lack of consideration for the religious background of refugees could be seen as a way for the Trump administration to avoid challenges under the Establishment Clause, which forbids governments from preferring one religion over another. While the court reserved consideration of the states’ Establishment Clause claims, the original complaint had alleged the order was designed to “disfavor Islam and give preference to Christianity.”<sup>31</sup>

After EO-2, states filed additional challenges against the ban. The courts responded again, with district court judges in Hawai‘i and Maryland blocking parts of the travel ban after finding that the plaintiffs who brought suit were likely to succeed on their claims that the order exceeded the scope of the President’s authority delegated by Congress, contravened the Immigration and Nationality Act (INA) prohibition on nationality-based discrimination, and violated the Establishment Clause by singling out members of a particular religion as the target of exclusion.<sup>32</sup> In May, the Fourth Circuit affirmed the Maryland court’s decision in substantial part, upholding the issuance of a nationwide preliminary injunction against the Second Executive Order.<sup>33</sup> In parallel litigation, the Ninth Circuit also refused to reinstate the travel ban.<sup>34</sup>

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28. *Id.* at 13212, § 1(h).

29. *Id.*

30. See also *Trump’s Executive Order: Who Does Travel Ban Affect?*, BBC NEWS (Feb. 10, 2017), <https://www.bbc.com/news/world-us-canada-38781302> [<https://perma.cc/G8MT-YBPQ>] (“While announcing the plan, Mr. Trump cited the attacks of 11 September 2001. But none of the 19 hijackers who committed the attacks came from countries included in the suspension. They were from Saudi Arabia, the United Arab Emirates (UAE), Egypt and Lebanon. Some pointed out that the list did not include countries where President Trump had business interests – like Saudi Arabia – a suggestion dismissed by the president’s chief of staff as not related.”).

31. Complaint 1 at 5, paras. 41–52, *Washington v. Trump*, 2017 WL 443297 (W.D. Wash. 2017) (No. 2:17-cv-00141-JLR).

32. *Int’l Refugee Assistance Project v. Trump*, 241 F. Supp. 3d 539 (D. Md. 2017); *Hawai‘i v. Trump*, 245 F. Supp. 3d 1227 (D. Haw. 2017).

33. *Int’l Refugee Assistance Project v. Trump*, 857 F.3d 554 (4th Cir. 2017).

34. *Hawaii v. Trump*, 859 F.3d 741 (9th Cir. 2017).

There is no dearth of evidence demonstrating anti-Muslim animus as being the primary motivation of the promulgation of the Executive Orders. Lower courts focused on this animus as requiring an injunction on the bans' implementation. Each of the legal opinions mentioned the pre- and post-election statements made by Trump and members of his staff.<sup>35</sup> These statements demonstrated that the intent of the Executive Orders was to mark Muslims for exclusion, and that some effort was made to couch the Muslim Ban in more neutral, legally acceptable terms after the First Executive Order was struck down.

In addition to exceeding the President's scope of authority to make immigration decisions, the bans likely violated the Establishment Clause of the First Amendment by targeting members of a particular religion.<sup>36</sup> Based on the President's clearly articulated desire to exclude Muslims, the district and appellate courts determined that the primary purpose of the bans was religious discrimination.<sup>37</sup> The Government urged that the court evaluate the bans based solely on the four corners of its text, but the Fourth Circuit emphasized that EO-2 could not be read in isolation from the statements of planning and purpose that accompanied it.<sup>38</sup> An analysis into discriminatory intent "does not end with the text of the statute."<sup>39</sup> The courts also found that the President's articulated national security motivations for the ban had been alleged in bad faith, again pointing to the plethora of anti-Muslim statements that belied a reasoned, evidenced-based inspiration behind the orders.<sup>40</sup>

The lower courts also identified harms that the first and second executive orders created. The district court in Washington found that the first Executive Order "adversely affects the States' residents in areas of employment, education, business, family relations, and freedom to travel."<sup>41</sup> The ban would harm "the operations and missions of [the states'] public universities and other institutions of higher learning," and create "injury to the States' operations, tax bases, and public funds."<sup>42</sup> The court in Hawai'i similarly focused on harms that related to

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35. See, e.g., *Int'l Refugee Assistance Project*, 857 F.3d at 591–92 (finding that based on evidence of "Trump's numerous campaign statements expressing animus towards the Islamic faith; . . . his subsequent explanation that he would effectuate this ban by targeting "territories" instead of Muslims directly; . . . an advisor's statement that the President had asked him to find a way to ban Muslims in a legal way." Plaintiffs "more than plausibly alleged that EO-2's stated national security interest was provided in bad faith, as a pretext for its religious purpose.").

36. See *First Amendment and Religion*, U.S. COURTS, <http://www.uscourts.gov/educational-resources/educational-activities/first-amendment-and-religion> [<https://perma.cc/LR5H-U55X>].

37. *Int'l Refugee Assistance Project*, 857 F.3d at 572; *Int'l Refugee Assistance Project*, 241 F. Supp. 3d at 563.

38. *Int'l Refugee Assistance Project*, 857 F.3d at 597 (citing *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 534 (1993)).

39. *Id.*

40. *Int'l Refugee Assistance Project*, 857 F.3d at 575–76; *Int'l Refugee Assistance Project*, 241 F. Supp. 3d at 547–48.

41. *Washington v. Trump*, No. C17-0141JLR, 2017 WL 462040, at \*2 (W.D. Wash. Feb. 3, 2017).

42. *Id.*

the state's university employees and students, including a decrease in tuition revenue, and cited the public interest in uniting families and supporting humanitarian efforts in refugee resettlement.

The court in Maryland included “[f]eelings of marginalization and exclusion,” as potential injuries resulting from the ban.<sup>43</sup> But the court also noted that the injury must be “a personal injury suffered” by the plaintiff.<sup>44</sup> The court did not question the Trump administration’s implicit association of Muslims with terrorists, nor did they acknowledge the implicit suggestion that Muslims, writ large, are not to be trusted and present a danger to Americans and their values.

The individualized harms described in the lower court cases can be connected to wider feelings of marginalization and recent anti-Muslim hate incidents. While not the originator of an anti-Muslim political climate in the United States, Trump has capitalized on racial and religious fear-mongering and demagoguery to attract people to his presidential campaign and political platform, and with apparent great success.<sup>45</sup>

Trump’s anti-Muslim rhetoric has legitimized overt anti-Muslim hostility and violence since he assumed the presidency. The plaintiffs in the Fourth Circuit case argued that the bans represented a state-sanctioned message that foreign-born Muslims are “outsiders, not fully members of the political community,” and that there is injury to be derived from feelings of marginalization and exclusion.<sup>46</sup> One of the plaintiffs referred to “anti-Muslim views” promoted by the ban and cited fears about his safety in the United States.<sup>47</sup> Another described the “anti-Muslim sentiment” motivating EO-2 as leading him to feel “isolated and disparaged in [his] community.”<sup>48</sup> He explained that when in public with his wife, who wears a headscarf, he “sense[s] a lot of hostility from people” and recounted that his nieces, who both also wear headscarves, “say that people make mean comments and stare at them for being Muslim.”<sup>49</sup> A classmate pulled one of their scarves off in class.<sup>50</sup>

In response to the Government’s argument that the circuit court’s incorporation of Trump’s campaign statements into their analysis would “inevitably ‘chill political debate during campaigns,’” the Fourth Circuit responded “[t]o the extent that our review chills campaign promises to condemn

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43. *Int’l Refugee Assistance Project*, 857 F.3d at 582 (citing *Moss v. Spartanburg Cty. Sch. Dist. Seven*, 683 F.3d 599, 607 (4th Cir. 2012)).

44. *Int’l Refugee Assistance Project*, 241 F. Supp. 3d at 552 (citing *Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc.*, 454 U.S. 464, 485 (1982)).

45. See IAN HANEY LÓPEZ, *DOG WHISTLE POLITICS: HOW CODED RACIAL APPEALS HAVE REINVENTED RACISM AND WRECKED THE MIDDLE CLASS* ix (2013) (“Dog whistle politics”: coded racial appeals that carefully manipulate hostility toward nonwhites. Examples of dog whistling include repeated blasts about criminals and welfare cheats, illegal aliens, and sharia law in the heart-land.”).

46. *Int’l Refugee Assistance Project*, 857 F.3d 554, 605 (4th Cir. 2017).

47. *Id.* at 578.

48. *Id.*

49. *Id.*

50. *Id.*

and exclude entire religious groups, we think that a welcome restraint.”<sup>51</sup> This is the closest the courts came to acknowledging that the rhetoric of the Muslim Ban has pernicious effects beyond financial harm to organizational plaintiffs and individualized feelings of marginalization and exclusion. The discussion of broader harm is truncated there: there is no explanation of why campaign promises to condemn and exclude certain classes should be restrained, nothing offered to future litigants resisting these forms of exclusion and exposing them for what they really are, appeals to the preservation of white supremacy through the legitimization of anti-Muslim hatred and conduct.

C. *The Third Executive Order and Trump v. Hawaii*

On September 24, 2017, Trump issued a final version of the Muslim Ban. Presidential Proclamation 9645, “Enhancing Vetting Capabilities and Processes for Detecting Attempted Entry Into the United States by Terrorists or Other Public-Safety Threats,” (EO-3 or Third Executive Order) would indefinitely bar the entry into the United States of some or all nationals of Iran, Libya, Somalia, Syria, Yemen, Chad, North Korea, and Venezuela.<sup>52</sup> On October 3, Iranian Alliances Across Borders and six individual plaintiffs (later joined by others in an amended complaint) filed suit alleging that the Order violated the Immigration and Nationality Act (INA), the Free Speech Clause of the First Amendment and the equal protection and procedural due process components of the Fifth Amendment. Three days later, additional plaintiffs filed suit stating causes of action under the Establishment Clause, the INA, and the Administrative Procedure Act. The district court enjoined the Order and the Ninth Circuit upheld the injunction.

The Government appealed the injunctions and the Muslim Bans reached the Supreme Court. On June 26, 2017, the Supreme Court issued a *per curiam* opinion which granted the Government’s applications to stay the injunctions against the ban, “to the extent the injunctions prevent enforcement of §2(c) with respect to foreign nationals who lack any bona fide relationship with a person or entity in the United States.”<sup>53</sup> To support its decision, the Court wrote that “[t]he interest in preserving national security is ‘an urgent objective of the highest order.’ To prevent the Government from pursuing that objective by enforcing § 2(c) against foreign nationals unconnected to the United States would appreciably injure its interests.”<sup>54</sup> In taking no cognizance of the racial dimensions of perceived threats to national security, the Court accepted the suggestion that people from the six identified Muslim-majority countries,

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51. *Id.* at 600.

52. Proclamation No. 9645, Enhancing Vetting Capabilities and Processes for Detecting Attempted Entry into the United States by Terrorists or Other Public-Safety Threats, 82 Fed. Reg. 45161 (Sept. 24, 2017).

53. *Trump v. Int’l Refugee Assistance Project*, 137 S. Ct. 2080, 2087 (2017).

54. *Id.* at 2088 (citing *Holder v. Humanitarian Law Project*, 561 U.S. 1, 28 (2010)).

including refugees, inherently pose a threat to national security and should therefore be prohibited from reaching the United States.

The Supreme Court ignored both the applicable history and the President's own statements on the ban when it reversed the Ninth Circuit in its 5-4 decision written by Chief Justice Roberts. The Court concluded that the language of the INA provision in question, which prohibited nationality-based discrimination, "exude[d] deference" to the President, and was clear in giving the President "broad discretion" to suspend the entry of non-citizens into the United States "[w]henever [he] finds that the entry' of aliens 'would be detrimental' to the national interest."<sup>55</sup> It held that a "worldwide, multi-agency review" concluded that entry restrictions were necessary because foreign nationals could potentially enter the United States even when United States immigration officials lacked the information to vet them properly.<sup>56</sup>

The Court found that the order was related to a legitimate purpose, namely national security.<sup>57</sup> The fact that five of the seven named countries in the updated executive order had Muslim-majority populations was held not to "support an inference of religious hostility."<sup>58</sup> The Court reached this conclusion despite a dearth of evidence supporting that inference. An amicus brief of former national-security officials emphasized that there was not a single sworn declaration from an executive official willing to testify that there was "persuasive evidence that the entry suspension has a legitimate grounding in national security concerns."<sup>59</sup> In the Court's opinion, Roberts weakly warned, however, that the courts should not substitute their own judgment for that of the executive branch on national security matters, which he characterized as "delicate," "complex," and involving "large elements of prophecy."<sup>60</sup>

The Supreme Court dispensed with an analysis of Trump's anti-Muslim statements altogether, instead offering overwhelming deference to the executive's unfounded assertion of a national security basis for excluding Muslims from entry into the United States. The Court failed to seize the critical opportunity it had before it instead conferred further legitimacy on the normalization of racial fear, othering, and exclusion. The Court should embrace its institutional responsibility to act to prevent unconstitutional action arising from racial fear and mass panic, and in *Trump v. Hawaii* it utterly failed to do so.

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55. *Trump v. Hawaii*, 138 S. Ct. 2392, 2408 (2018).

56. *Id.*

57. *Id.* at 2420–21.

58. *Id.* at 2421.

59. *Id.*; Brief of Amici Curiae Former National Security Officials Supporting Respondents at 3, *Trump*, 138 S. Ct. 2392 (2018) (No. 17-965).

60. *Trump*, 138 S. Ct. at 2421.

## II.

## THE IMPACTS OF ISLAMOPHOBIA ON U.S. IMMIGRATION LAW

The Muslim Bans arise in the context of American Islamophobia and racial exclusion more generally and contribute to the legitimization of exclusion based on Muslim identity. In order better to understand the flaws in *Trump v. Hawaii*, it is necessary to look more broadly at the history of racial discrimination in immigration law in the United States. This Part will proceed by examining social attitudes toward Muslims, and legal exclusion of Muslims from nominal and substantive citizenship as an effort to preserve the rights and privileges that national membership accords to those considered to be white.

Racial animus against Muslims did not begin with President Trump's Muslims bans.<sup>61</sup> Since September 11, there has been a well-documented increase in harassment and hate crimes against Muslims and those perceived to be Muslim.<sup>62</sup> For example, the FBI reported a 1,600 percent increase in incidents of anti-Muslim hate crime in 2001.<sup>63</sup> A poll conducted by the University of Maryland in 2011 revealed that 61 percent of Americans had a negative view of Islam.<sup>64</sup> Well over a decade after the attacks, anti-Muslim violence has resurged: according to the Pew Research Center, the number of assaults against Muslims in the United States in 2016 surpassed the previous peak reached in 2001.<sup>65</sup>

An examination of legal history reveals that the current hostile climate for Muslims in the United States is part of a much larger story about establishing whiteness as a prerequisite to substantive citizenship and the conflation of Arab and Muslim identity in the law.<sup>66</sup> Anti-Muslim incidents dramatically increased in the wake of the September 11 attacks but American Islamophobia is not a

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61. Jennifer Williams, *A Brief History of Islam in America*, VOX (Jan. 29, 2017), <https://www.vox.com/2015/12/22/10645956/islam-in-america> [<https://perma.cc/ZQ3X-XBJX>].

62. *Post 9-11 Backlash*, SOUTH ASIAN AMS. LEADING TOGETHER, <http://saalt.org/policy-change/post-9-11-backlash> [<https://perma.cc/C9EL-PKA7>].

63. DEP'T OF JUSTICE, CIVIL RIGHTS DIV., CONFRONTING DISCRIMINATION IN THE POST-9/11 ERA: CHALLENGES AND OPPORTUNITIES TEN YEARS LATER (Oct. 19, 2011), [https://www.justice.gov/sites/default/files/crt/legacy/2012/04/16/post911summit\\_report\\_2012-04.pdf](https://www.justice.gov/sites/default/files/crt/legacy/2012/04/16/post911summit_report_2012-04.pdf) [<https://perma.cc/8CWM-8U8Z>].

64. Shibley Telhami, *What Americans Really Think About Muslims and Islam*, BROOKINGS (Dec. 9, 2015), <https://www.brookings.edu/blog/markaz/2015/12/09/what-americans-really-think-about-muslims-and-islam> [<https://perma.cc/5WKX-XCSQ>].

65. Katayoun Kishi, *Assaults Against Muslims in U.S. Surpass 2001 Level*, PEW RES. CTR. (Nov. 15, 2017), <http://www.pewresearch.org/fact-tank/2017/11/15/assaults-against-muslims-in-u-s-surpass-2001-level> [<https://perma.cc/L974-FF93>].

66. See Caroline R. Nagel & Lynn A. Staeheli, *Citizenship, Identity, and Transnational Migration: Arab Immigrants to the United States*, 8 SPACE & POLITY 3, 5 (2004) ("It therefore becomes necessary to distinguish between formal citizenship and substantive citizenship—that is, between one's legal status and one's ability to realise the rights and privileges of societal membership."); see also Khaled A. Beydoun, *"Muslim Bans" and the (Re)Making of Political Islamophobia*, 2017 U. ILL. L. REV. 1733, 1741 (2017).

post-September 11 phenomenon.<sup>67</sup> In fact, until 1944, those who were perceived to be Muslim offered American courts a reason to deny citizenship based on their identity alone.<sup>68</sup>

Equal treatment before the court requires that all persons be afforded the same constitutional protections regardless of race, religion, caste, or status. The ongoing, deeply-rooted hostility towards Muslims in the United States suggests that courts should pay particular attention when justifications are proffered for differential treatment of Muslims and adjudication of their rights.

*A. The Naturalization Act of 1790 and Whiteness as a Prerequisite for Citizenship*

The Naturalization Act of 1790 made whiteness a prerequisite for American citizenship and remained on the books until the mid-twentieth century.<sup>69</sup> Judges actively participated in the evolving construction of white identity, initially conflating Arab and Muslim identity. Courts held that, in part due to the “intense hostility of the people of Moslem [*sic*] faith [toward Christian civilization],” Arabs/Muslims were categorically excluded from the statutory definition of whiteness that was a prerequisite for citizenship.<sup>70</sup> Judges issued rulings based upon the idea that Muslims and Islam posed “an inherent menace and threat to American life.”<sup>71</sup> Instead of recognizing Islam as a multi-ethnic and multi-racial religion, the courts “mutated it into a political ideology, and most saliently, a homogenous race.”<sup>72</sup>

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67. *Islamophobia: Understanding Anti-Muslim Sentiment in the West*, GALLUP, <http://news.gallup.com/poll/157082/islamophobia-understanding-anti-muslim-sentiment-west.aspx> [<https://perma.cc/DR57-YMQB>].

68. Khaled A. Beydoun, *Viewpoint: Islamophobia has a Long History in the US*, BBC (Sept. 29, 2015), <http://www.bbc.com/news/magazine-34385051> [<https://perma.cc/37QB-SNBX>] [hereinafter Beydoun, *Long History*].

69. Naturalization Act of 1790, Ch. 3, 1 Stat. 103, 103, *repealed by* Immigration and Nationality Act of 1952, Pub. L. No. 82-414, 66 Stat. 163 (1952) (“[A]ny alien, being a free white person, who shall have resided within the limits and under the jurisdiction of the United States for the term of two years, may be admitted to become a citizen thereof, on application to any common law court of record, in any one of the states wherein he shall have resided for the term of one year at least . . .”).

70. *Ross v. McIntyre*, 140 U.S. 453, 463 (1891); Khaled Beydoun, *Between Muslim and White: the Legal Construction of Arab American Identity*, 69 N.Y.U. ANN. SURV. AM. L. 29, 33 (2013) [hereinafter Beydoun, *Between Muslim and White*].

71. Beydoun, *Long History*, *supra* note 68 (discussing *Ex Parte Mohreiz*, 54 F. Supp. 941 (D. Mass. 1944) and noting that “the court denied a Lebanese Christian immigrant citizenship because they associated his ‘dark walnut skin’ with ‘Mohammedanism.’ And in 1942, A Muslim immigrant from Yemen was denied citizenship because, writing about ‘Arabs’ the court noted, ‘it cannot be expected that as a class they would readily intermarry with our population and be assimilated into our civilization.’ In that case, the court conflated ‘Arab’ with ‘Muslim’ identity. The courts too believed that such an identity was “inconsistent with the Constitution”, and said so in public rulings.”); *see also Mohreiz*, 54 F. Supp. 941.

72. Beydoun, *Long History*, *supra* note 68.

During this Naturalization Era, “Muslim petitioners were categorically ineligible for citizenship.”<sup>73</sup> Christianity, by contrast, functioned as a “hallmark of whiteness” and “a prospective gateway toward citizenship” for immigrants from the Middle East.<sup>74</sup> Emphasizing the religious contours of eligibility determinations, as opposed to exclusion grounded ultimately in racial or ethnic prejudice, Arab Christian petitioners who succeeded in convincing judges of the authenticity of their Christian identity could sometimes also create enough distance between themselves and Muslim immigrants to succeed in their claims of entitlement to citizenship.<sup>75</sup>

*B. Ex Parte Mohriez and the Political Impetus for a Changing Definition of Whiteness*

The absolute bar on access to citizenship for Muslims was lifted in 1944 with *Ex parte Mohriez* when, for the first time, a judge held that Arab Muslims fit within the statutory definition of whiteness.<sup>76</sup> As the first case in which white identity was extended to an Arab Muslim, *Mohriez* is a decision best understood when viewed in its wider geopolitical context.<sup>77</sup> As Khaled Beydoun notes, “geopolitical factors as well as industrialization set a new template for engaging the Arab World in a manner that eroded the notion of Arabs as threats to American interests.”<sup>78</sup> The discovery of oil in Saudi Arabia was perhaps foremost among these factors.<sup>79</sup> “Assessed more broadly, the ruling in *Mohriez* might be seen as a judicial declaration formulated with the primary aim of advancing U.S. interests in Saudi Arabia and the Arab World at large.”<sup>80</sup>

Without the development of American economic and political interests in Saudi Arabia, spurred by discovery of and increased demand for oil, the judge in *Mohriez* may have not extended the construction of white identity to Arab immigrants.<sup>81</sup> Until *Mohriez*, “U.S. courts not only institutionalized an image and understanding of Islam as an irreducibly foreign and inassimilable religion, but also as one that was bent on threatening the Christian character of the United

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73. Beydoun, *Between Muslim and White*, *supra* note 70, at 34.

74. *Id.* at 33.

75. *Id.* at 33, 52. These early rulings that Christian Arabs were “white by law” were driven by eugenic science.

76. *Mohriez*, 54 F. Supp. 941. The First Executive Order’s exemption for religious minorities (*i.e.* Christians) heralds back to this history.

77. Beydoun, *Between Muslim and White*, *supra* note 70, at 67.

78. *Id.* at 67–68.

79. *See generally* DAVID HOLDEN & RICHARD JOHNS, *THE HOUSE OF SAUD: THE RISE AND RULE OF THE MOST POWERFUL DYNASTY IN THE ARAB WORLD* (1981).

80. Beydoun, *Between Muslim and White*, *supra* note 70, at 67–68; *see also* DAVID JACOBSON, *PLACE AND BELONGING IN AMERICA* 179 (2002) (“In so far as the Nationality Act of 1940 is still open to interpretation, it is highly desirable that it should be interpreted so as to promote friendlier relations between the United States and other nations and so as to fulfill the promise that we shall treat all men as created equal.”).

81. Beydoun, *Between Muslim and White*, *supra* note 70, at 68.

States.”<sup>82</sup> The unprecedented expansion of the availability of citizenship to include Muslims from Arab countries signaled to their governments, particularly emerging, resource-rich countries like Saudi Arabia, that the United States was an attractive superpower with whom they could align during the Cold War.<sup>83</sup> In suggesting that the *Mohriez* decision is best understood in light of its value to whites, Beydoun echoes Derrick A. Bell, Jr.’s observations that policy shifts benefitting non-whites “cannot be understood without some consideration of the decision’s . . . value to whites in policymaking positions able to see the economic and political advances at home and abroad that would follow abandonment of segregation.”<sup>84</sup>

There are similar political factors functioning today, and the selection of the particular countries covered in the Muslim Bans reflects those geopolitical calculations. Writing for the Court, Chief Justice John Roberts in *Trump v. Hawaii* ignored the political context which resulted in targeting certain Muslim-majority countries, but not others. In arriving at the conclusion that the ban was not based in anti-Muslim animus, Roberts pointed to the fact that only eight percent of the world’s Muslims lived in the banned countries, and that not all Muslim-majority countries were banned. Not only does this shortcut in reasoning reach a result in the case that is wholly divorced from its facts and the political realities that surround it, much has been written about why a country like Saudi Arabia, a self-declared Islamic theocracy and close ally of the Trump administration, could not feasibly have been included on the list of banned countries.<sup>85</sup>

The Arab naturalization cases that preceded *Mohriez* drew upon decades of exclusionary legal history and the legitimization of racial fear and othering to subordinate classes of people and carve out exceptions to constitutional protection.<sup>86</sup> Thus, despite the formal domestic impact of the ruling in *Mohriez*, which established that both Christian and Muslim immigrants met the statutory definition of whiteness and could therefore be naturalized as American citizens, the conflation of Arab and Muslim identity and the assumption that these

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82. *Id.* at 47.

83. *Id.* at 69–70; see Derrick A. Bell, Jr., *Comment, Brown v. Board of Education and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518, 524 (1980) (citing Derrick A. Bell, Jr., *Racial Remediation: An Historical Perspective on Current Conditions*, 52 NOTRE DAME L. REV. 5, 12 n. 31 (1976)) (“In many countries, where U.S. prestige and leadership have been damaged by the fact of U.S. segregation, it will come as a timely reassertion of the basic American principle that ‘all men are created equal.’”); Mary L. Dudziak, *Desegregation as a Cold War Imperative*, 41 STAN. L. REV. 61, 62–63 (1988) (“U.S. government officials realized that their ability to sell democracy in the Third World was seriously hampered by continuing racial injustice at home.”).

84. Beydoun, *Between Muslim and White*, *supra* note 70, at 70; see Bell, *supra* note 83.

85. The history of US-Saudi relations might be said to have been established in the early twentieth century at the urging of oil companies which actively lobbied for closer ties with the House of Saud. Ties were strengthened during the Cold War and a perpetual fear that anti-colonial uprisings and socialist or pan-Arab politics might threaten US interests in oil-rich regions in the Middle East. See HOLDEN & JOHNS, *supra* note 79.

86. See Beydoun, *Between Muslim and White*, *supra* note 70, at 36.

identities stood at fundamental odds to American identity continues to limit the substantive citizenship of both Arab Americans and Muslim Americans today.<sup>87</sup> This troubled story of white supremacy and the pursuit of substantive citizenship is how we arrive at *Trump v. Hawaii*, where a majority of the Justices on the nation's highest court accepted the idea that Muslims, as a group, pose a national security threat.

C. “Othering” and the Erosion of Civil Liberties in American Muslim Communities

Many decades after *Mohriez* established that U.S. citizenship could be open to immigrants from Middle Eastern nations, Arab Americans and Muslims continue to be “‘raced’ as ‘terrorists’: foreign, disloyal, and imminently threatening.”<sup>88</sup> This has led to attacks on and the erosion of civil liberties for Arab and Muslim communities in the United States. In 1979 during the Iranian Revolution and the U.S. hostage crisis, constant media coverage “brought the plight of the hostages and the revolutionary religious fervor of their Muslim captors into the homes of millions of Americans.”<sup>89</sup> Subsequently, hate crimes against Muslims, Arabs, Iranians, and South Asians increased dramatically.<sup>90</sup> Over fifteen years later, when the Federal Building was bombed in Oklahoma City in 1995, media reports speculated that “Islamic extremists” or “Arab radicals” were the culprits,<sup>91</sup> even though the culprit, Timothy McVeigh, was Christian and white.<sup>92</sup> Muslim communities are disproportionately targeted for surveillance, even though it is well-documented that people with similar identities as McVeigh, and white supremacist ideologies more generally, have been and continue to be responsible for the majority of domestic terror.<sup>93</sup> Rather than addressing the apparent source of violent ideologies and American terrorist activity, the legislation that followed the Oklahoma City bombing focused on heightened policing of Muslim communities, scrutiny and surveillance of their legitimate and lawful political and social activities, and even the deportation of Muslims with unproven links to terrorist activity.<sup>94</sup> The destructive legacy of

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87. *Id.* at 36–37; see Nagel & Staeheli, *supra* note 66, at 3, 5 (“It therefore becomes necessary to distinguish between formal citizenship and substantive citizenship—that is, between one’s legal status and one’s ability to realize the rights and privileges of societal membership.”).

88. Natsu Taylor Saito, *Symbolism Under Siege: Japanese American Redress and the “Racing” of Arab Americans as “Terrorists,”* 8 ASIAN L.J. 1, 12 (2001).

89. Williams, *supra* note 61.

90. Beydoun, *Long History*, *supra* note 68; Williams, *supra* note 61.

91. Beydoun, *Long History*, *supra* note 68.

92. *Id.*

93. “Far more Americans have been killed in domestic terror attacks than Islamic terror attacks” since September 11, 2001. Still, only 20% of FBI field agents are devoted to far right and white supremacist extremism, over Islamic extremism and international terrorism. Alexander Mallin, *Democrats Grill FBI, DHS Officials on White Supremacy Threat*, ABC NEWS (June 4, 2019), <https://abcnews.go.com/Politics/lawmakers-grill-trump-administration-officials-white-supremacy-threat/story?id=63478001> [<https://perma.cc/U88D-AAANT>].

94. *Id.*

surveillance of American Muslim communities has long outlasted the collective memory of the trauma that offered the cover for these surveillance programs in the first instance.

Racial fear and othering have historically led to the erosion of civil liberties and a hollowing of the rights and privileges that accord with substantive citizenship. As the largest attack on American soil since the 1941 bombing of Pearl Harbor, the terrorist attacks of September 11, 2001 represented a “watershed moment,” particularly for American Muslims.<sup>95</sup> Similar to what took place in the aftermath of the Oklahoma City bombing, targeted policing and surveillance of Muslim communities took off after the September 11 terrorist attacks, under an acquiescent air of understanding that civil liberties for certain minorities could legitimately be sacrificed to preserve the rights and freedoms of Americans at large.<sup>96</sup> The Patriot Act, passed shortly after the attacks, greatly expanded the government’s authority to spy on its citizens while reducing judicial oversight and public accountability.<sup>97</sup> Upon its implementation against swaths of Muslims and Arabs that fell into the government’s surveillance net, the Act was understood to have been designed to single out Muslims and those perceived to be from the Middle East, including many South Asians.<sup>98</sup> In addition to the Patriot Act, the U.S. government also instituted the National Security Entry-Exit Registration System in 2002, targeting immigrants from twenty-six countries, twenty-five of them known as Muslim countries, subjecting them to fingerprinting and registration upon entry into the country.<sup>99</sup>

This erosion of civil liberties coincides with majoritarian political support for targeting of Muslims for surveillance—pointing to the need for the courts to play a counter-majoritarian role. A Gallup poll conducted shortly after the September 11 attacks found that nearly six in ten Americans “favored requiring people of Arab descent to undergo special, more intensive security checks when flying on American airplanes,” half of those polled thought Arabs living in the United States, including those who are U.S. citizens, should be required to carry special identification with them, and one-third of Americans thought Arabs should be placed under surveillance similar to that under which Japanese-Americans were placed after Pearl Harbor.<sup>100</sup> Courts are both limited and

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95. Williams, *supra* note 61.

96. *Id.*

97. *Surveillance Under the USA/PATRIOT Act*, ACLU, <https://www.aclu.org/other/surveillance-under-usapatriot-act> [<https://perma.cc/YVT7-Z958>].

98. Cassidy Pitt, *U.S. Patriot Act and Racial Profiling: Are There Consequences of Discrimination?*, 25 MICH. SOC. REV. 53, 54 (2011).

99. KAREEM SHORA & SHOBA SIVAPRASAD WADHIA, NSEERS: THE CONSEQUENCES OF AMERICA’S EFFORTS TO SECURE ITS BORDERS (2009), <http://www.adc.org/wp-content/uploads/2016/12/NSEERS-ADC-Report.pdf> [<https://perma.cc/3NRJ-ZBDB>].

100. Jeffrey M. Jones, *Americans Felt Uneasy Toward Arabs Even Before September 11*, GALLUP NEWS SERV. (Sept. 28, 2011), <https://news.gallup.com/poll/4939/americans-felt-uneasy-toward-arabs-even-before-september.aspx> [<https://perma.cc/EUQ4-89AX>].

empowered by majoritarian politics and must take their responsibility seriously to protect vulnerable groups and politically unpopular minorities.

Today, there is a powerful and well-funded Islamophobia industry that is dedicated to spreading hate and misinformation about Islam and Muslims, exemplified by groups like ACT! For America, Pamela Geller's Stop Islamization of America, and David Horowitz's Freedom Center.<sup>101</sup> Though purporting to be "experts" on Islam, individuals like Frank Gaffney at the Center for Security Policy, Daniel Pipes at the Middle East Forum, and Robert Spencer of Jihad Watch present "heavily biased and often factually inaccurate information" to the public."<sup>102</sup>

The mainstream media also significantly contributes to informing the mass hatred of Muslims and the perception that Muslim identity is antithetical to American identity. A study released by consulting firm 416Labs showed that over twenty-five years of coverage and headlines, the portrayal of Islam and Muslims in the *New York Times* "exhibit[ed a] more negative sentiment than cancer and cocaine."<sup>103</sup> The study also found that "[t]here are no positive words in the top 24 ranked word associations with Islam & Muslims." Furthermore, only "8% of headlines associated with Islam & Muslims have positive association."<sup>104</sup>

The normalization of anti-Muslim rhetoric has also appeared to legitimize acts of violence and hostility against Muslims in the public sphere. A report from the Council on American-Islamic Relations (CAIR) indicated that the number of hate crimes in the first half of 2017 "spiked 91 percent" compared to the same period in 2016, which was the worst year for such anti-Muslim incidents since the organization began its current documentation system in 2013.<sup>105</sup> Zainab Arain, coordinator in CAIR's Department to Monitor and Combat Islamophobia, identified a connection between Trump's election as president and the dramatic rise in hate crimes against Muslims, stating, "the presidential election campaign and the Trump administration have tapped into a seam of bigotry and hate that has resulted in the targeting of American Muslims and other minority groups."<sup>106</sup>

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101. WAJAHAT ALI ET AL., CTR. FOR AM. PROGRESS, FEAR, INC. THE ROOTS OF THE ISLAMOPHOBIA NETWORK IN AMERICA (2011), <https://cdn.americanprogress.org/wp-content/uploads/issues/2011/08/pdf/islamophobia.pdf> [<https://perma.cc/SA6L-MX8Z>].

102. Williams, *supra* note 61.

103. OWAIS ARSHAD ET AL., 416LABS, ARE MUSLIMS COLLECTIVELY RESPONSIBLE? 19 (2015), [https://static1.squarespace.com/static/558067a3e4b0cb2f81614c38/t/564d7b91e4b082df3a4e291e/1505087319147/416LABS\\_NYT\\_and\\_Islam.pdf](https://static1.squarespace.com/static/558067a3e4b0cb2f81614c38/t/564d7b91e4b082df3a4e291e/1505087319147/416LABS_NYT_and_Islam.pdf) [<https://perma.cc/2GR9-V3J3>].

104. *Id.* at 3. Cancer fared better at seventeen percent. *Id.* at 18.

105. CAIR Report Shows 2017 on Track to Becoming One of Worst Years Ever for Anti-Muslim Hate Crimes, COUNCIL ON AMERICAN-ISLAMIC REL. (July 17, 2017), [https://www.cair.com/cair\\_report\\_shows\\_2017\\_on\\_track\\_to\\_becoming\\_one\\_of\\_worst\\_years\\_ever\\_for\\_anti\\_muslim\\_hate\\_crimes](https://www.cair.com/cair_report_shows_2017_on_track_to_becoming_one_of_worst_years_ever_for_anti_muslim_hate_crimes) [<https://perma.cc/CXK2-R4CE>].

106. *Id.*

Islamophobia has a long history in the United States and continues to impact Muslim communities. By fueling the phenomenon of American Islamophobia through the Muslim bans, Trump and his associates are continuing to set the stage for the erosion of civil liberties and constitutional protection that has historically followed similar rhetoric. Understanding this history is necessary to put the Muslim Ban in context and highlights the flaws in the court's reasoning offered in upholding the ban, as well as its inability to recognize its own racial bias as an institution.

### III.

#### LIMITS OF MUSLIM BAN CASES RECONSIDERED

Islamophobia, and racial animus more broadly, is widespread in the development of legal doctrine in the United States. When adjudicating issues of state-sanctioned discrimination, intent doctrine as it stands limits the view of the court, rendering it blind to the context in which executive action emerges and operates. This myopia limits the court's power to defend against future discriminatory conduct couched in less brazen terms than that of the rhetoric surrounding the Muslim Bans. But while intent doctrine does limit to some extent the manner in which courts can consider extrinsic motivations of discriminatory actors, the courts need not willfully avert their eyes from evidence of racial animus. In this section, I will introduce intent doctrine as it has developed in relation to discrimination, and then apply it to the Supreme Court's decision in *Trump v. Hawaii*.

##### A. *The High Bar for Intent Established by Arlington Heights*

The courts' limited analysis of the intent behind the executive orders is closely related to their narrow evaluation of its potential consequences. While this narrow view is partially a result of constraints of legal advocacy, it is also a result of the extremely high bar for proving intentional discriminatory conduct.<sup>107</sup> In *Arlington Heights v. Metropolitan Housing Development Corp.*, the Court held that, absent a "clear pattern, unexplainable on grounds other than race" of behavior, "impact alone is not determinative" in proving discrimination.<sup>108</sup> A plaintiff must show that intent to discriminate was a "motivating factor" of the conduct in question.<sup>109</sup>

After *Arlington Heights*, even proof that a particular decision "was motivated in part by a racially discriminatory purpose" would not necessarily result in its invalidation, simply shifting the burden to the defendant to establish that the same decision would have resulted even if the impermissible purpose had not been considered.<sup>110</sup> This case signals the Court's trust in the government

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107. See *Village of Arlington Heights v. Metropolitan Housing Dev. Corp.*, 429 U.S. 252 (1977).

108. *Id.* at 266.

109. *Id.*

110. *Id.* at 251–52 n.21.

and its willingness to maintain a standard of rational basis review barring (unlikely) overt acknowledgement by a defendant of discriminatory intent. With the Supreme Court's decision in *Trump*, the Court's trust of the executive reaches new heights, steamrolling past clear statements of discriminatory intent.

In excluding history, social practices, and statistics from the adjudication of discrimination claims, *Arlington Heights* sets up a test for discrimination that makes it nearly impossible to prove. In fact, there is not a single case using this malice test from which the Supreme Court has found intentional discrimination against minorities.<sup>111</sup> But while the Supreme Court has never found intentional discrimination using the malice test, the clearly articulated discriminatory rhetoric describing Trump's Muslim Bans, often from Trump himself, was too overwhelming for the lower courts to ignore. Even with limiting the "historical context" of the Muslim Bans to Trump's election campaign and the statements that he and his staff made explicitly acknowledging the Muslim Bans as Muslim Bans, the lower courts clearly identified illegal malicious intent.

Barring the relatively rare instance in which an unsophisticated political actor proudly boasts of the discriminatory intent of his planned conduct, however, intent doctrine currently does little to protect harmed groups from discriminatory action. When combined with excessive deference to national security threat assertions by the executive, accepted without any evidence, the fundamental guarantees of equality in our Constitution and the role of the court as a check on the other branches is severely undermined.

The rhetoric of the Muslim Bans, and the very language that they employ, capitalize on the work of an Islamophobia industry that has been churning for decades. The current political climate is such that the political actors making anti-Muslim statements do so expecting to receive political support as a result.<sup>112</sup> Professor Charles Lawrence argues that the courts should examine the cultural meaning of social practices for unconscious racism, noting that the judges and justices themselves are part of the culture and cannot act without being influenced by racial considerations.<sup>113</sup>

Islamophobia did not begin with the Muslim Ban and neither would it have been put to rest even if the Supreme Court had affirmed an injunction against its implementation. The normalization of Islamophobia as a legitimate justification for racial fear mongering and discriminatory executive action must be challenged by the Court by looking to the context in which the action is taking place. The standard set by *Arlington Heights* acts to focus the Court's analysis narrowly on

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111. HANEY LÓPEZ, *supra* note 45, at 86.

112. Hannah Allam & Talal Ansari, *State and Local Republican Officials Have Been Bashing Muslims. We Counted*, BUZZFEED NEWS (Apr. 10, 2018), [https://www.buzzfeed.com/hannahallam/trump-republicans-bashing-muslims-without-repercussions?utm\\_term=.jeB7DJnzK&wpsrc=nl\\_todayworld&wpmmm=1#.myMZmD8GA](https://www.buzzfeed.com/hannahallam/trump-republicans-bashing-muslims-without-repercussions?utm_term=.jeB7DJnzK&wpsrc=nl_todayworld&wpmmm=1#.myMZmD8GA) [<https://perma.cc/24TY-KVDF>].

113. See Charles R. Lawrence III, *Unconscious Racism Revisited: Reflections on the Impact and Origins of "The Id, the Ego, and Equal Protection,"* 40 CONN. L. REV. 931, 952 (2008).

overt admissions of discrimination, effectively dismissing any attention to the social and political context in which these actions take place.

*B. Chae Chan Ping, Korematsu, Iqbal, and the Consequences of Using National Security as a Guise to Allow Racial Discrimination*

When asserted in the immigration context, the failures of intent doctrine to recognize discriminatory action are magnified due to the historical unwillingness of the judiciary to peer behind the reasoning of the other branches. This lack of will or interest was exemplified by the Supreme Court's decision in *Trump v Hawaii*. Foreign affairs or national security exceptionalism refers to the argument that these categories of governmental action deserve greater deference to the executive than other types of legislation.<sup>114</sup> Analogously, arguments for immigration exceptionalism derive in part from the supposed national security and foreign relations implications of immigration decisions.<sup>115</sup>

United States legal history forewarns the abuse of the phrase “national security” and the deference to military action that often follows. Two major cases of exclusion and deprivation of constitutional rights on the basis of racial fear reveal that invocations of “national security” can and should be understood as perceived threats to national identity and, ultimately, white supremacy. In *Chae Chan Ping v. United States*, a Chinese laborer who had resided in the United States previously was refused re-entry into the country based on the Chinese Exclusion Act.<sup>116</sup> The Supreme Court found that there was no constitutional constraint on the federal government's ability to exclude aliens from its territory.<sup>117</sup> Writing for the majority, Justice Stephen J. Field held, “If . . . the government of the United States . . . considers the presence of foreigners of a different race in this country, who will not assimilate with us, to be dangerous to its peace and security, their exclusion is not to be stayed” merely because there are no actual hostilities with the other nation.<sup>118</sup> The judiciary was deemed to have no authority to intervene.

In rooting immigration control in conceptions of national security and sovereignty, the Supreme Court suggested that this “pre-constitutional” power lay beyond the purview of liberty and equality. The Court acknowledged that there was no active military or violent threat.<sup>119</sup> The text of the opinion, however, and the wider context surrounding the case reveals that Chinese laborers were perceived to pose an economic threat as competition with whites for labor. Additionally, the Court suggests that Chinese immigrants posed a threat to the

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114. Ingrid Brunk Wuerth & Ganesh Sitaraman, *The Perils of National Security Exceptionalism*, TAKE CARE BLOG (Apr. 23, 2018), <https://takecareblog.com/blog/the-perils-of-national-security-exceptionalism> [<https://perma.cc/UDA9-YHQ3>].

115. *Id.*

116. 130 U.S. 581, 582 (1889).

117. *Id.* at 604.

118. *Id.* at 606.

119. *Id.*

(white) identity of the nation, discussing the nation's duty to prevent "vast hordes" of foreigners from "crowding in upon us."<sup>120</sup>

Half a century later, in *Korematsu v. United States*, the Court failed to heed the central lesson of *Chae Chan Ping*, ignoring the fact that its national security adjudications are not mutually exclusive with racism, and again improperly conflating national security and race. In *Korematsu*, the majority declared "all legal restrictions which curtail the civil rights of a single racial group are immediately suspect," but not necessarily "unconstitutional," ones demanding strict scrutiny by the Court.<sup>121</sup> But while Justice Hugo Black for the majority wrote that racial antagonism may never validate such restrictions, he noted that "pressing public necessity" could sometimes justify the curtailment of a group's civil rights. In *Korematsu*, the Court deferred to the military's assessment that the threat to national security posed by Americans of Japanese ancestry constituted such "pressing public necessity," failing to acknowledge both the dearth of evidence in support of the military's assessment and the illegitimate racial antagonism upon which this assessment was based. As a consequence, the Court sanctioned the grave injustice of the internment in camps of 113,000 people of Japanese ancestry.<sup>122</sup>

More recently, the Court acquiesced to the national security justification created by the attacks of September 11, 2001 to find for the government in *Ashcroft v. Iqbal*. In *Iqbal*, the Supreme Court found that the respondent's pleadings regarding a deprivation of his constitutional rights by governmental actors were insufficient to enter the discovery phase, dismissing the complaint for failure to state a plausible claim.<sup>123</sup> *Iqbal* emerged in the aftermath of the FBI's arrest and detention of thousands of Muslim men as part of an investigation into the 9/11 attacks. One of those men, a Pakistani Muslim who had been placed in the Administrative Maximum Security Housing Unit and subjected to repeated physical abuse, filed a *Bivens* action against federal officials, alleging that he had been designated a person of "high interest" on account of his race, religion, or national origin, in contravention of the First and Fifth Amendments.<sup>124</sup>

The Court responded to these allegations by explaining that the 9/11 attacks were perpetrated by "Arab Muslim hijackers" who were members of Al Qaeda, also headed by an "Arab Muslim" and "composed in large part of his Arab Muslim disciples."<sup>125</sup> Therefore, according to the Supreme Court, "it should come as no surprise" that Arab Muslims in the United States would be disparately arrested and detained, hence an "obvious alternative explanation" for

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120. *Id.*

121. *Korematsu v. United States*, 323 U.S. 214, 216 (1944).

122. *Id.*; *A Brief History of Japanese American Relocation During World War II*, NAT'L PARK SERV., <https://www.nps.gov/articles/historyinternment.htm> [<https://perma.cc/CH8G-R475>] [hereinafter *Brief History*].

123. *Ashcroft v. Iqbal*, 556 U.S. 662 (2009).

124. *Id.* at 667.

125. *Id.* at 682.

the respondent's arrest that defeated any plausible inference of discrimination.<sup>126</sup> Equation of the actions of a single individual with those of an entire group to which that individual purportedly belongs is a deprivation of their due process and constitutional rights. The Court in *Iqbal* had the opportunity to condemn the broad equation of Arab Muslims with terrorists but reinforced it instead.

As demonstrated by the historical pattern of using national security as an excuse further to marginalize racial and religious minorities, the Court has often abdicated its responsibilities to protect minority rights, even in cases of overt racial discrimination.

#### IV.

#### THE "COURTS OF THE CONQUEROR"<sup>127</sup>

The facts were before the Court in *Trump v. Hawaii*, yet a majority of Justices chose to accept the Government's unilateral and wholly unsubstantiated declaration that people from five Muslim-majority countries pose a threat to national security. The phrase "national security threat" has loaded significance and has been used to reify stereotypes of Muslims and those perceived to be Muslim as terrorists (at most) or unassimilable (at best).<sup>128</sup> The willingness of the Court to acquiesce to the Government's unsupported declaration that Muslims as a group threaten to undermine national security parallels the Court's flawed reasoning in cases that have come before it throughout history and reflects majoritarian white supremacist sentiments that take for granted the idea that Muslims as a group pose a threat to the national security of the United States.

In *Trump v. Hawaii*, the Court abdicated its responsibility to act as a democracy-perfecting, counter-majoritarian force in society, intervening on behalf of politically unpopular and powerless groups when their rights are threatened by the majority.<sup>129</sup> William Rehnquist forewarned in his memo regarding *Brown v. Board of Education*, written during his time as a law clerk for Justice Robert Jackson: substantive protection of the constitutional rights of a minority ultimately depends on the majority's willingness to protect minority rights.<sup>130</sup> This partial autonomy of the courts regarding their ability—and willingness—to act to contravene majoritarian action helps to explain how and why past doctrine has failed adequately to protect the constitutional rights of minorities against racial fear and mass panic.

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126. *Id.*

127. See WALTER R. ECHO-HAWK, IN THE COURTS OF THE CONQUEROR: THE 10 WORST INDIAN LAW CASES EVER DECIDED (2010).

128. See Robert M. Cover, *Violence and the Word*, 95 YALE L.J. 1601, 1617 (1986) ("Legal interpretation . . . can never be 'free;' it can never be the function of an understanding of the text or word alone . . . . Legal interpretation must be capable of transforming itself into action; it must be capable of overcoming inhibitions against violence in order to generate its requisite deeds; it must be capable of massing a sufficient degree of violence to deter reprisal and revenge.").

129. ELY, *supra* note 5.

130. See William Rehnquist, *A Random Thought on the Segregation Cases* (1952).

A. *The Lower Courts' Opinions Recognize the Danger of a Repeat Korematsu*

In contrast with the Supreme Court, which neither cited nor asked for evidence that the banned classes posed any threat, the lower courts took a more critical approach to the Government's invocation of harm to "national security" interests as justifying the plaintiffs' alleged injuries.<sup>131</sup> The Fourth Circuit was "unmoved" by this argument and noted the irony of asserting national defense to sanction the subversion of civil liberties, making the strongest declaration compared to the other courts' opinions that the Executive Orders were motivated by anti-Muslim animus, holding that "[w]e remain unconvinced that Section 2(c) has more to do with national security than it does with effectuating the President's promised Muslim Ban."<sup>132</sup>

Still, the Fourth Circuit did not "discount that EO-2 may have some national security purpose," but simply found that the articulated interest did not outweigh the harms attributed to the Establishment Clause violation asserted by the Plaintiffs.<sup>133</sup> Here we find the only citation to *Korematsu* in the lower courts' Muslim Ban opinions: "unconditional deference to a government agent's invocation of 'emergency' . . . has a lamentable place in our history."<sup>134</sup> The court stopped short of repudiating the dangerously flawed doctrine of *Korematsu* entirely.

Understanding what went wrong in *Korematsu* is important to show that the same strategy of using majoritarian fear to deprive a politically unpopular minority group of certain rights and privileges was present in the Muslim ban cases. If the courts fail to uphold constitutional protections for racial minorities, they risk becoming instruments of majoritarian prejudice. Justice Jackson's dissent in *Korematsu* warned against the constitutionalization of panic, warning that a decision such as that of the majority "lies about like a loaded weapon ready for the hand of any authority that can bring forward a plausible claim of an urgent need."<sup>135</sup>

Similar to the Muslim Ban cases, in *Korematsu*, no credible evidence demonstrating the necessity of Japanese internment was offered for the Court to attempt to establish the reasonableness of the military order. Due to the secrecy of military operations, Jackson notes that courts seem to have no meaningful alternative to "accepting the mere declaration of the authority that issued the order that it was reasonably necessary from a military viewpoint."<sup>136</sup> He writes:

But once a judicial opinion rationalizes such an order to show that it

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131. *Int'l Refugee Assistance Project v. Trump*, 857 F.3d 554, 603–04 (4th Cir. 2017).

132. *Id.* at 604.

133. *Id.*

134. *Id.* (citing *Patrolmen's Benevolent Ass'n of N.Y. v. City of New York*, 310 F.3d 43, 53–54 (2d Cir. 2002) (citing *Korematsu v. United States*, 323 U.S. 214, 223 (1944))).

135. *Korematsu*, 323 U.S. at 246 (Jackson, J., dissenting).

136. *Id.* at 245.

conforms to the Constitution, or rather rationalizes the Constitution to show that the Constitution sanctions such an order, the Court for all time has validated the principle of racial discrimination in criminal procedure and of transplanting American citizens.<sup>137</sup>

Similarly, the lower court opinions on the Muslim Ban demonstrate in detail that national security reports did not support the implementation of a ban. The Department of Homeland Security (DHS) Office of Intelligence and Analysis released an unclassified, internal report shortly before the President signed EO-2 indicating that most foreign-born U.S.-based violent extremists “became radicalized many years after entering the United States,” and concluded that therefore “increased screening and vetting was . . . unlikely to significantly reduce terrorism-related activity in the United States.”<sup>138</sup> A separate DHS report indicated that citizenship in any country is likely an unreliable indicator of whether a particular individual poses a terrorist threat.<sup>139</sup> Ten former national security, foreign policy, and intelligence officials who previously served in the White House, State Department, Department of Homeland Security, and Central Intelligence Agency, four of whom were aware of intelligence related to terrorist threats as of January 20, 2017, advised that “[t]here is no national security purpose for a total ban on entry for aliens from the [Designated Countries].”<sup>140</sup> These facts were not enough for a majority of Justices to overcome their assumptions about Muslims as a group.

Justice Frank Murphy’s strong dissent in *Korematsu* advocated judicial oversight of executive acts especially during times of national crisis, when the nation is experiencing mass panic.<sup>141</sup> He discussed the brazen anti-Japanese animus that motivated the majority’s decision to uphold the internment of Japanese-Americans, pointing out that the Exclusion Order relied on the assumption that all such people were dangerous.<sup>142</sup> There having been no evidence of disloyalty by Japanese-Americans, Murphy recognized that the majority opinion was rooted purely in notions of racial and economic prejudice, rather than any bona fide military necessity.<sup>143</sup> Not a single Japanese-American was tried or convicted of espionage or sabotage between the Pearl Harbor attack

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137. *Id.* at 246.

138. See OFFICE OF INTELLIGENCE & ANALYSIS, U.S. DEP’T OF HOMELAND SEC., MOST FOREIGN-BORN, US-BASED VIOLENT EXTREMISTS RADICALIZED AFTER ENTERING HOMELAND; OPPORTUNITIES FOR TAILORED CVE PROGRAMS EXIST (2017).

139. Vivian Salama, *DHS Report Disputes Threat from Banned Nations*, ASSOCIATED PRESS (Feb. 24, 2017), <https://apnews.com/39f1f8e4ceed4a30a4570f693291c866/AP-Exclusive:-DHS-report-disputes-threat-from-banned-nations> [<https://perma.cc/59TG-G7X8>].

140. *Int’l Refugee Assistance Project v. Trump*, 857 F.3d 554, 575 (4th Cir. 2017). Indeed, increased surveillance and targeting of Muslims has had perverse effects in terms of radicalization.

141. *Korematsu*, 323 U.S. at 233–34 (Murphy, J., dissenting).

142. *Id.* at 233, 235.

143. *Id.* at 233–34.

and the military order.<sup>144</sup> *Korematsu*, to Justice Murphy, represented the “legalization of racism.”<sup>145</sup>

When it comes to perceived threats by racial minorities to national identity, those threats are conceptualized as threats to national security. While *Korematsu* uses the language and form of strict scrutiny, in actuality it employs no scrutiny at all. Strict scrutiny here takes the form of deference to the military in their determination that it was not beyond the war power of Congress and the Executive to exclude those of Japanese ancestry from the West Coast war area and intern them in camps. In 2011, the United States filed a formal “confession of error,” acknowledging that the government had misled the Court in *Korematsu*.<sup>146</sup> Still, *Chae Chan Ping* remains good law and the Muslim Ban cases make clear that the government can persecute minority groups under the guise of national security without interference from the judiciary. The result of this doctrine is that if the United States is faced with a threat to its national security, racial discrimination is acceptable.

*B. The Supreme Court’s Missed Opportunity to Correct the Errors of  
Korematsu*

Having been invoked just once by lower courts, Chief Justice Roberts dealt with the specter of *Korematsu* and its stark comparisons to the Muslim Ban cases squarely, but not in the way that he should have. Roberts declared that in upholding Japanese internment, *Korematsu* “was gravely wrong the day it was decided, has been overruled in the court of history,” and, citing Justice Jackson’s dissenting opinion in the case, “has no place in law under the Constitution.”<sup>147</sup> The precedential significance of this lukewarm repudiation of *Korematsu* remains unclear from this statement, and is complicated further by the fact that Roberts went on to say that it would be “wholly inapt to liken that morally repugnant order to” Trump’s travel bans.<sup>148</sup>

As a matter of law, the *Trump* majority applied an extraordinarily deferential standard of review, essentially admitting that although the executive order could be based on unconstitutional grounds, so long as a separate legitimate reason for the policy is available, the court will not strike it down. The existence of discriminatory intent, of which there was ample evidence here, is supposed to shift the Court’s inquiry out of rational basis review and trigger a heightened level of scrutiny. The Court refused to evaluate evidence of invidious intent,

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144. *Brief History*, *supra* note 122.

145. *Korematsu*, 323 U.S. at 242 (Murphy, J., dissenting).

146. *Confession of Error: The Solicitor General’s Mistakes During the Japanese-American Internment Cases*, U.S. DEP’T OF JUSTICE ARCHIVES (May 20, 2011), <https://www.justice.gov/archives/opa/blog/confession-error-solicitor-generals-mistakes-during-japanese-american-internment-cases> [https://perma.cc/Y8PQ-EX92].

147. *Trump v. Hawaii*, 138 S. Ct. 2392, 2423 (2018).

148. *Id.*

applying its weak standard of review without contending with the President's blatantly discriminatory statements.

Despite the willful blindness of the *Trump* majority, in both *Korematsu* and the Muslim Bans the President invoked an ill-defined national security threat to justify a discriminatory policy that significantly infringed on the freedom of a particular ethnic or religious group. President Trump himself made these connections abundantly clear in a December 2015 interview, justifying his call for a total ban on Muslims entering the United States by claiming that President Franklin D. Roosevelt "did the same thing" by interning Japanese-Americans during World War II; "What I'm doing is no different than [what] FDR [did]," stated then-candidate Trump.<sup>149</sup> In both cases, the government characterized individual members of broad groups as threats to the nation's security without basis. In both cases, the Court failed to recognize the xenophobic majoritarian sentiments from which executive action arose and which operated to limit their vision of justice and commitment to upholding the Constitution.

In the words of Justice Sonia Sotomayor, in her resounding dissent in *Trump v. Hawaii*:

By blindly accepting the government's misguided invitation to sanction a discriminatory policy motivated by animosity toward a disfavored group, all in the name of a superficial claim of national security, the Court redeploys the same dangerous logic underlying *Korematsu* and merely replaces one "gravely wrong" decision with another.<sup>150</sup>

Racial discrimination doctrine currently works to place a great degree of emphasis on Trump's statements which clearly indicate malicious intent; however, it does little to protect against a more sophisticated political actor effectuating the same policies but not making similar statements publicly. The Court must overcome deficiencies in its intentional discrimination analysis that require the plaintiff to prove malice on the part of the actor whose conduct is in question in order to prevail, and it must look to the context from which a particular legislative action arises to help determine discriminatory intent.

Crucially, the Court must also address its undue deference to invocations of national security in the immigration context, which remains at odds with heightened scrutiny for laws targeting "discrete and insular minorities," and must recognize that assessments of national security threat have been and continue to be rooted in racial prejudice.<sup>151</sup> Not being in a state of national crisis is not enough, on its own, to effectuate a theory of the Court in which it is committed to protecting the rights of vulnerable groups. The Court must also commit to a

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149. Rebecca Kaplan, *Trump Defends Muslim Plan by Comparing Himself to FDR*, CBS NEWS (Dec. 8, 2015), <https://www.cbsnews.com/news/donald-trump-defends-muslim-plan-by-comparing-himself-to-fdr> [<https://perma.cc/A9KZ-MZZB>].

150. *Trump*, 138 S. Ct. at 2448 (Sotomayor, J., dissenting).

151. See *United States v. Carolene Products*, 304 U.S. 144, 153 n.4 (1938).

repudiation of white supremacy, starting with a denunciation of *Korematsu* that shifts the trajectory of legal doctrine.

CONCLUSION: A MISSED OPPORTUNITY FOR THE COURT

The courts have a duty to protect “discrete and insular minorities.”<sup>152</sup> Rather than paralyzing the courts, the fluidity of who belongs in this descriptive category should provide the basis for meaningful engagement with the social factors that surround actions by the executive and the legislature to determine on whose behalf the courts must step in to correct the trajectory of the nation and fulfill its institutional responsibility. The lower courts evaluating the Muslim Bans limit “historical context” unduly narrowly to the Executive’s statements.<sup>153</sup> While this was certainly enough to demonstrate anti-Muslim animus as a bald motivation for the executive orders, the Court must also commit to engaging with the context in which government action takes place, attune to political and social trends and unwilling to defer to logically indefensible government invocations of national security to persuade courts not to inquire about discriminatory intent.

The district court in Maryland in the Muslim Ban cases suggested that nationality discrimination is at odds with “our basic American tradition.”<sup>154</sup> One might readily point out that nationality discrimination is not only *not* at odds with “basic American tradition,” but is in fact an integral part of the very fabric of the nation’s development. The Chinese Exclusion Act discussed above was the first law implemented which excluded a specific racial group from immigration to the United States. The Court played an important role in legitimizing this racial fear and exclusion by upholding the constitutionality of the Act.<sup>155</sup> At the time it was debated, Senator George Frisbie Hoar described the Act as “nothing less than the legalization of racial discrimination.”<sup>156</sup>

Racial discrimination is as American as apple pie, but it does not need to be. The courts and the country must mature, evolving past childhood fantasies of innocence, to recognize past errors and to accept, and to guard against, the likelihood of the repetition of history. Islamophobia is arguably the most accepted form of discrimination the United States today. As Harold Hongju Koh, former legal adviser to the United States Department and Professor of Law at Yale Law School said, “to finally inter *Korematsu*’s ghost, we will all need to keep resisting these new national-security masquerades.”<sup>157</sup> While it may

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152. *Id.*

153. *See, e.g., Int’l Refugee Assistance Project v. Trump*, 241 F. Supp. 3d 539, 557 (D. Md. 2017).

154. *Id.* at 553.

155. *Chae Chan Ping v. United States*, 130 U.S. 581 (1889).

156. ROGER DANIELS, *COMING TO AMERICA: A HISTORY OF IMMIGRATION AND ETHNICITY IN AMERICAN LIFE* 271 (2002).

157. Harold Hongju Koh, *Symposium: Trump v. Hawaii- Korematsu’s Ghost and National-Security Masquerades*, SCOTUSBLOG (June 28, 2018),

sometimes find the means to safeguard progressive values when presented with explicit uncontroverted evidence of intent to discriminate against a class of persons, a Court with Justices that purport to operate at a distance from this social and political context will necessarily fail to serve as a check against an executive branch intent on isolating and targeting Muslims in the long run.

The Framers of the Constitution understood that immigration laws could be used to disfavor minority groups and denied the federal government the ability to act to disfavor any particular religious group.<sup>158</sup> The bas-relief statue of the Prophet Muhammad situated on the north wall of the Supreme Court might serve as a reminder to the Justices on the Court of this history as they consider how they might protect the pluralistic nature of American society and begin to extricate white supremacy from their conception of national identity.

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<https://www.scotusblog.com/2018/06/symposium-trump-v-hawaii-korematsus-ghost-and-national-security-masquerades> [<https://perma.cc/85YT-TWN7>].

158. David Gans, *Our Constitution Forbids a Religious Test for Immigration*, TAKE CARE BLOG (Apr. 19, 2018), <https://takecareblog.com/blog/our-constitution-forbids-a-religious-test-for-immigration> [<https://perma.cc/5Q64-565E>].