CONSTITUTIONALITY OF RELIGIOUS AND ALIENAGE DISCRIMINATION IN THE TERRORISM CONTEXT*

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Thank you for all coming out today. The issue I want to talk today about is discrimination, particularly against non-citizens, and how that plays out in the terrorism context. I figured I would start with this poem. I think you all have seen it, I hope you've all seen this poem,[1] by Martin Niemöller who was a Lutheran pastor in the period of Nazi Germany.

He begins by saying, "first they came for the socialists, and I'm not a socialist, and so I didn't say anything."[2] Then he proceeds to the trade unionists, and then the Jews, and then to him, and he says ultimately they get you too, and when they come for you there's no one there to stand up for you.[3]

I really like this poem and I think it speaks a lot to the issues we're dealing with today first because it is about complicity. And it's about our complicity in allowing illiberalism to take hold.

Part of what he's saying here is that there's an incentive to keep quiet, to stay safe, to stay on the inside, and to be a member of what the Germans would call the "Volk," the true people. I think another part of what he's saying is that that's also a foolish belief because illiberalism by its nature, and the "Volk" in particular, is exclusionary. It defines itself, its value comes from, what it is not.

If we think back in our own history, during Jim Crow fir exanoke, why did we have colored water fountains? Well, it's because the only way to have a white water fountain is to have a colored water fountain. It gives you as a white person, regardless of what your socio-economic status is in the Jim Crow South, the opportunity to say, "I'm worth something; I'm part of something." And Niemöller reminds us that this is a dangerous place to put your sense of self-worth. Because inevitably, when you're talking about the "Volk," you're talking about exclusion.

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1. Martin Niemöller, FIRST THEY CAME (1955).

2. *Id.*

3. *Id.*

Its value depends on always keeping more and more people out. So, over time he is saying, look, you can't be assured of your own safety because you very well may be the chaff the next time the wheat gets refined.

Another point he's making, and I think it is the most important point for the times we live in today, is that illiberalism is subtle. It very rarely happens suddenly. It happens in incremental steps that at each point are a consensus in some way.

So, I look at his hierarchy there: first they came for the socialists—socialists in the 1920s and 30s were widely viewed as terrorists and sympathizers with Soviet Communism. It was common throughout the West, not just Germany, to be terrified of socialists. Then you go to trade unionists who are sort of a light form of socialists. And then to Jews. In the early 20th century what race, what nationality was more associated with communism than the Jews, who could claim Marx and Trotsky as their own? I found this quote from an essay in 1920 called "Zionism versus Bolshevism" in which the author laments the violence of "terrorist Jews" and "the conflict of good and evil which proceeds unceasingly in the breast of man nowhere reaches such an intensity as in the Jewish race. The dual nature of mankind is nowhere more strongly or more terribly exemplified."[4] And so because of this, Winston Churchill, who is the author of this piece, puts a familiar burden on "good Jews" that we often, I think, now see with respect to "good Muslims." And he says "it's up to the 'good Jews' to come forward on every occasion as many of them in England have already done, and take a prominent part in every measure for combatting the Bolshevik conspiracy."[5]

So, what this poem warns us is that illiberalism accretes, it comes slowly, and at each point there is a decision point at which liberals are willing to civilly agree to disagree. By the time it's too late, too many people have agreed to disagree.

There is one major point at which I would depart from Niemöller's poem. It describes the mechanics of illiberalism very well. But what I want to talk about today is the first step on his continuum. Because he talks about the socialists being the first step. And in illiberal countries very rarely is it the ideological opposition that they come for first. Instead, they typically come for ideological opponents on a path that has been paved by oppression meted out to non-citizens. Why is that?

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4. Winston S. Churchill, *Zionism versus Bolshevism*, THE SUNDAY HERALD, Feb. 8, 1920, at 5.
5. *Id.*

Well, for one thing, citizenship is very clear. It is the clearest way that the law can create an "us" and a "them." And it's exclusively defined by law. So, who is and who is not a citizen is ultimately a political question, and we give a lot of deference to citizenship distinctions as a result of that. But it's because of that deference that citizenship tends to be the most vulnerable entry point for illiberalism to grow.

What I want to talk about today is one of those specific entry points, and that is the denial to non-citizens of equal justice under law. And I focus on this because it has a lot of relevance to the work I do the military commissions in Guantanamo.

Some of you may know this, but the military commissions are governed by a statute Congress passed called the Military Commissions Act. And for a liberal lawyer, there's plenty to dislike about the military commissions and the Military Commissions Act. They have no independent judiciary, they allow hearsay evidence, and they allow for evidence derived from torture. The statute in many respects creates *ex post facto* crimes. And, in fact, the judges are essentially subject to the influence of the prosecutors. But what makes all of that possible is another feature of the Military Commissions Act: it segregates the court system. Only non-citizens can be brought before a military commission in Guantanamo. And I don't think any of these deviations would have been possible if it weren't for that segregation.

Ultimately there are twenty-three million people in this country subject to this law. And they're subject to this law without any political voice respecting whether or not it's being applied. In fact, if we look at the legislative history of the Military Commissions Act we see that's exactly what Congress was up to. They were concerned that, if citizens were subject to the procedures of the military commissions, that Congress would be politically accountable for them. It would be something that they would have to answer for at the ballot box. It had nothing to do with the relative danger of citizens versus aliens. If you think about it, of course it couldn't. Assume we just limit our view to Muslim terrorist attacks over the past ten years: San Bernardino, the Pulse nightclub, Ft. Hood, the Boston bombing. All of these were perpetrated by citizens. These were citizen terrorists. Of course, citizens are at least as dangerous, and in many respects far more dangerous, than non-citizens when it comes to terrorism.

I'll read one quote from the Congressional record, because I think it illustrates that Congress knew how absurd the distinction it was making actually was. It's Representative Beyer saying "let's say an American citizen has been arrested for aiding and abetting a terrorist. Maybe even participating in a conspiracy, or maybe participating in an action

that harmed or killed American citizens. That American citizen cannot be tried in the military commissions. His co-conspirators could be. They could be tried in the military commission if they were aliens. But if the other co-conspirator was an American citizen, they will be prosecuted in a federal court."[6] So you have this deliberate intent to discriminate, done for the most invidious purpose: to cause a breakdown of the ordinary democratic forces that ensure rational and fair lawmaking.

In the Declaration of Independence, the first self-evident truth is that all men are created equal, endowed by their creator with certain inalienable rights to life, liberty, and the pursuit of happiness. And the Constitution codifies, in both due process clauses, that no *person* shall be denied life, liberty, or property without the due process of law. I want you to focus on the language of the due process clause. It doesn't say "no citizen." It doesn't say "no member of our community." It doesn't say "no member of the Volk." It says "no person." Because certain inalienable rights, such as equal justice under law, inhere into personhood not into citizenship. They are not a privilege of membership.

And so unsurprisingly, in the only instance in which the Supreme Court ever reviewed the segregation of the justice system on the basis of alienage, it struck it down as unconstitutional. The case is *Wong Wing v. United States*.[7] It arose in the context of what was called the "yellow peril." If you think American politics respecting Latino immigration is ugly, fraught, and disturbing, you should go look at the yellow peril and the treatment of Chinese, typically laborers on the West Coast, and how they were dealt with inside the United States.

One of the things Congress attempted to do in order to deter Chinese illegal immigration into the United States was to not only make undocumented Chinese laborers deportable, but it also created special commissions, special courts, that were authorized to punish and sentence Chinese laborers illegally in the country to hard labor. The Supreme Court struck that down, and notably they did so in 1896. And why is that year important? Well, in 1896 the Court also decided a case called *Plessy v. Ferguson*,[8] which established the doctrine of "separate but equal." This is not a Supreme Court, therefore, that is particularly concerned with the rights of minorities. Yet, the segregation of the

6. 152 CONG. REC. 16, 20731 (2006).

7. *See Wong Wing v. United States*, 163 U.S. 228 (1896).

8. *See Plessy v. Ferguson*, 163 U.S. 537 (1896).

justice system was the bridge too far. And it was the bridge too far because, due process "is guaranteed without regard to any differences of race, of color, of nationality, and the equal protection of the laws is a pledge of equal laws . . . even aliens shall not be held to answer for a capital or otherwise infamous crime, unless on presentment by indictment of a grand jury, nor be deprived of life, liberty, or property, without due process of law."[9]

So, in full disclosure, I have a case right now that's being petitioned to the Supreme Court on this very issue, on the segregation of the military commissions on the basis of nationality. Whether or not the Supreme Court will grant cert, I don't know. I won't bog you down with all the legal arguments, but I wanted to point out in the last few minutes of this talk, the dangers inherent in this. Even if it's not, strictly speaking, illegal and unconstitutional, there are real dangers to segregating the justice system.

To illustrate those dangers, I think it's important to look at how unprecedented the segregation of the military commissions is. If you look back at American history, military commissions are not shining moments. They were criticized, whether in the Lincoln case or the trial of the Japanese after World War II, for their lax procedural due process and continue to be so criticized. But even back then, the United States never segregated military tribunals. Citizen war criminals were always tried alongside non-citizens because it was the character of their conduct, not the cover of their passport, that determined whether they were war criminals; whether they were a danger to national security.

And as a contradistinction to that, look at those countries that did segregate their military commissions in World War II. I think you can guess who. It was Japan and Germany. Japan in 1939 passed its own military commissions law subjecting only non-Japanese citizens to summary trial before a military tribunal. Germany in 1941 passed the Night and Fog Decree, again limiting its jurisdiction to non-Germans who were acting against the state. And after the war, we prosecuted German and Japanese lawyers for participating in what we called "terrorism" at the time, the use of the legal system to terrorize.

In part, these laws were condemned on their face. It was a clear denial of equal justice under law. But the denial of equal justice with substantive as well. Put in the position of judging only non-citizens, these tribunals had no inherent check against abuse. The defendants were not viewed as people with rights. In a society where only citizens

9. *Wong Wing*, 163 U.S. at 238.

have rights, non-citizens, particularly those characterized as enemies of the people, are barely human. Any procedural protections accorded them are nothing more than *noblesse oblige*. And as a consequence, their efforts to assert their rights in these proceedings did not simply fall on deaf ears, they invited disdain as expressions of these aliens' ingratitude toward their captor's generosity in according them any protections at all.

As rights become conflated with the privileges of citizenship, two dangers are realized that are anticipated by Niemöller's poem. The first danger is that rights become narrower and less secure for everyone. As I stated before, citizenship is a legal construct. It reflects nothing inherent in the individual who holds it. And so what becomes permissible in the treatment of noncitizens sets a precedent for all.

Rarely are rights deprivations justified on citizenship alone. Instead, alienage is a thumb on the scale to justify a policy whose legality is, at best, marginal. For example, the D.C. Circuit Court of Appeals decided in the *El-Shifa Pharmaceuticals*[10] case, holding that the courts could not hear lawsuits involving Sudanese citizens who had been targeted for military strikes outside recognized war zones. The case arose out of President Clinton's decision to strike a chemical factory following the bombing of the U.S. Embassies in 1998. This case then formed the basis of two decisions from the D.C. District Court, from judges Bates and Collyer, extending this reasoning to drone strikes in Yemen that targeted a Muslim-American citizen.

Likewise, in a variety of cases, the Circuit Courts of Appeals have held that government officials are immune from lawsuits brought by non-citizens rounded up in the war on terrorism; cases alleging torture, arbitrary detention, or other mistreatment. Then last year, in a case called *Meshal v. Higgenbotham*,[11] the D.C. Circuit extended the rationale of this immunity to also bar lawsuits brought by Muslim-American citizens.

I emphasize the phrase "Muslim-American" in both examples because that is how rationales accrete. In the first precedents, those without rights are non-citizens. The next precedents involve citizens who resemble the non-citizens. They are only "technically" citizens. And when the substance is evaluated, it makes it easier for the court recognize that citizenship had little relevance to begin with. It was

10. *See El-Shifa Pharm. Indus. Co. v. United States*, 607 F.3d 836 (2010).

11. *See Meshal v. Higgenbotham*, 804 F.3d 417 (2015).

simply a jurisprudential lubricant that made it easier to accept weak arguments.

The second danger, which we are beginning to see in the Trump Administration, is the narrowing of citizenship. The historical examples of this are too numerous to list. At the risk of violating Godwin's Law again, the Nuremberg Laws that ultimately made the Holocaust possible began by narrowing the definition of German citizenship, meaning that the number of people entitled to the ever shrinking rights of Nazi Germany was itself shrinking.

But I want to focus on a largely forgotten precedent from this country, what I will call the "slave commissions". Throughout the 18th and early 19th centuries, slave States took a variety of approaches to the due process afforded to slaves suspected of crimes. As a practical matter, in most slave States, plantation owners exercised unfettered authority over their slaves, such that in some States a "master" was legally incapable of committing a crime against a slave. But crimes committed against third parties posed a problem. Slaves, after all, are still people. They can escape and in many instances were permitted to move about freely so long as they had a permit. What then of crimes committed against the public at large?

The answer was special courts. Practices varied across States and many states simply used the ordinary courts. But for others, it was important that the justice system take more thoroughgoing account of slaves' special status and the competing interests at play in such cases. It is worth remembering that the prosecution of a slave posed an economic conundrum. From the vantage point of the slave-holding class, incarceration was meaningless, since slaves were under bondage in any event. And the punishment of the slave hurt the master, who was deprived of the value of his "property." The principal means of punishment was therefore corporal and when capital punishment was imposed, the State was often bound to compensate the slaves' "owner."

The most common fora of prosecution were commissions of *oyer and terminer*, an archaic legal practice from England in which a commission would be convened ad hoc by the appointment of some collection of magistrates and slave-holding citizens. The states of Virginia, South Carolina, and Louisiana, were the most sophisticated in segregating the justice system in this manner. Notably when Alexandria was still a county within the District of Columbia, there are cases from the D.C. federal courts remanding the trial of slaves to such tribunals.

Over time, these tribunals increasingly followed ordinary procedural rules. Historians have even found cases being reversed on appeal. This led some contemporary legal commentators to worry, not that slaves

were being denied the full complement of due process, but that the facial similarity of these proceedings to ordinary trials would set precedents that could spill over to the trial of whites.

Lest there be any doubt, separate was unequal and these tribunals were largely untroubled by questions of procedural due process. In a case from 1853, the Louisiana Supreme Court took it as a given that "The law moreover does not demand on the trial of slaves, in the tribunals established for that purpose, an observance of the technical rules which regulate criminal proceedings in the higher courts."[12] The very point of this legal separateness was its inequality.

And this habit of inequality would ultimately be used to narrow the American definition of citizenship in *Dred Scott v. Sandford*.[13] While frequently and justly condemned for its place within the Supreme Court's anti-cannon, it is often forgotten that *Dred Scott* is about the citizenship of free persons. Chief Justice Taney writes at tedious length about the chattel status of slaves in this country. And he is happy to hoist abolitionist states on their own petards for the petty bigotry of their own laws, States such as Connecticut and Massachusetts, which instituted systems of apartheid of the kind we now only remember in Alabama and Mississippi. But among Taney's points of proof for the emphatic non-citizen status of all blacks, descended as they were from disenfranchised slaves, was "the special laws and . . . the police regulations which [the Slave states] considered to be necessary for their own safety,"[14] *i.e.* the slave commissions.

It was therefore a short legal step from the segregation of the justice system applicable to slaves, whose legal inferiority could be generalized, to the wholesale denial of citizenship under the Constitution to all black Americans. It was a short step to conclude that the "negro" was "altogether unfit to associate with the white race either in social or political relations, and so far inferior that they had no rights which the white man was bound to respect."[15]

And it is a short step from the segregation of the justice system applicable to non-citizens, to the kind of illiberalism that leaves all our rights contingent. It is the kind of illiberalism that forces us to ask with each new executive order, with each new tweet, how long we will remain part of the Volk? It's the problem that Niemöller was talking

12. *State v. Kentucky*, 8 La. Ann. 308, 309 (1853).

13. *See Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857).

14. Arnold T. Guminski, THE CONSTITUTIONAL RIGHTS, PRIVILEGES, AND IMMUNITIES OF THE AMERICAN PEOPLE 238 (2009).

15. *Scott*, 60 U.S. (19 How.) at 407.

about with his continuum. When citizenship becomes the source of rights, as opposed to humanity or personhood, all of the sudden, citizenship becomes a lot more valuable and much more precarious for all of us. It's a rule that starts applying to minorities and soon applies as oppression to us all.

So I would simply conclude by encouraging you, particularly as law students, and particularly as law students at one of the great American law schools, to really ask yourself: what is my line on this continuum? You as lawyers have a unique power to speak up. And you should use that power to speak up not just for yourself.