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# THE TRUMP MEMOS

The ACLU's Constitutional Analysis of the Public Statements and Policy Proposals of Donald Trump



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# TRUMP ON IMMIGRATION

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During Donald J. Trump’s presidential campaign, the candidate has proposed banning all Muslims from the United States, creating a “deportation force” to round up and deport undocumented immigrants, and building a wall the length of the U.S.-Mexico border. All of these proposals would most likely violate the Constitution, federal statutory law, and/or international law.

## Ban on the Admission of Muslims

In December 2015, Trump stated that he would establish a “total and complete” ban on Muslims entering the United States.<sup>1</sup> His campaign manager explained that the ban would apply to “everybody,” including those seeking to immigrate and tourists.<sup>2</sup> The campaign declined to say whether Muslim U.S. citizens would be barred.<sup>3</sup>

More recently, Trump has asserted that U.S. immigration law would grant him the authority to institute the ban.<sup>4</sup> Although he has not cited any particular provision, it appears he is invoking the authority vested in the president to suspend entry of “any class of aliens.”<sup>5</sup>

But Congress cannot grant, and a president cannot exercise, authority that would violate the Constitution. In light of the constitutional flaws in Trump’s proposed ban, § 1182(f) either must be read narrowly not to authorize such unconstitutional conduct, or it should be struck down as unconstitutional insofar as it authorizes such a ban.

### A “Muslim ban” would violate the Establishment Clause of the First Amendment.

A policy categorically excluding members of a particular religion from the country would violate the Establishment Clause of the First Amendment by explicitly disapproving of one religion and implicitly preferring others.<sup>6</sup>

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1 [https://www.washingtonpost.com/politics/2015/12/07/e56266f6-9d2b-11e5-8728-1af6af208198\\_story.html](https://www.washingtonpost.com/politics/2015/12/07/e56266f6-9d2b-11e5-8728-1af6af208198_story.html).

2 <http://www.foxnews.com/politics/2015/12/08/trump-calls-for-complete-shutdown-on-muslims-entering-us.html>.

3 *Id.*

4 <https://www.donaldjtrump.com/press-releases/donald-j.-trump-addresses-terrorism-immigration-and-national-security>.

5 8 U.S.C. § 1182(f).

6 *See, e.g., Awad v. Ziriax*, 670 F.3d 1111, 1127, 1132 (10th Cir. 2012) (enjoining a state provision banning court consideration of Sharia law because the Establishment Clause prohibits any “programs or practices . . . which aid or oppose any religion” (quoting *Larson v. Valente*, 456 U.S. 228, 246 (1982) (alteration in original, internal quotation marks omitted))). While the Establishment Clause — like the rest of the First Amendment — is stated as a proscription on congressional action, it applies to executive branch action as well. *Cf. Shrum v. City of Coweta, Okla.*, 449 F.3d 1132, 1140 (10th Cir. 2006) (holding the Free Exercise Clause applicable because “the First Amendment applies to exercises of executive authority no less than it does to the passage of legislation”).

The history of U.S. immigration policy is rife with race discrimination, and a few commentators have argued that Trump’s religious ban might survive a legal challenge, just as those historical race discrimination measures did. But *Chae Chan Ping v. United States*<sup>7</sup> and the other cases upholding and applying the Chinese Exclusion Act of 1882 and related legislation were decided in the same era as *Plessy v. Ferguson*,<sup>8</sup> which established the now-discredited doctrine of “separate but equal,” and not long after *Dred Scott v. Sandford*,<sup>9</sup> which upheld the legal foundations of slavery. Those cases, of course, have long been disavowed as the country has evolved to reject the racist premises on which the Supreme Court of that era relied.<sup>10</sup> There can be no question that such racial exclusion laws would not pass constitutional muster today.

But there has *never*, even during the period of racial exclusion, been an immigration ban on the basis of religion. In part, this likely reflects the priority of religious neutrality since the nation’s founding.<sup>11</sup> In contrast, the Supreme Court did not formally recognize a right to equal protection against the federal government until 1954.<sup>12</sup> Therefore, even under the now-dubious precedents regarding racial exclusion, a ban on Muslims would be unconstitutional.

## **A “Muslim ban” of U.S. citizens and permanent residents would violate Due Process and Equal Protection.**

A ban on Muslim U.S. citizens from entering the United States would be a blatant violation of due process and equal protection under the Fifth Amendment and the basic principle that the government may not banish its citizens or deny them entry to the United States.<sup>13</sup> In addition, any religion-based bar on the readmission of lawful permanent residents — who have a lawful right to readmission (particularly after a brief trip abroad) unless and until the government can prove they should lose that right — should fail under the Due Process Clause.<sup>14</sup>

## **U.S. citizens could challenge a “Muslim ban” for violating the First Amendment’s speech, religion, and associational protections.**

Trump’s proposed “Muslim ban” could also be subject to legal challenge by U.S. citizens within the United States. The ban would, for example, burden citizens’ First Amendment rights to religion; speech;

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7 130 U.S. 581 (1889).

8 163 U.S. 537 (1896).

9 60 U.S. 393 (1856).

10 See, e.g., *Brown v. Board of Education*, 347 U.S. 483 (1954).

11 See U.S. Const. amend. I (“Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . .”). The Constitution’s emphasis on religious neutrality is underscored by Article VI, which provides that “no religious test shall ever be required as a qualification to any office or public trust under the United States.”

12 See *Bolling v. Sharpe*, 347 U.S. 497, 499 (1954).

13 See *Afroyim v. Rusk*, 387 U.S. 253, 268 (1967) (holding that “the Fourteenth Amendment was designed to, and does, protect every citizen of this Nation against a congressional forcible destruction of his citizenship, whatever his creed, color, or race”); *United States v. Wong Kim Ark*, 169 U.S. 649, 704-05 (1898). Equal Protection requirements apply to the federal government under the Fifth Amendment Due Process Clause. See *Bolling*, 347 U.S. at 500.

14 See *Kwong Hai Chew v. Colding*, 344 U.S. 590, 601 (1953) (a lawful permanent resident’s “status as a person within the meaning and protection of the Fifth Amendment cannot be capriciously taken from him”).

and political, cultural, and familial associations as grounds to challenge the denial of admission of an individual. Because discrimination on the basis of religion is not a facially legitimate basis for burdening the rights of citizens, the ban would very likely be unconstitutional on this basis as well.<sup>15</sup>

## **A “Muslim ban” would violate U.S. obligations under international law as well as under domestic law.**

A religious bar could be held to violate U.S. obligations in individual cases under international law, including the Refugee Convention and Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, and it would conflict with numerous U.S. statutes concerning refugee protection.<sup>16</sup>

## **Any attempt to disguise the “Muslim ban” would fail.**

Perhaps recognizing the legal and moral indefensibility of the “Muslim ban,” Trump has recently sought to muddy the waters by proposing bans based upon nationality instead of religion.<sup>17</sup> In the past, U.S. law has disgracefully permitted prohibitions on the entry of individuals from a broad swath of the world based on bare racism, for example barring all Chinese or all “Asiatics.”<sup>18</sup> As explained above, constitutional law and our national values have evolved substantially since then.

But in any event, Trump’s ban on Muslims would be illegal for the reasons already explained, whether that ban is explicit, as Trump initially proposed, or concealed, as he now seems to suggest. Intent to discriminate on the basis of religion, even hidden behind pretextual religious neutrality, violates the Establishment Clause and Equal Protection.<sup>19</sup> To the extent that Trump’s proposed ban has shifted from an explicit religion-based ban to a pretextual country-based ban, it remains unmistakably clear from the history of this proposal and the continuing focus on Muslims in public statements from the Trump campaign that the target continues to be adherents of a particular faith. The Constitution does not tolerate such discrimination.<sup>20</sup>

15 See *Kleindienst v. Mandel*, 408 U.S. 753 (1972).

16 See, e.g., 8 U.S.C. §§ 1158, 1231(b)(3); 8 C.F.R. §§ 1208.16-17.

17 See <https://www.donaldjtrump.com/press-releases/donald-j.-trump-addresses-terrorism-immigration-and-national-security> (proposing to “suspend immigration from areas of the world when there is a proven history of terrorism”).

18 See *United States v. Bhagat Singh Thind*, 261 U.S. 204, 215 (1923).

19 See *Church of the Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520, 534 (1993) (“Facial neutrality is not determinative.”); *id.* at 540 (discussing the Establishment Clause and citing *Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 266 (1977)); *Larson v. Valente*, 456 U.S. 228, 232 n.3 (1982); *Children’s Healthcare Is a Legal Duty, Inc. v. Min DeParle*, 212 F.3d 1084, 1090 (8th Cir. 2000).

20 See <https://www.washingtonpost.com/news/post-politics/wp/2016/06/25/trump-now-says-muslim-ban-only-applies-to-those-from-terrorism-heavy-countries/> (Trump’s spokesperson recently told reporters that “Trump’s ban would now just apply to *Muslims* in terror states, but she would not confirm that the ban would not apply to non-Muslims from those countries or to Muslims living in peaceful countries” (emphasis added)); [https://www.washingtonpost.com/politics/trump-pushes-expanded-ban-on-muslims-and-other-foreigners/2016/06/13/c9988e96-317d-11e6-8ff7-7b6c1998b7a0\\_story.html](https://www.washingtonpost.com/politics/trump-pushes-expanded-ban-on-muslims-and-other-foreigners/2016/06/13/c9988e96-317d-11e6-8ff7-7b6c1998b7a0_story.html) (A Trump spokesperson explained that “[t]he language may have been a little different, but it was a reiteration of what he’s been saying for months” and “[w]hat he was doing was reiterating that the terrorists we’re dealing with are *Muslim* and mostly come from Muslim nations” (emphasis added, internal quotation marks omitted)); see also <http://www.nbcnews.com/politics/2016-election/trump-people-will-say-trump-was-right-muslim-ban-n593136> (reporting that, after the above-referenced speech, Trump said that “In a year or two or three from now, . . . people will say ‘Trump was right’ to propose the ban on Muslim immigrants”).

## Mass Deportations

Trump has indicated that he would constitute a “deportation force”<sup>21</sup> to “round up”<sup>22</sup> all undocumented noncitizens and deport them so that the “good ones” can reenter legally.<sup>23</sup>

As an initial matter, Trump has not explained what he means by a “deportation force,” but he presumably means something other than the existing immigration enforcement agencies tasked with executing removals. As immigrant advocates have pointed out, the Obama administration has deployed the existing “deportation force” to set a record for deportations — more than 2.5 million — by a wide margin over any previous president.<sup>24</sup> A draconian “deportation force,” therefore, is nothing new or remarkable.

Nonetheless, constitutional problems would arise from Trump’s notion that he would attempt to deport all of the undocumented immigrants in the United States.

### **Massive immigration enforcement would erode civil liberties of undocumented immigrants and U.S. citizens alike by leading to a systematic reliance on racial profiling and illegal detentions. Such a campaign would result in rampant Fourth Amendment and Equal Protection violations.**

Trump has pledged to round up and deport the entire undocumented population, by some estimates 11 million people, within two years.<sup>25</sup> Trump’s mass deportation scheme would mean arresting more than 15,000 people a day on immigration charges, seven days a week, 365 days a year.<sup>26</sup>

From a civil liberties standpoint, there is no conceivable mechanism to accomplish the roundup that Trump has promised while respecting basic constitutional rights. The reason is simple: Undocumented immigrants are not readily identifiable as such, unless they come to the attention of the authorities. Thus, the vast majority of noncitizens eventually removed are identified either through contact with the criminal justice system or are found and arrested in the process of attempting to enter the United States. To carry out his mass deportation scheme, Trump would have to cast his net far deeper into American communities. Even if massive taxpayer dollars could be diverted to do so as a practical matter, the effort would erode the civil liberties of all.

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21 <http://thehill.com/policy/national-security/260007-obama-blasts-trumps-deportation-force-plan>.

22 <http://www.cnn.com/2015/07/29/politics/donald-trump-immigration-plan-healthcare-flip-flop/index.html>; <http://www.cbsnews.com/news/donald-trump-60-minutes-scott-pelley/>.

23 <http://www.cnn.com/2015/07/29/politics/donald-trump-immigration-plan-healthcare-flip-flop/index.html>; <http://www.latimes.com/nation/politics/trailguide/la-na-7th-republican-debate-live-updates-01282016-htmlstory.html>.

24 <http://www.mystatesman.com/news/news/opinion/norwasteh-president-obamas-mixed-legacy-on-immigra/nrbRZ/>.

25 <http://www.nytimes.com/2016/05/20/us/politics/donald-trump-immigration.html>.

26 A recent study concluded that effectuating that many removals within two years would require an increase from 4,844 to 90,582 immigration agents; from 34,000 to 348,831 immigration detention beds; and corresponding increases in immigration courts, attorneys, and transportation. [http://www.americanactionforum.org/research/the-personnel-and-infrastructure-needed-to-remove-all-undocumented-immigrants-in-two-years/#\\_ftn2](http://www.americanactionforum.org/research/the-personnel-and-infrastructure-needed-to-remove-all-undocumented-immigrants-in-two-years/#_ftn2).

As ACLU litigation has shown, recent experiments with concentrated interior immigration enforcement have been inextricably linked with tactics like suspicionless interrogations and arrests, unjustified and pretextual traffic stops, warrantless searches of workplaces and homes, and door-to-door raids in immigrant neighborhoods.<sup>27</sup> Practiced on a huge scale throughout the country, those activities would systematically violate the Fourth Amendment, which unequivocally applies to federal immigration enforcement activities and safeguards individuals' rights to be free from precisely these sorts of police-state tactics.<sup>28</sup>

Likewise, any large-scale electronic surveillance of immigrant communities conducted without individualized justification and proper warrants would violate both federal wiretap laws and the Fourth Amendment.<sup>29</sup> Moreover, recent ACLU litigation has illustrated that officers implementing interior immigration dragnets of this sort inevitably rely on race and national origin in violation of the Constitution's guarantee of equal protection under the law.<sup>30</sup> The same would be true of Trump's proposal but on an enormous scale.

### **Mass deportations would lead to a mass breakdown of due process, thus violating the Fifth Amendment.**

Trump's mass deportation scheme also cannot be carried out without massive violations of the Due Process Clause of the Fifth Amendment.

Because the Constitution generally requires that the government provide individuals in deportation proceedings with due process,<sup>31</sup> and because Congress has created a variety of grounds for relief from removal on humanitarian grounds (like, for example, the need to protect trafficking victims and domestic violence survivors from further injury and exploitation),<sup>32</sup> deportations cannot be accomplished instantly. The government must prove its allegations of alienage and deportability in proceedings before an immigration judge, while the immigrant has a right to defend against those allegations and to apply for relief from deportation.<sup>33</sup> A long line of Supreme Court precedent further establishes that the Suspension Clause guarantees federal court review of the legal validity of deportation orders.<sup>34</sup>

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27 Indeed, even comparatively modest past interior enforcement efforts, such as joint federal-local raids on homes, have led to civil rights litigation and substantial settlements. See, e.g., <https://www.aclu.org/news/aclu-announces-settlement-lawsuit-over-warrantless-raid-us-immigration-agents-and-nashville> (\$310,000 settlement); <http://www.nytimes.com/2012/02/15/nyregion/us-to-pay-immigrants-over-raids.html> (\$350,000 settlement).

28 See *United States v. Brignoni-Ponce*, 422 U.S. 873, 883 (1975) (holding that detaining motorists at random for immigration enforcement violates the Fourth Amendment); *Terry v. Ohio*, 392 U.S. 1, 8-9 (1968) (the “inestimable right of personal security” protected by the Fourth Amendment “belongs as much to the citizen on the streets of our cities as to the homeowner closeted in his study”); see also <http://www.nytimes.com/2016/05/20/us/politics/donald-trump-immigration.html> (quoting former Secretary of Homeland Security Michael Chertoff as saying, “I can’t even begin to picture how we would deport 11 million people in a few years where we don’t have a police state, where the police can’t break down your door at will and take you away without a warrant”) (internal quotation marks omitted).

29 See 18 U.S.C. § 2510 *et seq.*

30 See, e.g., *Melendres v. Arpaio*, 784 F.3d 1254, 1258, 1260-61 (9th Cir. 2015) (affirming trial court’s findings that sheriff’s department engaged in pattern and practice of unjustified traffic stops and racial profiling in seeking to enforce civil immigration laws).

31 See *Yamataya v. Fisher*, 189 U.S. 86 (1903).

32 8 U.S.C. §§ 1101(a)(15)(T), 1229b(b)(2).

33 8 U.S.C. § 1229a(b)(4), (c)(3), (c)(4).

34 See *I.N.S. v. St. Cyr*, 533 U.S. 289, 305-07 (2001).

But the immigration court system is already notoriously backlogged and underresourced, and it could not sustain a sudden and massive increase in caseload as Trump proposes.<sup>35</sup> Indeed, the most recent data reflects an “all-time high” wait time of 635 calendar days for a merits hearing in immigration court.<sup>36</sup> Likewise, the federal circuit courts, from which noncitizens may seek review of deportation orders, continue to face severe backlogs in immigration matters.<sup>37</sup> Even if the government diverted untold resources to ramping up the immigration courts and federal courts, jamming tens of millions of individuals through the deportation system in a period of two years simply cannot be done without committing rampant due process violations.

## The “no-catch-and-release” policy would violate U.S. immigration law and the Fifth Amendment.

Trump has indicated that he does not support “catch and release” of noncitizens pending removal proceedings, at least of those who enter the country without inspection.<sup>38</sup> Any proposal to categorically detain immigrants “until they are sent home” would violate both our immigration laws and the Due Process Clause of the Fifth Amendment.<sup>39</sup> It is well established that these due process principles “appl[y] to all ‘persons’ within the United States, including aliens, whether their presence here is lawful, unlawful, temporary, or permanent.”<sup>40</sup>

As the Supreme Court has recognized, the legitimate “special justifications” for immigration detention are “preventing flight” and “protecting the community” from danger.<sup>41</sup> In addition, immigration detention requires “strong procedural protections” to ensure that detention is serving a legitimate goal.<sup>42</sup> Thus, immigration detention generally requires an individualized determination of flight risk and danger to the community.<sup>43</sup> Specifically, the Immigration and Nationality Act<sup>44</sup> and implementing regulations entitle immigrants to an individualized bond hearing before an immigration judge to determine if their detention is justified on these grounds.<sup>45</sup>

35 See <http://trac.syr.edu/immigration/reports/405/> (noting that nearly a half million individuals are awaiting immigration court hearings).

36 *Id.* (further noting that “this average wait time only measures how long these individuals have *already* been waiting, not how much *longer* they will have to wait before their cases are resolved”).

37 See Ninth Circuit 2014 Annual Report at 54-56, available at <http://www.ce9.uscourts.gov/publications/AnnualReport2014.pdf> (noting that the Ninth Circuit hears over half of all immigration administrative reviews nationwide, and that the median delay between docketing and decision in such cases is currently 21.5 months).

38 See <https://www.donaldjtrump.com/positions/immigration-reform> (“Detention—not catch-and-release. Illegal aliens apprehended crossing the border must be detained until they are sent home, no more catch-and-release.”).

39 See *Zadvydas v. Davis*, 533 U.S. 678, 690 (2001) (“[G]overnment detention violates th[e] [Due Process] Clause unless the detention is ordered in a criminal proceeding with adequate procedural protections, or, in certain special and ‘narrow’ nonpunitive ‘circumstances,’ where a special justification . . . outweighs the ‘individual’s constitutionally protected interest in avoiding physical restraint.’” (internal citations omitted)).

40 *Id.* at 693; see also *RILR v. Johnson*, 80 F. Supp. 3d 164, 187-88 (D.D.C. 2015).

41 *Zadvydas*, 533 U.S. at 690-91; see also *RILR*, 80 F. Supp. 3d at 188-90.

42 *Zadvydas*, 533 U.S. at 691.

43 *Id.*; accord *United States v. Salerno*, 481 U.S. 739, 751-52 (1987) (affirming Bail Reform Act in light of procedures for “determining the appropriateness of detention” based on individualized factors).

44 8 U.S.C. § 1226(a).

45 See 8 C.F.R. §§ 1003.19(a), 1236.1(d).



Categorically detaining immigrants charged with deportation “until they are sent home” — even when they pose *no* risk of flight or threat to public safety — violates these basic principles and cannot be squared with our immigration laws or the Constitution.

### **The path for “good” immigrants demonstrates profound ignorance of U.S. immigration law.**

It is worth noting that Trump’s suggestion that the “good” immigrants could come back betrays a surprising ignorance of U.S. immigration law. He fails to understand that immigrant visas are not readily available and that for individuals from certain countries — even close relatives of U.S. citizens — wait times for a visa can reach into the decades. For example, for a married adult son or daughter of a U.S. citizen, the government is currently processing visas for Mexican and Filipino nationals who applied in 1994.<sup>46</sup> Moreover, the vast majority of the undocumented population of the United States would, if removed from the country, be subject under statute to a 10-year bar from reentering the country.<sup>47</sup> Thus Trump’s proposal that “the good ones” may return is an empty promise as preposterous and legally ignorant as the rest of his mass deportation scheme.

## **U.S.-Mexico Border Fence**

As Trump himself has frequently noted, he only needs to mention the border wall fence to stir up frenzied applause among his supporters. Like his mass deportation scheme, the border wall is simply preposterous from a practical standpoint. By Trump’s own estimate, his wall would cost \$10 to \$12 billion to cover only selected segments of the southwest border. Independent experts, however, say that is a vast underestimate. One construction expert predicted the Trump wall would cost at least \$25 billion and require at least 40,000 workers a year for at least four years.<sup>48</sup>

The border wall idea also raises serious concerns about civil rights abuses in border communities, which are among the safest in the nation and want no part of Trump’s wall fantasy. A border wall would exacerbate the current wasteful militarization of our southwest border that daily confronts border residents going to school or work with checkpoints, roving patrols, almost 20,000 heavily armed Border Patrol agents, drones, and other weapons of war.

Trump’s disrespect for border communities’ quality of life — as well as the vast trade and travel benefits from cross-border economic exchange that he would forfeit — promises a border security approach akin to the fortified shoot-to-kill zone dividing the Koreas. It would rely on and encourage Border Patrol’s unlawful racial profiling and excessive force that have plagued border communities, leading

<sup>46</sup> <https://travel.state.gov/content/visas/en/law-and-policy/bulletin/2016/visa-bulletin-for-june-2016.html>.

<sup>47</sup> See 8 U.S.C. § 1182(a)(9)(B).

<sup>48</sup> <https://www.washingtonpost.com/news/fact-checker/wp/2016/02/11/trumps-dubious-claim-that-his-border-wall-would-cost-8-billion/>.

residents to perceive their rights to be second-class as well as to the filing of numerous administrative complaints and lawsuits.<sup>49</sup>

Trump's border wall proposal is fundamentally based on racial and ethnic bias against Mexicans. He notoriously stated that the border wall is necessary because Mexicans are "bringing drugs. They're bringing crime. They're rapists."<sup>50</sup> There is little doubt that Trump's openness to racial profiling of Muslims<sup>51</sup> would also apply to Latinos in the vast American southwest borderlands, where U.S. Customs and Border Protection (CBP) claims extraordinary authority within 100 air miles of any external boundary.<sup>52</sup> In addition, Trump has proposed discriminatory actions to finance the wall: using § 326 of the USA Patriot Act to seize remittances sent from the United States to Mexico,<sup>53</sup> canceling Mexican nationals' visas to pressure the government of Mexico to accede to his demands that it pay for the wall, and increasing visa application fees for Mexicans.<sup>54</sup>

A troubling reflection of Trump's border agenda is his endorsement by the National Border Patrol Council (NBPC), a union that has stubbornly resisted basic oversight and accountability measures like body cameras despite a horrible track record of Border Patrol abuse incidents such as the cross-border shooting of an unarmed Mexican teenager 10 times in the back.<sup>55</sup> We've written elsewhere about the many ways the union's Trump endorsement was filled with lies and misinformation.<sup>56</sup> Trump's dehumanizing mentality toward immigrants blends with the union's. While he proudly touts the NBPC's endorsement, union leadership denounced a CBP award for agents who follow their training and successfully deescalate a situation without using deadly force.<sup>57</sup>

Like so many of Trump's attacks on civil liberties, his wall would be divisive, damage America's image, and foment discrimination and abuses against people of color. The Border Patrol union expects free rein under a Trump administration, which would mean rampant illegal policing of border communities with more racial profiling, more excessive force, and more dead teenagers.

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49 See, e.g., <http://bit.ly/ACLUazOPR>; <http://www.acluaz.org/issues/press-releases/2015-10/5418>; <https://www.aclu-nm.org/guiltyuntilproveninnocent/2015/05/>.

50 <https://www.washingtonpost.com/news/post-politics/wp/2015/06/16/full-text-donald-trump-announces-a-presidential-bid/>.

51 <http://www.politico.com/story/2016/06/donald-trump-muslims-profiling-224529>.

52 <https://www.aclu.org/constitution-100-mile-border-zone>.

53 This provision requires financial institutions to implement procedures to verify the identity of any person seeking to open an account, to the extent reasonable and practicable; maintain records of the information used to verify the person's identity; and determine whether the person appears on any lists of known or suspected terrorists or terrorist organizations provided to the financial institution by any government agency. Trump wants to expand its coverage to remittance companies like Western Union.

54 [https://www.washingtonpost.com/apps/g/page/politics/memo-explains-how-donald-trump-plans-to-pay-for-border-wall/2007/?tid=a\\_inl](https://www.washingtonpost.com/apps/g/page/politics/memo-explains-how-donald-trump-plans-to-pay-for-border-wall/2007/?tid=a_inl).

55 <https://www.aclu.org/cases/rodriguez-v-swartz>.

56 <https://www.aclu.org/blog/speak-freely/4-ways-border-patrol-unions-trump-endorsement-filled-lies-and-misinformation>.

57 <https://www.aclu.org/blog/washington-markup/border-patrol-union-scorns-award-agents-who-follow-policy-avoid-deadly-force>.

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# TRUMP ON SURVEILLANCE OF MUSLIMS AND THE CREATION OF A MUSLIM “DATABASE”

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Donald J. Trump has advocated profiling U.S. Muslims and Muslim communities as a counterterrorism tool, stating that “We really have to look at profiling [of Muslims]” and “I think there can be profiling.”<sup>58</sup> He also has promoted surveillance of mosques, asserting, “We’re going to have to look at the mosques. We’re going to have to look very, very carefully,” and “We have to go and . . . check . . . the mosques.” He has called upon New York City Mayor Bill de Blasio to reinstitute the New York City Police Department’s surveillance of mosques and Muslim communities, saying that the surveillance was a “good thing” that yielded “frankly good information.” Trump “100 percent” supports Ted Cruz’s statement in favor of additional law enforcement patrols of Muslim neighborhoods, calling them a “good idea.” Trump has also stated he would “certainly implement” a national database requiring the registration of all U.S. Muslims to protect the country against terrorism.

Trump’s statements suggest that as president he would implement policies and programs that would subject American Muslims to surveillance or registration based solely on their religion. Any such federal action would single out and expressly discriminate against American Muslims, violating the U.S. Constitution’s guarantee of equal protection, as well as the First Amendment’s clauses relating to religion and freedom of expression. Trump’s proposal to implement a national database of Muslims would also result in government retention of records based on how a person exercises their First Amendment-protected activities. This would likely violate federal and state privacy laws, and the government’s discriminatory or arbitrary use of such information would violate due process guarantees.

## **Profiling American Muslims would violate the First and Fifth Amendments.**

The U.S. Constitution guarantees equal protection of the laws, and a federal law or policy that intentionally treats Muslims differently on the basis of religion, as Trump has proposed, would be unconstitutional.<sup>59</sup> As the Third Circuit Court of Appeals has recognized, “Religious discrimination, ‘by [its] very nature,’ has long been thought ‘odious to a free people whose institutions are founded upon

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58 These quotations, and others included here, are taken from the Trump On Surveillance/Profiling of Muslims & A Potential Muslim Database compilation of statements.

59 See U.S. Const. amend. XIV, § 1. Although the Fourteenth Amendment’s equal protection clause does not apply to the federal government, the Supreme Court has made clear that the Fifth Amendment’s guarantee of due process includes the right to equal protection with respect to federal laws and policies. *Bolling v. Sharpe*, 347 U.S. 497, 499 (1954) (“[T]he concepts of equal protection and due process, both stemming from our American ideal of fairness, are not mutually exclusive. The ‘equal protection of the laws’ is a more explicit safeguard of prohibited unfairness than ‘due process of law,’ . . . [D]iscrimination may be so unjustifiable as to be violative of due process.”).

a doctrine of equality.”<sup>60</sup> Under the equal protection doctrine, courts deem classifications based on certain immutable characteristics “suspect” and analyze those classifications with a heightened degree of scrutiny.<sup>61</sup> Courts around the country have concluded that religion is a suspect classification akin to race and national origin, and they evaluate laws or policies based on an express religious classification with the most demanding scrutiny.<sup>62</sup> A law or policy expressly subjecting Muslims to heightened suspicion, surveillance, or special registration because of their religion, as Trump’s proposals would do, is presumptively invalid. A Trump administration would bear the heavy burden of demonstrating that its policies are narrowly tailored and serve a compelling interest, and it is highly likely that it would fail that test.<sup>63</sup>

A law or policy under which American Muslims are subject to blanket surveillance or registration would plainly fail to satisfy the narrow-tailoring requirement of the strict-scrutiny analysis because it applies to an entire category of people based on their beliefs and not on wrongful conduct.<sup>64</sup> Categorical surveillance is unjustified, unnecessary, and ineffective — especially when the government has the alternative of investigating individuals on the basis of reasonable suspicion of actual wrongdoing. Moreover, there can be no compelling government interest in the surveillance of entire communities on the basis of religion. Even if Trump were to claim an interest in protecting national security, the government’s invocation of a categorical national security interest cannot justify wholesale discrimination of Muslims based on unfounded fears.<sup>65</sup> Indeed, the New York City Police Department’s policy of mass surveillance of mosques and Muslim communities, which Trump specifically stated should be reinstated, was discontinued after its constitutionality was challenged in multiple venues, including by the ACLU.<sup>66</sup> In evaluating an equal protection challenge to that policy, the Third Circuit cautioned against unquestioningly accepting the government’s reliance on security considerations to

60 *Hassan v. City of New York*, 804 F.3d 277, 302 (3d Cir. 2015) (quoting *Bell v. Maryland*, 378 U.S. 226, 228 (1964) (Goldberg, J. concurring)) (alterations in original).

61 See, e.g., *City of New Orleans v. Dukes*, 427 U.S. 297, 303 (1976); *Hassan*, 804 F.3d at 302 (“Courts first have looked with particular suspicion on discrimination based on ‘immutable human attributes.’ Accordingly, a classification is more likely to receive heightened scrutiny if it discriminates against individuals based on a characteristic that they cannot realistically change or ought not to be compelled to change because it is fundamental to their identities.” (quoting *Parham v. Hughes*, 441 U.S. 347, 351 (1979) (plurality opinion))).

62 See, e.g., *Dukes*, 427 U.S. at 303; see also *Hassan*, 804 F.3d at 299-305; *Alpha Delta Chi-Delta Chapter v. Reed*, 648 F.3d 790, 804 (9th Cir. 2011); *Abcarian v. McDonald*, 617 F.3d 931, 938 (7th Cir. 2010).

63 See, e.g., *Grutter v. Gratz*, 539 U.S. 306, 326 (2003); *Plyler v. Doe*, 457 U.S. 202, 216-17 (1982). Trump’s proposals rely on the express classification of Muslims. But even a facially neutral law or policy that applied to American Muslims with a greater degree of severity than it did to other religious groups, or that intentionally had an adverse effect on Muslims, would also violate the Constitution’s guarantee of equal protection. See, e.g., *Village of Arlington Heights v. Met. Hous. Dev. Corp.*, 429 U.S. 252, 264-65 (1977); *Yick Wo v. Hopkins*, 118 U.S. 356, 373-74 (1886); *Jana-Rock Constr. v. New York State Dep’t of Econ. Dev.*, 438 F.3d 195, 204 (2d Cir. 2006) (“A law which is facially neutral violates equal protection if it is applied in a discriminatory fashion. Government action also violates principles of equal protection if it was motivated by discriminatory animus and its application results in discriminatory effect.”).

64 An alternative, more tailored policy would, for example, require fact-based investigations of suspected criminal conduct. See, e.g., *Hassan*, 804 F.3d at 306 (“[S]trict scrutiny requires that ‘the classification at issue . . . fit with greater precision than any alternative means.’” (quoting *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 280 n.6 (1986) (plurality opinion))).

65 See *id.* at 306 (“To be clear, we acknowledge that a principal reason for a government’s existence is to provide security. But while we do not question the legitimacy of the City’s interest, ‘[t]he gravity of the threat alone cannot be dispositive of questions concerning what means law enforcement officers may employ to pursue a given purpose.’” (quoting *City of Indianapolis v. Edmond*, 531 U.S. 32, 42 (2000)); *id.* at 307 (“Given that unconditional deference to the government’s invocation of ‘emergency’ has a lamentable place in our history, the past should not preface yet again bending our constitutional principles merely because an interest in national security is invoked.” (internal citations, quotations, and alterations omitted))).

66 See generally Stipulation of Settlement and Order, *Raza v. City of New York*, No. 13 CV 3448 (S.D.N.Y., Jan. 7, 2016), available at <https://www.aclu.org/legal-document/raza-v-city-new-york-settlement-stipulation-and-order>; *Hassan*, 804 F.3d at 277.

justify discrimination: “We have learned from experience that it is often where the asserted interest appears most compelling that we must be most vigilant in protecting constitutional rights.”<sup>67</sup>

Singling out Muslims for heightened law enforcement scrutiny based on religion would also violate the First Amendment’s Free Exercise and Establishment Clauses. The Free Exercise Clause bars government action that discriminates against religious beliefs or interferes with, restricts, or prevents religious practice related to a sincerely held belief.<sup>68</sup> As the Supreme Court has warned, “a law targeting religious beliefs as such is never permissible.”<sup>69</sup> The same decision notes that “it was ‘historical instances of religious persecution and intolerance that gave concern to those who drafted the Free Exercise Clause’<sup>70</sup> and that “[t]he door of the Free Exercise Clause stands tightly closed against any governmental regulation of religious beliefs as such.”<sup>71</sup>

Under the Free Exercise Clause, “a [law or policy] burdening religious practice that is not neutral or not of general application must undergo the most rigorous of scrutiny.”<sup>72</sup> Such a law or policy is presumptively invalid unless the government can show that it is narrowly tailored to serve a compelling interest. Trump’s proposed policies rely on the express classification of, and intentional discrimination against, Muslims on the basis of their religious beliefs. Any such program or policy would burden the exercise of religious faith or practice and, for the reasons explained above, would be highly likely to fail both prongs of a strict-scrutiny analysis.<sup>73</sup>

The Establishment Clause bars the government from enacting a law or policy that either favors religion generally, gives preference to one faith over another, or disfavors a particular religion.<sup>74</sup> As the Supreme Court has stated, “Neither a state nor the Federal Government . . . can pass laws which aid one religion, aid all religions, or prefer one religion over another . . . . No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance.”<sup>75</sup> Trump’s proposals to single out Muslims for discriminatory treatment based on their religious beliefs are anathema to these fundamental principles and would be subject to strict scrutiny.<sup>76</sup> For the same reasons set forth above, his suggested policies are unlikely to meet the requirements of this test and, therefore, are highly likely to violate the Establishment Clause.

To the extent any Trump proposal is based on American Muslims’ speech or associations, it would also violate the First Amendment’s guarantee of freedom of expression. The First Amendment prohibits the government “from proscribing speech, or even expressive conduct, because of disapproval of the

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67 *Hassan*, 804 F.3d at 306-07.

68 *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 533 (1993).

69 *Id.*

70 *Id.* (quoting *Bowen v. Roy*, 476 U.S. 693, 703 (1986)).

71 *Sherbert v. Verner*, 374 U.S. 398, 402 (1963) (citation omitted).

72 *Lukumi*, 508 U.S. at 546.

73 *Id.* at 533.

74 U.S. Const. amend. I.

75 *Everson v. Bd. of Educ. of Ewing Township*, 330 U.S. 1, 15-16 (1947) (citation omitted).

76 See *Awad v. Ziriax*, 670 F.3d 1111, 1130-31 (10th Cir. 2012) (holding, in ACLU case, that Oklahoma did not have a compelling state interest in enacting an anti-Muslim constitutional amendment that prohibited courts from considering so-called “Sharia law,” and that the amendment was not narrowly tailored under the strict-scrutiny test); see also *Larson v. Valente*, 456 U.S. 228, 246-47, 254-55 (1982) (ruling that a law or policy that discriminates among religions is subject to strict scrutiny).

ideas expressed.<sup>77</sup> Content-based regulations like these are presumptively invalid, subject to only a few narrow exceptions.<sup>78</sup> Those exceptions are not applicable here.

## **A “database” of Muslims would violate federal law and likely violate the Fifth Amendment.**

In addition to being unconstitutional, Trump’s proposal to register all Muslims in a “database” is also likely to violate federal privacy law. For example, the Privacy Act of 1974 bars the federal government from maintaining records “describing how any individual exercises rights guaranteed by the First Amendment.”<sup>79</sup> This statutory protection is subject only to certain narrow exceptions, none of which would apply here.<sup>80</sup> The freedom to practice religion — or no religion — is guaranteed by the First Amendment. A categorical requirement that all American Muslims register with the government by virtue of the fact that they practice Islam, or the fact that the government identifies them as Muslim, is likely to fall afoul of the Privacy Act’s bar prohibiting the government from compiling and maintaining records on people and communities based solely on religion.

Trump has not elaborated on the purpose any such database would serve. To the extent that inclusion in the database has other consequences, such as barring Muslims from flying or singling them out for additional scrutiny at U.S. borders, it is likely also to violate the Fifth Amendment’s Due Process Clause, which “provides heightened protections against government interference when certain fundamental rights and liberty interests are involved.”<sup>81</sup> A federal court has recognized that the “Due Process Clause guarantees more than fair process, and the liberty it protects includes more than the absence of physical restraint.”<sup>82</sup> Any deprivation of a person’s rights or liberties as a result of inclusion in Trump’s proposed database would have to be weighed against both the government’s interest in the law or policy and the risk of erroneous deprivation of that right.<sup>83</sup> It is highly unlikely any law or policy creating a discriminatory, Muslim-specific database would satisfy due process.

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77 *R.A.V. v. City of St. Paul, Minn.*, 505 U.S. 377, 382 (1992) (internal citations omitted).

78 *Id.* (citations omitted) (objections include obscenity, defamation, or “fighting words”).

79 5 U.S.C. § 552a(e)(7).

80 *Id.* (these exceptions include express authorization by statute or by the individual about whom the record is maintained or unless pertinent to and within the scope of an authorized law enforcement activity).

81 *Ibrahim v. Dep’t of Homeland Security*, 62 F. Supp. 3d 909, 928 (N.D. Cal. 2014) (citing *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997)).

82 *Glucksberg*, 521 U.S. at 720 (quotations and citations omitted).

83 *See, e.g., Ibrahim*, 62 F. Supp. 3d at 928 (citing *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976)).

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# TRUMP ON TORTURE

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Donald J. Trump has advocated the use of waterboarding and other forms of torture, stating that he “love[s] waterboarding” and that he “would absolutely authorize something beyond waterboarding.” Trump has suggested that he would use torture for both punishment and interrogation because “they deserve it anyway, for what they’re doing.”<sup>84</sup> He has also claimed that his authorization of torture would comply with controlling “laws and treaties” or that he would seek to change the laws to permit torture. Trump has at times suggested that the torture methods he would authorize track those authorized by the Bush administration as so-called “enhanced interrogation techniques.” These torture and abuse methods, which included waterboarding, were the subject of memoranda written by the Department of Justice’s Office of Legal Counsel (OLC), which purported to find the techniques lawful. Those memos have since been widely discredited and withdrawn, and legislation has been enacted to prevent future reliance on the erroneous legal reasoning they put forward.

Torture and other forms of cruel, inhuman, or degrading treatment (CIDT) are banned under the U.S. Constitution, domestic law, and international law. No deviation from the ban is permissible under the Constitution and international law. Federal statutes also criminalize torture and CIDT committed or authorized by government officials. In the wake of the Bush administration’s use of torture and cruel treatment, Congress has further strengthened the statutory legal prohibitions to bar any return to torture.

## **Torture violates the Fifth and Eighth Amendments, federal statutes, and international law.**

The prohibition against torture is one of the most fundamental and established principles of the U.S. legal system, dating back to the English Bill of Rights of 1689.<sup>85</sup> For more than three centuries, Anglo-American jurisprudence has rejected the use of torture and cruelty as a means of extracting information<sup>86</sup> or of inflicting punishment.<sup>87</sup>

Torture violates both the Fifth and Eighth Amendments of the U.S. Constitution. The Fifth Amendment’s Due Process Clause bars treatment that “shocks the conscience,” including interrogation by torture.<sup>88</sup>

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84 These and other quotations are taken from Beehive Research’s May 2016 compilation of statements made by Trump.

85 See *Gregg v. Georgia*, 428 U.S. 153, 169 (1976).

86 See *Ashcraft v. Tennessee*, 322 U.S. 143, 155 (1944).

87 See *Gregg*, 428 U.S. at 173.

88 See *Rochin v. California*, 342 U.S. 165, 172 (1952) (forbidding interrogation methods that were “too close to the rack and the screw to permit of constitutional differentiation”); see also, e.g., *Palko v. Connecticut*, 302 U.S. 319, 326 (1937) (the Due Process Clause protects “against torture, physical or mental”), *overruled on other grounds*, *Benton v. Maryland*, 395 U.S. 784 (1969); *Harbury v. Deutch*, 233 F.3d 596, 602 (D.C. Cir. 2000) (“No one doubts that under Supreme Court precedent, interrogation by torture like that alleged by [plaintiff] shocks the conscience.”), *rev’d on other grounds sub nom.*, *Christopher v. Harbury*, 536 U.S. 403 (2002).

And the infliction of torture as punishment violates the Eighth Amendment’s prohibition on “cruel and unusual punishment” and has been prohibited since the 19th century.<sup>89</sup>

The Constitution’s prohibition against torture accords with international law, which prohibits torture absolutely. The torturer, “like the pirate and slave trader before him,” is “an enemy of all mankind.”<sup>90</sup> For decades, this fundamental prohibition has been recognized by U.S. courts as a *jus cogens* norm.<sup>91 92</sup>

The international legal prohibition on torture was enshrined in domestic statutory law when the United States signed and ratified the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Convention Against Torture or CAT) decades ago.<sup>93 94</sup> Federal statutes barring or criminalizing torture and cruel treatment include the Torture Convention Implementation Act,<sup>95</sup> the Torture Victim Protection Act,<sup>96</sup> the War Crimes Act,<sup>97</sup> the Detainee Treatment Act of 2005, and the National Defense Authorization Act for Fiscal Year 2016.<sup>98</sup> In light of the web of prohibitions against torture, “a violation of the international law of human rights is (at least with regard to torture) *ipso facto* a violation of U.S. domestic law.”<sup>99</sup>

Torture — as well as cruel, inhuman, or degrading treatment — is also specifically barred in the context of wartime by the Geneva Conventions and the War Crimes Act. Common Article 3 of the Geneva Conventions requires that detainees “shall in all circumstances be treated humanely” and prohibits “outrages upon personal dignity, in particular humiliating and degrading treatment.”<sup>100</sup> As the U.S. Supreme Court recognized, these protections apply to anyone detained in a conflict in the territory of a signatory to the conventions — regardless of whether they are suspected militants, civilians, or privileged combatants.<sup>101</sup> The War Crimes Act criminalizes “grave breaches” of Common Article 3, including “torture” and “cruel or inhuman treatment.”<sup>102</sup>

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89 See *Estelle v. Gamble*, 429 U.S. 97, 102 (1976) (citing *Wilkerson v. Utah*, 99 U.S. 130, 136 (1879)); *Gregg*, 428 U.S. at 173 (to accord with the Eighth Amendment, “punishment must not involve the unnecessary and wanton infliction of pain”).

90 *Filártiga v. Peña-Irala*, 630 F.2d 876, 890 (2d Cir. 1980).

91 “A *jus cogens* norm, also known as a ‘peremptory norm of general international law,’ can be defined as ‘a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.’” *Yousuf v. Samantar*, 699 F.3d 763, 775 (4th Cir. 2012) (quoting Vienna Convention on the Law of Treaties art. 53, May 23, 1969, 1155 U.N.T.S. 331).

92 See *Sosa v. Alvarez-Machain*, 542 U.S. 692, 728 (2004); *Filártiga*, 630 F.2d at 880-85 (listing numerous sources, including the opinion of the Department of State, showing that torture is prohibited as a matter of customary international law and renounced by virtually all countries).

93 See Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, S. Treaty Doc. No. 100-20, 1465 U.N.T.S. 85 signed Apr. 18, 1988. As of September 28, 2015, there are 158 States Parties to the Convention. Torture is also prohibited under the International Covenant on Civil and Political Rights (ICCPR) art. 7, Dec. 19, 1966, 999 U.N.T.S. 171, 175, which the United States ratified in 1992. As of June 3, 2016, there are 168 States Parties to the ICCPR.

94 See *U.S. v. Belfast*, 611 F.3d 783, 802 (11th Cir. 2010) (recognizing that “CAT became the law of the land on November 20, 1994”).

95 18 U.S.C. § 2340.

96 28 U.S.C.A. § 1350.

97 18 U.S.C. § 2441.

98 42 U.S.C.A. § 2000dd-2.

99 *Yousuf v. Samantar*, 699 F.3d 763, 777 (4th Cir. 2012) (quoting *Wiwa v. Royal Dutch Petroleum Co.*, 226 F.3d 88, 105 (2d Cir. 2000) (quotation marks omitted)).

100 See Geneva Convention Relative to the Protection of Civilian Persons in Time of War, art. 3, Aug. 12, 1949, 75 U.N.T.S. 287.

101 See *Hamdan v. Rumsfeld*, 548 U.S. 557, 630-31 (2006).

102 See War Crimes Act, 18 U.S.C. §§ 2441(c)(3); 2241(d)(1)(A-B).



The Geneva Conventions do not permit any exception to the prohibition on torture and cruel, inhuman, or degrading treatment. The Convention Against Torture likewise provides that “[n]o exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture.”<sup>103</sup> In 2000, the U.S. Department of State confirmed that under U.S. law, there are no exceptions to the prohibitions on torture and CIDT for “exigent circumstances” or “orders from a superior officer or public authority.”<sup>104 105</sup>

## The Bush administration OLC memos that purportedly authorized torture have been thoroughly discredited.

Although torture is unequivocally illegal under domestic and international law, during the Bush administration, the Department of Justice’s Office of Legal Counsel (OLC) attempted to justify the use of specific torture methods through spurious legal reasoning in several now-withdrawn memoranda. As the Department of Justice’s Office of Professional Responsibility concluded, these memoranda did not seriously analyze the legality of so-called “enhanced interrogation techniques.”<sup>106</sup> Instead, the OLC memoranda created “illogical and convoluted” justifications for specific torture techniques, including wrongly relying “upon the phrase ‘severe pain’ in medical benefits statutes to suggest that the torture statute applied only to physical pain ‘that results in organ failure, death, or permanent injury.’”<sup>107</sup> The memoranda sought to create the appearance of legality for a torture program that was inherently unlawful.

The reasoning in the OLC memoranda has been widely repudiated, and they have been withdrawn.<sup>108</sup> The Office of Professional Responsibility concluded that the memoranda underpinning the torture “debate” were so flawed, misleading, and outcome-oriented as to constitute professional misconduct.<sup>109</sup> <sup>110</sup> It would not be credible for a future administration to claim that arguments made in the OLC memoranda provide a good-faith basis to reauthorize any torture or cruel treatment.

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103 CAT, *supra*, at art. 2(2).

104 The absolute prohibition on torture has been affirmed by numerous international tribunals. For example, the European Court of Human Rights emphasized in *Selmouni v. France*, 29 Eur. H.R. Rep. 403 (1999), that the prohibition against torture is “one of the most fundamental values of democratic societies” and that “[e]ven in the most difficult circumstances, such as the fight against terrorism and organised crime, the Convention prohibits in absolute terms torture or inhuman or degrading treatment or punishment.” The Inter-American Court of Human Rights recognizes the same principle, see *Lori Berenson Mejía v. Peru*, Inter-Am. Ct. H.R. (ser. C) No. 119 (Nov. 25, 2004), as does the International Criminal Tribunal for the former Yugoslavia, see *Prosecutor v. Furundzija*, Case No. IT-95-17/1-T (Oct. 2, 1995).

105 Initial Report of the United States of America to the United Nations Committee Against Torture ¶ 6, U.N. Doc. CAT/C/28/Add.5 (Feb. 9, 2000) .

106 See *Dep’t of Justice, Office of Pro’l Responsibility, Report of Investigation into the Office of Legal Counsel’s Memoranda Concerning Issues Relating to the Central Intelligence Agency’s Use of “Enhanced Interrogation Techniques” on Suspected Terrorists* (July 29, 2009) (“OLC Investigation”) 226 (memoranda purporting to objectively evaluate torture “were drafted to provide the client with a legal justification for an interrogation program that included the use of certain” coercive techniques).

107 OLC Investigation at 230, [https://www.aclu.org/files/pdfs/natsec/opr20100219/20090729\\_OPR\\_Final\\_Report\\_with\\_20100719\\_declassifications.pdf](https://www.aclu.org/files/pdfs/natsec/opr20100219/20090729_OPR_Final_Report_with_20100719_declassifications.pdf).

108 See Memo for the Files: Re: Status of Certain OLC Opinions Issued in the Aftermath of the Terrorist Attacks of September 11, 2001 (Jan. 15, 2009).

109 David Margolis, Memorandum of Decision Regarding the Objections to the Findings of Professional Misconduct in the Office of Professional Responsibility’s Report 67 (Jan. 5, 2010), [http://judiciary.house.gov/hearings/pdf/DAGMargolis\\_Memo100105.pdf](http://judiciary.house.gov/hearings/pdf/DAGMargolis_Memo100105.pdf). Although Deputy Attorney General Margolis found that the legal reasoning in the memoranda did not merit professional discipline, he noted that his “decision should not be viewed as an endorsement of the legal work that underlies those memoranda.” *Id.* at 2.

110 See OLC Investigation at 254. Associate Deputy Attorney General David Margolis agreed that memos contained “significant flaws.”

## **Congress has enacted further prohibitions on torture to bar any return to Bush-era torture methods.**

After disclosure of the Bush-era OLC memoranda sparked widespread outrage, Congress enacted two separate pieces of legislation — a decade apart — to ensure that a future administration could not rely on the OLC’s erroneous reasoning. Although torture was already unlawful even when the OLC memoranda were in effect, Congress asserted that further legislation was “necessary because the CIA was able to employ brutal interrogation techniques based on deeply flawed legal theories that those techniques did not constitute ‘torture’ or ‘cruel, inhumane, or degrading treatment.’”<sup>111</sup>

In 2005, Congress enacted the Detainee Treatment Act (DTA).<sup>112</sup> The DTA specifically foreclosed an argument previously made in the OLC memoranda that the prohibition against “cruel, inhuman or degrading treatment” did not protect foreign nationals held abroad by the United States. Through the DTA, Congress expressly prohibited cruel treatment of any person in U.S. custody — regardless of a prisoner’s location or nationality.<sup>113</sup> Additionally, the DTA banned the Department of Defense from using any interrogation techniques not authorized by the Army Field Manual.

In 2015, Congress enacted the McCain-Feinstein amendment to the National Defense Authorization Act, which prohibits all U.S. government agencies and officials — not just the Defense Department — from using interrogation methods that are not in the Army Field Manual.<sup>114</sup> The McCain-Feinstein Amendment protects any person in U.S. custody or the United States’ effective control from torture and cruel treatment — regardless of whether an armed conflict exists. As Senator Dianne Feinstein explained, “we are saying with this law that coercive interrogations will never again be used, period” and “there can be no turning back to the era of torture.”<sup>115</sup>

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111 Press Release, Sen. Dianne Feinstein, Feinstein Hails Congressional Passage of Anti-Torture Legislation (Oct. 7, 2015), [http://www.feinstein.senate.gov/public/index.cfm/press-releases?ContentRecord\\_id=A8BA0596-244E-468A-A5EE-77BE19AF3940](http://www.feinstein.senate.gov/public/index.cfm/press-releases?ContentRecord_id=A8BA0596-244E-468A-A5EE-77BE19AF3940).

112 42 USC § 2000dd(b) (“DTA”).

113 OLC attorneys issued a new memorandum after the DTA was enacted concluding that none of the “enhanced interrogation techniques” constituted cruel, inhuman, or degrading treatment so long as they were used for intelligence-gathering purposes. This memorandum was also withdrawn and has also been repudiated. See David J. Barron, Memorandum for the Attorney General Re: Withdrawal of Office of Legal Counsel CIA Interrogation Opinions (Apr. 15, 2009). See, e.g., David Cole, *The Torture Memos: The Case Against the Lawyers*, N.Y. Rev. Books, Oct. 8, 2009, at 14, <http://www.nybooks.com/articles/2009/10/08/the-torture-memos-the-case-against-the-lawyers/>.

114 The Army Field Manual’s Appendix M is flawed because it includes language that may be read as permitting the use of sleep and sensory deprivation, which are forms of cruel treatment and may rise to the level of torture. See U.S. DEP’T OF ARMY, FIELD MANUAL 2-22.3, HUMAN INTELLIGENCE COLLECTOR OPERATIONS 2006, M-1–M-10. To correct this flaw, the McCain-Feinstein amendment instructs the Department of Defense to review the Field Manual to ensure it “complies with the legal obligations of the United States and the practices for interrogation described therein do not involve the use or threat of force.” 42 U.S.C.A. § 2000dd-2(6)(A)(i).

115 Press Release, Sen. Dianne Feinstein, Feinstein Hails Congressional Passage of Anti-Torture Legislation (Oct. 7, 2015), [http://www.feinstein.senate.gov/public/index.cfm/press-releases?ContentRecord\\_id=A8BA0596-244E-468A-A5EE-77BE19AF3940](http://www.feinstein.senate.gov/public/index.cfm/press-releases?ContentRecord_id=A8BA0596-244E-468A-A5EE-77BE19AF3940).

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# TRUMP ON LIBEL

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Presidential candidate Donald J. Trump has promised that, if elected, he would “open up our libel laws” so that “we can sue [media outlets] and win money.” This proposal would be impossible for two reasons: First, there is no federal libel law. Second, the breadth of libel laws is constrained by the First Amendment.

## **There is no federal libel law for a president to change.**

Legal claims for libel arise under state law. There is no federal libel law.<sup>116</sup> The president of the United States has the power to sign or veto federal law passed by the U.S. Congress<sup>117</sup> but has no corresponding power to affect state law.<sup>118</sup> Were he to become president, Trump could not “open up our libel laws” because there is no federal libel law for the president to “open up.”

## **Libel laws are constrained by the First Amendment.**

Even assuming that the president had the authority to “open up our libel laws” by encouraging broader state law restrictions on defamatory speech<sup>119</sup> or persuading Congress to pass a federal libel statute, such laws would still be constrained by the First Amendment, which protects, among other things, the freedoms of speech and of the press.<sup>120</sup> Because libel laws punish speech, they must be carefully drafted in order to comport with the First Amendment. Specifically, the Constitution imposes a high barrier for libel suits brought by public officials or public figures — that is, those who are “involved in the resolution of important public questions or, by reason of their fame, shape events in areas of concern to society at large.”<sup>121</sup>

A defamatory statement is one that is false and tends to injure a person’s reputation.<sup>122</sup> To establish a claim for libel, a plaintiff must ordinarily show that a defendant wrote a defamatory statement about the plaintiff and published it to a third party.<sup>123</sup> But when the target of the speech is a public figure, a

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116 See, e.g., *Lauro v. Charles*, 219 F.3d 202, 207 (2d Cir. 2000).

117 See U.S. Const., art. I, § 7, cl. 2 (“Every Bill which shall have passed the House of Representatives and the Senate, shall, before it become a Law, be presented to the President of the United States. . .”).

118 See, e.g., *New York v. United States*, 505 U.S. 144, 161 (1992) (“[The federal government] may not simply commandeer the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program.” (alteration and quotation marks omitted)).

119 The president might attempt to achieve this outcome indirectly by urging Congress to exercise its Spending Clause authority to induce states to comply with a federal pro-libel mandate as a condition of receiving federal funds. See, e.g., *South Dakota v. Dole*, 483 U.S. 203, 206 (1987).

120 The protections of the First Amendment limit the enforcement of state libel laws by virtue of their incorporation into the Due Process Clause of the Fourteenth Amendment. *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 265 (1964); *Grosjean v. Am. Press Co.*, 297 U.S. 233, 244 (1936).

121 *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 332 (1974).

122 See, e.g., *Kimmerle v. N.Y. Evening Journal*, 262 N.Y. 99, 102 (Ct. App. 1933) (“The law of defamation is concerned. . . with injuries to one’s reputation.”).

123 See, e.g., *Costello v. Hardy*, 864 So. 2d 129, 139 (La. 2004); *Richie v. Paramount Pictures Corp.*, 544 N.W.2d 21, 25 (Minn. 1996); *Neumann v.*

plaintiff suing for libel must also show that the person made a *maliciously* false statement of fact: That is, they must prove that the statement at issue was made with knowledge of its falsity or with “reckless disregard” for the truth.<sup>124</sup>

This requirement — referred to as the “actual malice” standard — provides constitutional protection for speech that may be factually incorrect so long as it is not made with a “high degree of awareness of [its] probable falsity.”<sup>125</sup> The primary reason for such robust protection in cases involving public officials or public figures is a longstanding recognition that in the context of public discourse, which is often heated, punishing all false statements “may lead to intolerable self-censorship” by those who fear punishment for making an honest factual mistake.<sup>126</sup> The “actual malice” requirement ensures that only intentional lie-tellers are punished for defamation. This important limitation on the libel laws reflects our “profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open.”<sup>127</sup>

Trump believes that “if a paper writes something wrong . . . [a]nd if they don’t do a retraction, they should” be subject to liability.<sup>128</sup> For the reasons explained above, however, no such rule could constitutionally be applied in a libel case brought by a public official or public figure over any factual inaccuracy. In such cases, “writ[ing] something wrong” is constitutionally protected unless the writer knew that it was wrong and published it anyway.<sup>129</sup> No legislature, state or federal, is permitted to expand libel liability beyond this constitutional limit. There is, accordingly, no chance that Trump would be able to “open up our libel laws” in the manner that he has proposed.

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*Liles*, 369 P.3d 1117, 1121 (Or. 2016).

124 *N.Y. Times*, 376 U.S. at 280.

125 *Garrison v. Louisiana*, 379 U.S. 64, 74 (1964).

126 *Gertz*, 418 U.S. at 341.

127 *N.Y. Times*, 376 U.S. at 270.

128 Dylan Byers, *Donald Trump Struggles to Provide Specifics on Changes He’d Make to Libel Laws*, CNN Money (Mar. 21, 2016), <http://cnmnon.ie/1XILSXN>.

129 The focus here is on the constitutional principles that apply to public figures because that is presumably where the legal reform efforts of Trump — who himself is a public figure — would be directed. See *Trump v. O’Brien*, 29 A.3d 1090, 1095 (N.J. App. Div. 2011) (“[T]here is no doubt that Trump is a public figure. . . .”). It should be noted, however, that even in cases involving purely private-figure plaintiffs, it is still unconstitutional to impose liability without fault when the subject of the speech in question is a matter of public concern. See *Gertz*, 418 U.S. at 352.

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# TRUMP ON MASS SURVEILLANCE

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For more than a decade, the National Security Agency (NSA) kept a record of substantially all phone calls made or received on major U.S. telephone networks. In June 2013, this bulk collection of Americans' call records was revealed in the press, sparking a heated public debate about the government's surveillance of innocent Americans and the secret expansion of its spying powers.

Asked about the NSA's bulk collection of Americans' call records under Section 215 of the Patriot Act, Donald J. Trump said on May 22, 2015, "I support legislation which allows the NSA to hold the bulk metadata."<sup>130</sup> Less than two weeks later, however, Congress enacted legislation — the USA Freedom Act — that did precisely the opposite: It expressly prohibited the government from collecting Americans' call records in bulk.<sup>131</sup> That legislation came on the heels of a decision by the Second Circuit Court of Appeals, in a case brought by the ACLU, holding that the NSA's bulk collection of call records was illegal — because it had *never* been authorized by Congress.<sup>132</sup>

But even if Congress were to revisit this issue and pass new legislation authorizing the bulk call records program, that dragnet surveillance of Americans' communications would be unconstitutional.

## **The bulk collection of Americans' call records violates the First and Fourth Amendments.**

The NSA's call records program violated the Fourth Amendment because the bulk collection of metadata is an invasion of privacy and constitutes an unreasonable search. Call records reveal personal details and relationships that most people customarily and justifiably regard as private. Especially when such information is collected over long periods of time and across many individuals, this surveillance permits the government to assemble a richly detailed profile of an individual's habits, activities, and interests, including a comprehensive map of their associations. The government's collection of this information violates a reasonable expectation of privacy, and thus it constitutes a "search" under the Fourth Amendment.<sup>133</sup> Because these searches are warrantless, they are *per se* unreasonable.<sup>134</sup> But even if the warrant requirement did not apply, the government's dragnet collection of Americans' phone records would be unreasonable and, therefore, unconstitutional. Significantly, the NSA's bulk collection

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130 Ken McIntyre, *Where Do the Presidential Wannabes Stand on the Patriot Act?*, Newsweek (May 22, 2015), <http://www.newsweek.com/where-do-presidential-wannabes-stand-patriot-act-334968>.

131 USA FREEDOM Act of 2015, Pub. L. No. 114-23, 129 Stat. 268.

132 *ACLU v. Clapper*, 785 F.3d 787 (2d Cir. 2015).

133 See *Kyllo v. United States*, 533 U.S. 27, 33 (2001).

134 See *Katz v. United States*, 389 U.S. 347, 357 (1967).

program lacked all of the indications of reasonableness required by courts: It infringed on Americans' privacy without probable cause or individualized suspicion of any kind; it was effectively indefinite, vacuuming up call records for more than 10 years; and it lacked any measure of particularity, instead logging information about every single phone call.<sup>135</sup>

In defending the bulk call records program, the government frequently pointed to *Smith v. Maryland*,<sup>136</sup> in which the Supreme Court upheld the installation of a “pen register” in a criminal investigation. But *Smith* did not address indefinite dragnet surveillance, and the Supreme Court's decisions since then make clear that *Smith* does not control the legal analysis.<sup>137</sup> The pen register in *Smith* was very primitive. It tracked the numbers being dialed, but it did not indicate which calls were completed, let alone the duration of those calls.<sup>138</sup> It was in place for only several days, and it was directed at a single criminal suspect.<sup>139</sup> Moreover, the information it yielded was not aggregated with information from other pen registers, let alone with information relating to hundreds of millions of innocent people. Nothing in *Smith* — a case involving narrow surveillance directed at a specific criminal suspect over a very limited time period — remotely suggests that the Constitution allows the government to collect en masse sensitive information about every single phone call made or received by American citizens and residents over a period of years.

The bulk call records program also violated the First Amendment because it vacuumed up sensitive information about Americans' associational and expressive activities. Indeed, the scope of the program far exceeded that of the government surveillance that led to the Supreme Court's seminal associational-privacy cases.<sup>140</sup> Government surveillance that substantially burdens First Amendment rights, as the NSA's bulk call records program did, must survive “exacting scrutiny” — meaning it must serve a compelling state interest and constitute the “least restrictive means” of achieving that interest.<sup>141</sup> Because the NSA's bulk call records program swept up records of Americans' associations indiscriminately, and because it had long been clear that the government could have achieved its legitimate goals with less intrusive means, the program could not survive the exacting scrutiny that the First Amendment requires.

## **Warrantless surveillance of the content of Americans' telephone and email communications violates the Fourth Amendment.**

Trump's support of sweeping unconstitutional surveillance appears to extend beyond the bulk collection of metadata. In an interview on MSNBC, Trump stated that he assumes “people are listening” every time he picks up a phone, and although he “[doesn't] like it,” he “would really much err on the side

<sup>135</sup> See generally *Berger v. New York*, 388 U.S. 31, 58 (1967).

<sup>136</sup> *Smith v. Maryland*, 442 U.S. 735 (1979).

<sup>137</sup> See, e.g., *United States v. Knotts*, 460 U.S. 276, 284 (1983); *United States v. Maynard*, 615 F.3d 544 (D.C. Cir. 2010), *aff'd sub nom. United States v. Jones*, 132 S. Ct. 945 (2012).

<sup>138</sup> 442 U.S. at 741.

<sup>139</sup> *Id.* at 737.

<sup>140</sup> See *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449 (1958); *Bates v. City of Little Rock*, 361 U.S. 516 (1960).

<sup>141</sup> See, e.g., *Buckley v. Valeo*, 424 U.S. 1, 64 (1976); *Clark v. Library of Cong.*, 750 F.2d 89, 94-95 (D.C. Cir. 1984).

of security.”<sup>142</sup> As an initial matter, Trump’s premise is mistaken: The U.S. government can ensure our security without abandoning our freedoms and constitutional values. But insofar as Trump endorses the warrantless surveillance of Americans’ communications — surveillance that takes place today under Section 702 of the Foreign Intelligence Surveillance Act (FISA) — there are significant constitutional and statutory problems with that surveillance.

Section 702 of FISA is an unprecedented statutory authority that allows the government to warrantlessly monitor communications between people inside the United States and foreigners abroad.<sup>143</sup> The government relies on this authority to conduct both the PRISM and Upstream surveillance programs revealed by Edward Snowden. Specifically, Section 702 authorizes the government to intercept the *contents* of communications — including those of U.S. persons — when at least one party to a phone call or internet communication is a foreigner abroad targeted by intelligence officials.<sup>144</sup> Surveillance under Section 702 may be conducted for many purposes, not just counterterrorism, and it may target individuals who are not suspected of any wrongdoing whatsoever. The statute permits the government to acquire the communications of any foreigner abroad likely to communicate “foreign intelligence information,”<sup>145</sup> even when an American is also party to those communications. Although a secret court reviews the general procedures that the government proposes to use in carrying out its surveillance,<sup>146</sup> it plays no role in approving the government’s targeting decisions. In short, the effect of Section 702 is to give the government broad authority to warrantlessly monitor Americans’ international communications with virtually no judicial oversight.

As the ACLU has explained in greater detail elsewhere,<sup>147</sup> Section 702 violates the Fourth Amendment because it permits the government to surveil Americans’ international communications without ever obtaining a warrant. While some courts have recognized an exception to the warrant requirement in the foreign intelligence context, no court has recognized an exception broad enough to permit Section 702 surveillance.<sup>148</sup> Furthermore, even if the warrant requirement were inapplicable, Section 702 is unconstitutional because the surveillance it authorizes is unreasonable under the Fourth Amendment. To be reasonable, electronic surveillance must be precise, discriminate, and carefully circumscribed so

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142 Julian Hattam, *Trump Would ‘Err on Side of Security’ in NSA debate*, The Hill, Nov. 30, 2015, <http://thehill.com/policy/national-security/261486-trump-would-err-on-side-of-security-in-nsa-debate>.

143 Section 702 was enacted as part of the FISA Amendments Act of 2008 (FAA). By statute, this authority will sunset on December 31, 2017, unless it is reauthorized by Congress.

144 See 50 U.S.C. § 1881(a).

145 *Id.* § 1801(e).

146 See *id.* § 1881a(i).

147 See, e.g., Brief of ACLU & Elec. Frontier Found. as Amici Curiae in Support of Defendant-Appellant, *United States v. Mohamud*, No. 14-30217 (9th Cir. June 3, 2015), available at <https://www.aclu.org/legal-document/us-v-mohamud-amicus-brief>; Submission of Jameel Jaffer, Deputy Legal Director of the ACLU, *Public Hearing on Section 702 of the FISA Amendments Act Before the Privacy & Civil Liberties Oversight Board* (Mar. 19, 2014), available at [https://www.aclu.org/sites/default/files/field\\_document/pclomb\\_fisa\\_sect\\_702\\_hearing\\_-\\_jameel\\_jaffer\\_testimony\\_-\\_3-19-14.pdf](https://www.aclu.org/sites/default/files/field_document/pclomb_fisa_sect_702_hearing_-_jameel_jaffer_testimony_-_3-19-14.pdf).

148 In the foreign intelligence context, courts have excused the government from the ordinary warrant requirement only where the surveillance in question was directed at foreign powers or their agents and predicated on an individualized finding of suspicion. See, e.g., *United States v. Cavanagh*, 807 F.2d 787, 790-91 (9th Cir. 1987); *United States v. Duka*, 671 F.3d 329, 338 (3d Cir. 2011). They also required that the surveillance be personally approved by the president or attorney general. See, e.g., *United States v. Buck*, 548 F.2d 871, 875 (9th Cir. 1977).

as to prevent unauthorized invasions of privacy.<sup>149</sup> However, for the reasons described above, Section 702 surveillance fails to satisfy any of these constitutional requirements.<sup>150</sup>

Notably, for the U.S. persons who communicate with the tens of thousands of foreigners monitored under Section 702, the sole safeguard is the requirement that the government “minimize” the acquisition and retention of information concerning U.S. persons. But the government’s minimization procedures permit so-called “backdoor searches” in which the government searches its repositories of Section 702-collected communications for information about Americans, including for evidence of criminal activity. These kinds of queries are an end-run around the Fourth Amendment: They convert warrantless surveillance directed at foreigners and predicated on “foreign intelligence” needs into a tool for investigating Americans in ordinary criminal investigations. Even the president’s own nonpartisan review group recommended prohibiting backdoor searches on the grounds that the practice violates Americans’ privacy rights.<sup>151</sup>

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149 *Berger*, 388 U.S. at 58.

150 In addition, Upstream surveillance violates Section 702 itself because it is not limited to the communications of individual targets as the statute requires. *See* 50 U.S.C. § 1881a(a). Instead, Upstream involves the NSA’s bulk seizure and search of Americans’ international internet communications in order to identify those that are to, from, or about the NSA’s targets.

151 President’s Review Group on Intelligence and Communications Technologies, *Liberty and Security in a Changing World* at 145-50 (2013), <http://1.usa.gov/1be3wsO>.



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# TRUMP ON ABORTION

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In March 2016, Donald J. Trump said women should be punished for seeking abortions.<sup>152</sup> He later recanted but said that he believed punishment should be reserved for doctors performing abortions.

As president, Trump could not implement laws punishing women for having abortions or medical professionals for providing them. As Trump acknowledges, his idea of prosecution rests on abortion being banned — with exceptions only where the pregnancy results from rape or incest or where the pregnancy threatens the woman’s life. It is a stance that may garner Trump votes in the election, but it is a hollow cry for many reasons. It reflects a disregard of the law and of women’s lives.

## **Any federal law outlawing abortion would violate the Due Process Clause of the Fifth Amendment.**

The U.S. Constitution squarely prohibits federal and state governments from outlawing abortion. The right to obtain an abortion is longstanding and has withstood challenges in the Supreme Court, in Congress, and with voters.

In *Roe v. Wade*,<sup>153</sup> the Supreme Court held that the federal constitution protects a woman’s decision whether or not to terminate her pregnancy.<sup>154</sup> It recognized the right as “fundamental” to a woman’s “life and future” and held that abortion could be banned only after viability.<sup>155</sup> The Supreme Court further held that, even after viability, abortions “necessary to preserve the life or health” of the woman must be permitted.<sup>156</sup>

## **Overturing *Roe* would undermine the legitimacy of the Supreme Court and damage the United States’ commitment to the rule of law.**

Although anti-abortion advocates have repeatedly attempted to overturn *Roe* in the courts, in Congress, and in the state legislatures, these efforts have failed. In *Planned Parenthood v. Casey*,<sup>157</sup> the Supreme Court rejected calls to overturn *Roe* and instead reaffirmed a woman’s constitutional right to decide whether to terminate her pregnancy. Proclaiming that “[l]iberty finds no refuge in a jurisprudence of

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152 Matt Flegenheimer & Maggie Haberman, *Donald Trump, Abortion Foe, Eyes ‘Punishment’ for Women, Then Recants*, N.Y. Times, March 31, 2016, at A1, <http://www.nytimes.com/2016/03/31/us/politics/donald-trump-abortion.html? r=0>.

153 410 U.S. 113 (1973).

154 *Roe* declared protections under the Due Process Clause of the Fourteenth Amendment as it applies to the states; a federal ban would violate the Fifth Amendment’s Due Process Clause.

155 *Roe*, 410 U.S. at 152-55, 163-64.

156 *Id.* at 163-64.

157 505 U.S. 833 (1992).

doubt,”<sup>158</sup> Justices Sandra Day O’Connor, Anthony Kennedy, and David Souter — all of whom were appointed by Presidents Ronald Reagan and George H.W. Bush — held in their joint opinion for the court that the right to choose is “central” both to women’s “personal dignity and autonomy” and to their ability “to participate equally in the economic and social life of the Nation.”<sup>159</sup>

Perhaps more important for Trump’s consideration is the court’s analysis of what it would mean to overrule *Roe*. The court reasoned that “overruling *Roe*’s central holding would not only reach an unjustifiable result under principles of *stare decisis*, but would seriously weaken the Court’s capacity to exercise the judicial power and to function as the Supreme Court of a Nation dedicated to the rule of law.”<sup>160</sup> Today, no less than in 1992, a decision to overrule *Roe* would come at “the cost of both profound and unnecessary damage to the Court’s legitimacy, and to the Nation’s commitment to the rule of law.”<sup>161</sup>

### **As president, Trump would not be able to secure the necessary votes to amend the Constitution and ban abortion.**

The only other avenue for Trump to achieve his aim would entail amending the U.S. Constitution. Article 5 of the Constitution provides two mechanisms for constitutional amendment. The first method — the only one used to date — requires that a proposed amendment be approved by two-thirds of the House and Senate and then by three-fourths of the states. The second method requires a constitutional convention to be called by two-thirds of the state legislatures, and amendments proposed there must then be ratified by three-fourths of the states.<sup>162</sup>

It is no surprise then that attempts to amend the Constitution to prohibit abortion have proved fruitless. Between 1973 and 2003, Congress has considered more than 330 proposals to enact a “Human Life Amendment,” which would amend the Constitution to overturn *Roe* and, in many cases, prohibit both Congress and the states from legalizing abortion.<sup>163</sup> None of these proposals have succeeded, and the vast majority of proposed amendments died in congressional committee.<sup>164</sup>

### **State voters reject attempts to outlaw abortion.**

Additionally, although state governments cannot legally negate rights protected under the U.S. Constitution, it is noteworthy that voters have rejected state attempts to ban abortion. In South Dakota, for example, in both 2006 and 2008, voters rejected measures to ban abortions throughout the state.<sup>165</sup>

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158 *Id.* at 844.

159 *Id.* at 851, 856.

160 *Id.* at 865.

161 *Id.* at 869.

162 U.S. Const. art. V.

163 See Reva B. Siegel, *Dignity and the Politics of Protection: Abortion Restrictions Under Casey/Carhart*, 117 Yale L.J. 1694, 1708 n.43 (2008); Human Life Action, *Human Life Amendment*, <https://www.humanlifeactioncenter.org/issues/human-life-amendment> (last accessed June 30, 2016).

164 See Siegel at 1708 n.43.

165 H.R. B. 1215, 81st Leg. Assem., 2006 S.D. Sess. Laws ch. 119 (banning abortion except to prevent the pregnant woman’s death) (repealed by referendum Nov. 7, 2006); S.D. Initiative 11 (banning abortion except in cases of rape, incest, or to protect the pregnant woman’s health)

Personhood amendments — measures to amend state constitutions to recognize life as beginning at conception or fertilization — have been defeated whenever they have appeared on the ballot, including in Colorado (2008, 2010, 2014),<sup>166</sup> Mississippi (2011),<sup>167</sup> and North Dakota (2014).<sup>168</sup>

Trump’s proposal is thus a nonstarter as a matter of law. It is also callous to women’s liberty and well-being. As the Supreme Court recognized in *Casey*, “The ability of women to participate equally in the economic and social life of the nation has been facilitated by their ability to control their reproductive lives.”<sup>169</sup> And it shows disregard for women’s lives. The Trump proposal, if ever enacted, would not stop abortion. It would only stop safe and legal abortion. As experience in this country and in other countries illustrates, when abortion is illegal, women still get abortions but suffer dire and even deadly consequences.<sup>170</sup>

The proposal is unsound as a matter of basic constitutional law, policy, and humanity.

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(defeated Nov. 4, 2008), Ballotpedia, [http://ballotpedia.org/wiki/index.php/South\\_Dakota\\_Abortion\\_Ban\\_Initiated\\_Measure\\_11\\_\(2008\)](http://ballotpedia.org/wiki/index.php/South_Dakota_Abortion_Ban_Initiated_Measure_11_(2008)).

166 See Colo. Initiative 48 (defeated Nov. 4, 2008), Ballotpedia, [https://ballotpedia.org/Colorado\\_Definition\\_of\\_Person\\_Initiative\\_48\\_\(2008\)](https://ballotpedia.org/Colorado_Definition_of_Person_Initiative_48_(2008)); Colo. Initiative 62 (defeated Nov. 2, 2010), Ballotpedia, [https://ballotpedia.org/Colorado\\_Fetal\\_Personhood\\_Initiative\\_62\\_\(2010\)](https://ballotpedia.org/Colorado_Fetal_Personhood_Initiative_62_(2010)); Colo. Initiative 67 (defeated Nov. 4, 2014), Ballotpedia, [https://ballotpedia.org/Colorado\\_Definition\\_of\\_Personhood\\_Initiative\\_Amendment\\_67\\_\(2014\)](https://ballotpedia.org/Colorado_Definition_of_Personhood_Initiative_Amendment_67_(2014)).

167 Miss. Initiative 26 (defeated Nov. 8, 2011), Ballotpedia, [https://ballotpedia.org/Mississippi\\_Life\\_Begins\\_at\\_the\\_Moment\\_of\\_Fertilization\\_Amendment\\_Initiative\\_26\\_\(2011\)](https://ballotpedia.org/Mississippi_Life_Begins_at_the_Moment_of_Fertilization_Amendment_Initiative_26_(2011)).

168 N.D. Measure 1 (defeated Nov. 4, 2014), Ballotpedia, [https://ballotpedia.org/North\\_Dakota\\_Life\\_Begins\\_at\\_Conception\\_Amendment\\_Measure\\_1\\_\(2014\)](https://ballotpedia.org/North_Dakota_Life_Begins_at_Conception_Amendment_Measure_1_(2014)).

169 505 U.S. at 856.

170 See Guttmacher Institute, *Fact Sheet: Induced Abortion Worldwide* (May 2016), <https://www.guttmacher.org/fact-sheet/facts-induced-abortion-worldwide>.