

EQUAL JUSTICE UNDER LAW: HOW EXECUTIVE ORDER 13,780 IS
UNCONSTITUTIONAL UNDER THE EQUAL PROTECTION CLAUSE OF THE
FOURTEENTH AMENDMENT

INTRODUCTION

Justice Holmes once said that the Equal Protection Clause of the Fourteenth Amendment was the “last resort of constitutional lawyers.”¹ But his words on the Equal Protection Clause are outdated, especially when there is such a controversial President sitting in the Oval Office. Donald Trump’s presidency is controversial for many reasons, but one main source of the controversy is his so-called “Muslim ban,” which came in the form of an Executive Order.²

In general, Executive Order 13,780 bans foreign nationals from six Muslim-majority countries from entering the United States of America, and it suspends the United State Refugee Admission Program.³ This Comment will analyze how the Executive Order is unconstitutional under the Equal Protection Clause of the Fourteenth Amendment.⁴ To be clear an equal protection claim against the Executive Order comes in two forms: 1) discrimination based on national origin, and 2) discrimination based on religion. This Comment proposes that the Executive Order is unconstitutional under both theories. Under both theories, the Court will likely use a strict scrutiny standard when evaluating the constitutionality of the Executive Order, though the Court will reach strict scrutiny in different ways. Under the national origin discrimination theory, the Court will automatically apply strict scrutiny because national origin is a suspect class, and under the religious discrimination theory, the Court will likely apply the test it set forth in *Washington v. Davis*.⁵

Part I of this Comment will give a background into the history and substance of Executive Order 13,780, the different standards of scrutiny, and the various judicial decisions involving the Equal Protection Clause and strict scrutiny. Part II of this Comment will discuss

why a court will evaluate the Executive Order under the strict scrutiny standard. This Part analyzes the different routes the Court will take to get strict scrutiny, under both discrimination theories, and proposes a test that the Court should adopt when determining if strict scrutiny is appropriate for the religious discrimination claim. Part III of this Comment will discuss how the Executive Order is unconstitutional under the Equal Protection Clause by evaluating the Executive Order under strict scrutiny.

I. BACKGROUND

A. History and Substance of Executive Order 13,780

President Trump signed Executive Order 13,780 on March 6, 2017,⁶ which explicitly repealed and replaced Executive Order 13,769.⁷ In part, Executive Order 13,769 suspended “entry of certain aliens from seven countries: Iran, Iraq, Libya, Somalia, Sudan, Syria, and Yemen”⁸ for 90 days.⁹ But the courts enjoined this Order and halted its implementation.¹⁰ Thus, President Trump signed Executive Order 13,780. The main policy behind the Order is to, “protect its citizens from terrorist attacks, including those committed by foreign nationals.”¹¹

The details of the Executive Order are not complicated. The fundamental portion of the Order suspends entry of nationals, for 90 days, from Iran, Libya, Somalia, Sudan, Syria, and Yemen.¹² That said, it also contained an exception for people who are in those countries, at the time of the Order’s effective date, but have a valid visa into the United States.¹³ Another key provision of the Order prohibits refugees from entering the country under the United States Refugee Admissions Program, also known asUSRAP.¹⁴

Executive Order 13,780 has been subject to as much, if not more, criticism as Executive Order 13,769.¹⁵ Like its predecessor, the Order has been enjoined nationwide by a federal district court in Hawai’i.¹⁶ The plaintiffs in that case asserted several causes of action,¹⁷ but none of

them are equal protection challenges. Ultimately, the district court granted the plaintiff's temporary restraining order, mainly on Establishment Clause grounds, and enjoined the Executive Order nationwide.¹⁸

B. Strict Scrutiny vs. Rational Basis

In short, strict scrutiny and rational basis are standards that create strong presumptions that courts use when determining the constitutionality of governmental acts.¹⁹ Under a rational basis standard, the government need show only that the statute or policy at issue is rationally related to a legitimate government purpose.²⁰ Because the Government has to show only that their action was rationally related to a legitimate purpose, it is a lenient, Government-friendly standard.

On the opposite side of the spectrum, strict scrutiny is a challenger-friendly standard which raises the burden that the government must meet.²¹ To meet this burden, the government must show that their action was narrowly tailored to achieve a compelling governmental interest.²² But strict scrutiny is not limitless; it applies only when the government action discriminates against a "suspect class" or interferes with a "fundamental right."²³ Issues pertaining the interference with a "fundamental right" are beyond the scope of this Comment. For equal protection purposes, a "suspect class" includes, but is not limited to, race, religion, and alienage.²⁴

C. Judicial Decisions on Equal Protection and Strict Scrutiny

This Comment argues that Executive Order is unconstitutional under the Equal Protection Clause. Thus, this section introduces the relevant judicial decisions on equal protection and strict scrutiny.

In *Washington v. Davis*, a landmark decision, the Supreme Court held that facially neutral recruiting procedures for a police department were not unconstitutional, under the equal protection clause, because they have a racially disproportionate impact alone.²⁵ Here, the plaintiffs, two African-Americans, contend that the recruitment procedures, which involve a written test, are invalid because African-Americans failed the test at a rate of four times more than white applicants.²⁶ In addition to the disproportionate results, the plaintiffs argued that the test is invalid because it bore no relationship to job performance.²⁷

Ultimately, the Court upheld the department policies under rational basis standard.²⁸ While the end-result is important, the method in which the Court decided to review the department policy under rational basis is what makes this decision a seminal case. When a policy or law is facially neutral, the Court reasoned that it will not review the policy under strict scrutiny unless the plaintiff shows that the law or policy: (1) was enacted with a discriminatory purpose, and (2) the law or policy had a discriminatory impact.²⁹ Because the plaintiffs could only show that the policy had a discriminatory impact, the Court reviewed the constitutionality of the policy under a rational basis standard.³⁰

After the Court decided *Washington*, it heard another equal protection case, *McCleskey v. Kemp*.³¹ Here, a prisoner who was on death row argued that Georgia's capital punishment statute violated the Equal Protection Clause because the state administered it in a discriminatory manner.³² The prisoner relied on one statistical study and argued that, "persons who murder whites are more likely to be sentenced to death than persons who murder blacks, and black murderers are more likely to be sentenced to death than white murderers."³³ The Court ultimately rejected this argument because the prisoner failed to show that the capital punishment statute was enacted with a discriminatory purpose. This is an important case in the Court's equal protection

jurisprudence because it explains the “discriminatory intent” prong of the test set forth in *Washington*.³⁴ *McCleskey* explains that discriminatory intent must be proven by showing that the government action was enacted “because of,” and not merely “in spite of” its adverse effects on a group.³⁵

Another notable case is *Korematsu v. United States*, and while this case does not involve not an equal protection challenge, it is one of the first cases that introduced strict scrutiny when a suspect class is at issue.³⁶ There, a federal court convicted a Japanese-American citizen for remaining in an area of California that was designated a “Military Area,” which was off limits to “all persons of Japanese ancestry.”³⁷ This military order was based on Executive Order 9066.³⁸ Ultimately, the court held that the Order, which Korematsu was convicted of violating, was constitutional because the Order was justified in times of “emergency and peril.”³⁹ *Korematsu* is one of the most criticized judicial opinions in the modern era, and has even been deemed “as one of the greatest blunders in American legal history.”⁴⁰ This case has never been overturned, and even though the result in *Korematsu* is controversial, its application of strict scrutiny to a suspect class is routine.

II. WHY STRICT SCRUTINY IS THE APPROPRIATE STANDARD THAT THE COURT WILL USE WHEN EVALUATING THE EXECUTIVE ORDER

This Part evaluates why the strict scrutiny standard is the appropriate standard that the Court will use in evaluating the constitutionality of the Order. This Part also discusses how the Court will decide to use the strict scrutiny standard under the equal protection claims because the reasoning the Court will use for each claim differs. To be clear, there are two possible equal protection challenges to the Executive Order. First, an equal protection challenge can be based on national origin discrimination. Second, an equal protection challenge based on religious discrimination. Even so, under both challenges the Court will ultimately apply a strict scrutiny

standard in evaluating the Executive Order's constitutionality, though the route the Court will take to get to strict scrutiny will vary.

A. Equal Protection Challenge Based on National Origin Discrimination

A challenge to the Executive Order based on national origin discrimination is more well-defined than a challenge based on religious discrimination. The sole reason for this is clear from the text of the Executive Order. On its face, Executive Order 13,780 bars the entry of foreign nationals from six countries in the middle east: Iran, Libya, Somalia, Sudan, Syria, and Yemen.⁴¹ When a government action discriminates against a classified group of people, those people may raise an equal protection claim against that action.⁴² Likewise, under the Equal Protection Clause, a showing that a group of people were singled out because they are in a classified group can support a valid equal protection challenge.⁴³ But in order for the Court to apply a strict scrutiny standard, that classified group must be a "suspect class."⁴⁴

Here, there are facts that would lead to an actionable equal protection claim against the government for its implementation of Executive Order 13,780. The Executive Order explicitly bars some individuals from entering the country based on their national origin; this is an action by the government that discriminates against a classified group of people, which gives rise to the claim. But just because there is an actionable equal protection claim, that does not automatically guarantee that the Court will apply a strict scrutiny standard when evaluating the constitutionality of the government action.

When a government action explicitly curtails the rights of a suspect class, the Court will automatically apply the strict scrutiny standard.⁴⁵ Here, it is likely that the Court will apply the strict scrutiny standard because national origin is a suspect class.⁴⁶ When a suspect class is at issue, the Court is almost guaranteed to apply a strict scrutiny. Thus, the path for a national

origin discrimination claim to strict scrutiny is not difficult. But when the challenge is based on religion, the path to strict scrutiny is more war-torn.

B. Equal Protection Challenge Based on Religious Discrimination

Like the equal protection claim based on nation origin discrimination, the plaintiffs here must show that the government singled them out or discriminated against them based on their religion.⁴⁷ The plaintiffs will likely be able to raise this claim, but the real issue is if the Court will apply the strict scrutiny standard or the rational basis standard when evaluating the constitutionality of the Executive Order. It helps to note that religion is widely considered a suspect class.⁴⁸ Here, however, an equal protection claim based on religious discrimination differs from a national origin based claim because there is no reference to religion in the Executive Order, therefore for purposes of religious discrimination, the Court will not automatically apply strict scrutiny because it does not explicitly discriminate a group of people based on their religion.⁴⁹

Because the Executive Order does not explicitly discriminate against religion or “contain any term or phrase that can be reasonably characterized as having a religious connotation,”⁵⁰ the Order can be classified as facially neutral.⁵¹ While the United States Supreme Court has not decided when courts should apply the strict scrutiny standard to government actions that are facially neutral to religion, the Court tackled this issue in *Washington v. Davis* which concerned a racially facially neutral policy.⁵² In *Washington*, the plaintiff’s alleged racial discrimination under the Equal Protection Clause because a higher proportion of African-American’s were failing a police department’s written exam.⁵³ The written examination was facially neutral because it never mentioned race and every applicant, regardless of color, took this exam.⁵⁴ When confronted with a racially facially neutral policy, the Court reasoned that it would only apply

strict scrutiny if the plaintiffs could show that the government action had (1) a discriminatory purpose, and (2) a discriminatory impact.⁵⁵

This Comment proposes that the Court will adopt use *Washington* for guidance in determining if strict scrutiny should apply to the religious discrimination claim. *Washington* is not only a landmark decision, it is instructive for the case at hand. Because religion is a suspect class,⁵⁶ just as race is,⁵⁷ the two-part test that the Court used to determine if strict scrutiny should be applied to a racially facially neutral policy should be, and likely will be, applied to determine if strict scrutiny applies to a religious facially neutral policy. To say otherwise would mean that race-based claims deserve a different standard than religious based claims, this is an untenable notion which the Court will not take. Thus, to apply strict scrutiny to Executive Order 13,780, a religious facially neutral policy, the Court will use the two-part test it set forth in *Washington*.⁵⁸

1. Executive Order 13,780 was Enacted with Discriminatory Intent.

To meet the first prong of the *Washington* test, the plaintiffs must show that Executive Order 13,780 was enacted with discriminatory intent. After *Washington*, the Court's decision in *McCleskey v. Kemp*⁵⁹ clarified what is required to prove discriminatory intent. In *McCleskey*, a prisoner on death row argued that Georgia's capital punishment statute violated the Equal Protection Clause because the state administered it in a racially discriminatory manner.⁶⁰ But the Court held that to succeed on this claim, the prisoner would have to show that the "Georgia Legislature enacted or maintained the death penalty statute *because of* an anticipated racially discriminatory effect."⁶¹ Turning to Executive Order 13,780, and with *McCleskey* in mind, discriminatory intent can only be satisfied if the government enacted the Order *because of* its anticipated discriminatory effect on Muslims.

Executive Order 13,780 was intended to be a “Muslim ban” and to have discriminatory effects against Muslims by barring them from entering the United States. From the start, Donald Trump’s time on the national political stage has been replete with anti-Islamic sentiment.⁶² When he first brought up the idea, he called it a “Muslim ban,” then sought advice on “the right way to do it legally.”⁶³ Even more telling, the district court which temporarily enjoined Executive Order 13,780 heavily relied on statements from Donald Trump, and members of his administration, to show that the Order was intended to be “Muslim ban.”⁶⁴ To play devil’s advocate, critics have argued that it is improper for the Court to consider outside statements from Donald Trump or his surrogates, especially if some of them occurred before he became President.⁶⁵ Yet lawyers and members of his own party realize that Donald Trump’s statements are hurting the legitimacy of the Order.⁶⁶ Next, the argument may be raised that this Order cannot does not discriminate against Muslims because it is a general ban that applies to all religious groups. But this argument was raised in the district court and was summarily rejected.⁶⁷ And more pragmatically, when a facially neutral policy, law, or executive order is born from such discriminatory animus towards a group of people, equity requires that the Court find discriminatory intent. Thus, the Court will likely conclude that Executive Order 13,780 was enacted with the discriminatory purpose of keeping Muslims out of the United States.

2. Executive Order 13,780 has had a Discriminatory Impact against Muslims

Here, this prong of the *Washington* test is easily satisfied, and we look the landmark case itself for guidance. In *Washington*, discriminatory impact was shown because more African-American recruits failed the examination when compared to Caucasian candidates.⁶⁸ Here, for there to be a discriminatory impact, the government action must affect a greater proportion of Muslims when compared to other religious sects. Quite simply, the Executive Order affects

Muslim-majority countries.⁶⁹ A general ban on these six countries will most certainly affect a greater proportion of Muslims, when compared to other religious sects in the countries because they are all Muslim-majority countries. Any argument to the contrary would likely be futile.

To sum up, both theories of discrimination result in the Court applying the strict scrutiny standard to evaluate the constitutionality of the Executive Order. First, the Court will automatically apply strict scrutiny to an equal protection challenge based on national origin discrimination because it is explicit in the Order. Second, the Court will use the *Washington* test to apply strict scrutiny to a religious discrimination claim. While the Court has never applied the *Washington* test to a religious discrimination case, it is likely to do so because both groups are suspect classes and to do otherwise would be untenable.

III. EXECUTIVE ORDER 13,780 IS UNCONSTITUTIONAL BECAUSE IT FAILS THE STRICT SCRUTINY STANDARD

This Part will analyze the application of the strict scrutiny standard to the discrimination claims under the Equal Protection Clause, and under both theories, the Court will likely hold that the Executive Order is unconstitutional. That said, there is no need to analyze strict scrutiny under separate analyses for each claim because one application is the same for both claims. To satisfy strict scrutiny, the government must show that its action was necessary, or narrowly tailored, to serve a compelling interest.⁷⁰

A. Compelling Governmental Interest

One need only look to the title of Executive Order 13,780 to realize which compelling governmental interest the Executive Order is intended to serve. The title of the Executive Order is “Protecting the Nation from Foreign Terrorist Entry into The United States.”⁷¹ Even further, the first two paragraphs of the Order state that it is the policy of the United States to protect itself from terrorist entering the country and committing terrorist activities.⁷²

There is little doubt that protecting the United States from terror attacks is a compelling governmental interest. Around the globe, The Islamic State of Iraq and Al-Sham (ISIS) are committing terrorist attacks with devastating force; including, the mass genocide in Syria⁷³ and the recent bombing in London.⁷⁴ ISIS and other equally heinous terrorist groups are located throughout the world, but the six countries listed in Executive Order have been known to have significant terrorist ties and may pose a threat to the United States.⁷⁵ In a somewhat analogous situation, though in a different time, the Court has held that the government has an interest in protecting its borders in war-time, and when our borders are threatened.⁷⁶ Thus, in a post-9/11 world where terror threats and attacks are more prevalent than ever, the Court will likely find that the Executive Order serves a compelling governmental interest to protect the nation from terrorist attacks.

B. Narrowly Tailored

Even though the government has a compelling interest in protecting the United States from terrorist attacks, they must show that the Executive Order was *necessary*, also known as narrowly tailored, to protect the United States from terrorist attacks. Particularly, the government must show that it could not prevent terrorist attacks in the United States through some other method that did not discriminate based on national origin or religion.⁷⁷ This is an extremely difficult burden for the government to meet, accordingly, they cannot.

There are countless other prophylactic, less discriminatory measures that the government could have taken to prevent terrorist attacks in the United States. Indeed, the government has even instituted some of these policies. A representative example of a less discriminatory action is the Trump administration's carry-on restrictions for flights originating from ten Muslim-majority countries.⁷⁸ This restriction bars passengers from bringing certain electronic devices onto

airplanes that originate from certain Muslim-majority countries, and the reason behind this new restriction is based on the fear of terrorist attacks in the United States.⁷⁹ By the governments own admission by implementing the carry-on restriction,⁸⁰ a complete “Muslim ban” is unnecessary to protect the United States from terrorist attacks because there are other, less discriminating actions it could take. Thus, Executive Order is not narrowly tailored to serve the governments interest in protecting the United States from terror attacks.

Since the government can only show that it has a compelling government interest, it cannot satisfy the strict scrutiny standard that the Court will apply when it is evaluating the constitutionality of the Executive Order. Because the government fails to meet its burden under strict scrutiny, the Court will find that Executive Order 13,780 is unconstitutional under the Equal Protection Clause.

CONCLUSION

The President of the United States has an enormous amount of authority, but that authority is not boundless. Because Executive Order 13,780 can be challenged under the Equal Protection Clause based on theories of national origin and religious discrimination, the Court will evaluate the constitutionality of the Order under a strict scrutiny standard. When the Court applies this strict scrutiny standard, it will find that while the government has a compelling interest to protect the United States from terror attacks, the Executive Order was not narrowly tailored to promote that interest. Thus, the Court will find that Executive Order 13,780 is unconstitutional under the Equal Protection Clause.

¹ Joseph Tussman & Jacobus tenBroek, *The Equal Protection of the Laws*, 37 CAL. L. REV. 341, 341 (1949).

² Exec. Order No. 13,780, 82 Fed. Reg. 13,209 (Mar. 6, 2017).

³ *Id.* at 13,231, 13,215–16.

⁴ U.S. CONST. amend. XIV, § 1.

⁵ *Washington v. Davis*, 426 U.S. 229 (1976).

⁶ Exec. Order No. 13,780, 82 Fed. Reg. at 13,209.

⁷ *Id.* at 13,209–10 (discussing the background of Exec. Order. No. 13,769).

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.* at 13,209.

¹² *Id.* at 13,213.

¹³ *Id.*

¹⁴ *Id.* at 13,215.

¹⁵ See Karen Herzog, *Trump's Travel Ban Is on the Back Burner in Courts, but It's Still Front Burner for Universities*, MILWAUKEE J. SENTINEL (April 16, 2017, 7:39 PM),

[http://www.jsonline.com/story/news/education/2017/04/16/trumps-travel-ban-back-burner-](http://www.jsonline.com/story/news/education/2017/04/16/trumps-travel-ban-back-burner-courts-but-s-still-front-burner-universities/100104050/)

[courts-but-s-still-front-burner-universities/100104050/](http://www.jsonline.com/story/news/education/2017/04/16/trumps-travel-ban-back-burner-courts-but-s-still-front-burner-universities/100104050/) (discussing how Exec. Order No. 13,780 still has repercussions for universities and student, even though it was enjoined by a court); John

D. Skrentny, *Trump's Revised Travel Ban Hurt's America's Universities*, FORTUNE (Mar. 16,

2017), <http://fortune.com/2017/03/16/trump-revised-travel-ban-u-s-colleges/> (discussing how

Exec. Order No. 13,780 is deterring foreign students from attending high-demand, scientific baccalaureate programs); Cathy Bussewitz, *Hawaii Fears Travel Ban Could Jeopardize Tourism, the State's Main Economic Driver*, CHI. TRIBUNE (March 15, 2017, 9:34 AM), <http://www.chicagotribune.com/news/nationworld/ct-hawaii-travel-ban-tourism-20170315-story.html> (discussing how Exec. Order No. 13,780 will have a “chilling effect” that will discourage travel to Hawai’i and other States).

¹⁶ *Hawai’i v. Trump*, 241 F. Supp. 3d 1119, 1140 (D. Haw. 2017).

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ See Tara Leigh Grove, *Tiers of Scrutiny in a Hierarchical Judiciary*, GEO. J. L. & PUB. POL’Y 475, 478 (2016) (“These standards create strong presumptions that guide lower courts in evaluating the constitutionality of legislation.”).

²⁰ *Washington v. Davis*, 426 U.S. 229, 246 (1976) (applying the rational basis standard, the Court stated “[the government action] rationally may be said to serve a purpose the Government is constitutionally empowered to pursue.”).

²¹ Susan Gellman & Susan Looper-Friedman, *Thou Shalt Use the Equal Protection Clause for Religion Cases (Not Just the Establishment Clause)*, 10 U. PA. J. CONST. L. 665, 707 (2008) (noting that the strict scrutiny standard is “challenger-friendly”).

²² *Alpha Delta Chi-Delta Chapter v. Reed*, 648 F.3d 790, 797 (9th Cir. 2011) (stating the rule that under strict scrutiny, the Government restrictions “must be narrowly tailored to serve a compelling government interest.”); see also Gellman & Looper-Friedman, *supra* note 21, at 708 (noting that the government must show why the action it took was necessary to serve a compelling purpose).

²³ Gellman & Looper-Friedman, *supra* note 21 (“[S]trict scrutiny is applied to government action that either intentionally discriminates against a ‘suspect class’ or interferes with a ‘fundamental right.’”).

²⁴ *Id.*; Tussman & tenBroek, *supra* note 1, at 355.

²⁵ 426 U.S. at 245–46.

²⁶ *Id.* at 237.

²⁷ *Id.*

²⁸ *Id.* at 246 (“As we have said, the test is neutral on its face and rationally may be said to serve a purpose the Government is constitutionally empowered to pursue.”).

²⁹ *Id.* at 239–42.

³⁰ *Id.* at 246.

³¹ *McCleskey v. Kemp*, 481 U.S. 279 (1987).

³² *Id.* at 291–92

³³ *Id.* at 291.

³⁴ 426 U.S. at 239–42.

³⁵ 481 U.S. at 298.

³⁶ *Korematsu v. U.S.*, 323 U.S. 214 (1944).

³⁷ *Id.* at 215–16 (noting that when policies which curtail the rights of a single race “are immediately suspect,” and that courts must “subject them to the most rigid scrutiny.”).

³⁸ *Id.* at 216–17.

³⁹ *Id.* at 220.

⁴⁰ Ian Samuel & Leah Litman, *No Peeking? Korematsu and Judicial Credulity*, TAKE CARE (Mar. 22, 2017), <https://takecareblog.com/blog/no-peeking-korematsu-and-judicial-credulity>.

⁴¹ Exec. Order No. 13,780, 82 Fed. Reg. 13,209, 13,213 (Mar. 6, 2017).

⁴² See Gellman & Looper-Friedman, *supra* note 21 (noting that an equal protection claim can be based on intentional discrimination against a class of people).

⁴³ See *Alpha Delta Chi-Delta Chapter v. Reed*, 648 F.3d 790, 804 (9th Cir. 2011) (indicating that when a classified group is singled out, it may support an equal protection claim).

⁴⁴ Gellman & Looper-Friedman, *supra* note 21.

⁴⁵ *Korematsu v. U.S.*, 323 U.S. 214, 215–16 (1944); see Gellman & Looper-Friedman, *supra* note 21 (“[S]trict scrutiny is applied to government action that either intentionally discriminates against a ‘suspect class’ or interferes with a ‘fundamental right.’”).

⁴⁶ See Gellman & Looper-Friedman, *supra* note 21 (noting that alienage is an inherently suspect distinction); see also Tussman & tenBroek, *supra* note 1, at 347 (noting that alienage is a forbidden classification).

⁴⁷ *Alpha Delta Chi-Delta Chapter*, 648 F.3d at 804.

⁴⁸ See Gellman & Looper-Friedman, *supra* note 21 (noting that religion is an inherently suspect distinction); see also Tussman & tenBroek, *supra* note 1, at 347 (noting that religion is a forbidden classification).

⁴⁹ Compare *Koromatsu*, 323 U.S. at 216–18 (automatically applying the “most rigid scrutiny” because the government action explicitly restricted “those of Japanese ancestry.”) with *Washington v. Davis*, 426 U.S. 229, 239, 242 (1976) (refusing to automatically apply strict scrutiny because the government action was facially neutral, meaning that it made no explicit restrictions to a suspect class).

⁵⁰ *Hawai’i v. Trump*, 241 F. Supp. 3d 1119, 1134–39 (D. Haw. 2017) (discussing how Executive Order 13,780 is facially neutral).

⁵¹ *Washington*, 426 U.S. at 234–35, 242.

⁵² *See id.* at 252 (holding that a racially and facially neutral policy was constitutional).

⁵³ *Id.* at 233.

⁵⁴ *Id.*

⁵⁵ *Id.* at 239.

⁵⁶ *See* Gellman & Looper-Friedman, *supra* note 21 (noting that religion is an inherently suspect distinction); *see also* Tussman & tenBroek, *supra* note 1, at 347 (noting that religion is a forbidden classification).

⁵⁷ *See* *Korematsu v. U.S.*, 323 U.S. 214, 215–16 (1944) (noting that when policies which curtail the rights of a single race “are immediately suspect,” and that courts must “subject them to the most rigid scrutiny.”); *see also* Gellman & Looper-Friedman, *supra* note 21 (noting that race is an inherently suspect distinction); *see also* Tussman & tenBroek, *supra* note 1, at 347 (noting that race is a forbidden classification).

⁵⁸ *Washington*, 426 U.S. at 239.

⁵⁹ *McCleskey v. Kemp*, 481 U.S. 279 (1987).

⁶⁰ *Id.* at 286, 292.

⁶¹ *Id.* at 299.

⁶² Jenna Johnson, *Trump Calls for ‘Total and Complete Shutdown of Muslims Entering the United States’*, WASH. POST (Dec. 7, 2015), https://www.washingtonpost.com/news/post-politics/wp/2015/12/07/donald-trump-calls-for-total-and-complete-shutdown-of-muslims-entering-the-united-states/?utm_term=.867861c2c36c (observing that Donald Trump advocated for a ban on Muslims entering the United States).

⁶³ Rebecca Savarnsky, *Giuliani: Trump Asked Me How to Do a Muslim Ban 'Legally'*, HILL (Jan. 29, 2017, 08:48 AM), <http://thehill.com/homenews/administration/316726-giuliani-trump-asked-me-how-to-do-a-muslim-ban-legally>.

⁶⁴ *Hawai'i v. Trump*, 241 F. Supp. 3d 1119, 1126–27 (D. Haw. 2017) (collecting statements).

⁶⁵ Samuel & Litman, *supra* note 40 (arguing that it is improper for a court to evaluate the Executive Order based on campaign rhetoric).

⁶⁶ Josh Gerstein, *Trump's Tweets Prompt Backlash from GOP lawyers*, POLITICO (Jun. 5, 2017, 4:45 PM), <http://www.politico.com/story/2017/06/05/trump-tweets-republican-lawyers-backlash-239148> (collecting statements from Republican party members and attorneys).

⁶⁷ *Hawai'i*, 241 F. Supp. 3d at 1135 (“The illogic of the Government’s contentions is palpable. The notion that one can demonstrate animus toward any group of people only by targeting all of them at once is fundamentally flawed.”).

⁶⁸ *Washington v. Davis*, 426 U.S. 229, 242 (1976) (noting that there was a disproportionate impact when a greater number of black candidates were affected).

⁶⁹ *Hawai'i*, 241 F. Supp. 3d at 1135 (identifying the countries listed in Exec. Order No. 13,780 as Muslim-majority); Herzog, *supra* note 15 (same); Savarnsky, *supra* note 62 (same).

⁷⁰ *Alpha Delta Chi-Delta Chapter v. Reed*, 648 F.3d 790, 797 (9th Cir. 2011) (stating the rule, that under strict scrutiny, the Government restrictions “must be narrowly tailored to serve a compelling government interest.”); *see also* Gellman & Looper-Friedmna, *supra* note 21, at 708 (noting that the government must show why the action it took was necessary to serve a compelling purpose).

⁷¹ Exec. Order No. 13,780, 82 Fed. Reg. 13,209, 13,209 (Mar. 6, 2017).

⁷² *Id.*

⁷³ See *UN Human Rights Panel Concludes ISIL Is Committing Genocide against Yazidis*, UN NEWS CTR. (Jun. 16, 2016),

<http://www.un.org/apps/news/story.asp?NewsID=54247#.WVwxxsaZPBI> (discussing the genocide ISIS is committing in Syria).

⁷⁴ Laurel Wamsley, *ISIS Claims Responsibility for London Attack That Killed 7, Injured 48*, NPR (Jun. 4, 2017, 12:32 PM), <http://www.npr.org/sections/thetwo-way/2017/06/04/531459784/raids-in-london-after-attack-that-killed-7-injured-48> (detailing the terrorist attack that occurred in London).

⁷⁵ Exec. Order No. 13,780, 82 Fed. Reg. at 13,210–12.

⁷⁶ *Korematsu v. U.S.*, 323 U.S. 214, 244 (1944).

⁷⁷ Gellman & Looper-Friedman, *supra* note 21, at 708 (“Under an equal protection strict scrutiny analysis, the government should have to demonstrate that it could not serve that purpose through some other display (or otherwise) that did not marginalize minorities.”).

⁷⁸ Ron Nixon, Adam Goldman & Eric Schmitt, *Devices Banned on Flights From 10 Countries Over ISIS Fears*, N.Y. TIMES (Mar. 21, 2017),

<https://www.nytimes.com/2017/03/21/us/politics/tsa-ban-electronics-laptops-cabin.html?mcubz=1> (explaining the Trump administration’s new policy which imposes carry-on restrictions from airports originating from ten Muslim-majority countries because of potential terrorist attacks).

⁷⁹ *Id.*

⁸⁰ *Id.*