Does U.S. Law Permit a Ban on Entry into the United States Based on Religion?

Cindy G. BUYS

On December 7, 2015, U.S. Presidential hopeful Donald Trump issued a Press Release in which he called for “a total and complete shutdown of Muslims entering the United States until our country’s representatives can figure out what is going on.” This article considers whether his proposal to ban persons from entering the United States based on their actual or perceived religion violates U.S. constitutional, statutory, or international law. It also considers some of the practical implications of implementing such a proposal.

U.S. Constitutional Law

The U.S. Constitution is considered the “Supreme Law of the Land,” in the United States in part because it is listed first in the Supremacy Clause of the Constitution (Article VI). Thus, this article begins by considering whether a ban on entry to the United States for immigrants of a certain religion would violate the U.S. Constitution. In this regard, both the First Amendment, relating to freedom of religion, and the Fifth and Fourteenth Amendments, guaranteeing due process and equal protection, are relevant.

The First Amendment states in relevant part: “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.” It may be argued that by prohibiting persons of the Muslim faith from entering the United States, the federal government would be placing an unconstitutional burden on the free exercise of the Muslim faith. Current constitutional doctrine promotes the concept of religious equality (also sometimes referred to as religious neutrality), pursuant to which the government must not favor or disfavor a particular religion. In two cases involving challenges to school prayers, Engel v. Vitale (1962) and Santa Fe Independent School District v. Doe (2000), the U.S. Supreme Court has suggested at least three reasons why the government should be religiously neutral: (1) governments with established religions “tend to incur the hatred, disrespect and even contempt of those who hold contrary beliefs;” (2) governments that decide religious issues tend to encourage divisiveness along religious lines; and (3) government endorsement of religion tends to alienate dissenting citizens and creates an outsider status which weakens the political community.

The Free Exercise Clause, in particular, has been interpreted to prohibit discrimination against religion. The government cannot classify persons based on their religion in a way that confers a benefit or imposes a burden on a particular religious group. In addition, under the unconstitutional condition doctrine, the government may not grant a benefit on the condition that the beneficiary surrender a constitutional right, even if the government may withhold the benefit altogether. A ban on immigration to the United States by Muslims would likely force such an unconstitutional choice: give up your religion or forgo the opportunity to immigrate.

Additional relevant constitutional provisions include the Fifth and Fourteenth Amendments, which together prohibit the federal and state governments from denying due process of law, and which guarantee equal protection of the law. In particular, the Fourteenth Amendment provides that: “No State shall... deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.” Beginning with the classic case of United States v. Carolene Products Co. (1938), the U.S. Supreme Court has held that when the government classifies between groups based on characteristics such as race or religion, the Court will carefully scrutinize the classification and require the government to demonstrate a sufficiently compelling justification to uphold the law.

In this case, Mr. Trump’s proposal was made in response to certain terrorist attacks, both domestically and internationally, some of which involved persons of the Muslim faith. He has suggested that the United States at least temporarily ban entry to Muslims to give the government time to better assess the security threat and improve the screening process for persons entering the United States.

National security is certainly a compelling governmental interest. It was used by the U.S. government to justify the detention of Japanese Americans during World War II. However, the government has since apologized for those actions and the U.S. Supreme Court’s 1944 decision in Korematsu v. United States upholding that governmental action has been highly criticized, including by the Supreme Court itself. More recently in the case of Hamdi v. Rumsfeld (2004), the U.S. Supreme Court reaffirmed that the security of the nation is “critical” and a “crucially important” government interest. Despite that recognition, national security was not a sufficient justification to justify many of the U.S. detention practices for persons accused of being enemy combatants.

Under current constitutional jurisprudence, the Supreme Court would likely require the government to demonstrate that excluding an entire religious group is the most narrowly tailored method of achieving its compelling interest in national security, a very high hurdle to meet. Administrative convenience would not meet this standard. The government would have to demonstrate that it considered less restrictive alternatives, but none could achieve its goal of protecting national security.

It is important to note that even if a good argument may be made that banning Muslims violates freedom of religion and equal protection, many Muslims who are barred entry could not successfully bring a legal challenge to the ban. The U.S. Supreme Court has generally interpreted the U.S. Constitution to apply only to persons on U.S. territory or within its jurisdiction. Thus, non-U.S. citizens outside the United States who are seeking to enter the country...
generally do not receive the protections of the U.S. Constitution and would lack standing to challenge a ban on their entry.

Not all Muslim noncitizens may be barred from bringing a claim, however. U.S. Supreme Court jurisprudence recognizes that the longer a person has been in the United States, the more ties that person has developed to the country. As a result, the person is entitled to greater constitutional protections even if a noncitizen. In this regard, the U.S. Supreme Court has held in cases such as *Landon v. Plasencia* (1982) that returning lawful permanent residents (LPRs) of the United States who are not citizens are entitled to due process, which includes a fair hearing when threatened with exclusion or deportation. Thus, returning LPRs of the Muslim faith would be entitled to a hearing if the U.S. government were to exclude them based on their religious beliefs. In those hearings, they could claim due process and equal protection of the law.

There is an additional hurdle excluded Muslims would have to overcome, however. The U.S. Supreme Court has largely deferred to the political branches when it comes to making decisions about immigration under the “plenary power doctrine.” Dating back to *The Chinese Exclusion Case* (1889), the Court has held that because decisions about immigration relate to national security and foreign relations, it is the role of the political branches to decide who to admit or exclude from the United States and it is not the role of the courts to second-guess the political branches in this regard. In more recent cases such as *INS v. St. Cyr* (2001) and *Zadvydas v. Davis* (2001), the Court has been more willing to review actions of the political branches with respect to their treatment of aliens. However, these more recent cases involved aliens who were already in the United States, not aliens who were outside the country seeking admission. The executive branch authority over exclusion of immigrants is statutorily codified in the Immigration and Nationality Act, discussed in more detail below. Thus, even if a returning LPR of the Muslim faith could successfully argue that his or her constitutional rights were violated, the LPR would still have to convince the court that the exclusion is judicially reviewable and not an issue committed to the political departments of government.

**The U.S. Immigration and Nationality Act**

The second source listed in the Supremacy Clause are the laws of the United States. In this regard, the main statute governing immigration to the United States is the Immigration and Nationality Act (INA), 8 U.S.C. § 1101 et seq. The INA contains a nondiscrimination provision, section 202(a)(1), which bans discrimination in the issuance of immigrant visas on a variety of grounds including “race, sex, nationality, place of birth and place of residence.” Interestingly, it does not expressly ban discrimination based on religion.

History suggests Congress failed to include religion in the nondiscrimination provision of the INA because it did not believe it necessary. Beginning in the late 1800s and continuing into the 1950s, U.S. immigration law increasingly included racially discriminatory provisions that primarily were aimed at excluding Chinese, Japanese, and other Asians from the United States. Following World War I, there were concerns about immigrant radicals and anarchists, particularly with respect to persons from southern and eastern Europe. Hence, Congress enacted national origin quotas in 1921 and again in 1924 that restricted immigration from southern and eastern Europe. Then in 1952, influenced by the cold war atmosphere, Congress passed the McCarran-Walter Act which continued the national origins quota system for the Eastern Hemisphere and favored immigration from northern and western Europe. In 1965, Congress made several significant changes to the INA including, *inter alia*, ending the national origins quota system; abolishing the special immigration restrictions relating to Orientals; and prohibiting immigration discrimination because of race, sex, nationality, place of birth, or place of residence. The adoption of a provision banning racial discrimination in the issuance of visas was a direct response to the racial discrimination that had been codified in the INA for the previous seventy years. Discrimination based on religion was never mentioned in the amendment likely because such discrimination had never been codified in the Act. This idea finds support in the legislative history. In debating the amendment, U.S. senators expressed the view that any religious discrimination was a secondary effect of discrimination based on ethnicity or national origin rather than a freestanding issue that required separate redress. Consequently, there were no proposals to amend the nondiscrimination language of the INA to expressly address religious discrimination.

INA section 212(f) expressly gives the President broad authority to suspend the entry of aliens or classes of aliens who he believes would be detrimental to the interests of the United States for such period as he shall deem necessary. Recent U.S. Presidents have relied on this authority to deny entry to persons who were banned from travel pursuant to United Nations-sanctioned travel bans; persons who had engaged in serious human rights abuses; persons who participated in military coups; and persons who engaged in international corruption and other international criminal behavior, among other examples. No U.S. President has ever relied upon this authority to ban an entire religion, however, so it is unclear whether it would support such an action.

**International Law**

The third area of law listed in the Supremacy Clause of the Constitution is “Treaties made . . . under the Authority of the United States.” In this regard, the United States belongs to a number of international treaties that ban discrimination based on religion, including the United Nations Charter, the International Covenant on Civil and Political Rights, and the Convention Relating to the Status of Refugees. Each of these are discussed in turn below.

The United Nations Charter affirms in its first article that promoting and encouraging respect for human rights and fundamental freedoms without distinction as to race, sex, language or religion is a foundational purpose. Article 2 imposes on Member States the obligation to “fulfil in good faith the obligations assumed by them in accordance with the present Charter.” Pursuant to Articles 55 and 56, Member States pledge to take joint and separate action to achieve the purposes of the United Nations, including “universal respect for, and observance of, human rights and fundamental freedoms
for all without distinction as to race, sex, language, or religion.” Thus, as a member of the United Nations, the United States has a treaty-based obligation not to engage in discrimination based on religion.

Article 2 of the International Covenant on Civil and Political Rights (ICCPR) expands on this obligation as follows: “Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.” Article 2 also obligates States to adopt measures that give effect to the rights recognized in the Covenant. Article 18 of the ICCPR states that everyone shall have the right to freedom of thought, conscience and religion. However, the ICCPR recognizes that this right may be subjected to limitations that are prescribed by law and necessary to protect public safety, order, health, and morals.

Based on its membership in the ICCPR, the United States has an international legal obligation to respect and ensure the rights guaranteed by the Covenant, including freedom of religion. It also has a duty to adopt measures that furthers those rights — not measures that infringes on them by discriminating against a particular religious group. However, there are two caveats that must be mentioned.

First, as noted above, the United States is authorized to place limits on the right to freedom of religion if it can show that it is necessary to protect national security. It would be a difficult argument to make, however, that all Muslims present a security threat regardless of their country of origin or individual beliefs and actions. Muslims are not an undifferentiated group. They come from many different countries and from different branches and schools of Islam. The U.S. government would have to demonstrate that it is necessary to bar every Muslim from entering the United States to protect national security.

Second, when the U.S. Senate gave its advice and consent to ratification of the ICCPR, it attached a declaration stating that the first twenty-seven articles of the ICCPR are considered non-self-executing. That declaration essentially forecloses the possibility of a private person bringing a lawsuit in a U.S. court based on a claim that his or her rights under those articles of the ICCPR have been violated. However, the United States has accepted the competence of the United Nations Human Rights Committee (HRC) under Article 41 of the ICCPR. As a result, another member state of the ICCPR could file a complaint against the United States before the HRC alleging that the United States is violating its treaty obligation to not discriminate on the basis of religion. The HRC does not have its own enforcement authority, however, and could not compel a change in U.S. law. If it found the United States in violation of the ICCPR, it could only hope to create public pressure to facilitate that change.

The third treaty of particular relevance is the 1951 Convention Relating to the Status of Refugees, to which the United States belongs by virtue of its ratification of the 1967 Protocol Relating to the Status of Refugees. Some of Mr. Trump’s statements regarding a ban on the entry of Muslims and the need to improve the immigrant screening process were made in reference to the United States’ acceptance and resettlement of refugees, particularly Syrian refugees. Article 1 of the Refugee Convention defines a refugee as a person who is outside his or her country of nationality and who is afraid to return to that country due to a well-founded fear of persecution for reasons of race, religion, nationality, membership in a particular social group, or political opinion. The United States has implemented the Refugee Convention into U.S. law through statutory provisions of the INA that largely mirror this definition of refugee.

Article 3 of the Refugee Convention contains a specific ban on religious discrimination: “The Contracting States shall apply the provisions of this Convention to refugees without discrimination as to race, religion or country of origin.” Thus, if the United States refused to consider all refugees of the Muslim faith, this would be a direct violation of its obligations under the Refugee Convention. Article IV of the 1967 Protocol provides that any disputes between States Parties to the Protocol which cannot be settled by other means shall be referred to the International Court of Justice (ICJ). Consequently, another State Party to the Protocol could bring a complaint against the United States at the ICJ if it believed the United States to be engaging in impermissible religious discrimination.

One of the ongoing weaknesses of the Refugee Convention, however, is that it does not expressly require Member States to accept any refugees. Member States have a general obligation to cooperate with the Office of the United Nations High Commissioner for Refugees (UNHCR), which may imply a good faith duty to accept refugees in accordance with the terms of the Convention, but Member States generally decide for themselves how many and which refugees to accept. Those resettlement decisions are made jointly by the UNHCR and the receiving countries based on a number of factors, including the country’s capacity provide services to the refugees, whether the refugee already has one or more family members in the receiving country, medical needs of the refugee, and other factors. Accordingly, the United States has a significant amount of discretion in determining which refugees to accept.

Additionally, like the ICCPR, the Refugee Convention contains a national security exception. Article 9 of the Convention provides that nothing in the Convention “prevents a Contracting State, in time of war or other grave and exceptional circumstances, from taking provisional measures which it considers to be essential to the national security.” The United States could argue that the ongoing terrorist threats and attacks against the United States and its allies constitute a “grave and exceptional circumstance” justifying a provisional measure such as a temporary ban on acceptance of certain refugees. However, the Convention also states that such measures may be taken “in the case of a particular person,” not with respect to an entire group of persons belonging to a particular religion. A Contracting State must also demonstrate that such measures are necessary in the particular refugee’s case in the interests of national security. This language requires an individual determination be made on a case-by-case basis. Hence, the United States could not rely on the national security exception to justify a blanket exclusion of an entire religious group.
In addition to the treaty law described above, the United States has long accepted that customary international law is part of U.S. law, and is be applied by judges in U.S. courts. Because the principle of nondiscrimination is reflected in so many international instruments such as those described above, as well as resolutions such as the Universal Declaration on Human Rights (Article 2) and the American Declaration on the Rights and Duties of Man (Articles II and III), it may be said to reflect customary international law. Thus, it may be argued that regardless of its treaty obligations, the United States has a customary international law obligation not to engage in religious discrimination. As with treaty obligations, though, obligations under customary international law may be difficult to enforce.

**Practical Problems relating to Implementation of the Proposed Ban**

Finally, there are practical problems with the implementation of the proposal that must be considered. For example, it is not clear how a U.S. immigration official would know if an applicant for entry is a Muslim. While the immigration service may ask about a person’s faith in the visa application, the Immigration Service could not always rely on an applicant’s self-declaration. A person intending to cause harm to the United States due to his or her religious beliefs is not likely to be honest in declaring a religious affiliation if the person knows that the truth will result in being barred entry.

This quandary raises the question of how the United States will determine a person’s religion in case of doubt. If the government were to investigate the person’s background, what factors would be used to assess whether that person is a member of a particular religion? It is also not clear how would the United States treat a case where a person claims that past membership, but to have disavowed the faith or changed religions. Although the U.S. Constitution does not speak directly to this issue in the context of immigration, Article VI does forbid a religious test for public office, reaffirming support for religious neutrality.

Moreover, imposing an entry ban on all Muslims is likely to undermine the United States’ international reputation, making it more difficult for the United States to cooperate with its allies on related issues, such as investigations into terrorist activities and sharing of intelligence information about crime and other matters. It also is likely to widen rifts between Muslims and non-Muslims at home and abroad by perpetuating dangerous stereotypes, which may lead to an increase in terrorist attacks against the United States by certain extremist Muslim groups in the future. Finally, such a ban is contrary to the ideals of the United States which has long stood for the promotion of human rights, including religious freedom.

**Conclusion**

It is not entirely clear whether Mr. Trump’s proposed ban on the entry of Muslims into the United States could successfully be challenged as a violation of U.S. constitutional or statutory law. A better argument may be made that it violates the United States’ international law obligations; however, enforcement of those obligations is notoriously difficult. Regardless of the legality of the ban, there are prudential arguments that counsel strongly against it. It would create or perpetuate negative stereotypes of all Muslims as threats, tending, in the words of the U.S. Supreme Court, “to incur the hatred, disrespect and even contempt of those who hold contrary beliefs,” to encourage divisiveness along religious lines; and to alienate dissenting citizens and create an outsider status which weakens the bonds of the political community. For all these reasons, the United States should continue to screen intending immigrants on an individual basis rather than labelling an entire religion a threat to national security.

Professor Cindy G. BUYS
Law professor and Director of International Law Programs
Southern Illinois University School of Law
Carbondale, IL, United States
cbuys@siu.edu

1 Much of this historical information is from Kevin R. Johnson, et al., Understanding Immigration Law 50-61 (2009).